ON THE RECORD with Robbins Geller Rudman & Dowd LLP

Summer 2017

How the SCOTUS *ANZ Securities, Inc.* decision impacts opt-out litigation

Learn the latest in the *Good Technology*, *Puma Biotechnology* and *AARP* cases

+

Robbins Geller Wins Ninth Circuit Appeal for Quality Systems Investors

Proxy Season Roundup

What does *In re Wal-Mart Stores, Inc. Delaware Derivative Litigation* mean for investors?

ACS Ownership Rights

Find out the latest in U.S. and Global Corporate Governance News

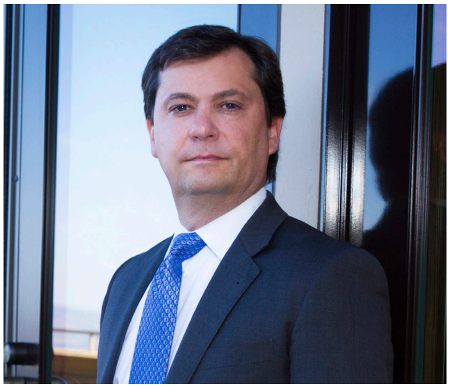
A Note from Darren Robbins

Summer 2017

Several recent developments will significantly impact institutional investors over the next several years. One involves the Delaware Supreme Court's consideration of a new preclusion rule for shareholder derivative actions. The Delaware Supreme Court will soon issue a determination in *In re Wal-Mart Stores, Inc. Delaware Derivative Litigation* as to whether a judgment in one shareholder derivative case binds the corporation and its shareholders in other shareholder derivative actions. The court will decide whether subsequent shareholder derivative actions will be precluded by a dismissal of a prior action only if the plaintiff in the first action either defeated a motion to dismiss based on demand futility or the board of directors declined to challenge demand futility. If adopted, this rule would remedy the problem that arose in the high-profile *Wal-Mart* case where Delaware plaintiffs investigated and developed derivative claims via a books and records request before filing a derivative complaint yet were subsequently barred from pursuing the company's claims when an earlier filed suit was dismissed in a different court.

Another important development occurred earlier this summer when the U.S. Supreme Court clarified the law regarding the three-year repose period in cases alleging violations of the Securities Act of 1933. The Supreme Court concluded in *California Public Employees' Ret. Sys. v. ANZ Securities, Inc.* that the commencement of a class action does not satisfy the statute of repose for a subsequent individual action brought by a putative class member who opts out of the class action. The decision resolves a circuit split on the issue and underscores that institutional investors should take steps early on in a securities class action to preserve their individual claims and a future right to opt out. We anticipate the Supreme Court's decision will be extended to claims brought pursuant to the Securities Exchange Act of 1934 as well. In the wake of the U.S. Supreme Court's ruling, we began providing clients with a Repose Report to help identify exposure in cases with potential timeliness deadlines. We look forward to continuing to work with you on how best to maximize your asset recovery efforts as the law continues to develop in this area.

Our lawyers diligently advocate on behalf of investors and consumers around the world. In June, we reached a $52 million settlement on the eve of trial on behalf of Good Technology Corp. shareholders for claims of breach of fiduciary duty relating to that company's merger with BlackBerry Ltd. We also continue to work with public officials across the country to investigate the opioid pharmaceutical manufacturers and distributors responsible for fraudulent marketing that fostered the country's devastating opioid crisis. And earlier this month, our Appellate Group was responsible for two significant decisions. One decision was a reversal by the Ninth Circuit Court of Appeals of the dismissal of a consumer case against AARP and UnitedHealth alleging violations of California insurance laws. Our Appellate Group likewise obtained a reversal of the trial court's dismissal of a securities class action brought on behalf of Quality Systems investors.



The Firm's lawyers were recognized again this year by independent organizations such as the *Daily Journal* for their extraordinary advocacy in cases such as *Household International*, a decade-long securities class action that recovered more than $1.5 billion for investors, and the successful prosecution and resolution of a case on behalf of a class of former Trump University students who alleged they were defrauded in connection with their purchase of real estate classes at the now-defunct Trump University.

We are honored to be at the forefront of the fight to protect your rights.

FEATURES

OTHER CONTENT

Robbins Geller Wins Ninth Circuit Appeal for Quality Systems Investors

On July 28, 2017, the United States Court of Appeals for the Ninth Circuit ruled in plaintiffs' favor in the *Quality Systems* securities case, reversing the district court's prior dismissal of the action. Quality Systems, Inc. ("QSI") sells practice management and electronic health records software and related services to medical and dental practices nationwide.

The case charges defendants with violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934. Specifically, the case alleges that defendants violated the federal securities laws by disseminating false statements to investors regarding QSI's business performance, revenue earnings growth for fiscal years 2012 and 2013, as well as QSI's product sales and the market demand for QSI's products. As a result of defendants' false statements and omissions, QSI shares traded at artificially inflated prices during the class period, reaching a high of $50.04 per share on September 27, 2011. In violation of §10(b)'s prohibition on trading on material non-public information, defendant Steven T. Plochocki dumped nearly 90% of his QSI holdings prior to the public disclosure of defendants' fraud and when QSI's stock price was near its all-time high.

Following appellate briefing and oral argument, a three-judge panel of the Ninth Circuit reversed the dismissal in a unanimous published decision spanning 37 pages. Writing for the court on an acknowledged issue of first impression concerning "mixed" future and present-tense misstatements, Judge William A. Fletcher explained that "non-forward-looking portions of mixed statements are not eligible for the safe harbor provisions of the PSLRA." The court reasoned that the purpose of the safe harbor is "to protect companies and their officials from suit when optimistic projections of growth in revenues and earnings are not borne out by events." The safe harbor does not protect defendants "when they knowingly make a materially false or misleading statement about current or past facts" or combine such a statement with a forward-looking one.

Regarding the specific statements in the case, the court noted that "Defendants made a number of mixed statements that included projections of growth in revenue and earnings based on the state of QSI's sales pipeline." The court held that "both the non-forward-looking and the forward-looking portions of these statements were materially false or misleading."

In addressing the non-forward-looking statements, the Ninth Circuit reversed the lower court's ruling and held that defendants' false statements were not mere corporate optimism or inactionable corporate "puffery"; rather, they "went beyond 'feel good' optimistic statements" by providing "concrete description[s]" of past and present sales while making optimistic statements. As for the forward-looking statements that were mixed with false and misleading facts, the court held that in such situations it is "likely that no cautionary language…would be 'sufficiently meaningful' to qualify the statement for the safe harbor," other than perhaps "an outright admission of the false or misleading nature of the non-forward-looking statement." Because the mixed statements in the case were not accompanied by any such admission, the cautionary language provided by defendants was inadequate.

The Ninth Circuit reversed the district court's dismissal and remanded the case to the district court for further proceedings.

Robbins Geller appellate partner **Joseph D. Daley**, who briefed and argued the appeal, applauded the Ninth Circuit ruling: "We felt very strongly that the Ninth Circuit would not allow defendants to insulate their numerous misstatements as corporate 'puffery' and non-actionable forward-looking statements." In addition to Daley, Robbins Geller attorneys **Darren J. Robbins**, **Robert R. Henssler, Jr.** and **Christopher D. Stewart** contributed to this important victory for investors.

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

Will the Delaware Supreme Court Adopt the Chancery Court's Bright-Line Rule Recommendation?

On July 25, 2017, Chancellor Andre G. Bouchard of the Delaware Chancery Court issued a Supplemental Opinion in the *In re Wal-Mart Stores, Inc. Delaware Derivative Litigation* that could afford greater protections to stockholders who wish to pursue books and records inspection demands against the risks of issue preclusion. Specifically, the Chancellor recommended that the Delaware Supreme Court adopt the bright-line rule that an adverse final judgment in a derivative action for failure to adequately plead demand futility "cannot bind 'the corporation or other stockholders in a derivative action until the action has survived a Rule 23.1 motion to dismiss, or the board of directors has given the plaintiff authority to proceed by declining to oppose the suit.'"

If adopted by the Delaware Supreme Court, this new rule would, according to the Chancellor, "better safeguard the due process rights of stockholder plaintiffs." This is because stockholder plaintiffs could use the "tools at hand" where appropriate to conduct pre-suit investigations into possible breaches of fiduciary duty knowing that the dismissal of an earlier filed derivative action on demand futility grounds would not impair their ability to assert valid derivative claims after the completion of the pre-suit investigations.

A. The Arkansas and Delaware Wal-Mart Derivative Litigation

On April 21, 2012, *The New York Times* published an article reporting on an alleged bribery scheme at Wal-Mart's subsidiary in Mexico, Wal-Mart de México. According to the article, employees of Wal-Mart de México systematically bribed Mexican officials to obtain building permits and other approval necessary for Wal-Mart's expansion into Mexico. However, these payments allegedly violated the anti-bribery and books and records provisions of the Foreign Corrupt Practices Act of 1977. Worse yet, after learning of the alleged bribes, Wal-Mart executives tried to cover up the unlawful scheme, according to *The New York Times*' report.

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Robbins Geller Achieves $34.5 Million Recovery for L-3 Investors

On August 16, 2017, the Honorable Valerie Caproni of the United States District Court for the Southern District of New York approved a $34.5 million recovery in *Patel v. L-3 Communications Holdings, Inc.* When approving the settlement, Judge Caproni commended Robbins Geller attorneys as having "litigated hard and long" on behalf of lead plaintiffs **City of Pontiac General Employees' Retirement System**, **Local 1205 Pension Plan** and **City of Taylor Police and Fire Retirement System**. The $34.5 million recovery represents a significant percentage of the damages plaintiffs could have reasonably expected to recover at trial and is more than eight times higher than the average settlement of cases with comparable investor losses.

L-3 is a prime contractor in aerospace systems and national security solutions and a leading provider of a broad range of communication and electronic systems and products used on military and commercial platforms. Initially filed August 1, 2014, plaintiffs alleged that L-3 and certain of its officers and directors made false and misleading statements regarding the company's Aerospace Systems segment during the January 30, 2014 through July 30, 2014 class period. The settlement resolves allegations that L-3 knowingly made materially false and misleading statements and failed to disclose that: (i) L-3's financial statements contained errors related to the improper deferral of cost overruns on a fixed-price maintenance and logistics support contract resulting in overstatement of operating income; (ii) net sales with respect to the fixed-price maintenance and logistics support contract were overstated; (iii) the company lacked adequate internal controls over financial reporting; and (iv) as a result of the foregoing, the company's financial statements were materially false and misleading at all relevant times.

Before the markets opened on July 31, 2014, L-3 announced its preliminary results and disclosed an internal accounting review into matters at the company's Aerospace Systems segment, announcing that it expected to incur an aggregate pre-tax charge of $84 million against operating income and a related reduction in net sales of approximately $43 million. As a result, L-3 shares fell $14.68 per share, or more than 12%, on extremely heavy volume, to close at $104.96 per share.

Robbins Geller attorneys **Samuel H. Rudman**, **David A. Rosenfeld**, **Alan I. Ellman**, **Jordan D. Mamorsky** and **Samuel J. Adams** obtained this result on behalf of lead plaintiffs.

Patel v. L-3 Communications Holdings, Inc., No. 1:14-cv-06038-VEC, Final Judgment and Order of Dismissal With Prejudice (S.D.N.Y. Aug. 16, 2017).

U.S. CORPORATE GOVERNANCE REPORT

U.S. Department of Labor Implements the Fiduciary Rule

Despite massive efforts to stop it, the Department of Labor's fiduciary rule went into effect on June 9, 2017. According to *Reuters*, the rule "has been heavily criticized by Republicans and Wall Street amid concerns it may make investment advice too costly."[1] The "concerns" *Reuters* refers to are "that the diversion of fees, often undisclosed, made possible by conflicts of interest, also undisclosed, will have to stop, returning to the customers the money that should have been theirs in the first place."

Goldman Sachs on the Rise of ESG Investing:[2]

> At Goldman Sachs, the growth of [Environmental, Social and Governance ("ESG")] investing has been significant, and it has accelerated since the acquisition of Imprint Capital, a leading ESG advisor, in 2015. We have seen a virtuous cycle in which demand has driven product and service innovation, creating new models for success and driving further demand. As a result, our assets under supervision in dedicated ESG strategies have grown significantly, to $6.5 billion by the end of 2016.
>
> Fundamental to this growth is an increased understanding that a disciplined approach to ESG investing can drive competitive risk-adjusted returns – just as with any other investment. Risk/return profiles of ESG portfolios now mirror the markets and span asset classes, fueling the evolution of impact investment strategies that meet conventional risk/return hurdles, but also include social and environmental impacts that are both intentional and measurable.

NOTE: IRRCi has a new paper on investor approaches to ESG.[3]

Uber's Bro-Culture Founder-CEO and a Director Resign

For years, concerns have been expressed about the "bro" culture at Uber, but the attitude of analysts and insiders seemed to be "boys will be boys." Perhaps there was a rueful headshake now and then, but apparently the board believed that the same qualities that made co-founder/CEO Travis Kalanick brash and boorish also made him visionary and dynamic. That was until programmer Susan J. Fowler wrote about her "one very, very strange year" of virulent mistreatment, ultimately leading to the departure of Kalanick as CEO (though he remains on the board, for now).[4] A male director who made a sexist joke *at a meeting about sexism* also resigned.

NOTE: At TechCrunch, veteran CEO/director Betsy Atkins explained how "[a] better boardroom can reverse Uber's cultural woes."[5] Also, an article by Bethany McLean (the reporter who broke the Enron scandal story), published in *Vanity Fair*, focuses on how the corporate culture at Wells Fargo led to widespread violations of law and ethics.[6]

FTSE Russell Index Considers Dropping Companies with Non-Voting Shares

When does a stock stop being a stock? The three essential ownership rights that accompany the stock certificate are proxy voting, litigation, and transferability/liquidity. If you remove proxy voting, is it still stock or is it a bond without a promised return? FTSE is considering the exclusion of non-voting shares from its Russell index.[7] This could force companies like Alphabet Inc., Facebook Inc. and Ford Motor Co. to choose between keeping their places in broad stock benchmarks or changing their share class structures. The proposal calls for setting a minimum threshold for the percentage of voting control attached to company shares in an index. For example, a company whose Class A shares in an index control 40% of the total votes might be excluded from FTSE Russell's main indexes, like the Russell 3000 or Russell 2000, if the threshold were higher than that.

Matt Levine Blames Index Funds for Changing the Focus of Airlines from Customers to Investors

ValueEdge Advisors Chair Bob Monks has written at length about "drone investors" who hold no more of a company's stock than its proportion in the index and provide no oversight or market response to prevent management drift and self-dealing.[8] Matt Levine comes to the same conclusion in his article about the failure of the airlines:[9]

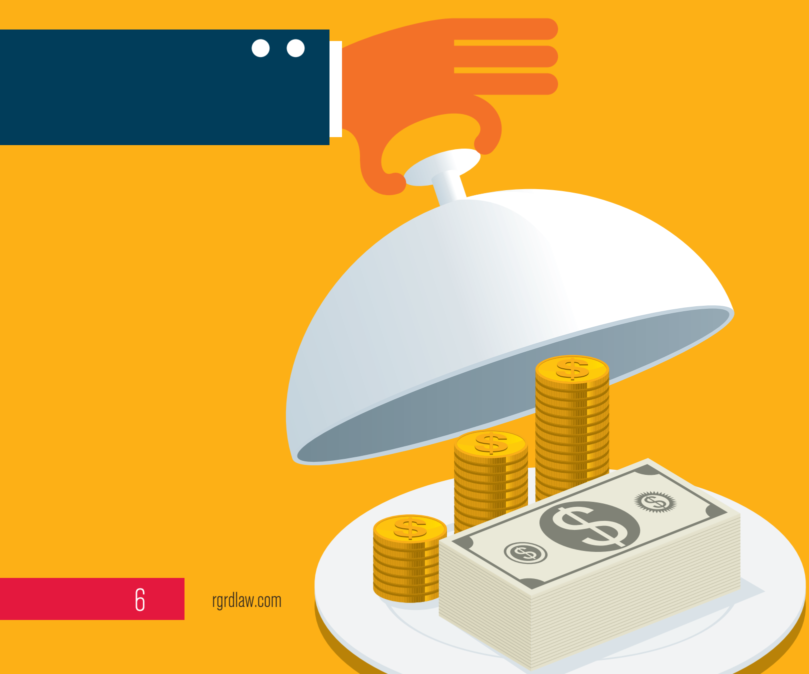
> [C]ross-ownership of many U.S. airlines by the same diversified institutional investors – index funds and "quasi-indexers" – discourages the airlines from competing on price and quality, and encourages them to focus on margins. An airline that cuts fares or spends money on better service to win market share isn't necessarily doing its shareholders any favors: The increased ***continued on page 20***

1 http://www.reuters.com/article/us-usa-congress-fiduciary-idUSKBN18J0HA
2 http://www.goldmansachs.com/s/esg-report/content/esg-investing/
3 http://files.constantcontact.com/27d4e85b001/2c4fba38-950d-43c3-8d3c-521d7a9375bc.pdf
4 https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber
5 https://techcrunch.com/2017/06/17/a-better-boardroom-can-reverse-ubers-cultural-woes/
6 https://www.vanityfair.com/news/2017/05/wells-fargo-corporate-culture-fraud
7 https://www.wsj.com/articles/proposal-puts-focus-on-share-class-structure-1497873601
8 https://www.amazon.com/Citizens-DisUnited-Investors-Corporate-American/dp/1939282101/ref=as_li_ss_tl?s=books&ie=UTF8&qid=1498746750&sr=1-1&keywords=robert+monks+citizens&linkCode=sl1&tag=miniverpress-20&linkId=b808f7efa7b51eca286a5c380c97d449
9 https://www.bloomberg.com/view/articles/2017-05-30/airlines-stock-splits-and-voting

The Supreme Court Rules on Timeliness of Individual Securities Actions

On June 26, 2017, the United States Supreme Court ruled 5-4 in *California Public Employees' Ret. Sys. v. ANZ Securities, Inc.*, No. 16-373, 582 U.S. ___ (2017), that the timely filing of a securities class action does not satisfy the Securities Act of 1933's three-year repose period for subsequent suits filed by individual class members. The majority opinion by Justice Kennedy affirms an earlier ruling by the Second Circuit Court of Appeals that, despite being putative class members in a timely-brought securities class action, individual litigants cannot opt out of a class action and pursue their individual claims more than three years after the defendants offered the relevant securities to the public.

The underlying case arises out of the California Public Employees' Retirement System's ("CalPERS") purchase of bonds issued by Lehman Brothers, then the fourth-largest investment bank in the country, without knowing that Lehman was invested heavily in subprime mortgage loans and had concealed its exposure thereto and used accounting gimmicks to mask its shaky financial condition. As the truth about Lehman's financial condition was revealed in September 2008, the company collapsed and bond investors were damaged.



CalPERS filed an individual action to recover losses it suffered on the purchase of Lehman bonds. By filing its own action, and opting out of the class settlement in 2011, CalPERS was able to recover almost $30 million from settlements it reached with Lehman's auditor Ernst & Young LLP, Lehman's officers and directors and several investment banks that underwrote the sale of Lehman bonds. CalPERS has publicly noted that the nearly $30 million recovery is substantially more than what it would have obtained had it remained in the class action.

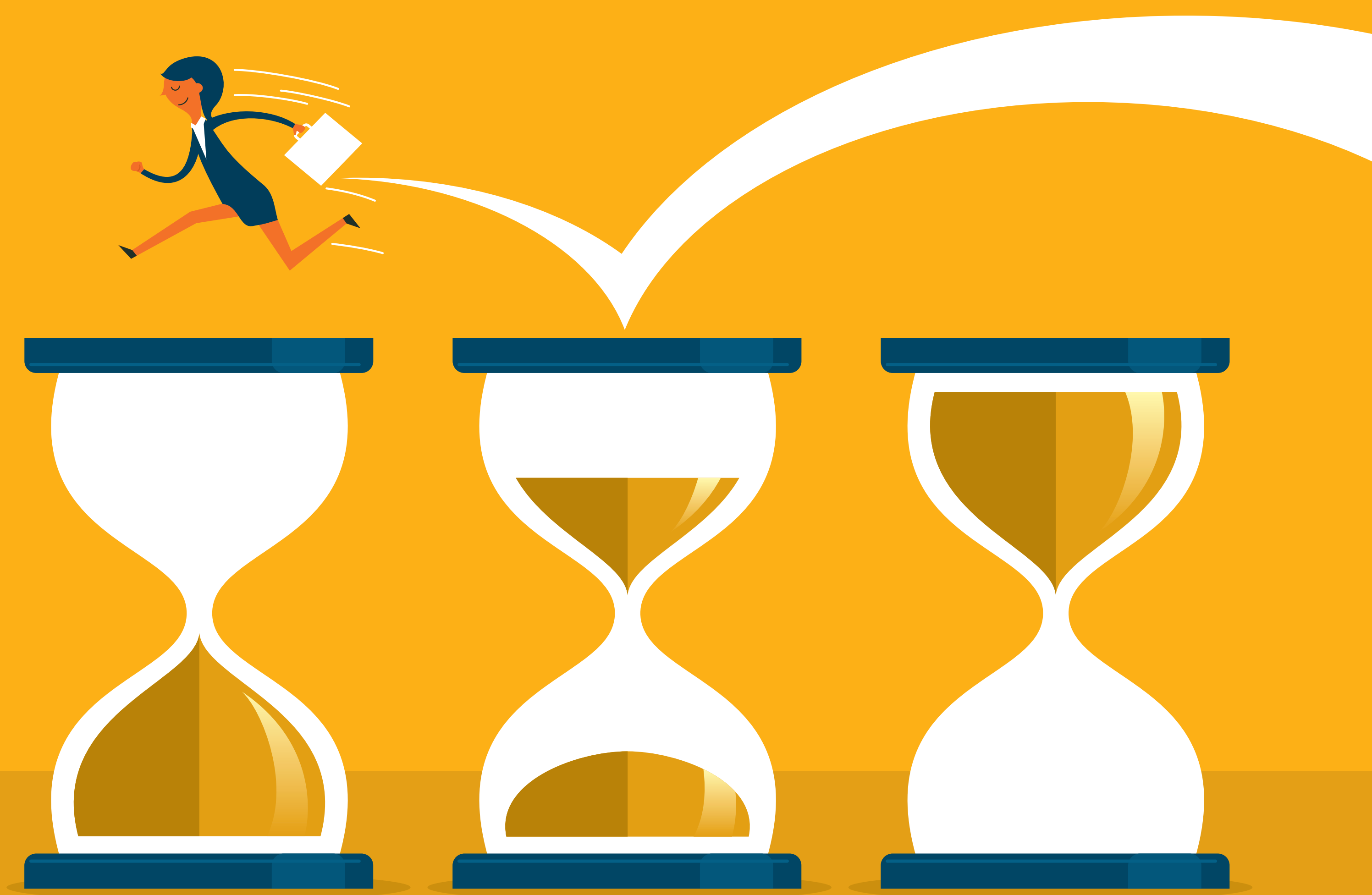
After CalPERS's suit was filed and after it had settled with a number of defendants, the district court dismissed its remaining claims relating to a number of the bond offerings at issue, reasoning that the individual action claims were time-barred by the three-year repose period contained in §13 of the Securities Act of 1933. The dismissal was appealed because the decision conflicted with the Supreme Court's ruling in *American Pipe & Constr. Co. v. Utah*, which established that the filing of a putative class action satisfies the limitations period for all proposed class members. The Second Circuit Court of Appeals affirmed the district court's holding and Supreme Court review was sought.

The U.S. Supreme Court decision reiterates the importance of remaining vigilant. Institutional investors can no longer passively monitor a class action's progress until a resolution is reached before considering the opportunity to opt out. Instead, class members must now be proactive in assessing their valuable damages claims well before three years have passed to avoid running afoul of the Supreme Court's decision. Importantly, while the decision specifically addressed the three-year statute of repose applicable to claims brought pursuant to the Securities Act of 1933, we have no reason to doubt that it will likewise apply to the five-year statute of repose applicable to claims brought pursuant to the Securities Exchange Act of 1934.

The majority decision will result in inefficiencies for litigants and district courts around the country. The majority notes without any hint of irony that "permitting a class action to splinter into individual suits . . . would threaten to alter and expand a defendant's accountability." Opinion at 13. Yet, the decision ensures the very outcome that the majority dismissed as "overstated" and sought to avoid. *Id.* Indeed, rather than allow class members to monitor class actions and determine when a settlement is announced whether to participate in the class recovery or opt out and pursue an individual recovery, the Court's opinion compels institutional investors to take steps early in class action litigation to ensure the right to opt out is preserved in the event of a future settlement.

Robbins Geller partner **Darren J. Robbins** noted: "Justice Ginsburg's dissent provides a road map for investors impacted by [the] decision upending the status quo in securities cases: 'Any class member with a material stake in a §11 case . . . will have strong cause to file a protective claim, in a separate complaint or in a motion to intervene, before the three-year period expires.'" Dissent at 4-5. Institutional investors are now compelled to be even more vigilant in assessing and protecting their valuable securities claims.

Robbins Geller provides a Repose Report to its Portfolio Monitoring Program® clients to assist in preserving their claims in light of the Supreme Court's ruling. This report identifies putative U.S. securities class action cases with claims that defendants could argue may be expiring, the earliest date defendants may contend that a potential limitations deadline could expire, and the client's market loss in each case.



Global Corporate Governance Report

EU Amends the Shareholders' Rights Directive

EU Directive 2017/828 has now been published in the Official Journal and became effective in mid-June 2017, amending the Shareholders' Rights Directive (SRD).

Changes include:

• Member States shall ensure that companies have the right to identify their shareholders, so companies will have the right to collect personal data on their shareholders "in order to enable the company to identify its existing shareholders in order to communicate with them directly with the view to facilitating the exercise of shareholder rights and shareholder engagement with the company."

• Institutional investors and asset managers must comply with two requirements, or publicly disclose a reasoned explanation as to why they have not complied: (i) institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement into their investment strategy; and (ii) institutional investors and asset managers shall, on an annual basis, publicly disclose how their engagement policy has been implemented.

• Institutional investors must publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to medium to long-term performance of their assets.

• Asset managers must disclose annually how their investment strategy and implementation contributes to the medium to long-term performance of the assets of the institutional investor or the fund.

• Proxy advisors must have and disclose a code of conduct.

• Shareholders have the right to vote on director pay.

• Companies must disclose related party transactions.

40% of Top Managers Surveyed Said Their Organizations Did Not Meet Corporate Governance Standards

A new international corporate governance survey of 314 practitioners included 250 directors and senior managers from Australia, India, Norway, Spain, South Africa, and the United Kingdom.[1]

A few highlights: Fewer than 24% found the current proliferation of corporate governance codes helpful. The overwhelming majority of respondents (96.7%) said that corporate governance was primarily an organizational issue, not a financial one. Yet 66.7% said that risk management was mostly about financial risk, suggesting that they did not see a connection between corporate governance and risk management. Only 60% said that their organizations had high standards of good governance, making it clear that there is a long road ahead.

Japanese Firms Pioneer Posting of AGM Agendas Online

Japanese firms are required by law to make the agendas for their annual meetings available two weeks ahead of time. Now they are beginning to release the topics and agendas online, before they send them out by mail to investors. The development comes in response to growing calls from international investors. Some of the key firms that have decided to release online notices in advance this year include Yakult Honsha, a Japanese drinks maker, along with Meitec, a major staffing business.

NOTE: In *Forbes*, John Vail writes about the link between corporate governance improvements and profitability in Japan:

> The fact remains that partly due to the encouragement of the Abe administration, Japanese corporations are continuing their structural shift towards higher profitability. Abenomics is "icing on the cake" of the "Show Me the Money" corporate governance improvement that I have long-highlighted on Japan.

Suncor Impresses Investors by Cutting Back on Its Core Business

What should a company do when its business is not sustainable due to changing consumer priorities, the likelihood of government restrictions, or just the fact that it is based on a non-renewable resource? *The Wall Street Journal* writes:[2]

> One of the best-performing oil companies in the past year is gaining favor with investors in part by embracing an unusual strategy: promising not to reinvest in its core business "in the foreseeable future."
>
> The company is Suncor Energy, Canada's largest oil producer, and the core business is the country's controversial oil sands.
>
> * * *
>
> After years of spending to ramp up new projects, the company is about to take a pause in the oil sands, where operators must use steam or expensive equipment to transform the tar-like crude into a substance suitable for refining.
>
> Instead, Suncor plans to give investors much of the excess cash it will generate in the coming years. . . . Suncor may generate [$US15 billion (CAD $19.5bn)] in free cash flow over the next three years, according to Goldman Sachs.
>
> * * *
>
> Suncor is a top pick among energy analysts at Goldman Sachs Group Inc. and is recommended as a "buy" by 81% of analysts, more than any other big oil producer. Including reinvested dividends, the company's U.S. shares returned 18% to shareholders from June of last year to May 31. That's better than every other major North American oil company.

Norges Fund Pushes Back on Non-Voting Shares

Norway's $960 billion sovereign wealth fund believes that equity indexes should not include companies that aren't subject to shareholder control. *Bloomberg* notes, "The move opens a new front in the fund's efforts to use its considerable – and growing – clout to force companies to improve their ESG act."[3] Concerns raised by the recent IPO of Snap, with non-voting stock, have brought more attention to the issue – isn't non-voting stock just a bond without the benefit of a guaranteed return? Norges has proposed scaling index weighting based on voting rights.

NOTE: As of this writing, SNAP has sunk to $13.81 from a high of $27.09 immediately following the public offering.

Japanese Pension Fund Invests in ESG

Japan's $1.2 trillion Government Pension Investment Fund has moved about 3% of its passive domestic equity investments, or around one trillion Japanese yen ($8.8 billion), into index funds tracking three socially responsible benchmarks: gender diversity, ESG, and the FTSE Blossom Japan index – Japanese firms that perform well on a more general social-responsibility agenda.[4]

The U.K. Follows the U.S. in Allowing Virtual AGMs

Despite shareholder concerns, 177 U.S. companies have had online or telephonic annual meetings, and now U.K. companies are moving toward that as well. *The Wall Street Journal* reports:[5]

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1 http://corgovinstitute.com/a-survey-on-corporate-governance/
2 https://www.wsj.com/articles/oil-company-wins-over-investors-by-promising-to-stop-looking-for-oil-1498910581
3 https://www.bloomberg.com/news/articles/2017-06-27/norway-sovereign-wealth-fund-is-refusing-to-be-silenced
4 http://www.ftse.com/products/indices/blossom-japan
5 https://blogs.wsj.com/riskandcompliance/2017/07/25/shareholders-voting-to-allow-virtual-meetings-at-u-k-companies/?utm_source=dlvrit&utm_medium=twitter

Better Result for Good Technology Holders

On June 7, 2017, just days before a scheduled trial, defendant J.P. Morgan Securities LLC ("J.P. Morgan") agreed to settle with plaintiffs for $35 million in the Delaware lawsuit over the "fire sale" acquisition of mobile security provider Good Technology Corp. by BlackBerry Ltd. Robbins Geller lawyers had already obtained an agreement from the other defendants in the case to pay $17 million in settlements in the weeks before trial was set to begin. The $52 million in settlements came shortly after Vice Chancellor J. Travis Laster granted plaintiffs' motion for class certification and denied defendants' summary judgment motions.

Good Technology opted to merge with BlackBerry for $425 million. However, the company had previously turned down higher offers and had also planned, delayed and ultimately cancelled an IPO, which was intended to bring in even more to the company's investors. In the words of one Good Technology director: "BlackBerry got an absolutely fantastic fire sale deal because the company couldn't have made payroll next week."

Plaintiffs charged Good Technology's board and its financial advisor, J.P. Morgan, with breaching their duties to common stockholder plaintiffs by failing to launch an IPO or pursue a higher sale price in the spring of 2015. Plaintiffs alleged J.P. Morgan misled company insiders about the viability of an IPO, instead trying to curry favor with BlackBerry (which it was hoping to recruit as a client) by driving down the merger compensation to Good Technology.

In ruling against defendants' summary judgment motions on May 12, 2017, Vice Chancellor Laster noted: "During the first half of 2015, the Company pursued both an IPO and a merger in a dual-track process. Because the Company was running out of cash, it was essential that the Company enter into a transaction quickly. There is evidence that the Company Fiduciaries nonetheless delayed entering into a transaction in the hopes of achieving greater financial upside. There is evidence that this decision was motivated by the Company Fiduciaries' economic interests, which caused them to be more risk-seeking than a loyal fiduciary," including holding "stock options that would only be triggered by a high-value IPO or acquisition." Laster also found sufficient evidence that "J.P. Morgan engaged in such manipulation by lying to the Board about the prospects for completing an IPO in March 2015," that "J.P. Morgan was motivated to delay the IPO because a merger would be more lucrative for J.P. Morgan," that "J.P. Morgan could have launched the IPO as scheduled, but refused for self-interested reasons," and finally, that "[i]t can be inferred that J.P. Morgan wanted Blackberry to buy the Company because J.P. Morgan wanted to cultivate Blackberry as a future client. There is evidence J.P. Morgan provided Blackberry with a lower asking price than it gave other bidders. There is also evidence that J.P. Morgan lied to the Board about providing Blackberry with price guidance."

On May 12, 2017, Vice Chancellor Laster also granted plaintiffs' motion for class certification, the class consisting of all holders (excluding defendants) of Good Technology Corp. common stock on October 30, 2015.

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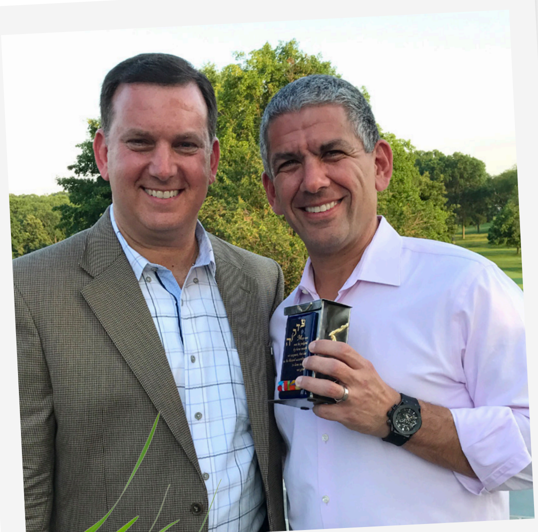


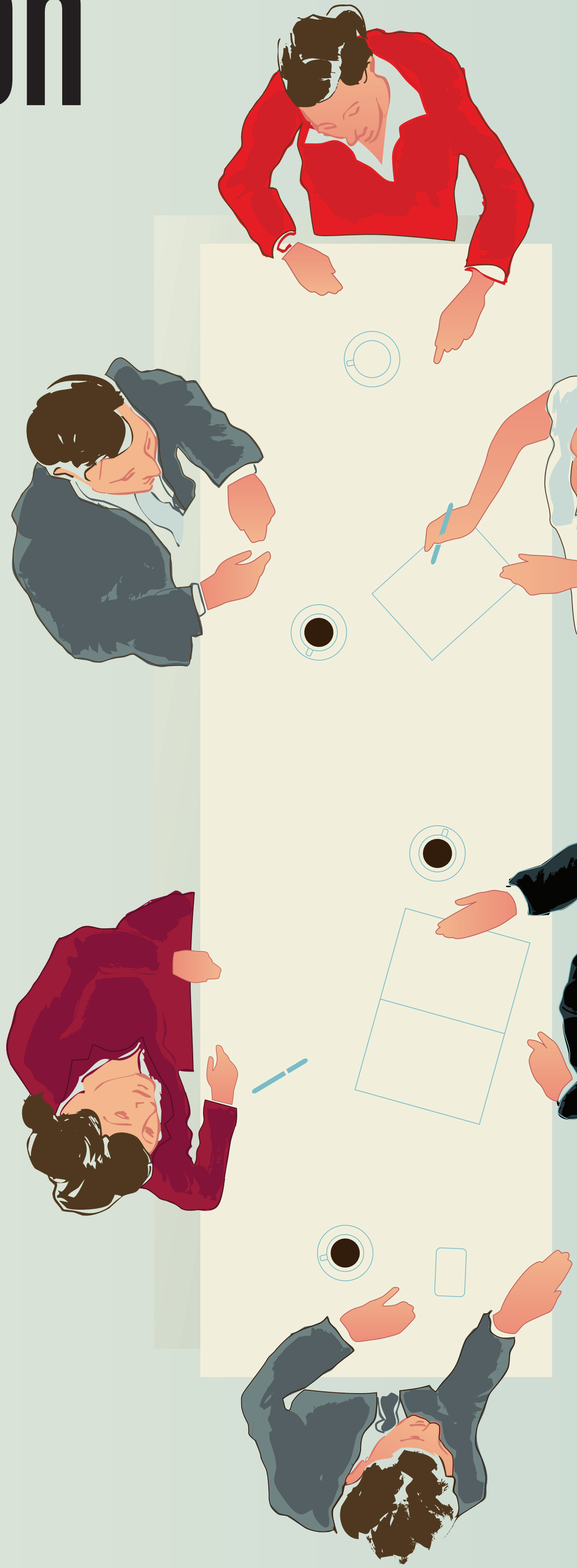
Rick Lewis, CEO of MIYJCC (left) and Sam Rudman

Robbins Geller Founding Partner Sam Rudman Named 2017 Honoree by the Mid-Island Y Jewish Community Center

On June 12, 2017, the Mid-Island Y Jewish Community Center ("MIYJCC") held a Golf Outing charity event in honor of Robbins Geller named partner **Samuel H. Rudman**. In naming him their 2017 Honoree, the MIYJCC praised Rudman for opening the Rudman Family Food Pantry, which supplies food and support for hundreds of families in need each year in the New York area.

All proceeds from the event benefitted the MIYJCC, which was first established in 1956 and serves more than 12,000 community members and patrons by offering various programs and services, ranging from nursery school and athletic programs to travel camps and adult education.

Proxy Season Roundup



Occidental Petroleum and PPL

During Occidental Petroleum's shareholder meeting on Friday, May 12, 2017, almost two-thirds of the shareholders (65%) voted in favor of a shareholder proposal seeking an assessment of Occidental's energy portfolio for its long-term climate change impact consistent with the Paris Climate Agreement's goal of limiting global temperature increases to two degrees Celsius. Significant support came from BlackRock, which voted for the resolution and noted on its website, "[W]hen we do not see progress despite ongoing engagement, or companies are insufficiently responsive to our efforts to protect the long-term economic interests of our clients, we will not hesitate to exercise our right to vote . . . ."

By a vote of 56.8%, shareholders of the PPL Corporation asked the utility company to produce reports on how it will be affected by efforts to limit climate change, despite the board's opposition.

The proposal asked PPL to publish, with board oversight, an assessment of the long-term impact on the company's portfolio of "public policies and technological advances that are consistent with limiting global warming to no more than two degrees Celsius over pre-industrial levels," including:

- How PPL could adjust its capital expenditure plans to align with a 2 degrees Celsius temperature rise scenario.
- Plans to integrate technological, regulatory and business model changes, such as electric vehicle infrastructure, distributed energy sources, demand response, smart grid technologies and customer energy efficiency, as well as corresponding revenue models and rate designs.

NOTE: Some companies are taking the lead on reducing carbon emissions. For instance, State Street announced that it has met its own environmental goals three years ahead of schedule, reducing greenhouse gas emissions and water use by 20% per person and diverting 90% of waste sent to landfills. In an interview with the *Huffington Post*, Rick Pearl, Vice President, Corporate Citizenship at State Street Corporation said, "Environmental issues are of increasing importance to our stakeholders, including employees, the communities in which we operate, clients and shareholders. From a business standpoint, more clients are expecting their financial service providers to offer products and services that address environmental issues and ***continued on page 22***

Six Robbins Geller Partners Honored on *Daily Journal* "Top Lawyers" Lists

On June 14, 2017, the *Daily Journal* named partners **Spencer Burkholz** and **Jason Forge** as Top Plaintiff Lawyers for 2017. The annual award recognizes the top attorneys in California who are making an impact through their excellent lawyering skills and leadership.

For nearly 20 years, Burkholz has successfully prosecuted several high-profile securities class actions that resulted in historic recoveries for investors. The publication commended him for his work on the 14-year-long *Household International* case, in which he obtained a record-breaking $1.575 billion recovery. "It is the largest recovery following a securities fraud class action trial, the largest securities fraud settlement in the 7th Circuit and the seventh-largest settlement in a securities fraud case filed after the Private Securities Litigation Reform Act of 1995," wrote the *Daily Journal*. When speaking to the publication, Burkholz noted that because of the Firm's reputation, it is known that "companies facing legitimate securities fraud claims – at least when our firm is representing the plaintiffs – have to face the risks of going to trial." The *Daily Journal* additionally praised Burkholz for the $500 million settlement in the *Countrywide MBS* litigation, which resolved claims "that Countrywide Financial, along with various Wall Street banks, packaged millions of dollars of mortgage backed securities with defective Countrywide loans, then falsely told investors that the products were investment grade." The *Countrywide* recovery is the largest RMBS purchaser class action recovery to date. Burkholz has also recovered billions of dollars for injured shareholders in additional cases such as *Enron* ($7.2 billion), the largest securities class action recovery, and the individual actions in *WorldCom*, where $657 million was recovered, the largest opt-out (non-class) securities action recovery.

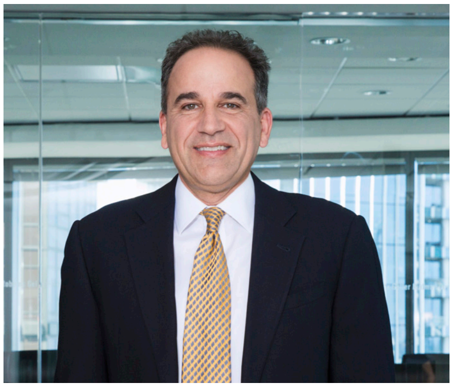
As an Assistant U.S. Attorney for over 12 years, Forge investigated and prosecuted some of the nation's most significant cases, including the largest corruption case in congressional history – against U.S. Rep. Randall "Duke" Cunningham – which the *Daily Journal* lauded. The publication again admired the stellar work done by Robbins Geller in the *Trump University* case, recognizing Forge for his contributions to the litigation. The publication noted that this unprecedented result "came just weeks after the election last November and despite Trump's repeated vows not to settle the case," and that the presiding Judge called the achievement "a testament to Class Counsel's representation and dedication to act in their clients' best interest." Forge told the *Daily Journal* that the resolution "was in the best interest of the class and the country." Instead of being a "national distraction for years," Forge explained, the settlement means that individual class members are eligible for nearly full refunds – tens of thousands of dollars for some. As the *Daily Journal* observed, Forge is no stranger to battling powerful adversaries. In addition to Congressman Cunningham and President Trump, Forge was one of the lead trial lawyers in a case against Pfizer, Inc. related to its off-label promotion of painkillers, which settled for $400 million on the eve of the trial, and he is currently prosecuting what is the first securities fraud case to be certified as a class action against Wal-Mart Stores, Inc., which arises out of Wal-Mart's alleged cover-up of suspected foreign corruption.

> "[A] testament to Class Counsel's representation and dedication to act in their clients' best interest."

Additionally, on May 24, 2017, the publication named partners **Debra Wyman**, **Rachel Jensen** and **Maureen Mueller** as Top Women Lawyers. The annual award specifically recognizes top women attorneys in California with excellent leadership and lawyering skills who are making a significant impact. All three of the honored attorneys have successfully prosecuted high-profile class actions that resulted in landmark recoveries.

"Wyman is known for her aggressive lawyering, tenacity and hard work," noted the publication, adding that Wyman has "litigated cases against public companies in state and federal courts, resulting in more than $1 billion in securities fraud recoveries." Wyman was one of the lead attorneys who "successfully appealed to the 6th Circuit Court of Appeals twice, reversing the district court's dismissal of the [Dana] action." The case, *Plumbers & Pipefitters Nat'l Pension Fund v. Burns*, resulted in a $64 million recovery for the class after 11 years of hard-fought litigation. "It was sort of the little case that could. No one really expected anything of that case," Wyman told the *Daily Journal*. "At every turn, we just kept plugging away. And at the end of the day, we got back for our class members 25 to 30 percent of their money before the company went bankrupt." She was also on the litigation team that obtained a $215 million recovery in the *HCA* action, the largest securities class action recovery ever in Tennessee, and $671 million in the *HealthSouth* case, which was based on one of the largest and longest-running corporate frauds in history.

Jensen has "played a key role in recovering billions of dollars for individuals, government entities and businesses injured by fraudulent schemes,



anti-competitive conduct and hazardous products," noted the publication. Jensen was one of the lead attorneys who worked on the *Trump University* case. "Obtaining a unanimous jury verdict against the president-elect would have been no easy feat, but we were prepared to go to trial," Jensen said. "It's an unprecedented settlement that caps off an unprecedented case." Additionally, she served as co-lead counsel in *City of Westland Police & Fire Ret. Sys. v. Stumpf*, obtaining a groundbreaking $67 million settlement in the shareholder derivative suit involving Wells Fargo & Co.

In commending Mueller for successfully prosecuting "several high-profile securities class actions that resulted in record-breaking recoveries [of] more than $3 billion for investors," the *Daily Journal* highlighted her work in the epic securities class action against Household International. Having begun the case as a junior associate, Mueller became one of the lead attorneys and helped secure final approval of a record-breaking $1.575 billion settlement, which is the largest securities class action recovery following a trial, the largest securities fraud settlement in the Seventh Circuit and the seventh-largest settlement ever in a post-PSLRA securities fraud case. "What I find so fulfilling about that case was the ability to see it through to the end, after 14 years of litigation. It was extremely hard-fought litigation," Mueller said. "To finally have a recovery for the class and to be part of that for more than half of the 14 years that the case was litigated was just a really great opportunity." Mueller also served as co-lead counsel in *Wachovia Preferred Securities and Bond/Notes Litig.*, securing a total recovery of $627 million for investors, one of the 15

Top left: Spencer Burkholz, top middle: Debra Wyman, top right: Rachel Jensen, middle left: Jason Forge, middle right: Daniel Pfefferbaum, and bottom: Maureen Mueller.

largest securities class action recoveries in history. The recovery is also one of the biggest securities class action recoveries arising from the credit crisis. Additionally, she was a member of the team responsible for recovering over $925 million for investors in the *UnitedHealth* litigation, the largest recovery arising out of the options backdating scandal.

Lastly, on April 12, 2017, the *Daily Journal* recognized Robbins Geller partner **Daniel J. Pfefferbaum** to its "Top 40 Under 40" list. The annual list honors top young attorneys, 20 from Northern California and 20 from Southern California, in all fields and practices. In the profile showcasing Pfefferbaum and his work, the *Daily Journal* highlighted the *Trump University* case, commending the attorney for "stepp[ing] well outside his legal specialty to represent former Trump University students *pro bono* in two fraud class actions against Donald J. Trump asserting false advertising, unfair business practices and Racketeer Influenced and Corrupt Organization Act violations."

"The litigation predates Trump's campaign, but it was intensely fought

even before he was a candidate," Pfefferbaum told the *Daily Journal*. "It was scorched-earth tactics all the way. When he made his [presidential candidacy] announcement, it ratcheted up the exposure."

Obtained shortly before trial was set to commence last November, the settlement, approved on March 31, 2017 provides $25 million to approximately 7,000 consumers, which means that individual class members will be eligible for upwards of $35,000 in restitution. "We are extremely proud of these results," Pfefferbaum told the *Daily Journal*, adding that the settlement "is historic for a consumer class action because the plaintiffs will recover so much."

Does Snap Inc.'s Decision to Issue Non-Voting Shares Undermine Shareholders' Rights?

On July 10, 2017, *Pensions & Investments* published an article discussing what Snap Inc.'s decision to issue non-voting shares means to shareholders.[1] Snap Inc. is a technology and social media company that is best known for owning Snapchat and Bitmoji. The article states that the decision "undermines the basic right of shareholders to have a say in the companies in which they invest. These rights are even more important for index investors, because, unlike active investors, they have minimal discretion to sell a stock if it is part of the index."

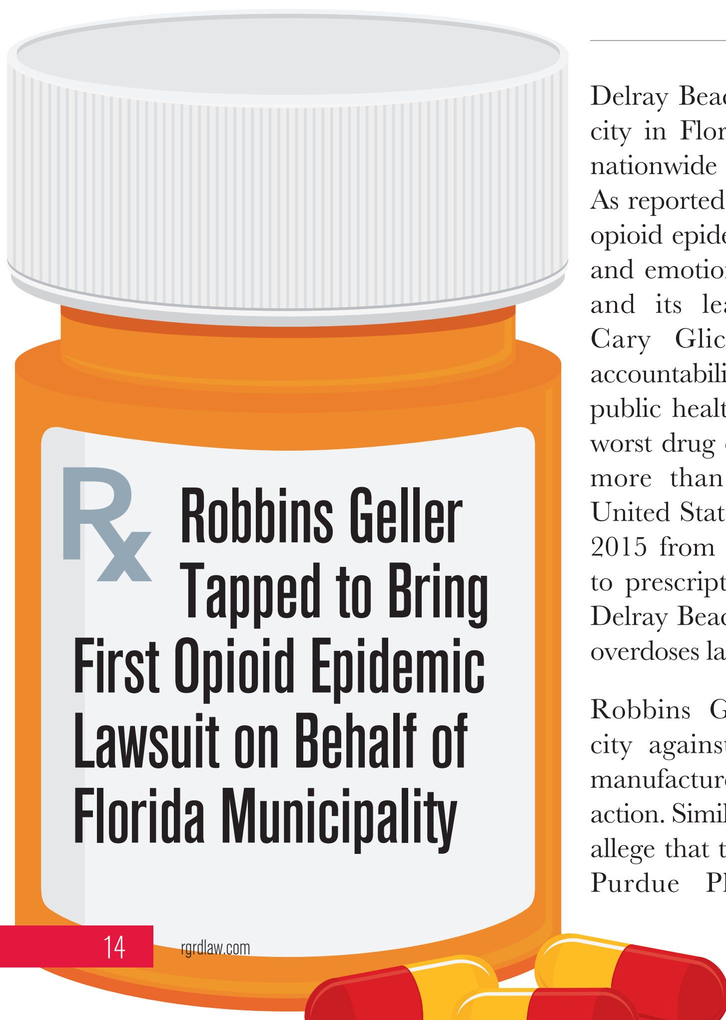
According to *Pensions & Investments*, Snap Inc.'s choice follows a trend that is destroying the one-share one-vote principle, and calls into question the idea of equity ownership. "The number of companies with unequal shareholder voting rights has increased, and now accounts for 12% of the S&P 500," the publication notes. Equal voting rights allow investors to align their needs with that of the company and to have a say in company matters, such as the election of directors, which is integral to an equitable public market system.

"Stock exchanges and index providers could in principle take a stand against unequal voting rights," states the publication. "While the New York Stock Exchange and Nasdaq allow companies with unequal voting rights to list, major exchanges in the U.K., Hong Kong, Singapore and Australia have banned the practice. Index providers face a trickier path in excluding publicly listed companies from the investible universe their indexes are meant to track."

Pensions & Investments suggests that regulators and long-term institutional investors might be in the best position to take a stand against unequal voting rights. Regulators, for instance, could "introduce rules requiring that a majority of minority shareholders approve key transactions, as is the case in India, the U.K. and China. They could also opine on whether shares without votes are actually shares in the conventional sense of common equity." Long-term institutional investors could use their voices in support of voting rights and, in turn, in support of board members and sustainable value.

"This is a fight not only for the interests of long-term shareholders, but also for the long-term sustainability of companies and the health of the broader economy," *Pensions & Investments* concludes. "We must all work together to protect the basic principles of shareholder rights and the ability to promote long-term value creation. Without these principles, the future of public companies and their investors is at risk."

[1] http://www.pionline.com/article/20170710/PRINT/170719999/snap-inc-puts-shareholder-rights-at-risk



Robbins Geller Tapped to Bring First Opioid Epidemic Lawsuit on Behalf of Florida Municipality

Delray Beach is poised to be the first city in Florida to take action in the nationwide opioid epidemic litigation. As reported in the *Palm Beach Post*, the opioid epidemic "has caused financial and emotional strain on the people," and its leaders, including Mayor Cary Glickstein, are demanding accountability and restitution. In what public health officials have called the worst drug crisis in American history, more than 183,000 people in the United States died between 1999 and 2015 from overdoses directly related to prescription opioids. The city of Delray Beach alone responded to 690 overdoses last year.

Robbins Geller will represent the city against several pharmaceutical manufacturers and distributors in the action. Similar opioid epidemic lawsuits allege that these companies, including Purdue Pharma and Cephalon, deliberately conceived strategies to create an entirely new "health care" narrative – one in which opioids were safe and effective long term and forced the burden of dealing with the resultant overdoses on the state, county and city governments. The lawsuits seek damages based on the claims that drug manufacturers and distributors violated the state consumer protection statute, created a public nuisance and were negligent.

"They went out and said that opioids are less than 1 percent addictive. That is obviously not true," said **Mark J. Dearman**, a Robbins Geller partner who spoke with the Delray Beach city commission. "This is a playbook right out of (Big) Tobacco."

Robbins Geller attorneys **Paul Geller**, **Mark Dearman**, **Aelish Baig, Michael Dowd** and **Patrick Coughlin** are litigating the case on behalf of Delray Beach and other cities and states in the country.

Robbins Geller Beats Back Defendants' Motion to Dismiss Yet Again in *Puma Biotechnology*

In an order dated July 25, 2017, the Honorable Andrew J. Guilford of the Central District of California again denied defendants' motion to dismiss in *Hsu v. Puma Biotechnology, Inc.* The case charges Puma and the company's CEO and CFO with violations of the Securities Exchange Act of 1934.

Puma is a development-stage biopharmaceutical company focused on the acquisition, development and commercialization of drugs to enhance cancer care. The company's only product candidate is an investigational drug known as PB272 ("neratinib"), which Puma touted as an extended adjuvant treatment for human epidermal growth factor receptor 2 ("HER2")-positive breast cancer. Lead plaintiff **Norfolk County Council, as Administering Authority of the Norfolk Pension Fund** asserts that on July 22, 2014, Puma overstated the top-line efficacy results and understated the safety results from its Phase III ExteNET trial, which compared extended adjuvant treatment with neratinib to placebo in HER2-positive breast cancer patients who were pretreated with Herceptin. The statements misled investors into thinking the disease-free survival rates over time showed an increasing benefit for those on neratinib versus those on a placebo, and that the severe diarrhea and adverse event drop-out rates were in line with prior trials. In response to defendants' statements regarding the results of the trial, Puma's stock increased $174.37 per share, a one-day increase of over 295%.

On September 30, 2016, Judge Guilford denied defendants' motion to dismiss, finding that the Norfolk Pension Fund had adequately pled the falsity of defendants' statements regarding the efficacy of neratinib, as well as defendants' knowledge of the true facts and their motive and opportunity to commit the fraud. In May 2017, following six months of discovery, the lead plaintiff moved to amend the consolidated complaint and add additional allegations regarding ***continued on page 23***

Seniors Rejoice: Federal Appeals Court Reinstates Case Alleging Illegal Kickback Scheme by AARP and UnitedHealth

On May 3, 2017, the Ninth Circuit Court of Appeals in San Francisco, in an important published opinion that will impact California consumer protection claims for many years to come, reinstated a lawsuit alleging a scheme by AARP and UnitedHealth to skim money off of payments by California senior citizens and disabled individuals to UnitedHealth for Medicare Supplemental (Medigap) insurance in the form of an undisclosed and illegal commission to AARP.

In January 2014, AARP member Jerald Friedman, represented by Robbins Geller and co-counsel, sued AARP and UnitedHealth for engaging in the allegedly illegal practice of paying AARP nearly 5% of every payment made to UnitedHealth by AARP members for Medigap insurance. Friedman claimed that this practice was, fundamentally, the payment of insurance commissions to an unlicensed entity in violation of California's insurance laws and was, therefore, illegal under California's Unfair Competition Law ("UCL").

The trial court dismissed the suit in October 2014, concluding that Friedman had not plausibly alleged that AARP acted improperly as an "unlicensed insurance agent."

In reversing dismissal of Friedman's case, the Ninth Circuit unanimously held that "Friedman has adequately pled that AARP both 'transacts' and 'solicits' insurance without a license in violation of the California Insurance Code." The court found support for its conclusion in several facts alleged in Friedman's complaint, including that AARP is contractually bound to solicit insurance sales through a marketing campaign, which includes materials owned by AARP, stating, "This is a solicitation of insurance," and that the nearly 5% payment to AARP, currently termed a "royalty" by AARP and UnitedHealth, was for years called an "administrative allowance" until AARP ran into trouble regarding its tax-exempt status with the IRS. Thus, the Ninth Circuit found that it had "little difficulty in concluding" that, "[i]n light of AARP's self-described 'solicitation of insurance,' as well as its contractual obligation to 'solicit' membership into the UnitedHealth Medigap plan, Plaintiff stated a plausible claim at the motion to dismiss stage that AARP 'solicits' insurance without a license, and, as a consequence, committed an unlawful act in violation of the UCL."

Robbins Geller attorneys **Stuart A. Davidson**, **Andrew S. Love, Christopher C. Gold**, **Dory P. Antullis** and **Christopher Collins** obtained this result for AARP Medigap insureds.

Friedman v. AARP, Inc., 855 F.3d 1047 (9th Cir. 2017).

Listed Securities: ACS Ownership Rights

LGPS funds, together with public pension funds around the world, increasingly have been leading securities fraud lawsuits in a variety of jurisdictions as representative plaintiffs and claimants.

The cases involved generate billions of dollars in recoveries for investors every year and, where possible, governance reforms designed to reduce recidivism. But, by pooling their ownership of listed securities via an authorized contractual scheme ("ACS") without retaining the right to seek legal redress when they have been defrauded, Local Government Pension Schemes ("LGPS") funds could lose their ability to participate actively in future cases. That may be of less concern if the ACS operator is owned by the participant funds and all of the various ACS constituents are in and remain in sufficient agreement. Indeed, in those agreeable circumstances, the leverage in litigation of participating LGPS funds will increase dramatically. However, where the operator is rented or where the various parties fail to agree or fall out, powerful rights could be lost to the funds and left unexercised.

Responsible Ownership

Over the last two decades, pension fund investors in publicly traded securities, including LGPS funds, have answered the clarion call to be responsible owners of otherwise "ownerless" public companies in various ways, including:

• Signing up to and following the prescriptions of stewardship codes and responsible investing initiatives;

• Exercising their voting rights;

• Engaging directly or via their chosen managers with the companies in which they invest; and

• Exercising their litigation rights, including seeking monetary redress and governance reforms via legal action when defrauded or otherwise harmed by redressable financial misconduct.

Even if some of the perceived benefits of the drive to responsible ownership can be debated, what cannot be is the fact that close to $100 billion has been recovered for defrauded securities investors over the last 20 years. Governance reforms are also being insisted upon with increasing frequency, all largely as a result of pension funds exercising their legal rights in various jurisdictions in which they entrust their money.

Pension funds have been readily able to lead class action efforts to secure such compensation – and governance reforms along the way – because significant amounts of their securities portfolios are segregated rather than pooled and because many fund members and officers are convinced that the responsible exercise of ownership rights is the right thing to do. The funds have been able to pursue such cases at no out-of-pocket cost to themselves because the proceedings are usually prosecuted and funded on a contingent "no win, no fee" basis. They have won governance reforms such as shareholder-nominated directors, auditor rotation, limitations on options grants, separation of the CEO and chairman positions, ethics monitoring, whistleblower hotlines and other bespoke governance enhancements as a result of the leverage that can be brought to bear when concluding meritorious cases.

The problem facing more proactive owners with the collective pooling of ownership is with the nature of an ACS itself:

• Typically only a complete owner of a security, and not a fractional owner, will have legal standing to assert any related claim; and

• ACS rules provide that only the ACS operator can exert day-to-day control over property in the ACS.

This in part explains why pooled funds are rarely at the vanguard of securities litigation recovery efforts. Their participants are often uncoordinated or are prevented from becoming involved, and most managers and operators have yet to pick up the mantle.

Only if the fractionalized ownership obstacle is overcome and funds are also assured that they are acting within their authority will there remain a path by which LGPS funds who choose the ACS route may still actively participate in anti-fraud cases for themselves and for other similarly damaged investors.

Who Owns What Matters

Unsurprisingly, it has been the real owners of publicly traded companies who, when defrauded by those companies, have led the charge for financial redress in courts across the world, and particularly in the United States. It stands to reason that the owner who suffers a loss owing to the purchase of securities at fraudulently inflated prices is more likely to assert a claim than a manager whose function is to select the securities for the owner and who may be, or feel, conflicted in myriad ways. And, in any event, it may be that the jurisdiction in which the claim is asserted requires that the claim be brought by the asset owner and not by the manager, unless the claim is sufficiently assigned.

Who, then, is the "owner" of listed securities purchased by an ACS? While the regulations say that the constituent LGPS funds will be the owners as "tenants in common" of the assets held by the ACS and the funds own units in the ACS, legal title to the underlying securities is held by or to the order of the depositary.

This confusion allows for the distinct possibility that LGPS funds, which in the past would have had no problem asserting their claims in court as segregated owners of securities with sufficient legal standing, may find themselves disabled from taking action. Courts may decline to recognize claims asserted by just one fund or a subset of constituent funds that all collectively own a security in an ACS, leaving it either to the non-owner operator to convince the courts of its standing (should it be motivated to do so) or perhaps to the manager of some sub-fund in which the loss manifested itself.

To date, depositaries have not displayed any appetite for asserting such claims, notwithstanding their possession of legal title or their status as trustees. The reality is that the more distance (and more fees) between beneficial asset ownership and asset management, the less aggressive the assertion of ownership rights is likely to be.

Even if the fractionalized ownership obstacle associated with ACS arrangements is overcome, LGPS participants still will be faced with the fact that they cannot exercise day-to-day control over the acquisition, holding, management or disposal of property in the ACS – only the operator can. The operator, however, is called upon by the rules to instruct the depositary as to how rights attaching to the ownership of property are to be exercised. How then can LGPS participants ensure that any erstwhile ownership rights over any listed securities are being exercised appropriately?

Directions and Board Oversight

ACS participants can issue directions to the operator so long as they do not amount to the exertion of non-FCA approved day-to-day control. Directions can be envisaged that mandate fraud monitoring, require the appropriate consideration by the operator or depositary of the exercise of litigation rights, and enable oversight and recommendations concerning litigation decisions by establishing an oversight board comprised of the participant funds. To ensure a court recognizes the legal standing of the non-owner operator, in circumstances where it will, but the depositary declines, to act, such directions could also anticipate the assignment of any right to sue in chosen situations. Assignments of litigation rights are recognized in most jurisdictions and can provide sufficient authority and legal standing for the assignee to pursue the claims as if the assignee were the legal or beneficial owner.

Reserving the Right to Sue

The "property" over which the ACS operator has day-to-day control and with respect to which the depositary notionally is directed by the operator concerning the exercise of "ownership" rights arguably includes the "chose in action," which is the right to sue. The "right" is itself an asset. Accordingly, if that right enters the ACS then it may be that only the operator or depositary can exercise it, albeit with a level of oversight by participant funds. Measures that LGPS funds may wish to consider taking in order to retain control over rights attaching to "legacy" securities they already own, but are transferring to the pool, include explicitly reserving such rights so that they do not enter the pool in the first place (even if any proceeds derived from their exercise are to be transferred to the pool).

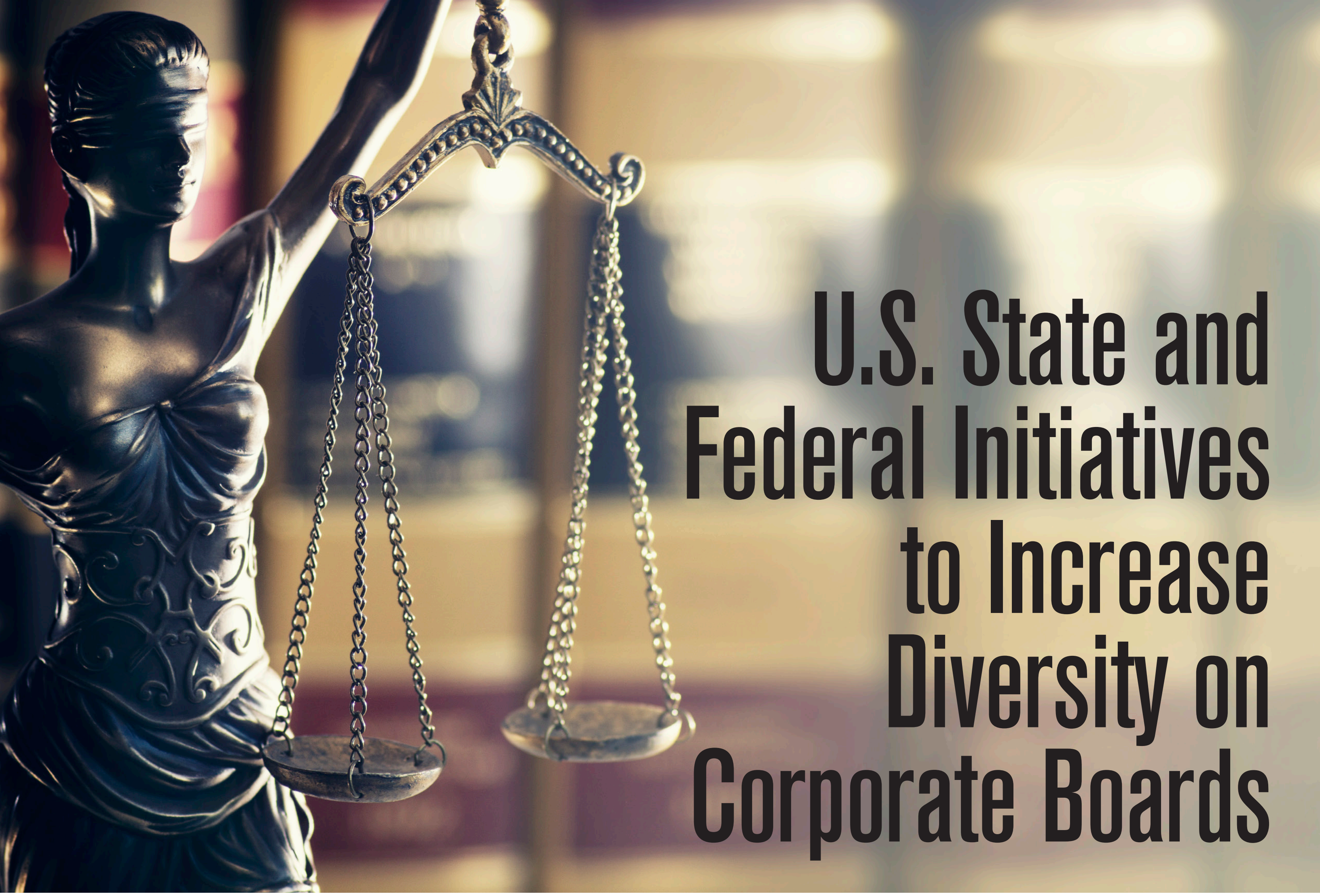
As for the exercise of rights attaching to non-legacy securities purchased in the ACS, unless agreements that pass FCA muster can be crafted prior to their purchase that ensure such rights are to be held outside the ACS by the participants or their nominee, LGPS funds may find themselves disabled from exercising any of the ownership rights that attach to them.

Conclusion

The ACS was not designed to promote active and responsible ownership. Nor was it designed with LGPS pools in mind. It was designed as a tax-transparent collectivized investment vehicle to attract multiple cross-border investors to the United Kingdom from Europe and around the world.

LGPS funds seeking whatever they perceive to be the benefits of collectivized investing in an ACS, while also preserving the accountability of the companies in which they invest, must carefully consider with their advisors how they can best fashion their ACS arrangements and still meet FCA approval. At stake is ensuring that at least one of the ACS entities – a participant fund, the operator, or even the depositary – continues the exercise and vindication of important, hard-won shareholder rights when the participant LGPS funds are victimized by securities fraud.

The above article was written by Robbins Geller partner Mark Solomon and featured in the UK's Pensions and Lifetime Savings Association's *Viewpoint* supplement, "Local Authority Pooling Focus." For a copy of the supplement, please visit: http://www.plsa.co.uk/PressCentre/news/0796-Viewpoint-feature-on-Local-Authority-pooling. aspx.



U.S. State and Federal Initiatives to Increase Diversity on Corporate Boards

Numerous studies have found that diversity among the members of the boards of directors of publicly traded companies can lead to improved corporate performance. For this reason, investors across the United States have been calling on companies to improve the diversity of their corporate boards. Similarly, elected officials at both the state and federal level have taken action to address the issue. While many are hesitant to put rules in place that prevent company leaders from deciding how to best address the issue, others feel that a "quota" approach to board diversity is the best way to effect change. This article summarizes the approaches currently being taken at the state and federal level to address board diversity.

State Initiatives

California Takes the Lead

California was the first state to pass a resolution calling on boards of publicly traded companies based in the state to increase the level of gender diversity among the members of their boards of directors by passing Senate Concurrent Resolution No. 62 in 2013.[1] The non-binding resolution encouraged companies based in California to have a specified number of female directors, depending on the size of the board, within the following three years. Although the resolution was not binding, it achieved at least three goals: 1) encouraging discussion regarding board diversity among corporate directors and other leaders; 2) supporting institutional investors' initiatives targeting companies lacking board diversity; and 3) setting an example for other state legislatures to call on companies based in their states to improve board diversity.

As of December 31, 2016, which was the end of the three-year time frame specified in the first California resolution, approximately 20% of the companies included in the Russell 3000 Index and headquartered in California were in compliance with the resolution's targeted number of female directors. Despite the continued low numbers of female directors serving on California company boards, the supporters of the resolution feel that it partially served its purpose in that it raised awareness regarding the need for improved gender diversity on the boards of companies based in the state.

Other States Take Action

This notion is bolstered by the fact that several other states around the country have followed California's lead and passed non-binding resolutions calling on companies in their states to improve gender diversity on the boards of companies based in their states. The following states are among those that have taken legislative action:

- In Illinois, HR0439 was adopted in May 2015.[2]
- In Massachusetts, Resolution S.1007 was adopted in October 2015.[3]
- In Colorado, House Joint Resolution 17-1017 was passed in March 2017.[4]
- In Pennsylvania, House Resolution 273 was adopted in April 2017.[5]

Federal Initiatives

Studies and Legislation

A report by the U.S. Government Accountability Office published in December 2015 found that, assuming women join boards in equal proportion to men, this number will likely not reach 50% – gender parity – before the year 2054.[6] In 2016, a bill called "Gender Diversity in Corporate Leadership Act of 2016" was introduced in the House of Representatives that called on the Securities and Exchange Commission ("SEC") to, among other things, "establish a Gender Diversity Advisory Group to study and make recommendations on strategies to increase gender diversity among the members of the board of directors of issuers."[7] This bill was re-introduced as H.R. 1611 in March 2017.[8]

Federal Rules Regarding Corporate Disclosure

While efforts to encourage companies to increase diversity among corporate directors are underway, others are focused on improving the disclosure regarding the current level of board diversity. Historically, those advocating change have had success by requesting enhanced disclosure to push companies to take action. This is likely due to the notion that, as Justice Louis D. Brandeis once said, "Sunshine is the best disinfectant." Also, when companies have to provide information in their regulatory filings regarding an issue, it often necessitates a review of the company's practices prior to documenting that practice to share with the investing public.

Currently, companies are required to provide a short biography of their current and nominated directors in their proxy statements, which are filed with the SEC and therefore available to the public at www.sec.gov. However, these biographies most often do not include much information regarding aspects of diversity each director brings to the board. Of course, titles and pronouns allow an external observer to determine the gender of the director and director ages are provided, but information regarding the ethnic and racial background is not discernible. Likewise, membership in other groups that might provide diverse perspectives in boardroom deliberations are often not discernible from the information currently provided.

Most recently, a group of 29 members of the U.S. House of Representatives, led by Congressman Gregory W. Meeks, a senior member of the House Financial Services Committee, signed a letter to the new Chair of the SEC, Jay Clayton, requesting that the commission require enhanced disclosure regarding board diversity from the companies that are required to file with the SEC.[9] This letter requests that companies be required to provide details regarding the "race, gender, and ethnicity of each board member/nominee." The previous SEC Chair, Mary Jo White, had indicated more than once that she was interested in pursuing such enhancements to the required disclosures. In a speech in June 2016, she said that her staff would be proposing rule changes to require companies "to include in their proxy statements more meaningful board diversity disclosures on their board members and nominees where that information is voluntarily self-reported by directors."[10] However, Chair White stepped down before this proposal moved forward. The letter from the Representatives indicates that there is support among current federal legislators to call on the current SEC Chair to move forward on this issue.

Conclusion

Taken together, the federal and state initiatives addressing the diversity of corporate boards should serve as a strong signal that institutional investors are not alone in their desires for more diversity in corporate boardrooms. Directors and other company leaders should take notice and act preemptively to improve the diversity of their boards and discuss these issues in their regulatory filings.

1 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SCR62
2 http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HR&DocNum=439&GAID=13&SessionID=88&LegID=91204
3 https://malegislature.gov/Bills/189/Senate/S1007
4 http://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a_hjr1017_signed.pdf
5 http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2017&sessInd=0&billBody=H&billTyp=R&billNbr=0273&pn=1554
6 http://www.gao.gov/products/GAO-16-30
7 https://www.congress.gov/bill/114th-congress/house-bill/4718
8 https://www.congress.gov/115/bills/hr1611/BILLS-115hr1611ih.pdf
9 https://meeks.house.gov/media/press-releases/rep-meeks-sends-letter-improving-corporate-board-diversity-disclosures-sec
10 https://www.sec.gov/news/speech/chair-white-icgn-speech.html

market share comes at the expense of other airline companies that the shareholders also probably own.

* * *

I think the "index funds ruin capitalism" story is best read as just one strand of a larger "financial capitalism ruins capitalism" story, and while the index funds story is still pretty niche, the financial capitalism story has become very popular. In this story, managers and investors have stopped thinking of companies as *companies*, as human networks of employees and customers and investors, and now think of them instead as *numbers*, as sets of financial factors to be optimized. There are many explanations for this: Developments in graduate business education, or the rise of corporate activism, or the cultural role of Wall Street. But the basic story is that companies used to balance the interests of workers, customers and investors; now they have adopted a fully investor-centric model in which profits are the only goal and customer service and workers' rights are sacrificed. Sheelah Kolhatkar writes that "the investors-above-all doctrine seems to have triumphed over the more inclusive approach."

The Biggest Institutions Are Adding to Their Governance Resources

The *Financial Times* reports:

BlackRock, Vanguard and State Street have expanded their corporate governance teams significantly in response to growing pressure from policymakers and clients to demonstrate they are policing the companies they invest in.

The move by the world's three largest asset managers, which together control nearly $11tn of assets, will help address fears that investors are not doing enough to monitor controversial issues around executive pay and board diversity at the companies they invest in.

World's Worst Reason for Not Docking a Fired CEO's Pay Used as a Defense in Court

United Continental Holdings, the parent company of United Airlines, fired its CEO for corruption in connection with the New Jersey "Bridgegate" scandal. The City of Tamarac, Florida Firefighters Pension Trust Fund sued because the company did not clawback his pay. Gretchen Morgenson writes in *The New York Times*:[10]

In a letter to the pension fund, a lawyer for United explained that it would harm the company to give the board "unfettered discretion to recoup compensation" in cases involving wrongdoing. "Where such discretion is out of step with industry norms," the letter said, it would "make it difficult for United to recruit and retain top talent, particularly at the senior management level."

In other words, clawing back severance awarded to executives amid a bribery investigation is not industry practice. And if United pursued such a recovery, the airline would be an outlier and unable to hire good people.

Young Consumers – and Possibly Shareholders – Are More Inclined to Respect Companies that Support Their Values

The conventional wisdom is that CEOs and other corporate spokespeople should stay away from taking positions on politics and policy that could alienate some customers. But a new report from the global public relations firm Weber Shandwick and KRC Research shows that millennials are more interested than their predecessors in corporate officials who make public statements on social issues. *The Washington Post* reports:[11]

In the survey, 56 percent of millennials said CEOs and other business leaders need to engage on hotly debated current issues more today than in the past, compared with just 36 percent of Gen Xers and 35 percent of baby boomers.

Forty-seven percent of millennials said CEOs have a responsibility to speak up on social issues that are important to society, compared with just 28 percent of Americans in older generations. And millennials were the only generation in the survey in which the percentage of those who said they view CEOs more favorably for taking public positions actually expanded since last year, rather than declined.

[10] https://www.nytimes.com/2017/06/09/business/united-airlines-ceo-scandal-lawsuit.html
[11] https://www.washingtonpost.com/news/on-leadership/wp/2017/07/24/what-millennials-want-from-their-ceos-activism/?utm_term=.51aab88f85e6

WAL-MART (CONTINUED FROM PAGE 4)

As a result of these actions, shareholder litigation ensued. On May 31, 2012, certain Wal-Mart stockholders filed a shareholder derivative action in the United States District Court for the Western District of Arkansas (the "Arkansas Action"), while on June 6, 2012, other Wal-Mart stockholders commenced a books and records proceeding in the Delaware Chancery Court to investigate possible derivative claims arising from the alleged Mexico bribery scheme (the "Delaware Action").

On March 31, 2015, the District Court dismissed the Arkansas Action for failure to adequately plead futility of demand, which the United States Court of Appeals for the Eighth Circuit affirmed on July 22, 2016. Meanwhile, in the Delaware Action, after a trial before the Chancery Court and an appeal to the Delaware Supreme Court, on May 1, 2015, the plaintiffs filed a shareholder derivative complaint in the Delaware Chancery Court. On June 1, 2015, defendants in the Delaware Action moved to dismiss the complaint, arguing that the dismissal of the Arkansas Action collaterally estopped the Delaware plaintiffs from pleading futility of demand. On May 13, 2016, the Delaware Chancery Court dismissed the Delaware Action with prejudice, and the plaintiffs in the Delaware Action appealed to the Delaware Supreme Court.

B. The Delaware Chancery Court's Ruling on Remand

On January 18, 2017, the Delaware Supreme Court issued an Order remanding the Delaware Action back to the Delaware Chancery Court to consider the following question:

> In a situation where dismissal by the federal court in Arkansas of a stockholder plaintiff's derivative action for failure to plead demand futility is held by the Delaware Chancery Court to preclude subsequent stockholders from pursuing derivative litigation, have the subsequent stockholders' Due Process rights been violated? *See Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

Answering in the affirmative, on July 25, 2017, the Delaware Chancery Court issued a Supplemental Opinion, recommending that the Delaware Supreme Court adopt the rule proposed by Vice Chancellor Laster in *In re EZCORP, Inc. Consulting Agreement Derivative Litigation*, 130 A.3d 934 (Del. Ch. 2016), where the Delaware Chancery Court stated *in dictum* that, "both as a matter of Delaware law and as a matter of due process, a judgment cannot bind 'the corporation or other stockholders, in a derivative action until the action has survived a Rule 23.1 motion to dismiss, or the board of directors has given the plaintiff authority to proceed by declining to oppose the suit.'"

The Delaware Supreme Court will decide whether to adopt the Chancery Court's recommendation. If it does, then institutional stockholders, interested in pursuing books and records demands before deciding whether to commence suit, will be able to do so with less risk of being collaterally estopped from pursuing derivative actions based on the dismissal of an earlier filed action on demand futility grounds.

In re Wal-Mart Stores, Inc. Delaware Derivative Litigation, Consolidated C.A. No. 7455-CB, Supplemental Opinion (Del. Ch. July 25, 2017).

GLOBAL CORPORATE GOVERNANCE REPORT (CONTINUED FROM PAGE 9)

At least a dozen companies in the U.K. have amended their bylaws this year to allow for AGMs to be held electronically in the future, whereby shareholders could follow the board's annual presentation on their computers and lodge questions online or, in some cases, over a live phone call. Only one company – luxury goods Jimmy Choo PLC – has so far held virtual-only meetings in the U.K., with the first in 2016 and then again this year.

Pension Funds Push for Governance Improvements in Latin America

Ethical Boardroom reports that it has been the practice of Latin American companies, which are usually controlled by a majority shareholder, that "misbehaviour and expropriatory attempts by a [controlling shareholder] will be harder to discipline. Even in the unlikely scenario of legal sanctions, they will usually be mild and take a very long time to be settled in courts."[6] However, an "extremely significant change in the region was initiated by the pension system reform promoted in Chile in 1981 and later extended to other countries in the region," the publication notes. "Today, through private pension administrators, called the AFPs, ninety million people are shareholders and creditors of the companies in the region. Their individual savings, amounting to approximately five hundred billion dollars, tilt the debt and equity markets. Their vote is a massive political power affecting the press, regulators and legislatures in significant ways. In fact, it is more and more common that they succeed in blocking questionable transactions that would have passed just a few years ago."

6 https://ethicalboardroom.com/board-evolution-in-latin-america/

State Street's asset management arm, State Street Global Advisors (SSGA) – has several (low-carbon ETF, green bonds, etc.). In addition, we have launched a program in our Global Exchange division that will help support clients in Environmental, Social and Governance (ESG) analysis and quantification of their investments."[2]

Proxy Access Majority Vote at Schwab

More than 61% of Charles Schwab Corp. shareholders voted in favor of a pension fund-led proxy access proposal submitted by CalPERS and NYCERS. The non-binding proposal would allow shareholders to nominate company directors.

Renault Shareholders Narrowly Approve CEO Pay Despite Government Opposition

Out of all Renault SA shareholders, 53% approved Carlos Ghosn's seven million euro ($7.8 million) compensation for last year over the objections of the French government, which owns almost 20% of the stock and which argued that the automaker's chief executive officer is overpaid, although it was cut by 20% last year.

An Unexpected Call for Disclosure of Corporate Political Expenditures from the Right

A shareholder proposal on the disclosure of lobbying priorities from the right-wing National Center for Public Policy Research's Free Enterprise Project is an effort to push Caterpillar Inc. to lobby the government to drop health and safety protections. It submitted a shareholder resolution asking the heavy equipment manufacturer to report on how and why it chooses its lobbying priorities.[3]

> "After eight years of President Obama's regulatory overreach, high corporate taxation and executive actions that hampered growth and led to America's worst economic recovery since the 1930s, we finally have a president willing to work with business leaders on a pro-growth agenda. President Trump is showing an eagerness to increase American manufacturing and bring jobs back to America," said National Center General Counsel and FEP Director Justin Danhof, Esq. "Our shareholder proposal urges Caterpillar to capitalize on the current political climate to advance the company's goals and improving shareholder value."

NOTE: The labor group Change to Win (CtW) also submitted a shareholder proposal at the Caterpillar annual meeting. Theirs was to implement a stronger clawback policy. It received 121,854,679 votes in favor and 292,939,985 votes against. There were no votes of more than 25 million cast against three of the directors as well.

Shareholders Protest Pay, Directors at Mylan

Eighty-three percent of all Mylan shareholders voted against Mylan's executive compensation. (The vote is non-binding.) Board member Wendy Cameron, chair of Mylan's compensation committee, was voted against by 56% of the shareholders.

> Mylan trumpeted in a press release last week that all of its board directors were "duly and validly elected." That's because Mylan, now headquartered in the Netherlands, follows a Dutch rule where a supermajority is needed to remove a board member. One-third of votes were cast against re-electing board chair Robert Coury, who is getting a nine-figure payout for last year. CEO Heather Bresch had more than a quarter of votes opposing her.
>
> Three investors – New York City Pension Funds, New York State Comptroller and California State Teachers' Retirement System – sent a letter[4] to independent directors demanding a slew of changes, including the immediate resignation of Cameron.
>
> The killer quote: "From the EpiPen price-hiking debacle, to allegedly overcharging the government for life-saving drugs, to paying chairman Coury nearly $100 million, this board's oversight failures have hurt investors, consumers and American taxpayers. We need to see change." – New York City Comptroller Scott Stringer.[5]

Institutional Investors Cast More No Votes on Directors

As with the increased support for climate change resolutions we reported on last month, the regulatory rollback from the Trump administration may be a factor in coaxing institutional investors to send a stronger message to underperforming boards. *Bloomberg* reports:[6]

> Shareholders have withheld 20 per cent or more of their votes for 102 directors at S&P 500 companies so far this year, the most in seven years, according to ISS Corporate Solutions, a consulting firm specializing in corporate governance. While largely symbolic, the votes at companies such as Wells Fargo & Co. and Exxon Mobil Corp. are recognized as signals of displeasure and put pressure on boards to engage.
>
> * * *
>
> While the Trump administration moves to reduce regulatory pressure on companies, big institutional investors are moving in the opposite direction. State Street Global Advisers

continued on next page

[2] http://www.huffingtonpost.com/entry/corporations-leading-on-environment-and-climate-change_us_592d71b9e4b07d848fdc0651
[3] http://s7d2.scene7.com/is/content/Caterpillar/CM20170427-29708-22840
[4] https://www.documentcloud.org/documents/3881457-Mylan-Post-Meeting-Letter.html
[5] https://www.axios.com/the-rising-opposition-to-mylans-leaders-2450280593.html
[6] https://www.theglobeandmail.com/report-on-business/international-business/us-business/wall-street-investors-throw-their-weight-in-corporate-votes/article35536516/

PROXY SEASON ROUNDUP (CONTINUED FROM PAGE 22)

and BlackRock Inc., for example, are increasingly taking an activist approach, calling for changes in diversity and corporate responsibility.

* * *

State Street voted against 731 directors in 2016 and expects a similar number this year, after rejecting 538 in 2015, [Rakhi] Kumar said. No longer are investors just "checking a box" to support directors, she said. State Street is encouraging companies to refresh their boards to get new and more diverse members.

NOTE: BlackRock also voted in favor of eight shareholder proposals on board gender diversity in the United States and Canada. They said, "We've been particularly focused on increasing the number of women on U.S. boards because progress in the U.S. has been slower than in many other markets. Board diversity, particularly in terms of gender, is important from a sustainable investment perspective, given that diverse groups have been demonstrated to make better decisions. This appears to be because they are better able to consider, where appropriate, alternatives to current strategies – a proposition that can ultimately lead to sustained value creation."

PUMA BIOTECHNOLOGY (CONTINUED FROM PAGE 15)

defendants' false statements about the safety results in the ExteNET trial and additional evidence of defendants' motive to defraud investors. The court granted lead plaintiff's proposed amendments and defendants subsequently moved to dismiss the newly amended portions of the complaint.

In denying the motion to dismiss on July 25, 2017, one day after oral argument, Judge Guilford found that the amended complaint again satisfied all applicable pleading requirements. While defendants argued that their statements regarding the safety results were accurate and protected by a "safe harbor" for forward-looking statements, the court credited lead plaintiff's allegations and found that "just days before making [the] alleged statements, [defendant] Auerbach received an email from Puma's Senior Director of Clinical Science regarding 'ExteNET top-line safety tables' that identified the precise information investors sought – the safety results and the dropout rates." As Judge Guilford remarked, "[d]efendants shouldn't benefit from [the] safe harbor by simply saying they 'anticipated' success when, in fact, they had a reasonable belief that defeat was just around the corner." On the issue of scienter, the court concluded that "[d]efendants haven't presented a compelling reason for the [c]ourt to reverse course at this stage."

Robbins Geller attorneys representing the plaintiffs in this case are **Trig Smith**, who argued the motion, **Tor Gronborg**, **Mark Solomon**, **Susannah Conn**, **Marco Janoski** and **Debashish Bakshi**.

Hsu v. Puma Biotechnology, Inc., No. 8:15-cv-00865, Order Denying Motion to Dismiss First Amended Complaint (C.D. Cal. July 25, 2017).

GOOD TECHNOLOGY (CONTINUED FROM PAGE 10)

Robbins Geller attorneys **Randall J. Baron**, **A. Rick Atwood, Jr.** and **Esther Lee** represented plaintiffs in the case.

In re Good Technology Corporation Stockholder Litigation, C.A. No. 11580-VCL (Del. Ch.).

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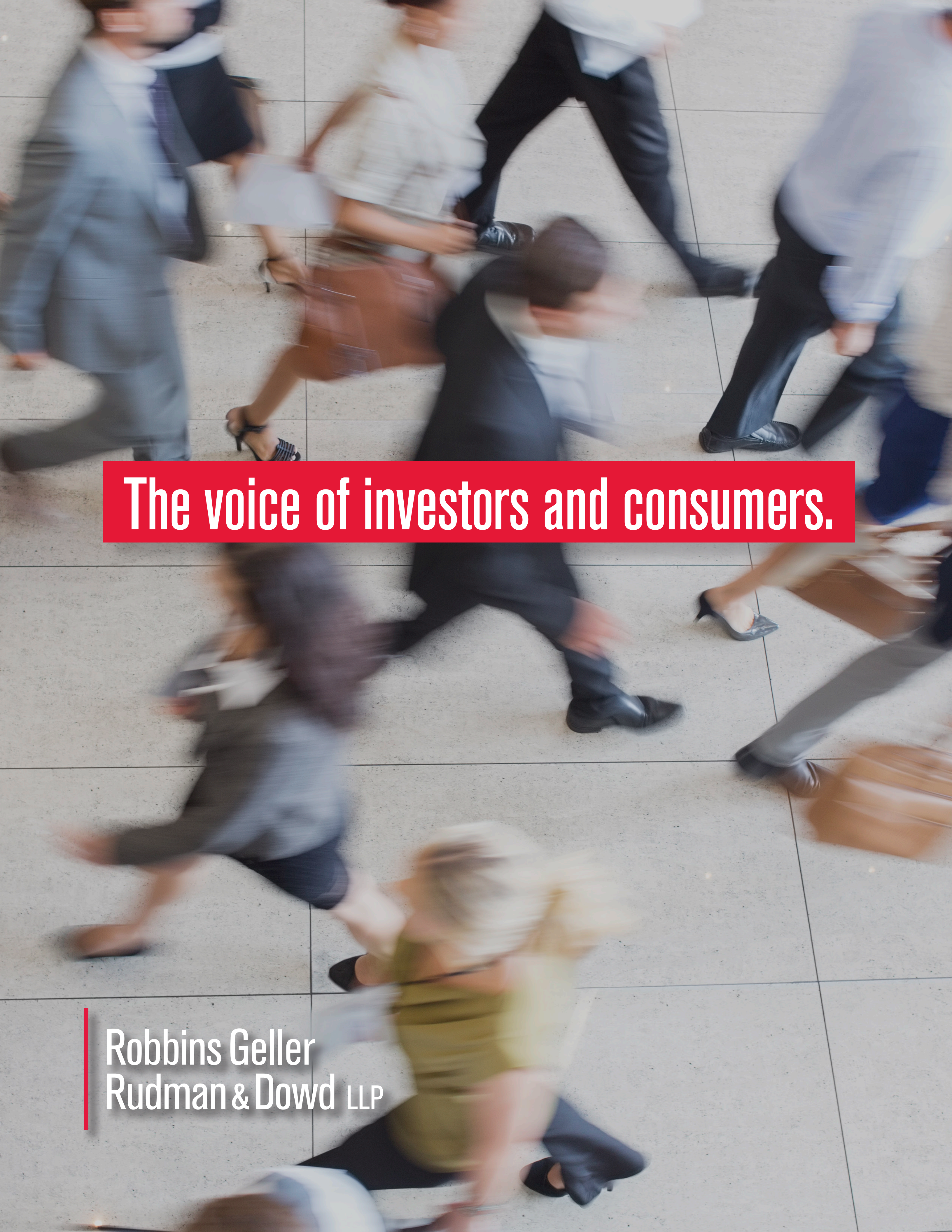
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