Robbins Geller Rudman & Dowd LLP

Corporate Governance Bulletin

3rd Quarter 2014

A Victory for Shareholders: U.S. Supreme Court Refuses to Overturn *Basic* Presumption of Reliance

On June 23, 2014, the U.S. Supreme Court issued a favorable opinion for investors in *Halliburton Co. v. Erica P. John Fund* (*"Halliburton II"*), 573 U.S. __ (2014). In a unanimous opinion, the Court refused to overturn its 25-year-old precedent in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), thus preserving investors' long-standing right to invoke a presumption of reliance at the class certification stage in actions brought under SEC Rule 10b-5 and §10(b) of the Securities Exchange Act of 1934.

The Court's refusal to overturn *Basic* was unequivocal, as Chief Justice Roberts's opinion stated:

> Halliburton urges us to overrule *Basic*'s presumption of reliance and to instead require every securities fraud plaintiff to prove that he actually relied on the defendant's misrepresentation in deciding to buy or sell a company's stock. ***Before overturning a long-settled precedent, however, we require "special justification," not just an argument that the precedent was wrongly decided. . . . Halliburton has failed to make that showing.***

Halliburton II, slip op. at 4 (emphasis added). Despite defendants' urging to the contrary, the Court's opinion places the burden squarely on defendants to prove the lack of a "price impact" (*i.e.*, that their misstatements did not affect the stock price) at the class certification stage in order to rebut the presumption of reliance.

Justices Thomas, Scalia and Alito issued an opinion concurring with the judgment, but refused to join the opinion of the Court, instead advocating for the abolishment of *Basic*'s presumption of reliance.

The *Basic* Opinion

For more than a quarter century, the U.S. Supreme Court's decision in *Basic* has allowed victims of securities fraud to allege class-wide reliance under the "fraud on the market" theory. "The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *Basic*, 485 U.S. at 241. In *Basic*, the Supreme Court recognized that "[m]isleading statements will … defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Id*. at 241-42. Thus, the "causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations." *Id*. at 242.

Basic's rebuttable presumption of reliance is significant, because without it each investor would be required to show individualized proof of his direct reliance on specific false or misleading statements, raising concerns that individual issues of proof could possibly overwhelm common ones – potentially foreclosing class treatment. *Basic* obviates this problem, holding that requiring such individualized proof regarding reliance places an

Continued on p. 8

A Note to Institutional Investors from Partner Darren J. Robbins

Between the Supreme Court's grant of *certiorari* in *Halliburton II* in November 2013 and the Court's opinion delivered in late June, the media and securities bar overflowed with predictions of possible outcomes. But, at the end of the day, *Basic* withstood the challenge, and its rebuttable presumption of reliance standard is still the law of the land.

While *Halliburton II* was pending, Robbins Geller attorneys have had a strong run of protecting both large and small investors, consumers, employees and intellectual property holders. Partner **Bonny E. Sweeney** was named in May to the *Daily Journal's* Annual List of 100 Leading Women Lawyers in California for her work on litigation involving VISA/MasterCard interchange fees and the resulting multi-billion dollar settlement. The Firm won two separate patent infringement jury trials in the Eastern District of Texas, with millions of dollars in damages awarded. Firm attorneys successfully concluded a 13-year-old employment class action with a $65 million recovery; settled a shareholder lawsuit arising from KKR's takeover of Gardner Denver for $29 million; and concluded shareholder litigation relating to a devastating coal mine explosion against Massey Energy with a $265 million recovery for investors.

To the extent defendants argue that *Halliburton II* requires additional attention to price impact at an earlier phase of litigation than before, we have the human and financial resources to be able to meet the challenge. ■

In This Issue:

Institutional Investors Will Gather to Take Action

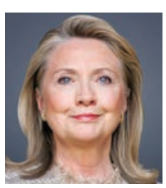
Six years ago, overreaching on Wall Street culminated with a financial crisis. Many have been struck by how little has been done or changed, and institutional investors are coming together to take action. The emergence of new and stronger investor advocates is a positive development resulting from the financial crisis. Public funds are partnering with investor advocates to reclaim their power to repair and strengthen the investment climate by taking increasingly active roles in monitoring corporate malfeasance, reforming dysfunctional corporate boards, and safeguarding investor assets for the benefit of plan participants.

GMI Ratings will host the sixth annual Future of Corporate Reform Public Funds Forum from September 2-4 in San Diego, California. Sponsors of the conference include Robbins Geller Rudman & Dowd LLP, the premier plaintiffs' securities litigation firm, and class-action administration experts Gilardi & Co. LLC. The exclusive conference sessions are designed to give representatives of public pension systems the knowledge and tools to help repair the markets, reshape corporate reform, and create and protect long-term value.

The educational sessions offered at the conference will be led by a dynamic and diverse group of experts, including luminaries from the communities of academia, pension fund management and private investment. Speakers will include Barney Frank, former U.S. Congressman (1981-2012) and Chairman of the House Financial Services Committee (2007-2011); Robert A.G. Monks, referred to by *The Economist* and *Fortune* magazines as the leading shareholder activist and governance advocate in the world; shareholder litigation experts Darren J. Robbins and Michael J. Dowd; Cherie Blair, CBE, QC, wife of former British Prime Minister Tony Blair and Chair of Omnia Strategy LLP; Michelle Edkins, Managing Director, Global Head of Corporate Governance and Responsible Investment at BlackRock; Philip Armstrong, Senior Advisor of Corporate Governance at International Finance Corporation; Anne Simpson, Senior Portfolio Manager and Director of Global Governance at California Public Employees' Retirement System (CalPERS); and Anne Sheehan, Director of Corporate Governance at California State Teachers' Retirement System (CalSTRS). Former Secretary of State Hillary Rodham Clinton will deliver closing remarks.

For representatives of public funds, the sixth annual Future of Corporate Reform Public Funds Forum is shaping up to again be this year's must-attend conference. For the most current information about the conference agenda and to register, please visit www.GMIconferences.com. ■

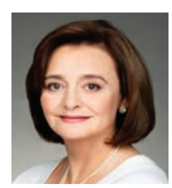
Distinguished Speakers Include:



Hillary Rodham Clinton

Barney Frank

Robert A.G. Monks



Cherie Blair

Captain Richard Phillips

Anne Simpson

Michelle Edkins

Philip Armstrong

Zombie Directors and Board Accountability

After a decade-long campaign by investors, nearly 93% of companies in the S&P 500 now either provide for the election of directors by a simple majority vote or require directors to submit a resignation if they fail to win a majority of votes cast. In conjunction with the decline of classified boards – about three-quarters of the S&P 500 now provide for the annual election of directors – shareholders can now hold directors accountable and remove them from the board if they fail to properly represent shareholder interests.

Or at least that's the theory. In practice, it is much, much harder for shareholders to remove directors in an uncontested election. Since 2011, at least 121 directors have failed to gain a majority of votes cast by shareholders at 75 different companies and yet remain on their boards. Some of them have failed multiple times, such as at Healthcare Services Group, Inc., where nine different directors have failed to receive a majority since 2011, including one director, Theodore Wahl, who has lost three out of the last four elections. All remain active members of the board. In this case, Healthcare Services Group has a plurality election standard, where a single vote in an uncontested election is sufficient to return a director to the board.

More disturbingly, a significant portion of these directors who remain on boards after losing their vote serve at companies with either a majority vote standard or a plurality vote standard where the director is required to submit a resignation when he or she fails to receive a majority. At Nabors Industries, which has a director resignation policy, the board refused to accept the resignations of the three directors who failed to receive a majority in 2014 (after doing the same in 2013). Similarly, at Big Lots in 2013, Russell Solt was opposed by a majority and tendered his resignation, yet he remains on the board of directors (and was re-elected in 2014).

Even at companies where directors are no longer serving after losing their elections, there is often a significant delay before they leave the board. Of 47 cases of directors who no longer serve after failing to receive majority support in the past three years, in only 18 cases did the director leave within a year. For instance, after Morris Goldfarb at Christopher & Banks received 47% support at the 2011 annual meeting, he did not leave until June 2013. Few and far between are cases where a director departs directly after the annual meeting, such as at Sterling Construction, where director Robert Eckels received only 42% support and immediately tendered his resignation, which was accepted by the board.

The willingness of companies to maintain plurality voting (where one vote suffices for re-election), to reject resignations from directors who fail to receive majority support, and to re-nominate these directors to the board in following years, reflects a fundamental rupture in the chain of board accountability. This rupture is, unfortunately, abetted in part by shareholders, who have shown themselves willing to reject a director one year and re-elect him or her the next, and who have not typically held nominating committees or the broader board accountable for keeping these zombie directors on boards. One possible path forward: broader access to the proxy for shareholders, to help make more elections contested, eliminate the plurality vote loophole, and provide an affirmative alternative for shareholders. Without a choice, especially in these cases where shareholders are expressing significant discontent, accountability is weakened. ■

Stock Buybacks: Rewarding Executives through Rearview Investing

Share repurchases, also referred to as stock buybacks, have recently become a very common way for corporations to spend excess capital. In fact, on June 18, 2014, S&P Dow Jones Indices reported that repurchases and buybacks had climbed by almost 60% in the first quarter of 2014 compared to the same period in 2013. According to the report, the S&P 500 increased buyback expenditures by 29% for the 12 months ending March 2014, to $535 billion from $415 billion over the 12 months prior. While companies often explain that they're buying back shares presently undervalued on the open market, there are certain additional motivations behind these share repurchases that deserve investor attention.

Indeed, stock buybacks can be a reasonable use of free cash, particularly in circumstances where dividends would be appropriate but the repurchase plan is more tax-efficient for shareholders. These share repurchases enrich shareholders by reducing the number of outstanding shares and boosting the company's share price. However, a poorly designed management incentive compensation plan can motivate share repurchases that are economically unwarranted for the company but benefit management at the expense of other shareholders. Such share repurchases can reflect attempts by management to artificially boost the company's earnings per share by reducing the number of shares outstanding, or to offset earnings per share dilution associated with employee stock option programs.

Furthermore, a corporation should repurchase its shares only when its stock is trading below management's best estimate of value. Conventional wisdom suggests that bear markets would then be an ideal time to repurchase undervalued shares. Yet buybacks rose significantly in 2007 and 2008 just prior to the financial crisis, when companies in the S&P 500 were trading at a P/E ratio of over 25, and declined significantly in 2009, when the market's P/E sank to 13.

Buybacks were up again in the first quarter of 2014, even though stocks were trading at 20.6 times net earnings in the Russell 3000 at the end of 2013, as opposed to 16.7 times at the end of 2012. These statistics suggest that companies are likely engaging in rearview investing, or repurchasing shares at a time when they are more likely overvalued than undervalued. When share repurchases occur in a bull market and not a bear market, it's more likely that a company is capitalizing on a wave of price increases instead of buying low based on an analysis of its own fundamentals, or simply acting to counteract dilution from option awards to executives.

Share buybacks can also divert a company's resources away from investments in research and development, hiring new workers, construction of factories, and other innovation and growth initiatives. However, some companies are also taking advantage of the Federal Reserve's low interest borrowing rates to conduct buybacks without using the company's cash flow. If a company is borrowing to repurchase shares when it's not particularly undervalued, this should serve as a red flag to investors. Also, a buyback will reduce the amount of equity on a company's balance sheet, increasing leverage and raising the return on equity, but without necessarily increasing profitability. Shareholders should question whether they are investing in financial engineering or in improved operational performance.

It's also difficult to ignore the effect these share repurchases have on executive pay. The vast majority of compensation earned by CEOs and other senior executives is in the form of stock options and restricted stock, which receive a boost in value along with the holdings of other shareholders. In addition, many CEOs'

Continued on p. 8

News Brief

Darren J. Robbins

Paul J. Geller

More Awards: Robbins Geller Partners Named as Two of the Nation's Top 500 Lawyers

National legal periodical *Lawdragon* has named **Darren J. Robbins** and **Paul J. Geller**, co-founders of Robbins Geller, to its 2013 list of the 500 Leading Lawyers in America. As stated by *Lawdragon*, attorneys were selected "after an intense vetting process in which more than 25,000 lawyers were considered." The guide is a compendium of "the nation's lawyers…who won the biggest verdicts and pulled off the biggest deals," and represents less than 1% of the legal profession. *Lawdragon's* selection process is based on a combination of written submissions, online votes and editorial research.

Lawdragon praised Robbins as "[o]ne of the brightest stars in the securities class action bar." Receiving the *Lawdragon* award for the seventh time, Robbins has also been named one of the "Top 100 Lawyers Shaping the Future" by the *Daily Journal*, one of the "Young Litigators 45 and Under" by *The American Lawyer*, and "Attorney of the Year" by *California Lawyer*. One of the hallmarks of his practice has been his focus on corporate governance reform. In the *UnitedHealth* case, a securities fraud class action arising out of an options backdating scandal, Robbins represented lead plaintiff CalPERS and was able to obtain the cancellation of more than 3.6 million stock options held by the company's former CEO and secure a record $925 million cash recovery for shareholders. In addition, he obtained sweeping corporate governance reforms, including the election of a shareholder-nominated member to the company's board of directors, a mandatory holding period for shares acquired via option exercise, and compensation reforms that tied executive pay to performance.

Geller receives the *Lawdragon* honor for the seventh time as well. Rated AV by Martindale-Hubbell (the highest rating available) and twice named one of the nation's top "40 Under 40" by *The National Law Journal*, Geller has served as lead or co-lead counsel in a majority of the securities class actions that have been filed in the southeastern United States in the past several years. *Lawdragon* commended Geller for being "involved in some of the country's most high-profile class actions." Throughout his career, Geller has remained deeply committed to legal remedies that result in better corporate governance reforms.

The *Lawdragon* award comes on the heels of numerous accolades conferred upon Robbins Geller this year, including a top ranking by *The National Law Journal* on the 2014 Plaintiffs' Hot List, and being named a national Tier 1 "Best Law Firm" by *U.S.News – Best Lawyers®*, a Band 1 firm by *Chambers USA*, an "Elite Law Firm" by *Forbes* and a Top 15 Litigation Boutique by *Vault*, to name a few. Many of the Firm's attorneys have received Super Lawyer honors as well. These recognitions are yet another reason why Robbins Geller and its attorneys continue to be unrivaled in the securities litigation field.

Judge Refuses to Buy Best Buy's Motion to Dismiss

In an investor lawsuit entitled *IBEW Local 98 Pension Fund v. Best Buy Co., Inc., et al.*, counsel from Robbins Geller have overcome seriatim motions by defendants to defeat the action, which has now proceeded to discovery. The lawsuit was filed on February 18, 2011, on behalf of shareholders against Best Buy and its now-former senior executives, including Chief Executive Officer Brian Dunn, Chief Financial Officer Jim Muehlbauer and Executive Vice President Michael Vitelli.

The complaint alleges that starting September 14, 2010, defendants issued materially false and misleading statements concerning Best Buy's ability to reverse negative sales trends in key product categories, including HDTVs and laptop computers, and falsely assured investors that the company was "on track" and "in line" to achieve its new increased earnings guidance. These false statements and others made during Black Friday and the Thanksgiving holiday in 2010 caused Best Buy's stock to trade at artificially inflated prices as high as $43 per share. The truth was revealed on December 14, 2010, when defendants announced quarterly sales results well below those previously forecast and sharply reduced their annual earnings forecast. The company also admitted that earlier forecasts had been too aggressive. Analysts that had previously cheered the company's positive outlook viewed management's credibility as damaged. The stock price fell from $41 to $35, causing hundreds of millions of dollars in damage to duped investors.

On March 20, 2012, the court dismissed the consolidated complaint with prejudice, finding that plaintiffs had failed to allege that defendants' statements were knowingly false, and that certain of the statements were forward looking and therefore protected by the Private Securities Litigation Reform Act safe harbor. Undeterred, counsel at Robbins Geller sought to reopen the case by filing a motion to alter the judgment pursuant to Federal Rule of Civil Procedure 59(e), forcefully setting forth the reasons the court's March 20, 2012 order should be altered. On October 22, 2012, United States District Judge Donovan W. Frank agreed with plaintiffs and took the extraordinary step of vacating his prior order and allowing plaintiffs to file an amended complaint.

Plaintiffs filed a first amended complaint on October 29, 2012, which clarified key allegations for the court and added new events that had transpired, including the resignation of top management at Best Buy. Defendants again moved to dismiss the case. In an August 5, 2013 order that the court acknowledged was a "departure from the Court's earlier ruling," Judge Frank held that the first amended complaint sufficiently alleged that defendants had made false and misleading statements: "Plaintiffs' allegations that Defendants made the 'on track' and 'in line' statements despite known negative trends are sufficient to satisfy the pleading requirements of the [Private Securities Litigation Reform Act of 1995]."

Defendants again moved to defeat the action, this time seeking reconsideration or, in the alternative, certification of the action for review by the Eighth Circuit Court of Appeals. Defendants asserted that the court's August 5, 2013 order was in error. However, on December 19, 2013, after further opposition from plaintiffs' counsel, the court denied defendants' motion.

On October 28, 2013, defendants moved for judgment on the pleadings with respect to defendant Vitelli, arguing that he had not made any of the statements found to be false in the court's August 5, 2013 ruling. Plaintiffs countered again, demonstrating that Vitelli remained potentially liable for the alleged fraud because he possessed the power to control the company's false and misleading statements. On April 30, 2014, the court once again agreed with plaintiffs and denied defendants' motion.

On January 31, 2014, plaintiffs filed a motion requesting that the court certify the action as a class action on behalf of all purchasers of Best Buy stock between September 14, 2010 and December 13, 2010. That motion is currently under submission.

Robbins Geller attorneys litigating the case are **Shawn A. Williams**, **Aelish M. Baig**, **Daniel J. Pfefferbaum** and **Kenneth J. Black**.

IBEW Local 98 Pension Fund v. Best Buy Co., Inc., et al., No. 0:11-cv-00429-DWF-FLN (D. Minn.).

Motion to Dismiss Denied in *Prudential*

On February 6, 2014, the Honorable Susan D. Wigenton of the United States District Court for the District of New Jersey denied from the bench defendant Prudential Financial, Inc.'s motion to dismiss. The case charges Prudential and certain of its officers and directors with violations of the Securities Exchange Act of 1934. Prudential is a financial services company that offers a wide array of financial products and services, including life insurance, annuities, retirement-related services, mutual funds, investment management and real estate services. Judge Wigenton held that lead plaintiffs **National Shopmen Pension Fund, Heavy & General Laborers' Locals 472 & 172 Pension and Annuity Funds** and **Roofers Local No. 149 Pension Funds'** claims under §§10(b) and 20(a) of the Securities Exchange Act of 1934 satisfy all applicable pleading standards and warrant full discovery. In doing so, Judge Wigenton commended lead plaintiffs' well-pled complaint, stating, "I don't think that anyone would disagree that the complaint is very specifically pled."

Lead plaintiffs allege that between May 5, 2010 and November 4, 2011, Prudential materially understated expenses and overstated income and earnings per share by failing to account for hundreds of millions of dollars in death benefits owed to states pursuant to unclaimed property laws or to the beneficiaries of policyholders it knew or should have known had died. Prudential knew so because it used the Social Security Administration's Death Master File, a government database of death records, but only when it benefited its bottom line instead of comprehensively to pay beneficiaries and escheat unclaimed property to states.

Prudential also concealed that state regulators had been investigating this misconduct since 2009. Ultimately, Prudential entered into regulatory settlements requiring changes to business practices and hundreds of millions of dollars in payments to beneficiaries and states. When California Controller John Chiang announced a settlement with Prudential, he stated: "For decades, the surviving families of policyholders have been cheated by life insurance companies who either knew or should have known that payout was due." Chiang's press release further stated that "[s]o far, more than 1,000 Prudential policies have been identified as being held for individuals in California who have been dead for more than 15 years." Prudential's Chief Communications Officer, in turn, stated that Prudential had entered into these settlements because it "didn't want to become the poster-child for opposing getting money to people it belonged to." After the true facts began to emerge in the fall of 2011, Prudential's stock price declined significantly, resulting in hundreds of millions of dollars in losses to investors.

With Judge Wigenton's ruling and discovery open, lead plaintiffs are aggressively pursuing evidence in support of their claims and working toward class certification, adjudication on the merits, and favorable recovery on behalf of aggrieved investors.

Robbins Geller attorneys litigating the case are **Shawn A. Williams**, **Aelish M. Baig**, **Armen Zohrabian, David W. Hall** and **Sunny S. Sarkis**.

Order, *City of Sterling Heights General Employees' Retirement System v. Prudential Financial, Inc., et al.*, No. 2:12-cv-05275 (D.N.J. Feb. 6, 2014). ■

Plaintiffs Prevail in Employment Class-Action Lawsuit

In a case that exemplifies Robbins Geller's unmatched commitment to its clients, plaintiffs recently prevailed in a long-running employment class-action lawsuit stemming from the misclassification of insurance claims adjusters in California. Plaintiffs, seven former claims adjusters at Liberty Mutual Insurance Company and several of its subsidiaries, sought the recovery of unpaid overtime compensation and penalties. At the end of 13 years of complex, exhaustive and contentious litigation, which included six years of appellate litigation, Robbins Geller, together with its co-counsel, secured a settlement in which Liberty Mutual agreed to pay $65 million into a fund to compensate over 1,600 current and former claims adjusters for unpaid overtime.

In May 2004, the trial court granted plaintiffs' motion for class certification and appointed three firms, including Robbins Geller, to represent the class.

After completing discovery in early 2005, plaintiffs moved for summary adjudication on defendants' affirmative defense that plaintiffs and class members were exempt from overtime pay under California law. Defendants countered with a motion to decertify the class and two motions for summary judgment. On October 18, 2006, the trial court issued a decision granting in part and denying in part defendants' motion to decertify and denying plaintiffs' motion for summary adjudication on the liability issue.

The battleground then shifted to the appellate courts. Over the next six years, the case generated two separate decisions by the California Court of Appeal and an intervening decision from the California Supreme Court. On August 16, 2007, the Court of Appeal issued its first decision, granting plaintiffs' motion for summary adjudication and denying defendants' motion to decertify the class. After granting defendants' petition for review, on December 29, 2011, the California Supreme Court found that the Court of Appeal had applied the wrong legal standard and remanded the case to the Court of Appeal for further proceedings.

Plaintiffs nevertheless pressed on. When the case returned to the Court of Appeal, Robbins Geller attorneys briefed the liability and class certification issues in light of the California Supreme Court's decision. On July 23, 2012, the Court of Appeal again ruled in plaintiffs' favor. In that ruling, the Court of Appeal found that defendants were liable for unpaid overtime. The court also found that the trial court had erred in decertifying the class.

Defendants promptly sought review by the California Supreme Court, but the court declined to hear their petition, leaving intact plaintiffs' complete victory at the Court of Appeal. Two months later, the case was returned to the trial court.

Even after losing the appeal, defendants continued to mount an aggressive defense, arguing in a motion to the trial court that the Court of Appeal's decision was not binding on the trial court. Before defendants' motion could be resolved, however, and after a full-day mediation session, in June 2013, the parties agreed to resolve all claims in exchange for a $65 million payment from Liberty Mutual.

With no objections from class members, the court granted final approval of the settlement in June 2014, calling it an "excellent result" for the class. The size of the recovery is particularly noteworthy since it comes at a time when virtually every other court over the past 10 years has decided similar cases involving the misclassification of insurance claims adjusters in favor of the defendants.

Average settlement checks for overtime claims are estimated to be $28,355, with several class members expected to receive nearly $100,000. "This is a solid victory for claims adjusters in California," said **Theodore J. Pintar**, who worked on the case from its inception. Monies to class members are expected to go out in August or September 2014.

Robbins Geller attorneys **Theodore J. Pintar**, **Patrick J. Coughlin**, **Steven W. Pepich**, **Kevin K. Green** and **Steven M. Jodlowski** were responsible for obtaining this settlement on behalf of the plaintiffs.

Liberty Mutual Overtime Cases, JCCP No. 4234 (Cal. Super. Ct., Los Angeles Cnty.).

> At the conclusion of the hearing for final approval of the settlement, the Honorable Elihu M. Berle stated: "I would finally like to congratulate [Robbins Geller] on their efforts to resolve this case, on excellent work - - it was the best interest of the class - - and to the exhibition of professionalism. So I do thank you for all your efforts."
>
> *Liberty Mutual Overtime Cases*, No. JCCP 4234, Transcript at 20:1-5 (Cal. Super. Ct., Los Angeles Cnty. May 29, 2014).

$265 Million Settlement Obtained in *Massey Energy*

On April 5, 2010, a tragic explosion at Massey Energy's Upper Big Branch ("UBB") mine in Raleigh County, West Virginia, killed 29 mine workers in the worst coal mine disaster in over 40 years. A subsequent investigation by the Mine Safety and Health Administration (the "MSHA") would conclude that the coal dust explosion at UBB was caused by a series of basic safety violations and "unlawful policies and practices" implemented by Massey, including the intimidation of miners and "a workplace culture that valued production over safety, including practices calculated to allow it to conduct mining operations in violation of the law."

Over the last four years, civil and criminal proceedings have sought to hold Massey and its executives accountable for the tragedy at UBB.

On December 6, 2011, the MSHA and U.S. Attorney announced a settlement with Alpha Natural Resources ("Alpha"), which had acquired Massey's assets and liabilities in 2011. The settlement provided that Alpha would pay a $10.8 million civil fine, as well as a $209 million penalty to the Department of Justice, including $46.5 million in restitution payments, $34.8 million in fines for safety citations, $48 million for a health and safety research and development trust fund, and $80 million for safety improvements during two years.

On January 17, 2013, Gary May, a former superintendent who oversaw underground operations at UBB, was sentenced to 21 months in prison for conspiracy to defraud the U.S. government by impeding federal inspectors.

On September 10, 2013, David C. Hughart, former President of Massey subsidiary Green Valley Resource Group, was sentenced to 42 months in prison for his role in the company's conspiracy to hide safety violations during federal safety inspections.

Most recently, on June 4, 2014, the United States District Court for the Southern District of West Virginia approved a $265 million settlement with Alpha brought by shareholders who alleged that Massey, as well as its executives and directors, had made false and misleading statements and omissions about Massey's health and safety practices, policies and results.

Lead plaintiff **Commonwealth of Massachusetts Pension Reserves Investment Trust** and named plaintiff **David Wagner** alleged that in the wake of prior mining deaths and litigation in 2006, defendants had sought to restore the company's reputation and image by emphasizing its strong commitment to safety and affirming in its SEC quarterly and annual filings, press releases and investor presentations that it put the safety of its miners before production.

For example, in its 2007 Annual Report, Massey declared that "a safe mine is a productive mine" and explained that its formula for success was "safety first, production second, and measurement third." Defendant Don L. Blankenship declared to investors that "the main thing about Massey is, we have a better safety performance than the industry, whether you're looking at underground, surface, or total. And we have S1 and safety programs in place that far exceed the law." Throughout the class period, Massey affirmed and

Continued on p. 7

Massey Energy continued from page 6

restated its commitment to safety and reported to investors that a key safety measurement rate, the NFDL rate, was decreasing year after year for the company.

Plaintiffs alleged that the tragic UBB explosion on April 5, 2010, as well as several subsequent disclosures about Massey's true conduct and practices, revealed the falsity of Massey's class period misstatements and omissions, causing hundreds of millions of dollars in losses to shareholders who were damaged by defendants' fraud.

After defendants' motion to dismiss the action was denied in March 2012, the parties began discussing the possibility of settlement, which was finalized and announced in December 2013. The district court gave final approval to the settlement on June 4, 2014.

Robbins Geller is co-lead counsel for the plaintiffs. Robbins Geller attorneys **Paul J. Geller**, **Jack Reise**, **Dennis J. Herman**, **Laurie L. Largent**, **Christopher M. Wood** and **Elizabeth A. Shonson** were responsible for obtaining this settlement on behalf of the settlement class.

In re Massey Energy Co. Securities Litigation, No. 5:10-cv-00689-ICB (D. W. Va.).

$29 Million Obtained for Gardner Denver Shareholders

Robbins Geller, as court-appointed lead counsel, has reached a $29 million settlement to resolve claims brought on behalf of the former public shareholders of Gardner Denver, Inc. arising out of the sale of Gardner Denver to Kohlberg Kravis Roberts & Co. L.P. ("KKR") for $76 per share. The lawsuit alleged that Gardner Denver's former board of directors breached its fiduciary duties to the shareholders in the sale and that KKR aided and abetted the board's misconduct. The lawsuit sought damages against the board and KKR, alleging that the $76 per share price paid by KKR undervalued Gardner Denver.

Through aggressive pursuit of the lawsuit, Robbins Geller obtained and utilized deposition testimony, email communication, and other evidence from key witnesses and entities. The lawsuit focused on the fact that KKR hired the recently resigned CEO of Gardner Denver as a consultant for the purchase of Gardner Denver. The lawsuit alleged that the former CEO breached his confidentiality agreement with Gardner Denver in providing advice to KKR, which gave KKR the ability to exploit Gardner Denver and gain unlawful advantages over other potential bidders in the ensuing corporate sales process. Coupled with leaks to the press during the process and the board's lack of proper involvement and oversight, the lawsuit alleged that the sale of Gardner Denver was skewed in favor of KKR to the detriment of Gardner Denver's shareholders.

Robbins Geller achieved the $29 million settlement after two days of mediation and prior to an adjudication of the defendants' impending request to dismiss the operative complaint. *The Wall Street Journal Online* noted that the settlement was a "rare monetary payout in litigation challenging mergers" and "represents an effective price increase of about 59 cents a share." *Law360* stated that the settlement "serves as a cautionary tale for other private equity firms looking to take on former insiders as deal consultants." *Reuters* quoted Robbins Geller attorney **Randall J. Baron** as stating that the $29 million settlement was "a very good result for shareholders in what would have been a very challenging case."

Vice Chancellor John W. Noble of the Delaware Chancery Court will consider final approval of the settlement at a hearing scheduled for September 3, 2014.

Robbins Geller attorneys **Randall J. Baron**, **A. Rick Atwood, Jr.**, **David T. Wissbroecker**, **Stuart A. Davidson**, **Cullin A. O'Brien** and **Maxwell R. Huffman** prosecuted the lawsuit.

In re Gardner Denver, Inc. Shareholder Litigation, C.A. No. 8505-VCN (Del. Ch.).

Robbins Geller Wins Two Trials in Two Months for USEI

Robbins Geller successfully enforced the intellectual property rights of its client U.S. Ethernet Innovations, LLC ("USEI") with two recent jury trial victories in federal court. USEI is the successor-in-interest to the famous and wildly successful Parallel Tasking technology developed by 3Com Corporation in the 1990s. 3Com's Parallel Tasking patent portfolio covers technology related to the manner in which a computer or other similar device transmits data over an Ethernet network. The patented Parallel Tasking technology was critical to 3Com's multi-billion dollar Ethernet business in the late 1990s and 2000s.

While Robbins Geller successfully enforced USEI's intellectual property rights with a number of companies based on license agreements, one infringer, Texas Instruments Incorporated, refused to acknowledge USEI's patents rights. Texas Instruments argued that the asserted claims of USEI's Parallel Tasking patents were invalid because they were both anticipated and obvious in light of two prior art devices that were on sale more than a year before the Parallel Tasking patents were filed.

In April 2014, Texas Instruments presented its arguments with regard to the validity of the asserted claims to a Texas federal jury. Following a week-long trial before the Honorable Michael H. Schneider, the jury returned a verdict for USEI on all three asserted patents and all 14 of the asserted claims. The jury found that the asserted claims were neither anticipated nor obvious, moving the case toward a second phase of trial on infringement and damages. As explained by **John Herman**, who led Robbins Geller's litigation team, shortly after the result: "U.S. Ethernet is pleased

Continued on p. 8

Attorney Spotlight

Bonny E. Sweeney

Robbins Geller partner **Bonny E. Sweeney** was recently honored by the *Daily Journal* when she was named to their "Annual List of 100 Leading Women Lawyers in California." Hailed as one of the "Top Women Lawyers," the print and online legal publication cited Sweeney's years of litigating on behalf of merchants alleging that Visa and MasterCard had engaged in years of illegal price fixing of card swipe fees in *In Re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, MDL 1720 (E.D.N.Y.). A New York federal judge approved the proposed multi-billion dollar settlement of the case in December 2013. The case is believed to be the largest class-action antitrust settlement ever.

Sweeney has specialized in antitrust and unfair competition class action litigation since 1996, and is a former Chair of the Antitrust and Unfair Competition Law Section of the State Bar of California. She was also cited by the *Daily Journal* for her leadership on *In Re Aftermarket Automotive Lighting Products*, MDL 2007 (C.D. Cal.), where settlements totaling more than $50 million were reached up to the eve of trial. Sweeney was also one of the trial lawyers in *Law v. NCAA/Hall v. NCAA/Schreiber v. NCAA* (D. Kan.), in which the jury awarded $67 million to three classes of college coaches. She has participated in the successful prosecution and settlement of numerous other antitrust and unfair competition cases, including *In re Currency Conversion Fee Antitrust Litigation* (S.D.N.Y.), which settled for $336 million. ■

For more information on these and other cases, please visit us on the web: www.rgrdlaw.com

HOW TO CONTACT US

We welcome your letters, comments, questions and submissions.

Please direct all inquiries to:

David C. Walton
(619) 231-1058 or davew@rgrdlaw.com

Contributors:

Randall J. Baron
Richard A. Bennett
Michael J. Dowd
Paul J. Geller
Elise J. Grace
Tor Gronborg
John Herman
Gary Hewitt
Steven M. Jodlowski
Peter M. Jones
Robert A.G. Monks
Cullin A. O'Brien
Steven W. Pepich
Daniel J. Pfefferbaum
Theodore J. Pintar
Jack Reise
Darren J. Robbins
Greg Ruel
Jessica T. Shinnefield
Shawn A. Williams
Christopher M. Wood
Armen Zohrabian

The *Corporate Governance Bulletin* is published by Robbins Geller Rudman & Dowd LLP, 655 West Broadway, Suite 1900, San Diego, CA 92101, (619) 231-1058 or (800) 449-4900.

Robbins Geller represents hundreds of institutional investors in the United States and around the globe in contingency-based securities and corporate litigation. The Firm's attorneys have shaped the law in the areas of securities litigation and shareholder rights and have recovered tens of billions of dollars for defrauded investors. Robbins Geller works hard to enforce corporate governance changes, helping to improve the financial markets for investors worldwide. Please visit rgrdlaw.com for more information.

Robbins Geller Rudman & Dowd LLP
(800) 449-4900
rgrdlaw.com

Atlanta · Boca Raton · Chicago · Manhattan
Melville · Nashville · Philadelphia · San Diego
San Francisco · Washington, D.C.

Halliburton continued from page 1

"unnecessarily unrealistic evidentiary burden" on plaintiffs in §10(b) class actions involving publicly disseminated misstatements concerning actively traded securities. *Id.* at 245.

The Practical Implications of *Halliburton II* for Securities Fraud Litigation

The Court's refusal to overturn *Basic's* presumption of reliance, and refusal to require plaintiffs to directly demonstrate price impact at class certification, is a significant victory for institutional investors, particularly given the standard advocated by the defendants in *Halliburton II*. It places on ***defendants*** the burden to prove a lack of price impact in order to defeat *Basic's* presumption of reliance, meaning defendants will have to provide evidence that their "misrepresentation did not in fact affect the stock price" to overcome the presumption of reliance. *Halliburton II*, slip op. at 18. The Court's decision avoids the dramatic shift sought by corporate defendants regarding what investors must show in order to obtain class certification, and avoids a heightened burden of proof on plaintiffs at the class certification stage. As succinctly noted in Justice Ginsberg's concurring opinion, "The Court's judgment . . . should impose no heavy toll on securities-fraud plaintiffs with tenable claims." *Id.*, concurring opinion at 1.

"*Halliburton II* preserves the ability of investors who have been harmed by fraud to recover the losses they have suffered," commented Partner **Tor Gronborg**. "It also reaffirms the critical role played by private securities litigation in protecting the integrity of our markets." ■

Stock Buybacks continued from page 4

bonuses are predicated on improvements in earnings per share, which means that a company can meet its targets simply by virtue of share repurchase. Indeed, if the true intent of a buyback is to return some cash back to shareholders, then bonus formulas should avoid paying out for earnings per share improvements driven solely by the reduction in shares outstanding.

Several of the companies conducting the largest share buybacks so far in 2014 are from the technology sector, a sector well known for bestowing large stock option and restricted stock grants on senior executives. Indeed, companies such as Apple, IBM, Oracle, Cisco Systems and eBay have all bought back a significant number of shares this year. These tech companies could be sending a message to the market that their shares are currently undervalued. However, it's also quite possible that these companies are simply propping up headline-grabbing earnings per share numbers to look more attractive to investors, or to maintain the value of executives' outstanding options. ■

Trial Victories continued from page 7

that the jury recognized the strength and validity of the patented Parallel Tasking technology, which once formed the heart of 3Com's multi-billion dollar Ethernet controller business. While we are not surprised by the results given the strength of the Parallel Tasking patents, the findings of validity are certainly welcome."

A second jury trial was held in June 2014 on infringement and damages. Following another week-long trial, the jury once again returned a multi-million dollar verdict for USEI, finding that Texas Instruments directly infringed and actively induced others to infringe all of the asserted claims.

"U.S. Ethernet is pleased that once again, a jury has confirmed the strength of 3Com's famous Parallel Tasking technology, this time against Texas Instruments," said Herman. "While much of the industry is now subject to a license for the widespread infringement that eroded 3Com's Ethernet market, a few companies remain in suit in the Northern District of California."

Robbins Geller attorneys **John Herman**, **Ryan K. Walsh**, **Peter M. Jones** and **Robert J. Leonard** led the team responsible for obtaining this result for USEI. The jury verdict resolves *U.S. Ethernet Innovations, LLC v. Texas Instruments Incorporated*, No. 6:11-cv-491-MHS-JDL (E.D. Tex.). The related cases in Texas were consolidated with *U.S. Ethernet Innovations, LLC v. Ricoh Americas Corporation, et al.,* No. 6:12-cv-235-MHS-JDL (E.D. Tex.). ■