On the Record *with* Robbins Geller Rudman & Dowd LLP

SUMMER 2018

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A Note from Paul Geller

Our country is at a crossroads. As this newsletter goes to print, we're in the midst of the longest "bull" market in history, yet our retirement plans, schools, and communities are stressed by underfunding. In partnership with our clients, Robbins Geller attorneys are striving to help make a difference and restore balance to our crucial institutions.

The Firm's attorneys continue to lead the charge against unchecked wrongdoing impacting our clients' daily lives, including being the only law firm in the country to investigate, file, and survive a dismissal bid of an innovative securities fraud case challenging the denial of the cause and impact of rising global temperatures against one of the world's largest oil and gas companies (*see* page 12), or rolling up our sleeves to help address the opioid crisis, one of the greatest health scourges in our nation's history (*see* page 17). Just this summer, the Firm's attorneys and staff demonstrated their talent and dogged determination in pursuit of our clients' best interests by obtaining a $500 million recovery in the *ISDAfix* price-fixing antitrust litigation (*see* page 13), defeating several motions to dismiss in cases that no other law firm was willing to prosecute (*see* pages 12, 19 and 28), securing class certification for investors harmed by false and misleading statements in a high-profile securities fraud case against Goldman Sachs (*see* page 32), and achieving victories for investors in several courts of appeal (*see* pages 6 and 33). Robbins Geller consistently delivers unmatched results for our clients. We pride ourselves on not being a fungible legal commodity. Our achievements are not ours alone; they are hard-fought victories that help even the playing field for our clients. Making sure our clients have a seat at the table in the prosecution and resolution of cases with national significance helps ensure wrongdoing does not go unchecked or unpunished.

The Firm and its lawyers have been repeatedly commended by independent legal observers such as *The Legal 500*, which ranked Robbins Geller Tier 1 in securities litigation and recognized a dozen Robbins Geller attorneys for their accomplishments in the securities and M&A fields. As proof that the next generation of Robbins Geller lawyers will continue leading the bar, *Benchmark Litigation* recently named five Robbins Geller partners to its 40 & Under Hot List for being "the top young talent in their respective litigation communities."

We look forward to continuing to work together to protect you and those who rely upon you from the adverse impact of fraudulent misconduct. Thank you for your trust and confidence.

Paul Geller, Managing Partner of Robbins Geller's Boca Raton, Florida office and head of the Firm's Consumer Practice Group.

Toshiba Investors Win Ninth Circuit Appeal

On July 17, 2018, the United States Court of Appeals for the Ninth Circuit ruled in plaintiffs' favor in *Stoyas v. Toshiba Corporation*, reversing the district court's prior dismissal of the action.

Toshiba Corporation is a worldwide enterprise headquartered in Tokyo, Japan, that engages in the research, development, manufacture, construction, and sale of a wide variety of electronic and energy products and services. The case alleges that Toshiba committed accounting fraud by misrepresenting its financial condition to investors. The fraud was revealed in 2015, when investigations into the company's accounting practices and a subsequent restatement of its previously issued financial results caused the price of Toshiba securities to decline by more than 40%. The case charges that Toshiba, over a period of at least six years, deliberately and improperly overstated its pre-tax profits by more than $2.6 billion (¥225 billion) and concealed at least $1.3 billion (¥128.2 billion) in impaired losses at its U.S. nuclear business, Westinghouse Electric Co.

Lead plaintiff **Automotive Industries Pension Trust Fund** and named plaintiff **New England Teamsters & Trucking Industry Pension Fund** brought securities law claims against Toshiba, asserting violations of American and Japanese law on behalf of U.S. purchasers of Toshiba common stock and ADR purchasers. The district court dismissed the U.S. law claims for ADR purchasers under *Morrison v. National Australia Bank*, concluding that "the Exchange Act, which does not apply extraterritorially, did not apply to the purchase of Toshiba ADRs because the over-the-counter market by which the Toshiba ADRs were sold was not a 'national exchange,' and there was no domestic transaction between the ADR purchasers and Toshiba." The district court also dismissed the Japanese law claims of U.S. purchasers of Toshiba common stock because it had "already dismissed the U.S. securities law causes of action." Plaintiffs then appealed to the Ninth Circuit Court of Appeals.

Following appellate briefing and oral argument, a three-judge Ninth Circuit panel reversed the dismissal in a unanimous 36-page opinion, stating "that the Exchange Act could apply to the Toshiba ADR transactions, as domestic transactions in securities [are] not registered on an exchange." Additionally, the court held that "Toshiba ADRs were 'securities' under the Exchange Act." In adopting the Second and Third Circuits' "irrevocable liability" test, the panel further concluded that "plaintiffs must be allowed to amend their complaint to allege that the purchase of Toshiba ADRs on the over-the-counter market was a domestic purchase, and that the alleged fraud was 'in connection with' the purchase." As to the Japanese law claims, the Ninth Circuit held that because the district court's opinion "predicated dismissal" of those claims "on dismissal of the Exchange Act claims," the Ninth Circuit declined to address whether dismissal "remains appropriate notwithstanding the Exchange Act claims' viability."

Robbins Geller attorneys **Susan K. Alexander**, **Dennis J. Herman**, **Willow E. Radcliffe**, **Andrew S. Love**, and **John H. George** obtained this result on behalf of investors.

Stoyas v. Toshiba Corporation, No. 16-56058, Opinion (9th Cir. July 17, 2018).

Corporate Governance Roundup

2018 Proxy Proposals Include Gun Safety

The post-Parkland move to improve gun safety rules in the United States has now moved from protests and politics to where the money is — the corporate executives and directors who run the companies that manufacture and sell guns and determine the millions of dollars the National Rifle Association ("NRA") spends on political contributions and lobbying. A shareholder resolution at one gun company got 70% of the vote. But the biggest institutional investors, like BlackRock, do not always live up to their stated policies of standing up to corporate insiders when they fail to respond to shareholder concerns.

Like other "social" issues raised at corporate annual meetings over the years, from apartheid to tobacco to climate change, guns are now seen as a quantifiable risk-and-return issue to be raised by investors in considering corporate strategy and executive compensation.

This means more focus on the members of the boards of directors to make sure they have the information and ability required to consider the future of an industry under unprecedented political oversight and that will likely be subject to legislative and regulatory action. Shareholders of Sturm, Ruger & Company, makers of Ruger firearms, submitted a shareholder proposal calling for a report on the company's activities related to safety measures and mitigation of harm associated with the company's products, including efforts to improve gun safety and assessment of the corporate reputational and financial risks related to gun violence in the United States. The proposal was successful, with 7.2 million votes in favor and 3.3 million votes cast against.[1]

Shareholder proposals are advisory only and corporate executives and directors are not obligated to comply. *The New York Times* reported:[2]

> Christopher J. Killoy, Ruger's chief executive, was defiant after the vote, saying that Ruger would not "adopt misguided principles by groups that do not own guns and do not understand guns."
>
> "This proposal requires Ruger to prepare a report," Mr. Killoy said. "That's it, a report."
>
> He added, "It cannot force us to change our business, which is lawful and constitutionally protected."

This defiant attitude indicates a lack of understanding of how corporations should work. Shareholders have the right to insist that the company's managers respond to changes in culture, politics, and technology.

Shareholders also challenged members of the board who were up for re-election, including Sandra Froman. From a shareholder filing with the U.S. Securities and Exchange Commission:[3]

[1] Sturm, Ruger & Company, Inc. 2018 Proxy, https://www.ruger.com/corporate/PDF/Proxy-2018.pdf.
[2] Tiffany Hsu, *Sturm Ruger Shareholders Adopt Measure Backed by Gun Safety Activists*, N.Y. Times, May 9, 2018, https://www.nytimes.com/2018/05/09/business/sturm-ruger-shareholders-activists.html.
[3] https://www.sec.gov/Archives/edgar/data/95029/000138713118001859/mja-px14a6g_050218.htm.

RGR director Sandra Froman has been nominated for re-election to the Board of Directors at RGR's annual meeting. Froman served as Vice-President of the NRA from 1998 to 2005, President of the NRA from 2005–2007, and as an NRA board member from 1992 to the present; she holds a lifetime appointment to the NRA Executive Council. She serves on the Risk Oversight, Compensation and Nominating and Corporate Governance Committees of RGR's Board.

Froman's presence on the board has already sparked controversy:

> Froman praised the 2000 boycott of Smith & Wesson, launched by the NRA and other gun groups after the company agreed to a Clinton administration request that they adopt certain gun safety measures, as an appropriate response to a company that makes a "deal with the devil" by compromising with gun control activists. Froman was an NRA Vice-President at that time.

(Footnotes omitted.)

The largest investor is BlackRock, with more than 16% of Sturm, Ruger's stock, followed by Vanguard, with 9.5%. Both voted in favor of Ms. Froman and the other members of the board.

Stock Buybacks Continue to Be Controversial

Roosevelt Institute's new report is entitled "Making the Case: How Ending Walmart's Stock Buyback Program Would Help to Fix Our High-Profit, Low-Wage Economy":[4]

> Walmart – as our country's largest retailer and the largest private employer of women and black and Latinx workers – is a tremendous force in our economy. Today, however, the starting wage its associates earn still falls below the federal poverty line. With over 1 million hourly employees, ending Walmart's stock buyback program and redirecting those funds toward investments in employee compensation would provide a huge benefit to American workers, families, and our economy at large.

According to the report:

> When companies engage in stock buybacks, they are choosing to not spend that corporate cash on investments in their employees, higher wages, or research and development. Such investments are the foundation of long-term innovation and economic growth. Supporters of buybacks argue that companies conduct buybacks when they no longer have productive uses for their cash: *i.e.*, they do not have productive investment opportunities; the cash returned to shareholders will find a more efficient use at another company through the capital markets. However, this argument has many flaws.
>
> First, investing in a company's ***workforce*** by raising wages and benefits improves a company's long-term prosperity and potential for innovation. Second, the claim is based on the faulty premise that only companies without opportunities for productive investments are engaging in stock buybacks; in fact, money is flowing out of firms at a much higher rate than money is returning to them – according to one estimate, $6 is withdrawn for every $1 that is invested. Finally, proponents of buybacks often ignore the primary reason why companies engage in buybacks: to quickly increase share price and thus boost shareholder and executive wealth.

(Footnotes omitted.)

If GAAP Isn't Working, What Will?

Cindy Fornelli of the Center on Audit Quality writes about perspectives from a series of roundtables with audit committee members, management, investors, securities lawyers, and public company auditors on non-GAAP reporting:[5]

[4] Lenore Palladino, *Making the Case: How Ending Walmart's Stock Buyback Program Would Help to Fix Our High-Profit, Low-Wage Economy,* Roosevelt Institute (May 22, 2018), http://rooseveltinstitute.org/making-case/.

[5] https://www.conference-board.org/blog/postdetail.cfm?post=6757&m
ok=eyJpIjoiWXpJNU56bGxZemM1TmpFeiIsInQiOiJDenhWMmdiMWVYb2hSQVwvSVpaZVNnTDdvV0hIZkt6WmlQM0I5QzBJZkxxXC9EVj
NCRkptRFdmbGpHUU1cL25qeGZVS1NNYkY2aDlJME0rXC9YMUpnd0ZuNVFBejNYTUJ5WllxREFRa3JzVEYzTFBBeXRUb1wvNkxYT2Yz
TU1JVGxJM3h6In0%3D.

If GAAP is the bedrock, why do companies present non-GAAP measures?

Participants were asked to share their views on what drives the presentation and use of non-GAAP measures. Several common themes emerged from the discussion.

- **Demand from investment analysts:** Participants shared that requests from investment analysts are often a primary reason company management chooses to present a non-GAAP measure. Investment analysts find that non-GAAP measures help them better understand the company's underlying business performance or forecast the company's long-term value in their proprietary models.
- **Desire to tell the company's story:** Participants also acknowledged, however, that company management does not present non-GAAP measures solely for investment analysts. Rather, non-GAAP measures can be a tool to help tell a company's story and provide users of the information with insight into how management evaluates company performance internally. In some cases, non-GAAP measures are also an input into how the company compensates employees for company performance.

It seems that if GAAP is seen as inadequate by both investors and executives, it is time to rethink GAAP rather than add on another series of disclosures that are not standardized or consistent.

Wells Fargo Gets in Trouble AGAIN. Shareholders Speak Out at the Annual Meeting.

Wells Fargo has announced another fine – a $1 billion payment to the government to settle consumer lending abuse complaints. Shareholders complained about this, the company's support for gun manufacturers, and other issues at a contentious annual meeting. *CBS* reported:[6]

> California Treasurer John Chiang spoke multiple times at the company's annual meeting, calling for the ouster of John Baker from the bank's board of directors for being among those at the helm when the bank's consumer abuses were taking place. However, the election of Baker and 11 other board nominees was approved at the meeting.
>
> Sloan, a 30-year veteran at the bank, "has not drained the swamp, he has become it," declared Chiang, a Democrat who's also a California gubernatorial candidate.

NOTE: Many are objecting to the inadequacy of the punishment, and lack of deterrence, for serial offender Wells Fargo.[7] A compelling *New York Times* editorial called for white collar criminals to be treated like… criminals.[8]

Do Outspoken CEOs Hurt Stocks?

The Harvard Business Review looked at the stock price impact of CEO statements on political or policy issues.[9] We might argue that the impact is better measured in terms of a company's brand than its stock price, but these figures are instructive and perhaps reassuring.

> What happens when CEOs speak out on hot-button issues or even directly rebuke the president of the United States? Do their companies suffer sustained backlashes? Damaging boycotts? Or do customers – new and existing – embrace their brands enthusiastically?
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> Stock price is one metric for evaluating how financially damaging or beneficial taking a stand may be. To explore the connection between leaders' actions and stock performance, we looked at more than a dozen U.S. companies whose CEOs

Continued on page 20

[6] Kate Gibson, *Wells Fargo CEO gets an earful from shareholders,* CBS News, Apr. 24, 2018, https://www.cbsnews.com/news/wells-fargo-ceo-tim-sloan-shareholder-complaints/.

[7] David Dayen, *The Trump Administration Is Letting Wells Fargo Get Away With Grand Theft Auto,* The Nation, Apr. 23, 2018, https://www.thenation.com/article/the-trump-administration-is-letting-wells-fargo-get-away-with-grand-theft-auto/.

[8] Editorial, *Mueller Guides Us Through the Swamp,* N.Y. Times, Apr. 22, 2018, https://www.nytimes.com/2018/04/22/opinion/mueller-investigation-swamp.html.

[9] Scott Berinato, Gretchen Gavett & James Wheaton, *The Cost of Taking a Stand,* Harvard Bus. Rev., Mar. 23, 2018, https://hbr.org/2018/03/the-cost-of-taking-a-stand.

Plaintiff Prevails Over Exxon Mobil's Motion to Dismiss

On August 14, 2018, the Honorable Ed Kinkeade of the U.S. District Court for the Northern District of Texas largely denied defendants' motion to dismiss in *Ramirez v. Exxon Mobil Corp.*

Lead plaintiff **Greater Pennsylvania Carpenters Pension Fund** alleges that Exxon Mobil Corporation, one of the world's largest publicly traded companies, and certain of its current and former officers and directors violated the Securities Exchange Act of 1934 by issuing false and misleading statements and failing to disclose adverse information regarding certain of the company's most important assets. Specifically, while defendants publicly touted Exxon's use of a "proxy cost" of carbon in calculating the projected financial outlook of each of its investments and projects, in reality, the company applied a significantly lower cost, or none at all. This, in turn, allowed Exxon to undertake massive investments in increasingly risky fossil fuel projects and to delay impairing and/or de-booking such assets when oil and gas prices began to plummet worldwide in mid-2014. When the truth was finally revealed, the company was required to record an impairment charge of $2 billion related to its dry gas operations in the Rocky Mountain region and de-book its entire proved reserve base in the Kearl Operations. As a result of defendants' false statements, Exxon stock traded at artificially inflated prices during the class period.

The court's August 14, 2018 order found that lead plaintiff had adequately alleged material misstatements and omissions with regard to Exxon's public statements concerning its purported use of carbon proxy costs and the value of its reserve assets, specifically finding that "accounting violations are sufficient to plead material misstatements" and rejecting defendants' contention that its statements concerning the Kearl Operations were protected by the PSLRA safe harbor as forward looking. Importantly, the court rejected Exxon's argument that "GHG proxy cost is separate from the proxy cost of carbon," and instead found that lead plaintiff adequately alleged material misstatements based on Exxon's representations to investors that "only one proxy cost value was used across all business units in making investment decisions." The court also found that lead plaintiff adequately alleged that the above misrepresentations were made with scienter as to the company and three of its senior officers.

Robbins Geller attorneys **Scott H. Saham**, **Nathan R. Lindell**, **John Herman**, **Peter M. Jones**, **Sara B. Polychron** and **Erika Oliver** obtained this result for investors.

Ramirez v. Exxon Mobil Corp., No. 3:16-cv-03111-K, Memorandum Opinion and Order (N.D. Tex. Aug. 14, 2018).

$500 Million

Recovery Secured in ISDAfix Price Fixing Antitrust Litigation

On June 26, 2018, Judge Jesse M. Furman of the U.S. District Court for the Southern District of New York granted preliminary approval of a $96 million settlement with the five remaining financial firms in an antitrust class action against 14 major banks and broker ICAP plc. If granted final approval, the settlement will bring the total recovery to more than $500 million for plaintiffs.

The case alleges that defendants conspired to manipulate the U.S. Dollar ISDAfix ("ISDAfix"), the key interest rate for a broad range of interest rate derivatives and other financial instruments, in contravention of the competition laws, to benefit their own trading positions. Additionally, the case alleges that ICAP assisted in the manipulation to earn brokerage commissions, all to the substantial detriment of plaintiffs and other counterparties to the defendant banks.

The Robbins Geller attorneys who helped secure this excellent result on behalf of the class are **David W. Mitchell**, **Patrick J. Coughlin**, **Brian O. O'Mara**, **Steven M. Jodlowski**, and **Lonnie A. Browne**.

Alaska Electrical Pension Fund v. Bank of America, N.A., No. 1:14-cv-07126-JMF-OTW, Order Preliminarily Approving an Additional Settlement and the Related Plan of Distribution, and Approving the Manner and Forms for Notice (S.D.N.Y. June 26, 2018).

The National Law Journal Names Robbins Geller as an "Elite Trial Lawyers" Finalist for the Fourth Year, Noting the Firm's "Cutting-Edge Work"

On July 26, 2018, *The National Law Journal* announced its list of 2018 Elite Trial Lawyers. For the fourth year, the publication named Robbins Geller a finalist in the Securities category. After more than 300 submissions were carefully reviewed, the final contenders were chosen due to their "exemplary performance in cutting-edge work on behalf of plaintiffs over the last 18 months."

This recognition comes on the heels of many others for Robbins Geller in recent months. These include being commended as one of the nation's top Securities Practice Groups of the Year by *Law360* and being named one of the Best Law Firms by *U.S. News – Best Lawyers®*. The Firm also received a Tier 1 ranking by *The Legal 500*, which called Robbins Geller "smart and aggressive" and lauded it for being "one of the market leaders," with "a disproportionate number of cases as lead counsel." Additionally, in ranking Robbins Geller a Top Ten Plaintiffs Firm, *Benchmark Litigation* called the Firm "[o]ne of the country's best-known plaintiff shops." And in awarding Robbins Geller with four Band 1 rankings, *Chambers USA* noted that "Robbins Geller is the leader in the battle against corporate securities fraud, recovering tens of billions of dollars to date for its individual investor and pension fund clients and the classes of investors they represent."

Amsterdam Court of Appeals Approves Europe's Largest Securities Settlement Ever

Following seven years of litigation against Ageas (f/k/a Fortis), a Dutch court approved the €1.3 billion ($1.5 billion) settlement with investors. This is the largest settlement ever under the Dutch Act on Collective Settlements of Mass Claims (in Dutch, the Wet Collectieve Afwikkeling Massaschade, or the "WCAM") and also the largest securities settlement ever obtained in Europe.

The claims arose from the 2007 acquisition of Dutch bank ABN Amro by Fortis, which was a Dutch-Belgian financial services company and a consortium of banks. But in order to participate in the acquisition, it was alleged that Fortis misrepresented three things: first, it overstated the value of its collateralized debt obligations; second, it understated its exposure to subprime-related mortgage-backed securities; and third, it failed to disclose that the acquisition had compromised Fortis's solvency. As a result, Fortis investors suffered nearly complete losses between 2007 and 2008 when the value of both CDO and RMBS securities plummeted in the financial crisis, pushing Fortis into insolvency.

Ultimately, Fortis was bailed out by the governments of Belgium, Luxembourg, and the Netherlands in September 2008 and was required to sell its stake in ABN Amro. In October 2008, investors sued Fortis in a U.S. class action, and in February 2010, following the dictates of the *Morrison* case, the claims of investors who acquired Fortis shares outside of the United States were dismissed with prejudice. In January 2011, investors excluded from the U.S. class action filed their claims against Ageas (Fortis's new name) in the Netherlands and Belgium.

The settlement overcame many obstacles, including judicial concerns and objections. The first attempted settlement was announced in March 2016, and the proposal was submitted to the Amsterdam Court of Appeals, in accordance with the WCAM. However, the WCAM envisions equal treatment of all investors, and the initial proposal called for a greater allocation of the settlement going to "active" claimants as compared to "passive" claimants. An active claimant was defined as an investor who took an active role in the litigation, vis-à-vis the litigation funders and involved law firms, whereas remaining class members were deemed passive. In a June 2017 decision, the court determined that differences in compensation could be based on substantive differences between claimants, but not only on whether a claimant was considered to be active. The court also wanted more information on the funding arrangements, fees and costs incurred, and whether those were reasonable. The second attempt to reach a settlement began in December 2017, when a restated and amended proposal was submitted to the Amsterdam Court of Appeals. In that proposal, Ageas agreed to increase the settlement amount by €100 million. Importantly, the differential allocation between active and passive was eliminated, but active claimants were entitled to an additional 25% to cover their costs. In a February 2018 decision, the court determined that these changes were positive and helpful, but it still did not approve the proposal, ordering the involved groups to provide more information on funding and expense issues.

The third and successful attempt to reach a settlement began during March 2018, when the court held hearings to discuss the settlement submissions. Ultimately, a second amended and restated proposal was submitted to the Amsterdam Court of Appeals in April 2018. In that proposal, and the hearings leading up to it, the involved groups disclosed their fixed compensation from Ageas, their costs incurred, and any success fee they expected to earn. Taking all of that information into account, on July 13, 2018, the court approved the proposal and declared the €1.3 billion settlement binding on all investors in Fortis from roughly February 2007 until October 2008.

In doing so, the court created an opt-out settlement fund for investors, selected a claims administrator to process those claims, and set a calendar for claims filing. The claims filing process opened on July 27, 2018 and will remain open for a year, until July 28, 2019. Robbins Geller attorneys have direct experience with the WCAM and are available to assist our clients in filing their claims in this historic settlement.

A Country Under Siege:

Robbins Geller Continues to Lead the Fight Against the Nationwide Opioid Crisis

The nationwide opioid epidemic has killed hundreds of thousands of Americans and is widely considered a public-health emergency. According to the Centers for Disease Control and Prevention, in 2016, more than 40% of all opioid-related overdoses in the United States involved a prescription opioid – which means that more than 46 people died every day that year from a prescription opioid-related overdose.[1] This epidemic has been plaguing the country for years, and now that hundreds of lawsuits have been filed against the pharmaceutical manufacturers, distributors, and retail pharmacies responsible for creating and perpetuating this tragedy, the legal battle has begun.

Robbins Geller has spearheaded the fight against these corporations (including Purdue Pharma, Teva Pharmaceuticals USA Inc., Johnson & Johnson, and Endo Health Solutions Inc.) and has been hired to represent numerous municipalities, as well as Taft-Hartley Plans, across the nation. To date, the Firm has been retained by numerous cities and counties in Michigan (Wayne, Oakland, and Monroe counties), Maryland (Talbot County and Rockville), California (the City of Los Angeles, Marin County, and San Francisco), Arizona (Phoenix), and Florida (Broward County and Delray Beach).

Additionally, founding partner **Paul J. Geller** was appointed by the Honorable Dan Aaron Polster to the team of elite lawyers spearheading more than 900 coordinated lawsuits in the multi-district litigation, *In re National Prescription Opiate Litigation*. The litigation team, including Geller, "reads like a 'Who's Who' in mass torts," according to *The National Law Journal*. Geller is also part of a smaller appointed group of negotiators that *Law360* reported is "split into two camps: seven attorneys representing local governments that allege grievous financial harm from the opioid crisis, and 11 attorneys representing opioid manufacturers and distributors. Their assignment is daunting: broker a quick and meaningful deal that earmarks money for health care and law enforcement, while also helping to curb opioid prescribing and abuse."[2]

"The defendants' massive nationwide campaign of false marketing, and their failure to report suspicious sales as required by law, resulted in dramatic increases in prescribing which advanced in lockstep with overdose deaths," said partner **Aelish M. Baig** who, along with Geller, leads the Robbins Geller opioid team.

Overdose-related deaths involving prescription opioids were "five times higher in 2016 than 1999," according to the Centers for Disease Control and Prevention. In 2012 alone, doctors wrote more than 255 million prescriptions for opioid painkillers.[3] In fact, between 1999 and 2016, "more than 200,000 people died in the U.S." as a result of opioid-related overdoses, with the highest overdose death rates from prescription opioids being found in West Virginia, Maryland, Maine, and Utah.

"Our firm is committed to holding opioid manufacturers and distributors accountable for their fraudulent marketing of opioids, which has fueled the worst drug scourge ever," said partner **Mark J. Dearman**.

Talbot County Attorney Anthony Kupersmith noted that when selecting Robbins Geller, he and Assistant Attorney Mary O'Donnell looked for "experience, a track record of successful outcomes in these larger litigation cases, a firm that has the resources to fight this fight against a group that has very deep pockets and that has representation from their firm on the settlement committee and the executive committee of the MDL."

"I believe that [Robbins Geller attorneys] have what we need to be successful," Maryland's Talbot County Council Vice President Corey Pack told *The Star Democrat* after retaining Robbins Geller. "This problem is not going to go away. It's not all about dollars and cents, but it's about holding those companies accountable for the fraud they've perpetrated on the American people."[4]

Counties affected the most by opioid-related deaths deal with significant financial consequences as a result of opioid over-prescription and addiction. These include increased law enforcement and judicial expenditures, increased jail expenditures, increased substance abuse treatment and diversion plan expenditures, increased emergency and medical care services expenditures, and lost economic opportunity. For instance, according to a recent study by *Urban Institute*, "Between 2011 and 2016, spending on Medicaid-covered prescriptions used to treat opioid addiction and overdoses increased from $394 million to $930 million, an average annual increase of 19 percent. Spending grew faster in later years, with a 30 percent increase between 2015 and 2016."[5]

"We see the devastation every day in our hospitals, in our jails and at the morgue, and it's getting worse. There has to be a price to be paid when corporations show such disregard for human life," said Wayne County, Michigan Executive Warren C. Evans. Wayne County alone suffered 506 opioid-related deaths in 2015. In 2016, that number reached 817 – more than 32 overdose deaths for every 100,000 residents.

In fact, a group of 44 hospitals has requested permission to file a brief that rebuts motions to dismiss that were filed by the drug manufacturers and distributors responsible for the epidemic. The hospitals' bellwether lawsuit was initially brought by Florida-based West Boca Medical Center, which argued that hospitals should not have to "bear the costs" of the care they continue to provide as a result of the conduct of the defendants.[6]

Recently, Judge Polster selected six of the lawsuits in the multi-district litigation to serve as "bellwether" cases, placing them on an expedited schedule. Three of the six involve Robbins Geller clients – Broward County, Florida, Monroe County, Michigan, and the Cleveland Bakers and Teamsters Pension Fund. Judge Polster has scheduled trial for three of the cases next year while eagerly pressing for a settlement that addresses this national dilemma.[7]

"The opioid epidemic is a public health crisis, and fighting the manufacturers and distributors who are largely responsible for it will be a privilege," said Geller. "Every day, Americans are dying from an opioid overdose. It's time to put an end to that."

Robbins Geller partners **Paul J. Geller**, **Mark J. Dearman**, **Aelish M. Baig**, **Thomas E. Egler**, and **Matthew S. Melamed**, along with associates **Dory P. Antullis**, **Carissa J. Dolan**, **Ricardo J. Marenco**, **Sabrina E. Tirabassi**, and **Bailie L. Heikkinen**, are leading the Firm's efforts in prosecuting these important cases and constructing a lasting solution to this unprecedented disaster.

[1] https://www.cdc.gov/drugoverdose/data/overdose.html

[2] https://www.law360.com/articles/998904/meet-the-attys-at-the-opioid-mdl-s-negotiating-table

[3] https://www.cdc.gov/drugoverdose/data/overdose.html

[4] https://www.stardem.com/news/local_news/talbot-joins-opioid-lawsuit/article_8f68b1b4-d5c7-5a02-ac85-65b242cab4a4.html

[5] https://www.urban.org/research/publication/rapid-growth-medicaid-spending-medications-treat-opioid-use-disorder-and-overdose

[6] https://www.law360.com/articles/1070606/providers-say-don-t-kill-hospital-bellwether-in-opioid-mdl

[7] https://www.bloomberg.com/graphics/2018-opioid-lawsuits/

Plaintiffs Battle Motions to Dismiss in Rite Aid and Walgreens Merger Case

On July 11, 2018, the Honorable John E. Jones III of the U.S. District Court for the Middle District of Pennsylvania partially denied defendants' motions to dismiss in *Hering v. Rite Aid Corporation*, a case filed by plaintiffs alleging defendants made false and misleading statements about the Rite Aid-Walgreens merger.

Rite Aid is a retail drugstore chain that sells prescription drugs and a range of other merchandise referred to as "front-end products." Walgreens describes itself as a global pharmacy-led health and well-being enterprise. Filed in December 2015, the case alleges that defendants made false or misleading statements regarding the level of regulatory risk faced by the proposed acquisition of Rite Aid by Walgreens for $9.00 per share. In response to concerns that the deal faced significant regulatory risk, defendants represented to investors that the regulatory process was progressing favorably, and that there was little to no risk that the merger would fail to pass regulatory scrutiny. After it was disclosed that regulators were, in fact, unlikely to approve the deal, and defendants were forced to terminate the merger, Rite Aid's stock price plummeted from its class period high.

Lead plaintiff argued that Walgreens "had ample reason to understand that the merger was in trouble," including concerns raised by the Federal Trade Commission. In agreeing with the plaintiff and denying defendants' motion to dismiss, the court concluded that "based on the allegations as a whole, we find a strong inference . . . of recklessness."

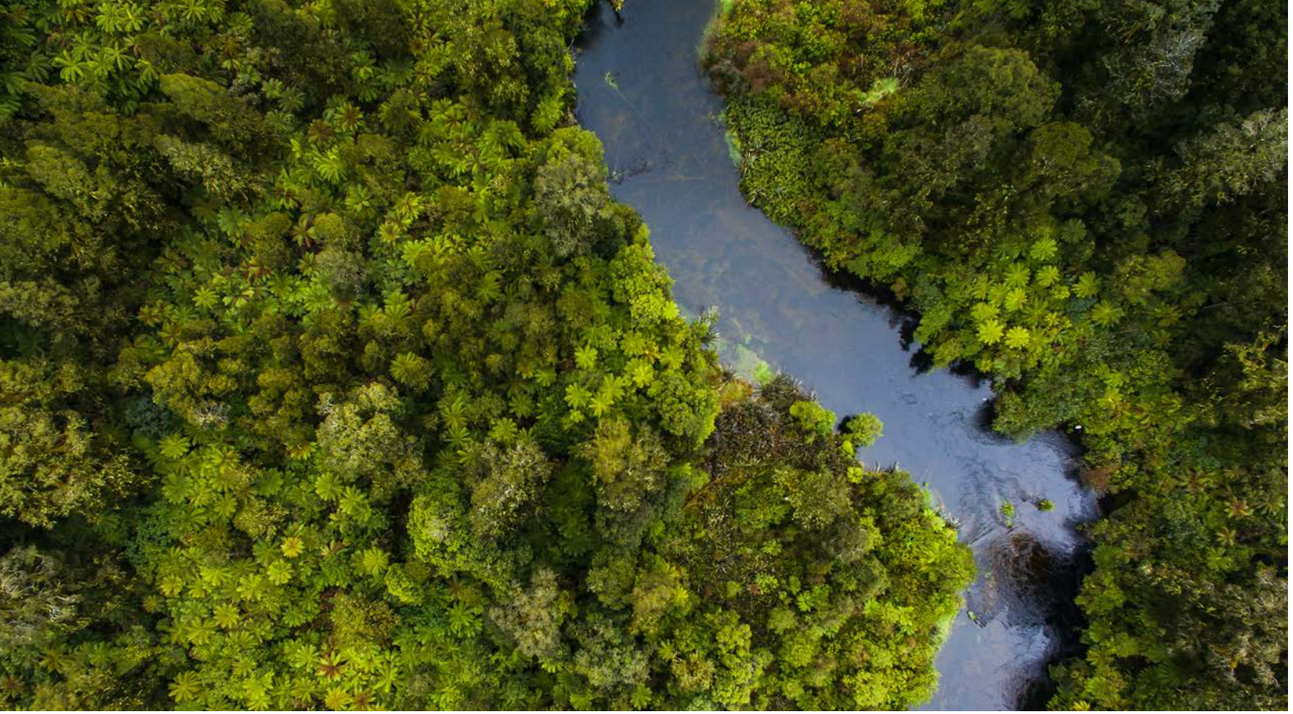
The Robbins Geller attorneys who obtained this result are **Randall J. Baron**, **David T. Wissbroecker**, **Stuart A. Davidson**, **David A. Knotts**, **Danielle S. Myers**, **Christopher C. Gold**, **Brian E. Cochran**, and **Esther Lee**.

Hering v. Rite Aid Corporation, et al., No. 1:15-cv-02440, Memorandum & Order (M.D. Pa. July 11, 2018).

publicly declared a position on issues ranging from state-level bills eroding LGBTQ rights (for instance, Indiana's Religious Freedom Restoration Act and North Carolina's Public Facilities Privacy & Security Act, also known as the "bathroom bill") to President Trump's noncommittal remarks after the clash between white supremacists and counter-protesters in Charlottesville, Virginia, to the Justice Department's efforts to rescind DACA, the federal policy giving some immigrants brought to the country as minors – the so-called Dreamers – deferred action from deportation. We collected daily closing stock prices over a four-month period, from two months before each CEO's statement to two months after, and plotted the percentage change in stock performance. We then compared the results for each stock with the closing prices of the exchange on which it trades.

Most companies did not see a sustained rise or drop in stock price following their CEO's public statement. Among those that did, in most cases the price returned to its previous level within two months. There were some notable exceptions. For example, Papa John's CEO John Schnatter came out against NFL player protests, claiming that the league's mishandling of protests against racial injustice by some players during the national anthem was turning off customers and hurting the company's pizza sales during broadcasts. The stock fell sharply following Schnatter's statement; weeks later he resigned, and the stock continued a downward trend over the next two months. By contrast, Apple's stock surged following CEO Tim Cook's denunciation of religious freedom laws in Indiana and Arkansas and remained high throughout the period we studied.

The stocks we looked at generally tracked the market's ups and downs, suggesting that any fluctuations after a CEO's statement were most likely associated with normal economic factors.



News on ESG and Sustainability

Are Investors Right to Consider ESG Risks?

Ted Knutson writes in *Forbes*:[1]

> Investors are right to consider environmental, social and governance (ESG) risks because they can impact the worth of intangible assets which make up more than 80 percent of company value, said a new report by the Society for Corporate Governance.
>
> The intangible assets that could be subject to ESG concerns include brand names, reputation, top managers, technological know how and a loyal, well-trained and engaged workforce said the study by the professional association for internal corporate governance workers and external consultants.

Matt Turner of compensation consultant Pearl Meyer wrote about the inclusion of ESG factors in incentive compensation:[2]

> [I]n various ways, ESG issues are showing up in the performance framework of executive incentive compensation and, more broadly, in executive performance evaluation. With respect to incentive plans, ESG issues may show up as modifiers to the overall funding of executive cash incentives. Alternatively, if the specific issue can be attributed to key individuals, or component metrics of the overall goal can be identified, they may show up in the individual performance portion of an incentive plan. . . . Typically such metrics are given only modest weight in the overall incentive funding formula – something along the lines of 10-20% of the total. The modest weighting may be due to the amount of practical control and influence an executive team may have over the goal. Somewhat related, objective measurement of progress or success may be difficult, requiring subjective judgment. While the actual weight may be modest, the important thing is the signal being sent both to the executive team and the external stakeholder community about the importance of the issue.

Does Sustainable Investing Lead to Lower Returns?

A special issue of *Barron's* on ESG is itself a significant indicator that ESG has entered the mainstream of securities analysis. The issue's articles are exceptionally thoughtful and well worth reading in detail.[3] An excerpt:

> Here's what ESG integration is really about: From an investor's standpoint, a sustainable company is one positioned for long-term success, one whose management understands and addresses short-term risks and innovates to exploit long-term opportunities. ESG data are a means that can enable an investor to understand a company's strategy, corporate purpose, and management quality, at scale and in an unbiased, quantifiable way.
>
> ESG is about understanding how companies are adapting to transformational change, such as the shift to a low-carbon economy. European electric utility companies, such as RWE, missed the message that renewables should become an important part of power generation. They lost half a trillion in market capitalization as a result. Automobile manufacturers are in a race to not become the next victims by missing the electrification wave. Consumer packaged-goods companies, such as General Mills, Nestlé, and PepsiCo, are product reformulating as consumer preferences change, taking out sugar and sodium from their products, while repositioning their offerings to compete in healthier food and beverage choices.
>
> It is also about understanding how and which technology companies are best at managing data-privacy issues. In the wake of the Facebook controversy, not only shares of Facebook, but also those of Twitter, which is also highly exposed to data-privacy issues, dropped more than 10% in a day. It is about how retailers are managing a more productive workforce. As Walmart discovered, moving away from its legacy of poor labor relations, improving workplace conditions, and creating economic opportunity for its associates can improve employee engagement, leading to higher customer satisfaction and higher revenue growth.

Morgan Stanley's Sustainable Signals Report[4]

The report finds that asset managers are increasingly relying on sustainability indicators:

> The survey polled 118 public and corporate pensions, endowments, foundations, sovereign wealth entities, insurance companies and other large asset owners worldwide and gathered insights about trends, motivations, challenges and implementation approaches in sustainable investing. By rounding out the sustainable investing landscape with the views of asset owners, this work builds on our previous Sustainable Signals studies focused on individual investors and asset managers.

They found that 84% of asset managers are pursuing or considering pursuing ESG integration in their investment process – 60% of those began doing so in the last four years and 78% seek to align with the U.N. Sustainable Development Goals.

BlackRock's New White Paper Is Called the Investment Stewardship Ecosystem[5]

It opens with a quote from Larry Fink's earlier letter to CEOs:

> "Your company's strategy must articulate a path to achieve financial performance. To sustain that performance, however, you must also understand the societal impact of your business as well as the ways that broad, structural trends – from slow wage growth to rising automation to climate change – affect your potential for growth."

And it puts this sentence in bold: "Our mission is to create a better financial future for our clients and our number one focus is on generating long-term sustainable performance."

Starbucks Ditches Straws

Starbucks Corporation agreed to eliminate plastic straws following a shareholder proposal from As You Sow, which got a 30% vote in favor.

Cambridge University Addresses Climate Change

Cambridge University has made a landmark commitment to addressing climate change in its £3 billion ($3.9 billion) endowment fund following months of pressure from students and staff.

Hermes Investment Management Invests in Carbon Tool

Hermes Investment Management has been investing in the development of a number of ESG tools for its fund managers and engagers to use to make enhanced investment decisions and to better inform engagement activities with companies on ESG matters. Hermes will be launching a carbon tool that allows fund managers to assess their fund's carbon performance, carbon risk, and corresponding engagements with investee companies in a comprehensive manner.[6] The tool will also be the source for enhanced client reporting to demonstrate how ESG and engagement is being credibly integrated into the firm's fund and stewardship offerings.

Be Aware of False ESG Disclosures

Harry Broadman writes in *Forbes* that investors should be alert to false ESG disclosures that may be hiding bribes to foreign officials:[7]

> One of the most well-known examples of such malfeasance dates back to 2011 when two oil companies contributed an initial installment of $175 million (out of a promised total of $350 million) to establish a technical research and training center in Angola to be run by that country's state owned

[1] Ted Knutson, *Investors Are Right to Consider ESG Risks, Says New Report by Corporate Governance Association*, Forbes, June 22, 2018, https://www.forbes.com/sites tedknutson/2018/06/22/investors-are-right-to-consider-esg-risks-says-new-report-by- corporate-governance-association/#1438587c7506.

[2] Ask the Expert Interview, *The ESG Impact on Executive Compensation* (July 2018), https://www.pearlmeyer.com/knowledge-share/ask-the-expert/the-esg-impact-on-executive- compensation.

[3] George Serafeim & Adam Seessel, *Does Sustainable Investing Lead to Lower Returns*, Barron's, June 23, 2018, https://www.barrons.com/articles/does-sustainable-investing-lead-to-lower-returns-1529712000.

[4] Morgan Stanley, *Sustainable Signals: Asset Owners Embrace Sustainability* (2018), http://www.morganstanley.com/assets/pdfs/sustainable-signals-asset-owners-2018-survey.pdf.

[5] Black Rock, *The Investment Stewardship Ecosystem* (July 2018), https://www.blackrock.com/corporate/literature/whitepaper/viewpoint investment-stewardship-ecosystem-july-2018.pdf.

[6] Hermes Investment Management, *Hermes is turning up the heat on climate change with the launch of a carbon tool*, June 20, 2018, https:// www.hermes-investment.com/us/blog/press/hermes-turning-heat-climate-change-launch-carbon-tool/.

[7] Harry G. Broadman, *When Too Much Corporate Social Responsibility Is Too Good To Be True*, Forbes, May 30, 2018, https://www.forbes.com/sites/harrybroadman/2018/05/30/when-too-much-corporate-social-responsibility-is-too-good-to-be-true/#3c924997499f.

oil monopoly – Sonangol. More than six years later there is no such center and no one seems to know where the money actually went.

New ESG Fund Makes Promises

Felix Salmon writes in *Slate* about a new ESG fund with some big names and promising prospects:[8]

> The product in question is called the JUST U.S. Large Cap Equity ETF, it trades under the ticker symbol JUST, and it's being brought to you by Goldman Sachs in association with Just Capital, a nonprofit organization founded by billionaire hedge fund manager Paul Tudor Jones.[9] Just Capital's raison d'être is to rank America's companies, and then to make those rankings public so that everybody has the ability to act on them, in terms of who they buy from, who they work for, and – yes – who they invest in.
>
> The names here – not only Goldman and Tudor Jones, but also Just Capital's board members, who include Deepak Chopra and Arianna Huffington – seem almost designed to elicit eye-rolling and snark.[10] But after you take a look at the Just website and its detailed methodology, it turns out that the JUST ETF and the Just 500, as the underlying index is known, are smart, well-constructed products that give the investing public something important and valuable.[11]

The European Bank of Reconstruction and Development Will Share Its Climate-Related Financial Information in Its Investments for the First Time This Year

In its Sustainability Report, it writes:[12]

> We pride ourselves on measuring and reporting on our impact transparently and in an accountable way. This report contains data on health and safety, greenhouse gases, and various other aspects of our project monitoring.

DOL Warns Pension Fiduciaries that Economic Concerns Should Not Be Compromised by ESG

A new Field Assistance Bulletin issued on April 23, 2018 by the U.S. Department of Labor, which has jurisdiction over ERISA funds, provides:[13]

> In IB 2015-01, the Department reiterated its longstanding view that, because every investment necessarily causes a plan to forego other investment opportunities, plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk as a means of using plan investments to promote collateral social policy goals. IB 2015-01 also reiterated the view that when competing investments serve the plan's economic interests equally well, plan fiduciaries can use such collateral considerations as tie-breakers for an investment choice. The preamble of IB 2015-01 added: "if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from environmental, social and governance [(ESG)] factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote."
>
> In making that observation, the Department merely recognized that there could be instances when otherwise collateral ESG issues present material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories. In such situations, these ordinarily collateral issues are themselves appropriate economic considerations, and thus should be considered by a prudent fiduciary along with other relevant economic factors to evaluate the risk and return profiles of alternative investments. In other words, in these instances, the factors are more than mere tie-breakers. To the extent ESG factors, in fact, involve business risks or opportunities that are properly treated as economic considerations themselves in evaluating alternative investments, the weight given to those factors should also be appropriate to the relative level of risk and return involved compared to other relevant economic factors.
>
> Fiduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision. It does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement or other investors. Rather, ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits. A fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives.

Guns Become a Significant ESG Issue

In the United States, citizens, shareholders, consumers and corporations have made guns an important priority. ValueEdge Advisors Vice Chair Nell Minow was quoted in the *Los Angeles Times* about shareholder pressure to improve gun safety:[14]

> The effort by Dick's and other private firms is not unlike earlier, concerted investor campaigns against tobacco companies and apartheid in South Africa, in which "people were taking those stocks out of their portfolios and putting pressure on companies," said Nell Minow, vice chairwoman of ValueEdge Advisors, which promotes strong corporate governance.
>
> "Investors were on it before the states' attorneys general and the regulators were on it," she said. In the gun-control movement, too, the private sector "is a leading indicator that the mood of the country is changing," Minow said.

NOTE: ISS and Glass-Lewis both recommended votes in favor of a proxy proposal calling for a report on gun safety. The shareholder proposal was filed by the Sisters of the Holy Names of Jesus and Mary in Oregon. It asks Sturm Ruger & Co. to report on gun safety such as how it monitors violence, research on safer guns, and its assessment of risks to its reputation. *Reuters* reports:[15]

> Proxy adviser Institutional Shareholder Services on Wednesday recommended investors vote to support a shareholder proposal calling for gun maker Sturm Ruger & Co to report on gun safety, which could put new attention on so-called "smart gun" technology.
>
> * * *
>
> The board of Connecticut company Sturm Ruger had recommended investors vote against the call for the safety report. Its proxy statement said that "the intentional criminal misuse of firearms is beyond our control. Similarly, the constitutional right of firearms ownership carries with it certain responsibilities and the Company has long advocated the safe and responsible ownership and use of firearms."

oekom Sees Progress in Social Responsibility/ESG

oekom research (now a part of ISS) is a rating agency focusing on sustainable investment. Their Corporate Responsibility Review 2018 report[16] confirms the upward trend observed over the past five years. The share of companies in industrialized countries with good and very good ratings is currently 17.19% – slightly higher than in the previous year. Moreover, at 43.62%, the group of companies with a medium sustainability performance is larger than the proportion of companies with inadequate sustainability performance for the first time. The percentage of companies with inadequate sustainability practices is down to 39.19%, the lowest level to date. However, there is a comparable trend that can be observed among companies in emerging markets at a lower level.

Is Facebook a "Sin Stock" for ESG Investors?

As the powerhouse digital "FANG" stocks (Facebook, Amazon, Netflix, Google) all took a dip in stock price, how much of the dip was in response to concerns over government action? An article in *Bloomberg* suggests that ESG investors may want to divest for reasons of principle as well as liability or regulatory concerns:[17]

> Just how toxic is the data-privacy scandal for Facebook Inc.?
>
> So toxic that some investment funds now are lumping in the social network with big polluters and other corporations they consider ethically challenged.

Sustainability Reporting Reaches "Supermajority" Status

Bloomberg Law reports:[18]

> Eighty-five percent of the nation's largest public companies reported on climate change, diversity, and other sustainability issues in 2017, according to a March 20 study from the Governance & Accountability Institute.
>
> Sustainability reporting by companies in the S&P 500 index hit a majority for the first time in 2012 and has climbed steadily since then, the institute's annual analysis shows. Its chairman and co-founder Hank Boerner called this year's result a "super-majority."

[8] Felix Salmon, *Invest Good*, Slate, June 13, 2018, https://slate.com/business/2018/06/just-500-the-goldman-sachs-paul-tudor-jones-values- driven-investment-fund-seems-good-actually.html.
[9] https://justcapital.com/reports/introducing-the-just-etf/.
[10] https://justcapital.com/about/our-board/.
[11] Just Capital, *JUST US Large Cap Diversified Index (JULCD) Calculation Methodology* (June 2018), https://com-justcapital-web-v2. s3.amazonaws.com/pdf/JULCD_Index_Methodology_20180605.pdf.
[12] European Bank for Reconstruction and Development, *EBRD Sustainability Report 2017*, http://2017.sr-ebrd.com/.
[13] U.S. Department of Labor, *Field Assistance Bulletin No. 2018-01* (Apr. 23, 2018), https://www.dol.gov/agencies/ebsa/employers-and-advisers/ guidance/field-assistance-bulletins/2018-01.
[14] James F. Peltz, *In a rare move, corporate America presses for gun control restrictions 'to take a stand,'* L.A. Times, May 3, 2018, http://www. latimes.com/business/la-fi-companies-gun-control-20201027-story.html.
[15] Ross Kerber, *Proxy adviser ISS backs call for gun safety report at Sturm Ruger*, Reuters, Apr. 25, 2018, https://www.reuters.com/article/us-usa-guns-sturmruger/proxy-adviser-iss-backs-call-for-gun-safety-report-at-sturm-ruger-idUSKBN1HW2YA.
[16] oekom research, *Corporate Responsibility Review 2018*, http://oekom-research.com/index_en.php?content=studien.
[17] Emily Chasen, *Facebook Turns Toxic for Some ESG Funds*, Bloomberg, Mar. 20, 2018, https://www.bloomberg.com/news/articles/2018-03-26/facebook-turns-toxic-for-some-esg-funds-as-shares-sink-again.
[18] Andrea Vittorio, *Corporate Sustainability Reporting Hits 'Super Majority' Status*, Bloomberg, Mar. 20, 2018, https://www.bna.com/corporate- sustainability-reporting-n57982090108/.

Robbins Geller Ranked Tier 1 by The Legal 500 and Called "Smart and Aggressive"

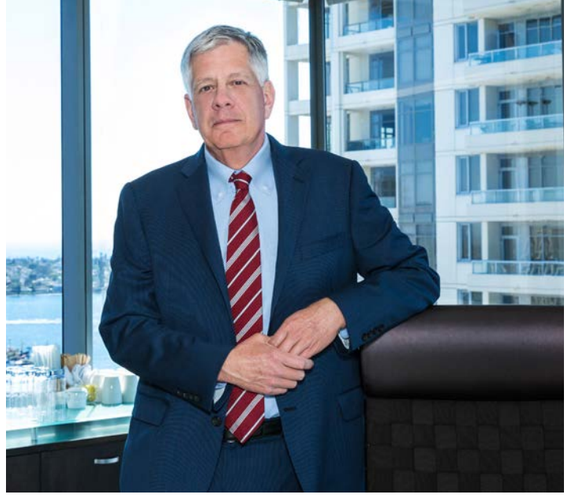
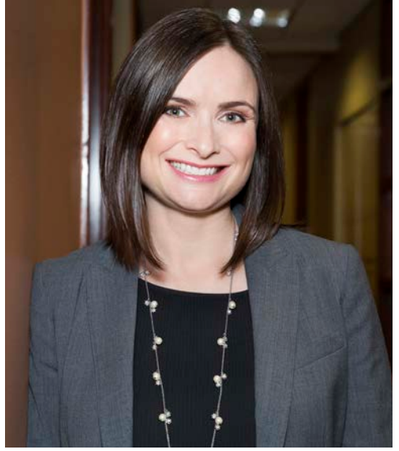
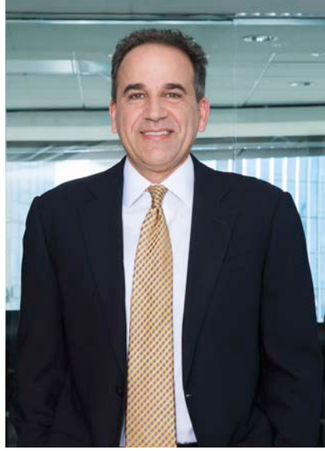
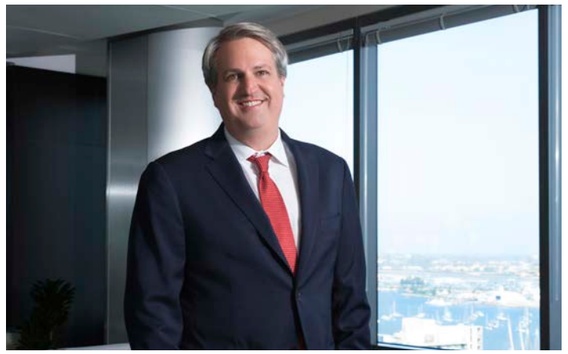
According to *The Legal 500*, Robbins Geller is "a smart and aggressive firm" with "a formidable reputation for both securities and corporate litigation." The publication awarded the Firm and its attorneys top rankings in several different categories for 2018. Stating that Robbins Geller "cannot be ignored on the plaintiff side" and commending the Firm for its "big presence in the market," the publication ranked the Firm Tier 1 in the category of Securities Litigation: Plaintiff and highly in the M&A Litigation: Plaintiff category.

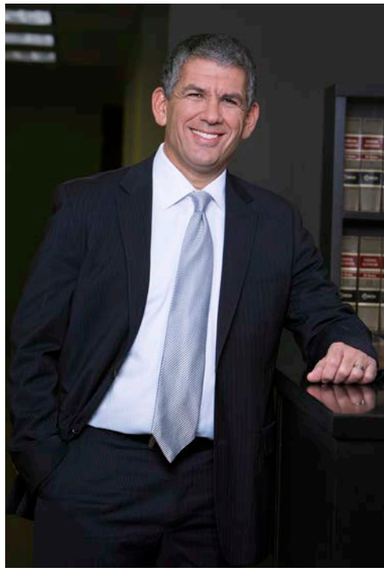
The Legal 500 also named **Randall J. Baron** a Leading Lawyer for M&A Litigation: Plaintiff, and recognized **Danielle S. Myers** and **Maureen E. Mueller** as Next Generation Lawyers for Securities Litigation: Plaintiff. The publication additionally recommended 13 Robbins Geller attorneys in both categories.

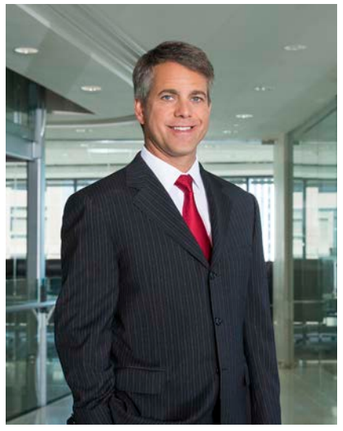
In commending Robbins Geller's work in securities litigation, *The Legal 500* highlighted the *Household International* case and praised the Firm's trial team, **Michael J. Dowd**, **Spencer A. Burkholz**, **Daniel S. Drosman**, **Luke O. Brooks**, and **Maureen E. Mueller**, for securing a $1.575 billion recovery. The *Household* settlement is the largest recovery following a securities class action trial, the largest securities fraud settlement in the Seventh Circuit, and the seventh-largest settlement ever in a post-PSLRA securities fraud case. "The firm built its track record of significant victories in 2017 with cases such as *Marcus v. JC Penney Company, Inc., et al.*," the publication stated, lauding **Robert R. Henssler, Jr.**, **Jonah H. Goldstein**, and **Danielle S. Myers** for their work in obtaining approval of a $97.5 million recovery following allegations that the company and certain officers and directors made false and misleading statements regarding the company's financial position. The publication went on to highlight **Samuel H. Rudman** and **David A. Rosenfeld** for their remarkable work on the *L-3 Communications Holdings, Inc.* case, securing approval of a $34.5 million recovery that represents a high percentage of the damages that plaintiffs could reasonably expect to be recovered at trial and is more than eight times higher than the average settlement of cases with comparable investor losses.

In regard to naming Baron a Leading Lawyer, *The Legal 500* highlighted his "enviable track record in landmark cases such as *In re Kinder Morgan, Inc. S'holders Litig.*, in which he obtained a $200m common fund for former Kinder Morgan shareholders in what was the largest-ever M&A class action recovery in history." *The Legal 500* went on to state that the Firm "is known as one of the most active in filing M&A and securities litigation" and referenced Baron's work with **A. Rick Atwood, Jr.** on *In re Dole Food Co., Inc. Stockholder Litig.*, in which they secured the largest trial verdict in a class action challenging a merger transaction. The publication also called attention to **David A. Knotts** and his "stellar track record," which includes a $30 million settlement in *In re Onyx Pharm., Inc. S'holder Litig.*

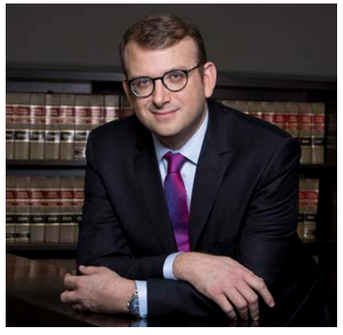
The Legal 500 rankings are based on a series of criteria that examine "the practice area teams who are providing the most cutting edge and innovative advice to corporate counsel." In order to rank law firms, the series considers feedback from 250,000 in-house peers and access to law firms' deals and confidential matters, which are independently assessed by their researchers. A more detailed look at *The Legal 500*'s selection methodology can be found on their official site.









Motion to Dismiss Defeated in Major Gasoline Producer Antitrust Action

On June 18, 2018, the Honorable M. James Lorenz, Federal District Court Judge for the Southern District of California, denied defendants' motion to dismiss in a case alleging the largest gasoline producers in the world gamed the California gasoline market, costing gas purchasers billions of dollars.

Plaintiff **Persian Gulf Inc.**, an owner of a gas station, brought suit in 2015 against BP West Coast Products LLC, Chevron U.S.A. Inc., Tesoro Refining & Marketing Company LLC, Equilon Enterprises LLC d/b/a Shell Oil Products US, ExxonMobil Refining & Supply Co., Valero Marketing and Supply Co., ConocoPhillips, and Alon USA Energy, Inc. The case alleges that defendants conspired to manipulate the wholesale gasoline market in California, causing historic spikes in wholesale prices in 2012 and 2015. The complaint alleges both federal and state antitrust claims.

As the court explained in denying the motion to dismiss:

> gasoline prices and Defendants' profits in 2012 and 2015 reached historically unprecedented highs. The magnitude and length of supply disruptions and the price differential between California and the rest of the United States in 2015 were also unprecedented. Finally, Defendants' conduct and its consequences were sufficiently extreme to prompt government investigation into deliberate manipulation of the California market. Plaintiff's extensive and detailed factual allegations of Defendants' activities, taken as true, support a plausible inference of agreement for purposes of a Sherman Act violation. To the extent Defendants seek dismissal of the Sherman Act claim, their motion is denied.

The court further noted that many of defendants' arguments ignored "the big picture that emerges from the totality of the allegations," including:

> several instances of tightly synchronized multiple refinery shutdowns, simultaneous exports during a short period of time, an orchestrated run on the market, joint public exaggerations regarding supply disruptions, and other coordinated actions such as unnecessary refinery shutdowns, failure to repair a damaged refinery, idling a Jones Act tanker, and coordinated exports all occurring simultaneously during a time of rising prices.

"Californians have been saddled with high gas prices for years because of these anticompetitive practices. We look forward to pursuing justice for gas purchasers as we vigorously litigate this case," said **Patrick J. Coughlin**, one of the lead attorneys on the case.

In addition to Coughlin, the Robbins Geller attorneys litigating this case are **David W. Mitchell**, **Alexandra S. Bernay**, **Carmen A. Medici** and **Armen Zohrabian**.

Persian Gulf Inc. v. BP West Coast Products LLC, et al., No. 3:15-cv-01749-L-BGS, Order Denying Motion to Dismiss (S.D. Cal. June 18, 2018).

Five Robbins Geller Partners Recognized on Benchmark Litigation's 40 & Under Hot List

Benchmark Litigation recently named Robbins Geller partners **Jessica Shinnefield**, **David Knotts**, **Daniel Pfefferbaum**, **Darryl Alvarado**, and **Jason Alperstein** to its 40 & Under Hot List (previously known as the Under 40 Hot List) for being "the top young talent in their respective litigation communities" in the United States and Canada.

Shinnefield, who was named to the 40 & Under Hot List for the first time, has prosecuted numerous high-profile class and individual securities actions, resulting in hundreds of millions of dollars of recoveries for Firm clients. She was a member of the litigation team prosecuting actions against investment banks and leading national credit rating agencies for their roles in structuring and rating structured investment vehicles backed by toxic assets in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Incorporated* ("*Cheyne*") and *King County, Washington v. IKB Deutsche Industriebank AG* ("*Rhinebridge*"). These cases were among the first to successfully allege fraud against the rating agencies, which have traditionally been protected by the First Amendment. *Reuters* described the settlement as a "landmark" deal and emphasized that it was the "first time S&P and Moody's have settled accusations that investors were misled by their ratings."

This year is also the first time that Knotts has been named to *Benchmark Litigation*'s 40 & Under Hot List. Most notably, he played an integral role in making history in the *Onyx Pharmaceuticals* $30 million settlement, which set a record for the largest post-merger common fund settlement in California state court history. Reached just days before the hearing on defendants' motion for summary judgment, the settlement came after three years of hard-fought litigation. A mere three weeks after the *Onyx* settlement was approved, Knotts and the Robbins Geller litigation team broke its *own* record by negotiating a $40 million settlement in *Websense, Inc.* Knotts was also part of the Robbins Geller litigation team that obtained a near total recovery of $110 million in *In re Rural/Metro Corp. Stockholders Litig.*, the largest damages award ever obtained against an investment bank for its role as a merger adviser.

Recognized for the third consecutive year, Pfefferbaum has recovered more than $100 million for individuals and institutional clients in complex securities fraud class actions across the country. He was a key member on the litigation team that secured a historic recovery on behalf of Trump University students in two class actions against President Donald J. Trump. The court hailed the settlement amount as "extraordinary" and "all the more exceptional when viewed in light of the risk" of continued litigation. Pfefferbaum was also an integral member of the Robbins Geller litigation team in *Garden City Emps.' Ret. Sys. v. Psychiatric Solutions, Inc.* After more than four years of litigation, and on the eve of trial, he led shareholders to a $65 million recovery.

In focusing his practice on securities fraud and other complex civil litigation, Alvarado has helped secure hundreds of millions of dollars for injured investors. Not only did he play a major role in the $388 million recovery for investors in *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, Alvarado was also a key member of the team of attorneys that secured a $95 million settlement for investors in Morgan Stanley-issued RMBS in *In re Morgan Stanley Mortgage Pass-Through Certificates Litig.* And, like Shinnefield, he was a key member of the litigation team that obtained a "landmark" settlement on the eve of trial from the major credit rating agencies and Morgan Stanley in the *Cheyne* and *Rhinebridge* cases. This year marks the first time that Alvarado has been named to the 40 & Under Hot List.

This year's honor marks the second time that Alperstein has been recognized by *Benchmark Litigation*. Among his most notable cases is *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liab. Litig.*, in which he helped prosecute claims on behalf of almost 600,000 consumers who were misled into purchasing and leasing Volkswagen, Audi, and Porsche vehicles. These cars were marketed as environmentally friendly, but emitted toxic pollutants up to 40 times the legal limit permitted by the EPA. Alperstein is currently litigating several other automotive cases, including *Bledsoe v. FCA US LLC*. That case involves allegations that Dodge Ram trucks emit pollutants such as NOx emissions beyond legal limits and contrary to the representations made by defendants. Alperstein is also working with Paul Geller in *Benkle v. Ford Motor Co.*, a case involving defective electronic throttle body units in Ford vehicles, and in *In re Ford Fusion & C-MAX Fuel Economy Litig.*, representing automotive owners against Ford for false or misleading advertisements about the fuel efficiency of certain Ford vehicles.

Though it focused solely on the U.S. commercial litigation market when it first began in 2008, *Benchmark Litigation* now also covers Canadian and Mexican litigation markets. The rankings result from a lengthy research period during which *Benchmark* researchers conduct thousands of interviews with litigators and their clients. Recent casework handled by the firms is examined and sources are asked to offer their professional opinions on the attorneys practicing within their state or national practice areas. For more detailed information regarding *Benchmark*'s selection methodology, visit their official website.

From left to right: Jessica Shinnefield, David Knotts, Daniel Pfefferbaum, Darryl Alvarado and Jason Alperstein

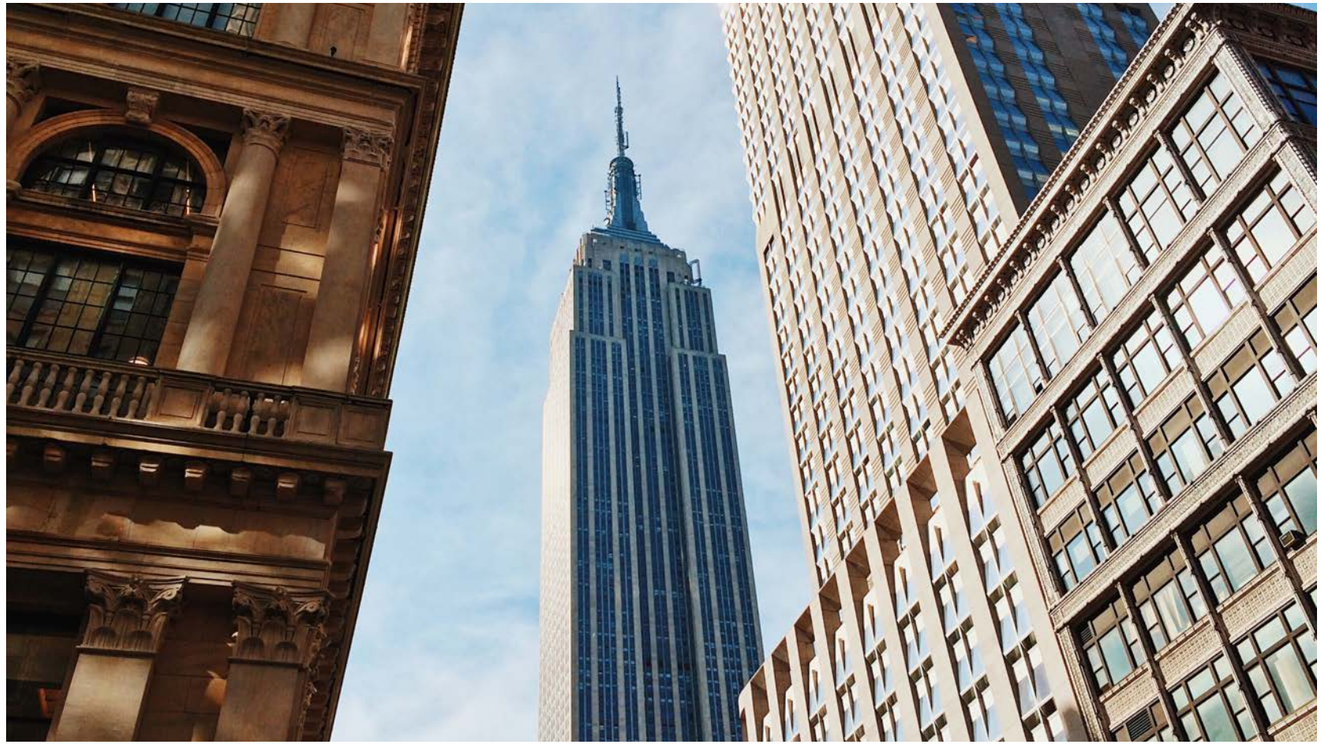
El Pollo Loco Class Certified in California Case

On July 3, 2018, the Honorable David O. Carter of the U.S. District Court for the Central District of California certified a class of El Pollo Loco investors in *Turocy v. El Pollo Loco Holdings, Inc*. The court also appointed Robbins Geller as class counsel, stating that the Firm is "'well-qualified to prosecute this case on behalf of Plaintiffs and the other members of the Class, and ha[s] already undertaken a vigorous prosecution of this action.'"

El Pollo Loco is a "quick service restaurant plus" restaurant chain – a term adopted by El Pollo Loco to suggest that its restaurants have both "quick service" and "fast casual" elements. The case alleges that during the class period, defendants made false statements and failed to disclose adverse information about El Pollo Loco's business and prospects, including that traffic at El Pollo Loco stores had declined substantially due to the removal of $5 value items from the restaurants' menu boards. As a result of the menu change, comparable store sales were not growing at 3% – much less the 3% to 5% the defendants had led investors to believe they would grow in the second quarter of 2015. As a result of defendants' failure to disclose the truth, El Pollo Loco securities traded at artificially inflated prices during the class period, with the company's stock price reaching a high of $25.37 per share. This allowed the company's controlling shareholders, CEO, and others to sell tens of millions of dollars' worth of their personally held El Pollo Loco shares at artificially inflated prices. The case is scheduled to go to trial in August 2019.

Robbins Geller attorneys **Laurie L. Largent**, **Ryan Llorens**, and **Kevin A. Lavelle** obtained this result for investors.

Turocy v. El Pollo Loco Holdings, Inc., No. 8:15-cv-01343-DOC-KES, Order Granting Plaintiffs' Motion to Certify Class [112]; Denying Defendants' Motion to Strike Portions of Reply [141]; Granting Defendants' Request to File Sur-Reply [141-2]; and Granting Plaintiffs' Request to File Sur-Sur-Reply [149-1] (C.D. Cal. July 3, 2018).



Goldman Sachs Investors Certified in Securities Case

Following extensive briefing and a two-day evidentiary hearing held in late July, the Honorable Paul A. Crotty of the U.S. District Court for the Southern District of New York certified a class of investors in *In re Goldman Sachs Grp., Inc. Sec. Litig.* In his order, Judge Crotty emphasized that defendants "failed to meet their burden of proof" and therefore "the *Basic* presumption is not rebutted."

The securities class action alleges that Goldman Sachs made false statements to investors about its conduct in connection with certain mortgage-backed securities transactions, including betting against the very same securities it was selling to its clients. The allegations in the complaint relate to several high-profile transactions, including the infamous Abacus transaction that resulted in Goldman Sachs paying $550 million in fines to the U.S. Securities and Exchange Commission.

"This is a tremendous result for investors and was the result of a lot of hard work by our team of lawyers at Robbins Geller – **Jonah H. Goldstein**, **Robert R. Henssler, Jr.**, **Eric I. Niehaus**, **Brian E. Cochran**, and **Alexi Pfeffer-Gillett**. We look forward to getting this case ready for trial," said **Spencer A. Burkholz**, one of the lead attorneys on the case.

In re Goldman Sachs Grp., Inc. Sec. Litig., No. 1:10-cv-03461, Opinion & Order (S.D.N.Y. Aug. 14, 2018).

Investors' Fraud Claims Against Hanger Revived with Win in the Fifth Circuit

On August 6, 2018, the U.S. Court of Appeals for the Fifth Circuit ruled in plaintiffs' favor in *Alaska Electrical Pension Fund v. Asar*, reversing the district court's prior dismissal of the action.

Hanger, Inc. is the largest provider of orthotic and prosthetic ("O&P") patient care services in the United States. Lead plaintiff **Alaska Electrical Pension Fund** (the "Pension Fund") alleges that Hanger and certain of its officers and directors violated the Securities Exchange Act of 1934. With the passage of the Patient Protection and Affordable Care Act in 2010, Medicare increased the number of audits of reimbursement claims that were submitted for O&P services, with the goal of eliminating overpayment of claims and targeting fraud in the market. In the class action amended complaint, the Pension Fund alleged that throughout the class period (July 27, 2011 to February 26, 2016), defendants issued materially false and misleading statements regarding the company's financial results and the company's success rate in Medicare audit appeals. Specifically, the company concealed from the investing public that it was failing Medicare audits (which required it to return reimbursements from Medicare that it had already recognized as revenue) and did not have the internal controls necessary to pass these audits. At the same time, the defendants were overstating same-store sales growth and failing to maintain adequate reserve estimates. As a result of defendants' fraudulent conduct, Hanger securities traded at artificially inflated prices above $40 per share during the class period. Ultimately, Hanger announced that it had greatly overstated its pre-tax income by understating its reserves, requiring it to restate its financial results. The disclosure of the truth caused Hanger's stock price to collapse in value and its stock to be delisted.

Last January, the district court dismissed the case on the grounds that a strong inference of scienter had not been sufficiently pled. Working with Robbins Geller attorneys, the Pension Fund went above and beyond in an effort to protect the retirement savings of its thousands of hard-working participants and the class that it represents by appealing the case to the Fifth Circuit. Following appellate briefing and oral argument, the court reversed the dismissal, concluding that the case "support[s] a strong inference of scienter" against Hanger and its CFO.

Robbins Geller appellate partner **Andrew Love**, who briefed and argued the appeal, stated: "We are pleased with the court's ruling and look forward to prosecuting the case on behalf of the Alaska Electrical Pension Fund." In addition to Love, Robbins Geller attorneys **Patrick J. Coughlin**, **Douglas R. Britton**, **Thomas E. Egler**, and **Carissa J. Dolan** obtained this result for investors.

Alaska Electrical Pension Fund v. Asar, No. 17-50162, Opinion (5th Cir. Aug. 6, 2018).

Board Diversity Developments

The Wall Street Journal reports:[1]

In the first five months of 2018, women accounted for 248, or 31%, of new board directors at the country's 3,000 biggest publicly traded companies, according to an analysis of corporate filings by ISS Analytics, the data arm of Institutional Shareholder Services. That is the highest percentage in at least a decade, and puts 2018 on track to be a record year for new female board members.

Shareholder pressure, along with the #MeToo movement, is fueling some of the momentum, board recruiters say. "Some [companies] are being dragged forward on this issue, and others are embracing it," said Julie Hembrock Daum, head of executive-recruitment firm Spencer Stuart's North American board practice.

Big investors such as State Street Global Advisors and BlackRock Inc. are urging companies to diversify their boards and, in some cases, voting against certain board members at firms with all-male boards.

One of those big investors is the New York City Pension Funds, led by Comptroller Scott Stringer. He announced in June 2018 that after less than a year, the groundbreaking "Boardroom Accountability Project 2.0" (BAP 2.0) campaign, an initiative that pushes for greater corporate board diversity and transparency reforms, has accomplished unprecedented engagement with more than half of the 151 major U.S. companies targeted.[2] The announcement reflects the growing momentum for greater transparency and diversity from often insular and homogeneous boardrooms.

Since last September, Comptroller Stringer and the NYC Funds have written to 151 public companies in the Funds' portfolios – 80% in the S&P 500 – calling for the disclosure of a board "matrix," a table describing the skills, gender, and race/ethnicity of individual directors on the board; and engagement with independent directors regarding "refreshment" opportunities to bring new voices and viewpoints into the boardroom. [3, 4]

Since then, over 85 companies have adopted improved processes and increased transparency regarding board quality, diversity, and refreshment. Over 35 companies are also now making unprecedented disclosure of not only the qualifications of their board members, but also details on boardroom gender and racial/ethnic diversity. In addition:

- Approximately 80% of the 151 targeted companies responded to the Comptroller's Boardroom Accountability Project 2.0 letters;
- Since September, the Comptroller's Office has substantively engaged with management teams at over 85 of the 151 companies targeted in the campaign, including dozens of directors;
- Since the launch of the BAP 2.0 in September, 49 targeted companies have elected 59 new directors who identify as a woman or person of color – including 44 women, 15 African Americans, 4 Hispanic Americans, and 2 Asian Americans;
- 24 companies have publicly committed to include women and people of color in the candidate pool for every board search going forward; and
- Over 25 companies provided meaningful disclosure about their annual board evaluation processes to ensure that their

[1] Vanessa Fuhrmans, *Women on Track to Gain Record Number of Board Seats*, Wall St. J., June 21, 2018, https://www.wsj.com/articles/women-on-track-to-gain-record-number-of-board-seats-1529573401.

[2] New York City Comptroller Scott Stringer, Press Release, *Comptroller Stringer, NYC Pension Funds Launch National Boardroom Accountability Campaign – Version 2.0* (Sept. 8, 2017), https://comptroller.nyc.gov/newsroom/press-releases/comptroller-stringer-nyc-pension-funds-launch-national-boardroom-accountability- project-campaign-version-2-0/.

[3] https://comptroller.nyc.gov/wp-content/uploads/2017/09/BAP-2.0-Focus-List.pdf.

[4] https://comptroller.nyc.gov/wp-content/uploads/2017/09/Example-Board-Matrix.pdf.

directors – individually and in the aggregate – remain of the highest quality and their boards are refreshed on an ongoing basis.

A group of top board leaders and other diversity advocates are challenging the continued barriers to board diversity with a new action plan, released by WomenCorporateDirectors (WCD), the largest organization of women board members globally. The Nominating & Governance Chair (N&G) Roundtable – composed of 18 male and female ethnically diverse board chairs, CEOs, and nominating and governance committee chairs – draws from companies ranging from Aetna and McDonald's to Alaska Air and Levi Strauss.[5] The N&G roundtable, which was sponsored by KPMG, met to address the persistent impediments to board diversity, even as investor groups have pushed for more women and other diverse directors around the boardroom table. The action plan:

1. Convene Nominating & Governance peer group exchanges focused on board diversity
2. Explore the value of a centralized database of diverse directors and board candidates
3. Architect a strategy to engage investor groups and alliance organizations
4. Develop a library/resource for Nominating & Governance committees
5. Benchmark and establish best-in-class individual board member performance assessments

Board Diversity in Goldman Sachs and JPMorgan

TheStreet Inc. published two recent articles by Bradley Keoun and Anders Keitz about the poor diversity records of Wall Street's most powerful firms.

The Goldman Sachs Board Remains Old Boys' Club Even as Rivals Promote Women:[6]

> Goldman Sachs Group Inc. is an old boys' club – in the boardroom.
>
> The Wall Street firm, which publicizes its efforts to promote women entrepreneurs around the world and hire more female professionals, has just two women on its 11-member board of directors. The percentage of female directors, at 18%, ranks the firm 358th in the Standard & Poor's 500 Index of large U.S. companies, according to an analysis by BoardEx, a relationship-mapping service of TheStreet Inc. The ratio also pales in comparison with that of some other big U.S. financial firms, including Wells Fargo & Co. at 42%, Bank of America Corp. at 33% and Citigroup Inc. at 31%.
>
> For a firm that prides itself on cutting-edge investing savvy, Goldman's record on boardroom gender diversity looks increasingly behind the times – potentially hurting its own shareholders, since a growing body of research has shown that boards with more women are better at decision-making and bring higher financial returns.

On JPMorgan's Board, Women Are Fewer Than a Few:[7]

> JPMorgan Chase & Co. Chairman and CEO Jamie Dimon talks a lot about promoting women's careers.
>
> He frequently touts the fact that half of the 10 executives on his senior most leadership team are women, and 50% of the largest U.S. bank's total employees are female. JPMorgan offers more than 20 support groups for female staffers, provides generous parental leave benefits and sponsors programs to encourage more women to choose technology-related careers.
>
> But it stops at the very top: On JPMorgan's board of directors, women are fewer than a few.
>
> Only two female candidates appear on the ballot for election to the 12-member board of directors at the company's annual shareholder meeting Tuesday. That works out to a 17% ratio, ranking in the bottom fourth of the Standard & Poor's 500 Index of large U.S. companies.

[5] http://www.womencorporatedirectors.org/WCD/Content/Nominating_and_Governance_Chair_Roundtable.aspx.

[6] Bradley Keoun & Anders Keitz, *The Goldman Sachs Board Remains Old Boys' Club Even as Rivals Promote Women*, The Street, May 1, 2018, https://www.thestreet.com/investing/as-companies-add-more-women-to-boards-goldman-sachs-keeps-a-pair-14574319.

[7] Bradley Keoun & Anders Keitz, *On JPMorgan's Board, Women Are Fewer Than a Few*, The Street, May 15, 2018, https://www.thestreet.com/investing/jpmorgan-ceo-dimons-advocacy-for- women-stops- at-board-of-directors-14588928.

One Step Forward, One Step Not Forward in Board Diversity

New York State Comptroller Thomas DiNapoli announced that the state pension fund will withhold votes for all-male boards.[8]

> "It is unconscionable that hundreds of publicly-held U.S. companies have no women directors," DiNapoli said. "We're putting all-male boardrooms on notice – diversify your boards to improve your performance. There is ample research that board diversity benefits companies. We will continue to urge our portfolio companies to adopt inclusive policies to diversify their boards, but we're also going to be speaking loudly with our board votes. We commend those companies that have agreed to improve their policies in an effort to diversify their boards."

TheStreet, Inc. notes that women are not just under-represented on corporate boards; they are even more under-represented in positions of authority and significance on those boards:[9]

> Among lead independent directors in the S&P 1500 in 2015, 57 were female compared with 539 who were men, according to the report, written by Yaron Nili, an assistant professor of law at the University of Wisconsin Law School. That was up from 28 women and 434 men acting as lead independent director in 2010.
>
> When it comes to having a leadership role performing the duties that make up much of a board's work, though, the evidence is less encouraging. Men outnumber women in leadership roles on all board committees by more than four to one, according to an analysis of data compiled by BoardEx, a relationship mapping service of TheStreet Inc.

NOTE: Asian boards are becoming more inclusive of women.[10]

[8] Office of the New York State Comptroller Thomas P. DiNapoli, *Press Release, DiNapoli: State Pension Fund Will Vote Against Board Members Corporations with No Women Directors* (Mar. 21, 2018), https://www.osc.state.ny.us/press/releases/mar18/032118.htm.

[9] Anders Keitz, *Women Are Gaining Seats Without Power on Corporate America's Boards*, The Street, Mar. 28, 2018, https://www.thestreet.com/story/14533100/1/women-are-gaining-seats-without-power-on-boards.html.

[10] Katrina Hamlin, *Breakingviews – Asia's boardrooms require critical mass of women*, Reuters, Mar. 7, 2018, https://www.reuters.com/article/us-boardroom-diversity breakingviews/breakingviews-asias-boardrooms-require-critical-mass-of-women-idUSKCN1GK0AF.

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

Susan K. Alexander
Aelish Marie Baig
Randall J. Baron
Nathan W. Bear
Richard A. Bennett
Spencer A. Burkholz
Mark J. Dearman
Michael J. Dowd
Paul J. Geller
Tor Gronborg
Dennis J. Herman
Steven M. Jodlowski
Andrew S. Love
David W. Mitchell
Danielle S. Myers
Willow E. Radcliffe
Darren J. Robbins
Samuel H. Rudman

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Robbins Geller Rudman & Dowd LLP is one of the world's leading complex litigation firms representing plaintiffs in securities fraud, antitrust, corporate mergers and acquisitions, consumer and insurance fraud, multi-district litigation, and whistleblower protection cases. With 200 lawyers in 10 offices, Robbins Geller has obtained many of the largest securities, antitrust, and consumer class action recoveries in history, recovering tens of billions of dollars for victims of fraud and corporate wrongdoing. Robbins Geller attorneys are consistently recognized by courts, professional organizations and the media as leading lawyers in their fields of practice. Please visit rgrdlaw.com for more information.

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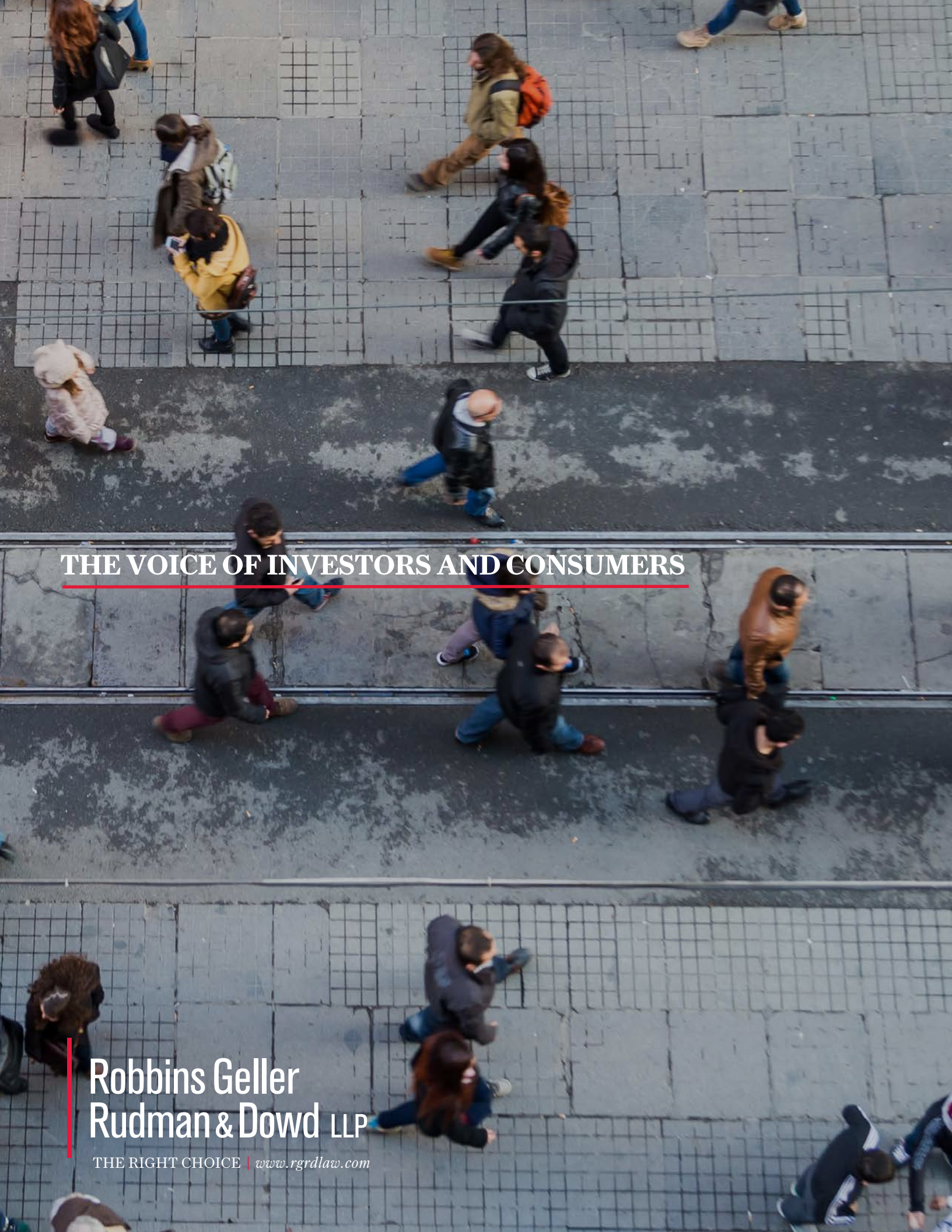
Washington, D.C.

Robbins Geller Rudman & Dowd LLP
1800-449-4900
0808-238-9902



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