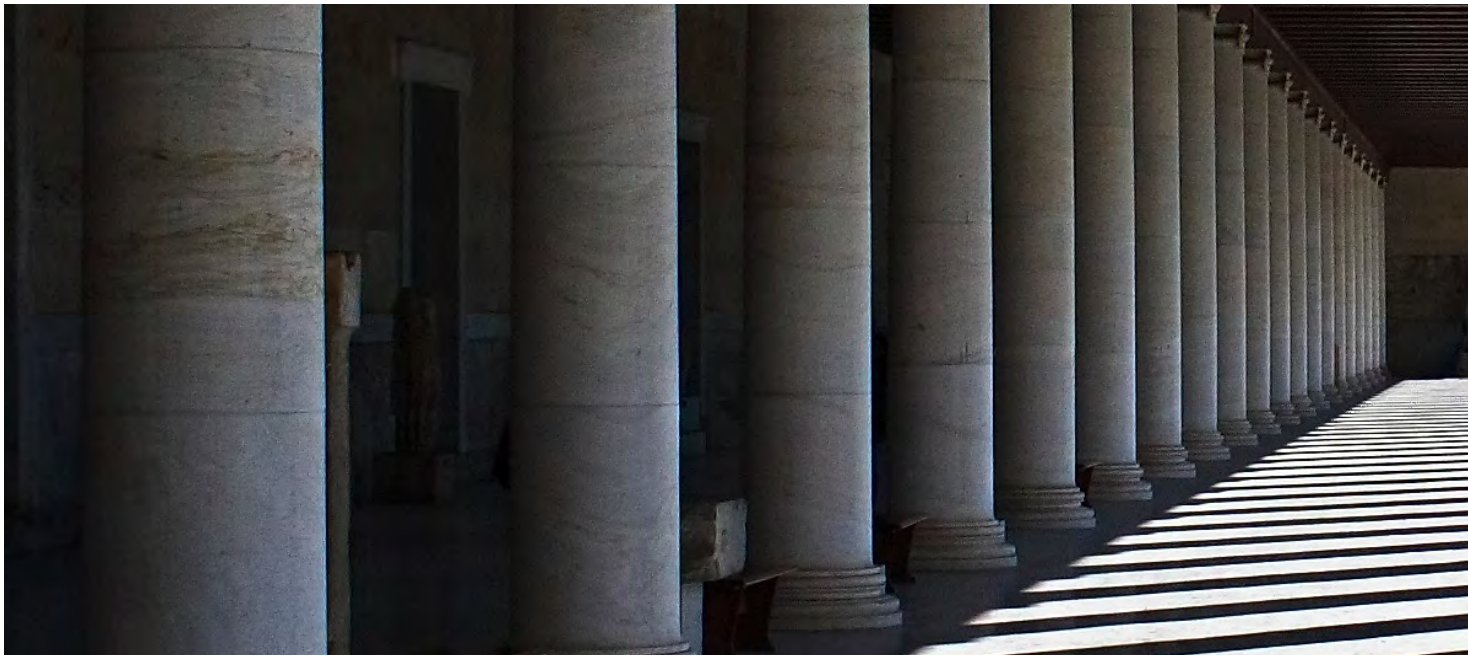
On the Record *with* Robbins Geller Rudman & Dowd LLP

SPRING 2019



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A Note from Samuel Rudman

Robbins Geller's recent successes – including last month's rare trial verdict in favor of plaintiffs in *Hsu v. Puma Biotechnology* – underscore our commitment to protecting our clients and the integrity of the financial markets.

In the *Puma Biotechnology* securities fraud class action, Robbins Geller attorneys represented lead plaintiff Norfolk County Council, as Administering Authority of the Norfolk Pension Fund, and a class of investors. The Robbins Geller team took the case to trial and obtained a verdict finding that defendants Puma Biotechnology, Inc. and its CEO, Alan H. Auerbach, committed securities fraud. Only the fifteenth securities class action case tried to a verdict since the Private Securities Litigation Reform Act was enacted in 1995, this rare victory awarded shareholders up to $100 million in damages.

The Firm also obtained preliminary approval of a record settlement of up to $6.26 billion in the *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, which arose out of alleged price fixing of "interchange fees" by Visa and Mastercard. This case is believed to be the largest antitrust class action settlement of all time.

We are proud to be able to continue to work with you to protect those who rely upon you from the adverse impact of fraudulent misconduct. Thank you for your trust and confidence.

Samuel Rudman, Managing Partner of Robbins Geller's New York offices.

Plaintiffs' Verdict Achieved in Puma Biotechnology, Inc. Securities Class Action Trial

Verdict Found Puma Biotechnology, Inc. and Its CEO Committed Securities Fraud and Awarded Shareholders Up to $100 Million in Damages

On February 4, 2019, a federal jury trial concluded with a verdict finding that defendants Puma Biotechnology, Inc. and its CEO, Alan H. Auerbach, committed securities fraud and awarded shareholders up to $100 million in damages. Robbins Geller represented a class of investors at trial, including lead plaintiff and class representative **Norfolk County Council, as Administering Authority of the Norfolk Pension Fund**. The case alleged that Puma's CEO committed securities fraud by falsely representing that Puma's lone product, a drug known scientifically as "neratinib" and later released commercially as Nerlynx, was twice as effective as it really was, which inflated Puma's stock price. The jury agreed, finding that Puma and Auerbach committed securities fraud by misrepresenting neratinib's effectiveness, and that defendants' fraud caused investors to pay an inflated price for Puma's stock. As a result of defendants' false statements regarding the effectiveness of neratinib, the jury found that Puma's common stock price was artificially inflated by $4.50 per share. The case, titled *Hsu v. Puma Biotechnology*, No. SACV15-0865, is pending in the U.S. District Court for the Central District of California before the Honorable Andrew J. Guilford.

"Any day we can hold bad actors responsible for investor losses is a good day," noted **Patrick J. Coughlin**, one of Robbins Geller's trial team members. The *Puma* case is only the fifteenth securities class action case tried to a verdict since the Private Securities Litigation Reform Act was enacted in 1995. "It's hard to overstate the significance of this verdict because it confirms that jurors and investors alike demand integrity from corporations and their executives," said **Jason A. Forge**, another member of the trial team.

"We are very proud of our trial team. It is gratifying to know that the jury has held Puma and its CEO accountable for their fraudulent misconduct," noted **Darren J. Robbins**. While trials in shareholder class actions are rare, Robbins Geller has tried nine shareholder class action cases including the success in *Puma*. Robbins Geller's *Puma* trial team included **Patrick J. Coughlin, Jason A. Forge**, **Tor Gronborg**, **Trig Smith**, **Susannah R. Conn**, **J. Marco Janoski Gray**, **Debashish Bakshi**, **Ting H. Liu**, and **Grace Cho**.

Hsu v. Puma Biotechnology, No. SACV15-0865 (C.D. Cal.).

Corporate Governance Roundup

Board Diversity

The C$368.3 billion Canadian Pension Plan Investment Board will vote against the chair responsible for director nominations at the public companies it invests in if the board has no women directors.[1]

Also on board diversity:

> Search firm Heidrick & Struggles has announced that on an annual basis at least half of its cumulative slate of initial board candidates presented to clients will be diverse, reaffirming a commitment to promoting diversity in board of director searches globally. Developed in collaboration with Stanford's Rock Center for Corporate Governance, Heidrick & Struggles' pledge is designed to increase the number of women and members of underrepresented groups considered by boards.
>
> "Now is the time to make public what we have been driving as a firm globally," said Krishnan Rajagopalan, President and CEO, Heidrick & Struggles. "Today, we are making a pledge to our clients, candidates and employees: we commit that a minimum of half of the initial board candidates presented to clients globally on an annual basis will be diverse." To accelerate this effort, the firm will proactively identify and interview diverse director candidates, with an emphasis on prospective directors who have not previously served on a corporate board. Each year, the firm will measure results and seek new ways to broaden and enhance global diversity efforts across each board search.[2]

Political Contributions

One of the most respected voices in corporate governance, Leo Strine (Chief Justice of the Delaware Supreme Court), wrote an important piece about the failure of shareholders to exercise oversight of corporate political contributions:

> In recent years, there has been a heartening improvement in the self-awareness of the major mutual fund families – BlackRock, Vanguard, State Street, and Fidelity (the "Big 4") – that have Worker Investors' capital. This Big 4 has grown enormously because of the legal pressures that generate capital inflows to them every month from Worker Investors. To their credit, the Big 4 recognize that they have a duty to think and act in a way aligned with the interests of Worker Investors by encouraging the public companies in which they invest to implement business plans that will generate sound long-term growth. In fact, the Big 4 have recently recognized that unless public companies act in a manner that is environmentally, ethically, and legally responsible, they are unlikely to be successful in the long run. Thus, the Big 4 are more willing than ever to second-guess company management to fulfill their fiduciary duties.
>
> In one area, however, the Big 4 continue to have a fiduciary blind spot: they let corporate management spend the Worker Investors' entrusted capital for political purposes without constraint. The Big 4 abdicate in the area of political spending because they know that they do not have Worker Investors' capital for political reasons and because the funds do not have legitimacy to speak for them politically. But mutual funds do not invest in public companies for political reasons, and public company management has no legitimacy to use corporate funds for political expression either. Thus, a "double legitimacy" problem infects corporate political spending.[3]

Buybacks

Buybacks hit a record $1.1 trillion this year. Bob Pisani of CNBC notes:[4]

> It's sad but true. Companies are obsessed with controlling earnings per share, which is the key to maintaining higher stock valuations. It is easier to control earnings per share by purchasing stock, and companies get addicted to that process. Buying back

1. https://www.ai-cio.com/news/canadian-pension-steps-gender-board-diversity-advocacy/
2. https://valueedgeadvisors.com/2018/11/05/heidrick-struggles-takes-action-with-board-diversity-pledge-globally/
3. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304611
4. https://www.cnbc.com/2018/12/18/stock-buybacks-hit-a-record-1point1-trillion-and-the-years-not-over.html

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stock often provides an incremental boost to earnings per share growth, and when companies stop doing that, accomplishing that goal becomes more challenging.

So the critics of corporate buybacks and dividend raises are correct. It is a form of financial engineering that does not do anything to improve business operations or fundamentals.

It also plays into the hands of the people who were critical of the tax cuts, arguing that obsessing over ways to boost stock prices helps the investing class but not the average American.

We note that many of these purchases occurred at a market high. And that it is almost unheard of for a compensation committee to adjust EPS targets to reflect the reduction in outstanding shares and that CEOs often sell into the buyback, both misaligning incentives. And there is some evidence that short-term gains from buybacks have more appeal to CEOs than investment in operations/employees/innovation (another way of looking at misaligned incentives).[5] ValueEdge Advisors Vice Chair Nell Minow was quoted in a *Wall Street Journal* article about "The Investment That Cost Apple $9 Billion in 2018," the buyback program.

"If they made an acquisition that decreased in value this much, people would be up in arms," said Nell Minow, vice chairwoman of ValueEdge Advisors, a corporate-governance consulting firm. "They have one job, and that is to make good use of capital."[6]

Corporate Directors: NACD Survey Results

The National Association of Corporate Directors has announced the results of its latest survey on corporate governance.[7] It shows that while some progress is reported, boards still lag on shareholder priorities like diversity, ESG, cyber-risk, and board "fitness for purpose."

Stilpon Nestor, Managing Director of Nestor Advisors Ltd. and Chairman of Aktis Ltd., made the following predictions in his keynote speech on the Future of Corporate Governance at the Nominee Directors Day of the Deutsche Investitions-und Entwicklungsgesellschaft (KfW DEG) in Cologne on September 28, 2018:[8]

• Diversity at every level and of every kind will continue to grow.

• Private companies will increasingly have outsiders on boards, who in many cases will be "professional" challengers, instead of lapdogs.

• Stakeholders will figure frequently on board agendas – and on boards themselves, possibly as a result of regulatory changes.

• While public company disclosures in the OECD might be streamlined…

• …private company boards will become more demanding on regular disclosures, and so will their shareholders.

• A more holistic view of the firm will emerge through systematic cultural audits.

• Diversity, disclosure, and interactions between principal and their agents, as well as stakeholders will increasingly require high quality governance data which will increase demand for data platforms at every level.

• The DFIs' [Development Financial Institutions] weight in the EM [Emerging Markets] governance area will continue to increase; they will become an important source of demand for diversity, disclosure and data thus becoming themselves an important driver of change.

SpencerStuart Board Index

The 2018 SpencerStuart Board Index has been released. Some of the highlights include:[9]

• S&P 500 boards appointed 428 new directors during the 2018 proxy year, the most since 2004 and an increase of 8% from 2017.

• Fifty-seven percent (57%) of boards added at least one new director. Nearly two-thirds (65%) of the incoming class come from outside the most senior board and company leadership roles.

• Only 35.5% of the new directors are CEO-level – active or retired CEOs, chairs, vice chairs, presidents or COOs – down from 47% a decade ago.

• Forty-five percent (45%) of CEOs of S&P 500 companies are serving on one or more outside boards.

• Reversing a decade-long decline, 56% of the incoming class are actively employed.

5. https://www2.deloitte.com/insights/us/en/economy/behind-the-numbers/corporate-share-buybacks-business-investment.html
6. https://www.wsj.com/articles/the-investment-that-cost-apple-9-billion-in-2018-11545925184
7. https://www.nacdonline.org/files/2018%E2%80%932019%20NACD%20Public%20Company%20Governance%20Survey%20Key%20Findings.pdf
8. https://corpgov.law.harvard.edu/2018/12/26/corporate-governance-2030-thoughts-on-the-future-of-corporate-governance/
9. https://www.spencerstuart.com/-/media/2018/october/ssbi_2018.pdf

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• First-time directors represent 33% of the incoming class of S&P 500 directors. They are younger than their experienced peers and more likely to be actively employed (64% versus 53%).

• More than a quarter (25.5%) of the incoming directors are financial experts, up from 18% in 2008. Eleven percent (11%) – nearly half of the financial professionals – are experienced CFOs/financial executives. Directors with investing/investment management skills are increasingly joining S&P 500 boards. Ten percent (10%) of new directors bring an investor lens to the boardroom, up from 4% a decade ago.

• Seventeen percent (17%) of the incoming class are age 50 and younger, up slightly from 16% last year. Nearly two-thirds of the next-gen directors are serving on their first public company board. More than half (53%) are women.

• Progress in boardroom diversity is mixed. For the second consecutive year, women and minorities represent half of the class of new S&P 500 directors. Women represent a record-breaking 40% of the incoming class (up from 36% in 2017). Minority women are 9% of the new directors, up from 6% last year. But minority men (defined as African-American, Hispanic/Latino or Asian) represent just 10% of the incoming class, down from 14% last year.

• Annual assessments have become the norm for boards, and 98% of S&P 500 companies in our index reported conducting a board assessment over the past year. Only 38% – largely unchanged from 37% last year and 33% five years ago – report some form of individual director evaluations.

• Half of S&P 500 boards split the chair and CEO roles, up from 39% a decade ago: 30.5% of boards have an independent board chair and 80% report having an independent lead or presiding director.

Activism and Engagement

In Australia:

• Following a 46.3% vote in favor of a shareholder resolution about political lobbying, Origin Energy agreed to fully disclose its membership of industry organizations, such as the Business Council of Australia, and where their policies differ on climate change.

• Shareholders of Whitehaven Coal voted in favor of a resolution calling on the company to comply with the provisions of the Paris climate accords. Shareholders also opposed the CEO pay plan and called on the chairman to reduce his outside obligations.

• Telstra is considering an overhaul of how it calculates executive bonuses after suffering a first strike from shareholders opposed to its remuneration report. More than 60% of investors voted against the company's remuneration report at the annual general meeting.

In the U.S.:

A bid by Goldman Sachs Group Inc. to settle a lawsuit over how much it pays directors was rejected by a judge who said that simply making changes in corporate governance didn't provide enough benefit to the firm. The lawsuit charged that a stock incentive plan for executives and directors was not sufficiently disclosed. The settlement terms involved no payments to shareholders, just an agreement to hire a consultant to review the pay of outside directors and additional disclosures, including an acknowledgement that Goldman Sachs directors are among the highest paid in the country. The objections to the settlement terms came from Fordham University law professor Sean Griffith, who said that the suit had "potentially-meritorious monetary causes of action" that were being extinguished without proper benefits in exchange.

Annual PWC Directors Survey

The annual PWC survey of corporate board members once again shows a gap between what directors say and what they do, and between what shareholders and directors think is important.[10]

More than 800 U.S. board directors responded to the questions, and there were meaningful increases of 7%-10% in the number of directors saying issues like health care availability, human rights, and income inequality should be critically considered when forming company strategy. With recent corporate scandals bringing national attention to corporate culture, 87% of respondents acknowledged that the tone set by the executive team contributes to problems with company culture. However, 79% pointed to the tone set by middle management as a driver for negative workplace behavior. Board members were better at identifying problems than fixing them. A remarkable 45% said that at least one of their fellow directors should not be on the board. And boards have done better in discussing cybersecurity (84%), but most have not done much to test their responsiveness (only 34% have) or even issue a written policy (only 47% have).

10. https://www.pwc.com/us/en/governance-insights-center/annual-corporate-directors-survey/assets/pwc-annual-corporate-directors-survey-2018.pdf

Recent Developments in Global Securities Litigation

The last year witnessed many significant developments in securities litigation outside of the United States. This article summarizes some of the most important developments, particularly in Germany, Australia, and the Netherlands. Because the rules vary among jurisdictions, and those rules are frequently in flux, this article also provides guidance as to how institutional investors can monitor securities litigation outside of the United States, taking a long-term view to ensure that recoveries are maximized and pitfalls are avoided.

Germany

Currently, Germany is home to separate group litigation against both Porsche and Volkswagen seeking recoveries for investment losses from the "dieselgate" scandal. That scandal was revealed in September 2015, when the United States Environmental Protection Agency found that Volkswagen had intentionally programmed smaller diesel engines to activate their emissions controls only during laboratory emissions testing. This allowed the vehicles' NOx output to meet U.S. standards during regulatory testing, but those vehicles emitted up to 40 times more NOx in real-world driving. Volkswagen deployed this "defeat device" in about 11 million cars worldwide, including 500,000 in the United States, for model years 2009 through 2015.

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Additionally, VW engineered larger diesel engines such that they only met the legal emission requirements in a "temperature conditioning" mode that was automatically switched on during testing conditions; at all other times, including normal vehicle operation, the vehicles operated in a "normal mode" that permitted NOx emissions of up to nine times the federal standard. Volkswagen deployed this "defeat device" on 85,000 3.0 liter diesel vehicles sold in the United States since 2009, including Volkswagen, Porsche, and Audi's larger SUVs.

The group litigations against Porsche and separately against Volkswagen operate under the KapMuG procedure in Germany. Generally, under the KapMuG, the court appoints a "model claimant" to actively litigate the claims common to the entire group. The KapMuG can be invoked when at least 10 claimants allege damages from the same or similar facts pertaining to the financial markets. It can also be invoked by a defendant who is facing multiple claimants.

However, in marked contrast to a class action in the United States, the KapMuG procedure is opt-in and requires advance registration to participate in any eventual settlement. Further, once a KapMuG is declared, investors have only a six-month window to formally register their claim. Thus, investors must be aware of the opportunity, receive timely advice from a trusted legal advisor, and then take action – all while under time pressure.

Additionally, because lawyers in Germany may not operate under a contingent fee basis, investors often must also consider the terms of a third-party funding agreement, further complicating matters and often resulting in a lower recovery because of the fees sought by the litigation funder. Indeed, Robbins Geller was aware of at least seven separate proposals for investors to participate in the Volkswagen or Porsche KapMuGs. All but one of those proposals included a third-party litigation funder – Robbins Geller is the only firm that could pursue the claims without requiring external funding. By operating without third-

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party funding, Robbins Geller enabled its clients to entirely avoid not just the effort of analyzing a funding proposal – including determining what the fee might be, performing due diligence on the funders and their sufficiency, finding out whether/when the funder could cease funding, etc. – but likewise avoid any exposure to any of the pitfalls of third-party litigation funding, such as loss of control, obligation to cover cost-shifting, and no role in selection or change of counsel, to name but a few.

Hearings in the Volkswagen KapMuG began in September 2018 in the Upper Regional Court of Braunschweig. The German investment firm Deka Investment GmbH, having been appointed as the model claimant, led the proceedings. The court made certain findings, including that the fraud dates back to at least July 2012, and perhaps as far back as June 2008. Additionally, in finding that the fraud could reach back to 2008, the court observed that it was effectively Volkswagen's burden to demonstrate why Volkswagen was not grossly negligent in either being aware of the risks of the "defeat devices" (and failing to make timely announcements to investors), or in being unaware of the risks.

In the separate procedure against Porsche, the Higher Regional Court of Stuttgart has not yet declared a KapMuG nor has it appointed a model claimant. Nevertheless, the Regional Court of Stuttgart found that Porsche failed in its obligations to inform investors about the risks of the "defeat devices" in 2014, and ordered damages for Robbins Geller clients.

Australia

Historically, despite a United States-style opt-out class action procedure, securities litigation in Australia has largely proceeded on an opt-in basis, with "closed" class actions. This was due to the inability of Australian lawyers to work on a contingent fee basis, and the presence of third-party litigation funders who did not want "free riders" to benefit from the litigation without compensating the funders. The result was an environment where only those investors who agreed to pay the fee of the third-party litigation funder were allowed to join the action. The courts enforced this process by issuing an order for a "closed" class action.

That practice began to dramatically change in 2018, as multiple firms competed for the opportunity to lead multiple securities litigations and the Australian courts began to issue common fund orders for "open" class actions. An "open" class action in Australia is one that adheres to the opt-out class action procedure. An "open" class action is largely enabled by the issuance of a common fund order, which states that the third-party litigation funder is entitled to take its court-approved fee from the total recovery of the class, rather than only from class members who executed a funding agreement. The issuance of a common fund order eliminates the third-party litigation funders' fear of paying for "free riders." The Australian courts first endorsed common fund orders in a case against QBE Insurance Group.

In January 2018, Australian media reported issues with customer contracts and forecasts of a local logistics software company, GetSwift, which resulted in a trading halt for its shares. When the halt was lifted, GetSwift shares dropped 82%. In response, three competing class actions were filed in Australian federal court.

In a lengthy judgment issued in May 2018, the court first determined that the common focus of the competing class actions was to obtain the greatest return to class members. With that in mind as the stated goal, the court then analyzed each of the class actions' respective funding models.

Ultimately, the court selected a two-tier funding model (over a simple percentage commission) based on linking the amount ventured with the likely return, to align the funder's risk with their reward. Additionally, the court was intrigued by measures to control costs that included additional court oversight. The court did not place much weight on many other factors, because they were largely equal among the competing class actions, or because they were of less consequence. Notably, the court took a dim view of the competitors' efforts to sign up clients or "book build" because that served no beneficial purpose when a common fund order, which would apply to all class members, was being sought. The court then permanently stayed the other two competing class actions.

As was expected, the lawyers and third-party funders from each of the two class actions that were permanently stayed appealed the decision to the Full Federal Court of Australia. In November 2018, the Full Federal Court issued an order approving the selection process utilized in the May 2018 judgment, although it did state that there are other case management options for dealing with competing class actions. Nevertheless, this process of selecting one class action to proceed while permanently staying the others has now been utilized in

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multiple instances, including class action litigations against financial services company AMP Limited and mining company BHP. Indeed, the Australian Law Reform Commission recently proposed in its Final Report that only open class actions should be permitted, and as a default position, only one class action should be allowed, unless efficiency or the interests of justice require more.

The Netherlands

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 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. 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 and compensation arrangements, fees and costs incurred, and whether those were reasonable.

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.

However, rather than celebrating this groundbreaking achievement, many of the parties involved claimed the *Fortis* settlement will discourage Dutch securities litigation in the future. Part of their rationale is that under the WCAM, shareholders can't sue for collective damages – they can only bring class-action-like declaratory judgment claims. But the WCAM allows a corporate defendant to enter global, opt-out shareholder damages settlements with special Dutch foundations called Stichtings. In other words, the WCAM doesn't allow shareholders to litigate collectively for damages but does allow them to settle collectively.

The problem, according to the parties, is the *Fortis* Court's insistence on equal treatment for "active" and "passive" claimants in the case of a settlement. In their view, the *Fortis* ruling effectively tells "active" claimants not to bother with the time and expense of forming or joining a Dutch Stichting seeking a global settlement, because the Dutch courts won't reward them for that effort with a premium on their recovery – they will get the same *pro rata* recovery as "passive" claimants.

Of course, that is just one interpretation of the *Fortis* settlement. Multiple Dutch lawyers have stated that the *Fortis* settlement didn't change Dutch Stichting lawyers' ability to ask for fees based on the global recovery, but rather simply demanded that the fee arrangement be disclosed. For obvious reasons, having to disclose their fees (at least one obtained $40 million from *Fortis*) is likely to make third-party litigation funders complain. But it is worth noting that the practice matches exactly what happens when a securities class action is settled in the United States – the fees are disclosed. Further, equalizing the *pro rata* recovery of "active" and "passive" claimants is likewise an exact match to what happens when a securities class action is settled in the United States.

Supreme Court Tracker: Five Securities Cases Under Review

The U.S. Supreme Court is currently considering a wide range of issues in securities cases that are likely to impact investors' ability to recover for losses caused by corporate wrongdoing. Specifically, the cases currently being considered by the Supreme Court involve: who can be held liable for participating in a scheme to defraud investors; the showing required to prove loss causation; investors' ability to assert claims when American Depositary Receipts ("ADRs") are purchased in the United States; the ability to assert claims arising out of materially misleading tender offer statements without alleging intentional conduct; and whether defendants are required to update a statement of historical fact that was accurate when made, but subsequently becomes inaccurate due to additional information or circumstances.

• *Lorenzo v. SEC,* No. 17-1077

At issue in *Lorenzo* is who can be held liable under §10(b) of the Securities Exchange Act of 1934 ("Exchange Act") for participating in a fraudulent scheme. The underlying case involves allegations that a securities broker sent emails to clients that included false statements written by the broker's supervisor. The D.C. Circuit held that while the broker could not be held liable for making a false statement under §10(b), the broker could be held liable under a theory of scheme liability because the broker helped produce and distribute the emails.

By way of background, §10(b) prohibits two types of misconduct in connection with the purchase or sale of securities: fraudulent *statements* and fraudulent *schemes*.[1] In *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), the Supreme Court considered the elements of a fraudulent statement claim and held that only the "maker" of a fraudulent statement may be held liable for that misstatement under §10(b).

In *Lorenzo*, the petitioner's question presented is whether the D.C. Circuit erred in concluding a misstatement claim that does not meet the elements set forth in *Janus* can nonetheless be pursued as a fraudulent *scheme* claim under §10(b).[2] The SEC's question presented is whether a person who knowingly disseminates false or misleading statements in connection with a securities transaction can be found to have violated §10(b) even if the person does not "make" a false or misleading statement.[3]

The four justices who dissented from

1. *See* 15 U.S.C. §78j(b).
2. *See* Brief for Petitioner, *available at* https://www.supremecourt.gov/DocketPDF/17/17-1077/60038/20180820140401235_17-1077%20ts--PDFA.pdf.
3. *See* Brief for the Respondent, *available at* https://www.supremecourt.gov/DocketPDF/17/17-1077/66089/20181005171520730_17-1077bsUnitedStates.pdf.

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the *Janus* decision (Ginsburg, Breyer, Sotomayor, and Kagan) are still on the Court. During the December 3, 2018 argument, Justice Alito asked the broker's counsel why sending emails with false statements did not "fall squarely within the language" of the statute. The Supreme Court should issue a decision in *Lorenzo* by June 2019. [4]

• ***First Solar, Inc. v. Mineworkers' Pension Scheme,* No. 18-164**

In *First Solar*, the Supreme Court is considering whether to grant defendants' Petition for a Writ of Certiorari regarding the correct test for loss causation, an element of a §10(b) fraud claim. In deciding whether to grant defendants permission to appeal, the Supreme Court has invited the U.S. Solicitor General to file a brief expressing the views of the United States on the questions presented. Defendants' question presented is whether a private securities-fraud plaintiff may establish the critical element of loss causation based on a decline in the market price of a security even if the event or disclosure that triggered the decline did not identify the fraud on which the plaintiff's claim is based.[5] Plaintiffs' question presented is whether the "causal connection between the material misrepresentation and the loss" in securities fraud actions must conform to a particular pattern or may be dependent on fact-specific context.[6]

The underlying case alleges that First Solar discovered a manufacturing defect causing field power loss and a design defect that caused its solar panels to suffer power loss in hot climates. Plaintiffs allege that First Solar wrongfully concealed these defects, misrepresented the cost and scope of the defects, and reported false information on its financial statements. For example, while defendants internally described the problem as "'a rather serious quality problem'" that is "'[b]ad, bad bad, bad, bad'" and one of "'the biggest smoking gun[s] we have at the company,'" a First Solar executive told investors one week after one of these admissions that "'our track [record] of field performance and our knowledge of field performance allows us to have fairly high confidence that our product is delivering in the field.'"[7]

In considering defendants' summary judgment motion as to loss causation, the district court applied the following loss causation test: "'A plaintiff can satisfy loss causation by showing that "the defendant misrepresented or omitted the *very* facts that were a substantial factor in causing the plaintiff's economic loss."'"[8] In affirming the district court's application of the correct test for loss causation, the Ninth Circuit held that the loss causation inquiry – "proving that the act or omission of the defendant . . . caused the loss for which the plaintiff seeks to recover damages" (15 U.S.C. §78u-4(b)(4)) – "requires no more than the familiar test for proximate cause."[9] The Ninth Circuit further reiterated that "'[d]isclosure of the fraud is not a sine qua non of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss.'"[10]

The Solicitor General's opinion is expected this spring. The lead plaintiffs in *First Solar* are **Mineworkers' Pension Scheme** and **British Coal Staff Superannuation Scheme**. Robbins Geller Rudman & Dowd LLP is lead counsel.

• ***Toshiba Corp. v. Automotive Industries Pension Trust Fund,* No. 18-486**

In *Toshiba*, the Supreme Court is considering whether to grant defendants' Petition for a Writ of Certiorari regarding the nature of domestic transactions in securities required to invoke the protections of the U.S. securities laws as outlined in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). As in *First Solar*, the Supreme Court has invited the U.S. Solicitor General to file a brief expressing the views of the United States on the questions presented. In addition, about half a dozen amicus curiae (friend of the court) briefs have been filed by various interested parties.

By way of background, the Supreme Court held in *Morrison* that the anti-fraud provisions of §10(b) of the Exchange Act do not apply extraterritorially. Rather, the statute only prohibits misconduct in connection with "the purchase or sale of a security listed on an American stock exchange" or "the purchase or sale of any other security in the United States." *Id.* at 273.

The underlying case in *Toshiba* alleges that over the course of nine months in 2015, Toshiba made a series of disclosures that revealed a massive, multi-year accounting fraud at the company which Toshiba's own internal investigation concluded was "carried out . . . in an institutional manner." After Toshiba's internal investigation and an outside investigation by an Independent Investigation Committee, Toshiba made a formal restatement of more than six years of reported financial results that eliminated approximately one-third ($2.6 billion) of the profits Toshiba had reported between 2008 and 2014. The investigations also led to a $1.3 billion writedown of goodwill at Toshiba's U.S. nuclear business, Westinghouse Electric Co., and the termination of nine Toshiba senior executives. Following

4. Justice Kavanaugh is recused in this case as he dissented from the D.C. Circuit's decision when it was issued.
5. *See* Defendants' Petition for a Writ of Certiorari, *available at* https://www.supremecourt.gov/DocketPDF/18/18-164/58554/20180806145630671_No.%2018-__%20First%20Solar%20Cert%20Petition.pdf.
6. *See* Plaintiffs' Brief in Opposition, *available at* https://www.supremecourt.gov/DocketPDF/18/18-164/62728/20180905140300594_Mineworkers%20Pension%20Scheme%20Br.%20in%20Opp.%20--%20No.%2018-164.pdf.
7. *See Smilovits v. First Solar Inc.*, 119 F. Supp. 3d 978, 1001-02 (D. Ariz. 2015) (citations omitted), *aff'd sub nom. Mineworkers Pension Scheme v. First Solar Inc.*, 881 F.3d 750 (9th Cir. 2018).
8. *See id.* at 989 (citation omitted).
9. *See Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 753 (9th Cir. 2018) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005)).
10. *Id.* (citation omitted).

the disclosure of the fraud, the price of Toshiba's securities – and the ADRs that move in tandem with that price – dropped by more than 40%.

The complaint alleges that defendants made false and misleading statements and omissions in violation of the Exchange Act and the Financial Instruments and Exchange Act of Japan, and is brought on behalf of a class of U.S. investors, including purchasers of ADRs on the over-the-counter ("OTC") market and Toshiba common stock on the Tokyo exchange. The district court dismissed the case with prejudice on the grounds that the OTC market by which ADRs are sold was not a "national exchange" within the meaning of *Morrison*, and that there was not any domestic transaction between ADR purchasers and Toshiba. Having dismissed the Exchange Act claims, the district court dismissed the Japanese law claim on the basis of comity and forum non conveniens.

On appeal, the Ninth Circuit first held that "Toshiba ADRs fit comfortably within the Exchange Act's definition of 'security.'"[11] And, while the Ninth Circuit determined that the OTC market was not an "exchange" as the Exchange Act defines the term, U.S. investors' purchase of ADRs on the OTC qualified as "domestic transactions in other securities" – the second *Morrison* prong. As such, the Ninth Circuit reversed the district court's decision, remanding with leave to amend the complaint.

Defendants' question presented is whether the Exchange Act applies, without exception, whenever a claim is based on a domestic transaction, or whether in certain circumstances the Exchange Act does not apply, despite the claim being based on a domestic transaction, because other aspects of the claim make it impermissibly extraterritorial.[12] Plaintiffs' question presented is whether the Exchange Act protects all domestic securities transactions from fraud, or instead, is subject to an undefined exception where the conduct or effects of fraud affecting a domestic transaction are "insufficiently" domestic.[13]

The Solicitor General's opinion is expected this spring. The lead plaintiff in *Toshiba* is the **Automotive Industries Pension Trust Fund**. Robbins Geller Rudman & Dowd LLP is lead counsel.

• ***Emulex Corp. v. Varjabedian,* No. 18-459**

In *Emulex*, the Supreme Court is considering whether to grant defendants' Petition for a Writ of Certiorari regarding the level of culpability required (negligence or scienter) to state a claim pursuant to §14(e) of the Exchange Act challenging false statements and omissions in connection with a tender offer, and whether §14(e) contains a private right of action at all (*i.e.*, whether only the SEC may sue for violations, or whether private investors may also sue for damages). Unlike *First Solar* and *Toshiba*, the Supreme Court has already granted the petition, and merits briefing will occur in 2019.

The underlying case arises from a merger between Emulex Corporation and Avago Technologies Wireless (USA) Manufacturing Inc. in which defendants allegedly issued a materially false and misleading statement to obtain the requisite number of shares tendered. Specifically, the complaint alleged that the fairness opinion issued by Goldman Sachs opined that the merger was fair from a financial perspective despite a below-average premium. The complaint also alleges that the $8.00 per share price offered was inadequate given Emulex's significant growth leading up to the tender offer and the company's prospects for future growth.

In dismissing the complaint, the district court held that §14(e) requires a showing of scienter (or intentional conduct), which was insufficiently alleged. On appeal, the Ninth Circuit reversed, holding that "because the text of the first clause of Section 14(e) is devoid of any suggestion that scienter is required, we conclude that the first clause of Section 14(e) requires a showing of only negligence, not scienter."[14]

Defendants' question presented is whether §14(e) of the Exchange Act supports an implied private right of action based on a negligent misstatement or omission made in connection with a tender offer.[15] Plaintiffs' question presented is whether an action solely premised on an untrue or misleading statement that is not predicated on fraudulent or deceptive conduct requires scienter.[16] Plaintiffs also caution that defendants' second question – the private right of action – was not addressed in the lower courts and should not be reviewed for the first time in the Supreme Court; in fact, defendants conceded a private right of action existed in the underlying case and therefore the question is waived.

The defendants in *Emulex* urged the Supreme Court to grant review – which it did – to resolve the split between the Ninth Circuit's negligence standard and five other circuit courts' scienter standard. Briefing will continue in 2019.

• ***Hagan v. Khoja (Orexigen Therapeutics, Inc.),* No. 18-1010**

In *Hagan*, the Supreme Court is considering whether to grant defendants' Petition for a Writ of Certiorari regarding whether corporate issuers have a duty to update under SEC Rule 10b-5(b). This petition for permission to appeal is in its

11. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 940 (9th Cir. 2018).
12. *See* Defendants' Petition for a Writ of Certiorari, *available at* https://www.supremecourt.gov/DocketPDF/18/18-486/66908/20181015160510195_2018-10-15%20-%20Toshiba_s%20Petition%20for%20Writ%20of%20Cert..pdf.
13. *See* Plaintiffs' Brief in Opposition, *available at* https://www.supremecourt.gov/DocketPDF/18/18-486/74994/20181212162345822_Brf.%20in%20Opp.pdf.
14. *Varjabedian v. Emulex Corp.*, 888 F.3d 399 (9th Cir. 2018), *cert. granted*, No. 18-459, 2019 WL 98542 (U.S. Jan. 4, 2019).
15. *See* Defendants' Petition for a Writ of Certiorari, *available at* https://www.supremecourt.gov/DocketPDF/18/18-459/66537/20181011123513447_2018-10-11%20Emulex%20cert%20petition%20and%20appendix.pdf.
16. *See* Plaintiffs' Brief in Opposition, *available at* https://www.supremecourt.gov/DocketPDF/18/18-459/73706/20181130110037037_varjabedian%20--%20brief%20in%20opposition%20--%20FILED.pdf.

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infancy, with only defendants' petition having been filed; the response was due March 6, 2019.

Defendants' petition suggests there is a circuit split on whether the federal securities laws impose a duty on corporate issuers to update a statement that was accurate when made but later became misleading because of subsequent events, with the Seventh Circuit rejecting any duty to update, the First, Second, Third, Fifth, and Eleventh Circuits recognizing a duty to update exists in certain circumstances, and the Ninth Circuit supposedly "creat[ing] a duty to update an accurate statement of historical fact when the 'value' or 'weight' of that statement has been 'diminished' by subsequent events."[17] Defendants' question presented is: "Whether the Court should resolve the current circuit split regarding a corporate issuer's duty to update under Securities and Exchange Commission Rule 10b-5(b) and find that the Ninth Circuit erred by imposing such a duty to a statement of historical fact that was accurate when made, where the 'value' or 'weight' of that prior statement was later 'diminished' by subsequent events."[18]

Each of these decisions could significantly impact investors' ability to hold wrongdoers accountable for violations of the federal securities laws.

Considering the four most recent Supreme Court decisions concerning securities litigation have been decided by a varying mix of justices, it is difficult to predict the outcome of any of these five current cases (assuming certiorari is ultimately granted):

Case	Holding	Justices Joining Majority Opinion	Concurring Justice(s)	Dissenting Justice(s)
China Agritech, Inc. v. Resh, No. 17-432, 138 S. Ct. 1800 (2018)	Upon denial of class certification, a putative class member may not commence a class action anew beyond the time allowed by the applicable statute of limitations.	Ginsburg, Roberts, Kennedy, Thomas, Breyer, Alito, Kagan, Gorsuch	Sotomayor	n/a
Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, No. 15-1439, 138 S. Ct. 1061 (2018)	Securities Litigation Uniform Standards Act of 1998 ("SLUSA") did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions brought under the Securities Act of 1933 ("1933 Act").	Unanimous (Kagan)	n/a	n/a
CalPERS v. ANZ Sec., Inc., No. 16-373, 137 S. Ct. 2042 (2017)	The 1933 Act's three-year time bar is a statute of repose that is not tolled by *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).	Kennedy, Roberts, Thomas, Alito, Gorsuch	n/a	Ginsburg, Breyer, Sotomayor, Kagan
Omnicare, Inc. v. Laborers Dist. Council Constr. Ind. Pension Fund, No. 13-435, 135 S. Ct. 1318 (2015)	A statement of opinion does not constitute an "untrue statement of . . . fact" simply because the stated opinion ultimately proves incorrect. But opinion statements are not wholly immune from liability under §11's first clause. Every such statement explicitly affirms one fact: that the speaker actually holds the stated belief. A statement of opinion thus qualifies as an "untrue statement of . . . fact" if that fact is untrue – *i.e.*, if the opinion expressed was not sincerely held. If a registration statement omits material facts about the issuer's inquiry into, or knowledge concerning, a statement of opinion, and if those facts conflict with what a reasonable investor, reading the statement fairly and in context, would take from the statement itself, then §11's omissions clause creates liability.	Kagan, Roberts, Kennedy, Ginsburg, Breyer, Alito, Sotomayor	Scalia (in part), Thomas	n/a

The fact that five securities cases are currently on the Supreme Court's docket confirms that the stakes for institutional investors remain high. Robbins Geller will continue our efforts to favorably shape the law in this area.

17. *See* Defendants' Petition for a Writ of Certiorari, *available at* https://www.supremecourt.gov/DocketPDF/18/18-1010/86441/20190131103256198_Hagan%20Petition.pdf.
18. *Id.*

Robbins Geller and Co-Counsel Obtain Preliminary Approval in Landmark Multi-Billion Dollar Class Action Settlement in Visa/Mastercard Interchange Antitrust Litigation

On January 24, 2019, the Honorable Margo J. Brodie granted preliminary approval for what is believed to be the largest antitrust class action settlement of all time in the long-running case against Visa, Mastercard, and their member banks related to fees merchants pay to accept credit and debit cards.

Robbins Geller serves as co-lead counsel for the damages class in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, MDL 1720 (E.D.N.Y.). The cash settlement amount is $6.26 billion, subject to possible reduction – not to exceed $700 million – in the event that opt-outs exceed a certain threshold.

"This is a significant step in the settlement, which will include sending notice to the millions of class members affected," said Robbins Geller partner **Alexandra S. Bernay**, one of the lead lawyers on the case. The plaintiffs will be sending notice to the millions of merchants who accepted Visa and/or Mastercard during the class period, which begins in 2004 and runs through January 24, 2019. Following notice to the class, the court will set a date for final approval of the settlement.

"This is an excellent result for the class that has been years in the making," said Robbins Geller attorney **Patrick J. Coughlin**. "We look forward to final approval and to getting merchants their long-awaited recovery."

In addition to Bernay and Coughlin, serving as co-lead counsel, Robbins Geller partners **Carmen A. Medici** and **David W. Mitchell** helped obtain this result for the class.

Delaware Chancery Court Denies Corporate Attempts to Restrict Venue for False and Misleading Offering Claims in Bylaws

In a recent decision that is notable both in its own right and for its broader implications, a Delaware court ruled that Delaware corporations cannot limit where a shareholder can bring a claim for violation of the federal Securities Act of 1933 (the "1933 Act") by including a venue limitation provision in the corporation's bylaws. The decision in *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018) will impact corporations' attempts to limit investors' rights not only under the 1933 Act, but also broader attempts to require shareholders to arbitrate all manner of securities-fraud claims.

The 1933 Act establishes requirements for the registration and sale of new securities issuances and allows purchasers to enforce those requirements. It is often relied upon by shareholders who believe they have been misled in connection with a company's public offerings. Notably, those claims can be filed in either state or federal court. Just last year, the U.S. Supreme Court agreed with Robbins Geller and its client, **Beaver County Employees Retirement Fund**, issuing a unanimous decision holding that plaintiffs may pursue 1933 Act claims in either federal or state court, contrary to defendants' assertion and some lower court rulings that amendments to the 1933 Act enacted in 1998 had changed that rule.[1]

Seeking to evade the investor-friendly rule upheld by the U.S. Supreme Court, some companies tried to eliminate shareholder plaintiffs' right to choose where to assert their 1933 Act claims by including a "forum selection" provision in their corporate charter or bylaws. On December 19, 2018, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery held that corporate issuers cannot eliminate plaintiffs' choice of forum in this way.[2]

The Chancery Court's reasoning hinged on the distinction between claims that are "internal" to the corporation and those that are "external" to it. Under the "internal affairs doctrine," the law of the state of incorporation regulates only the "internal" relationships within the corporation, like the relationship between shareholders, directors, and officers. The Vice Chancellor

1. *Cyan, Inc. v. Beaver Cnty. Empls. Ret. Fund*, 138 S. Ct. 1061 (2018).
2. *Sciabacucchi*, 2018 WL 6719718.

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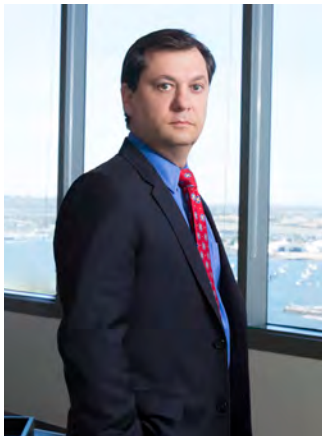
concluded that 1933 Act claims are "external" to the corporate relationship because, for example, 1933 Act claims could be brought by a purchaser of any one of a long list of "securities," not just shares; they could be brought against a range of potential defendants, many external to the corporation (such as underwriters); and even in cases involving shares and directors, the claim arises the moment before the plaintiff becomes a shareholder, and the plaintiff may no longer be a shareholder by the time it sues.

While no case had previously addressed the validity of such federal forum selection provisions, Vice Chancellor Laster drew on the development of Delaware law on forum-selection provisions for internal corporate-law claims. In 2013, Delaware's current Chief Justice, at the time the Chancellor, upheld bylaws that regulate the forum for "internal affairs claims brought by stockholders qua stockholders," including claims for breach of fiduciary duty against corporate directors or officers.[3] Delaware's legislature later codified that rule, adopting a statute that explicitly allows Delaware corporations to adopt a charter provision or bylaw that requires shareholders to file "internal corporate claims" only in Delaware courts.[4] Further, after the Delaware Supreme Court upheld a bylaw adopted by a membership corporation requiring its members to pay the defendants' attorneys' fees if the members brought a lawsuit and lost,[5] the Delaware legislature responded by amending the relevant statutes to prohibit charters and bylaws from containing fee-shifting provisions for "internal corporate claim[s]."[6] Vice Chancellor Laster noted that each of these cases and statutes was expressly limited to internal corporate claims, supporting his conclusion that charters and bylaws could only bind shareholders to the extent they related to "internal" claims.

The *Sciabacucchi* decision has implications for more than just 1933 Act claims. In recent years, certain corporate interests have argued that public companies should include mandatory arbitration provisions in their charters that would bar shareholders from bringing ***any*** securities law claims in ***any*** court. Under Vice Chancellor Laster's analysis, any such provisions will be invalid and unenforceable under Delaware law.

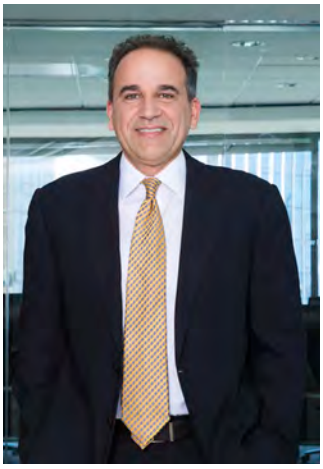
Of course, Vice Chancellor Laster's decision is unlikely to be the last word on this issue. The defendants in *Sciabacucchi* already tried to appeal to the Delaware Supreme Court and, while their initial appeal was dismissed as premature, it is expected that they will appeal once the Vice Chancellor's order is final. Those concerned about the efforts of publicly traded corporations attempting to insulate themselves from accountability for misleading investors should keep an eye on the Delaware Supreme Court in 2019.

3. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 952 (Del. Ch. 2013) (Strine, C.).
4. 8 Del. C. §115.
5. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).
6. 8 Del. C. §§102(f), 109(b).









Clockwise from top left: Darren Robbins, Paul Geller, Samuel Rudman, Rachel Jensen, Daniel Drosman, Randall Baron, Shawn Williams, Spencer Burkholz, and Michael Dowd

Eight Partners Named Leading Lawyers in America by Lawdragon

On February 21, 2019, *Lawdragon* announced that eight Robbins Geller partners have been recognized as Leading Lawyers in America for 2019. "These are lawyers who inspire with their public interest leadership, their vision of the rule of law and its relationship to our lives, our economies and our governance. They assess how to structure the most difficult deals, and how to counsel leaders who abuse, prevaricate and some who actually try to lead," stated the publication.

This year, **Darren J. Robbins**, **Paul J. Geller**, **Samuel H. Rudman**, **Spencer A. Burkholz**, **Daniel S. Drosman**, **Shawn A. Williams**, **Randall J. Baron**, and **Rachel L. Jensen** were all honored as Leading Lawyers in America. Additionally, last year **Michael J. Dowd** was elevated to the *Lawdragon* Hall of Fame, which is a permanent recognition.

This year marks the 13th time that **Darren Robbins** has been included on this list, and *Lawdragon* has commended him in the past for being "[o]ne of the brightest stars in the securities class action bar." Over the last two decades, Robbins has served as lead counsel in more than 100 securities class actions and has recovered billions of dollars for injured shareholders. Most recently, he led a shareholder derivative action brought by several pension funds on behalf of Community Health Systems, Inc., which yielded a $60 million payment to Community Health, as well as groundbreaking corporate governance reforms. In

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addition, Robbins obtained a $125 million settlement in *In re LendingClub Sec. Litig.*, a settlement that ranks among the top 10 largest securities recoveries ever in the Northern District of California, and a $215 million recovery in *Schuh v. HCA Holdings, Inc.*, the largest securities class action recovery ever in Tennessee.

Like Robbins, this marks the 13th time **Paul Geller** has been selected as a Leading Lawyer. He has previously been commended by *Lawdragon* for being "involved in some of the country's most high-profile class actions." Rated AV by Martindale-Hubbell (the highest rating available) and named a Best Lawyer in America, Geller has served as lead or co-lead counsel in many of the nation's largest class actions. For instance, he was selected to serve in a leadership position on behalf of governmental entities and other plaintiffs in the sprawling litigation concerning the nationwide prescription opioid epidemic. Geller was also part of the leadership team representing consumers in the massive *Volkswagen "Clean Diesel" Emissions* case. The San Francisco legal newspaper *The Recorder* labeled the group that was appointed in that case, which settled for more than $17 billion, a "class action dream team." Geller is currently serving as Co-Lead Counsel in *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, a nationwide class action that alleges that pharmaceutical company Mylan N.V. and others engaged in anticompetitive and unfair business conduct in its sale and marketing of the EpiPen Auto-Injector device. More recently, he was one of the lead counsel in the *Sony Gaming Networks Data Breach* litigation, which resulted in a significant monetary recovery and other benefits to class members.

Samuel Rudman's 25-year securities practice focuses on recognizing and investigating securities fraud, and initiating securities and shareholder class actions to vindicate shareholder rights and recover shareholder losses. Rudman has recovered hundreds of millions of dollars for shareholders, including a $200 million recovery in *Motorola*, a $129 million recovery in *Doral Financial,* an $85 million recovery in *Blackstone,* a $74 million recovery in *First BanCorp*, a $65 million recovery in *Forest Labs*, a $50 million recovery in *TD Banknorth*, a $48 million recovery in *CVS Caremark*, and a $34.5 million recovery in *L-3 Communications Holdings*. Not only does Rudman speak frequently on securities law matters, he has also been published in the *New York Law Journal* and has been recognized as a Leading Lawyer by *Chambers USA* and a Litigation Star by *Benchmark Litigation*. This is the fourth time that he has been named a Leading Lawyer.

This year marks the second time that **Spencer Burkholz** has been named a Leading Lawyer. He has more than 20 years of experience in prosecuting securities class actions and private actions on behalf of large institutional investors. Burkholz was one of the lead trial attorneys in *Jaffe v. Household International* in the Northern District of Illinois, a securities class action that obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a six-week jury trial in 2009 that resulted in a verdict for plaintiffs. Burkholz has also recovered billions of dollars for injured shareholders in cases such as *Enron* ($7.2 billion), *WorldCom* ($657 million), *Countrywide* ($500 million), and *Qwest* ($445 million), to name a few. He has been named a Top 100 Trial Lawyer and as a Plaintiff Attorney of the Year by *Benchmark Litigation*, a Top Plaintiff Lawyer by the *Daily Journal*, and a Recommended Lawyer by *The Legal 500*.

Like Burkholz, this is the second time **Daniel Drosman** has been selected as a Leading Lawyer. As a former federal prosecutor and one of the Firm's securities practice leaders, Drosman has obtained billions of dollars on behalf of investors. Along with Burkholz, he served as lead trial counsel in *Household International*. He also helped secure a $388 million recovery for investors in J.P. Morgan residential mortgage-backed securities in *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.* On a percentage basis, that settlement is the largest recovery ever achieved in an RMBS class action. In a pair of cases – *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.* ("*Cheyne*" litigation) and *King County, Washington v. IKB Deutsche Industriebank AG* ("*Rhinebridge*" litigation) – Drosman led a group of attorneys prosecuting fraud claims against the credit rating agencies, where he is distinguished as one of the few plaintiffs' counsel to defeat the rating agencies' traditional First Amendment defense and their motions for summary judgment based on the mischaracterization of credit ratings as mere opinions not actionable in fraud. Drosman has been named a Top 100 Lawyer by *The Daily Journal*, a Recommended Lawyer by *The Legal 500*, a Super Lawyer by *Super Lawyers Magazine,*

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and named a Best Lawyer in America by *Best Lawyers*.

Shawn Williams has accrued vast experience in shareholder derivative and class action litigation, and has recovered hundreds of millions of dollars for corporations and shareholders that were victims of fiduciary failures. He is also responsible for negotiating the implementation of comprehensive corporate governance enhancements, as well as leading multiple securities class actions and shareholder derivative actions in which Robbins Geller has secured significant rulings in the Ninth Circuit Court of Appeals (*Knollenberg v. Harmonic, Inc.*, 152 F. App'x 674 (9th Cir. 2005); *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226 (9th Cir. 2004); *Lynch v. Rawls*, 429 F. App'x 641 (9th Cir. 2011)); and the Fifth Circuit Court of Appeals (*Barrie v. Intervoice-Brite, Inc.*, 409 F.3d 653 (5th Cir. 2005)). In a shareholder derivative action, C*ity of Westland Police and Fire Ret. Sys. v. Wells Fargo & Co.*, Williams and a team of Robbins Geller attorneys secured significant governance reforms and corporate initiatives, including $36.5 million in funding for homeownership down-payment assistance in communities affected by the financial crisis and high foreclosure rates. This is the second time he has received the Leading Lawyer honor.

This honor marks the fourth time **Randall Baron** has been named a Leading Lawyer. He has worked to advance the practice of shareholder merger and acquisition litigation to achieve substantial monetary recoveries for shareholders for almost two decades. Baron has led a team of lawyers whose accomplishments include obtaining instrumental rulings both at injunction and trial phases, and establishing liability of financial advisors and investment banks. He helped obtain $148 million for shareholders in the *Dole Food* case, the largest trial verdict ever in a class action challenging a merger transaction, and served as co-lead counsel in the *Rural/Metro* case, leading former shareholders to a rare victory of nearly $100 million in an award against Royal Bank of Canada Capital Markets LLC ("RBC"), which had acted as financial advisor to Rural/Metro's lowball buyout. Baron was also involved in the record-breaking *Kinder Morgan* case, which yielded a $200 million recovery for investors, the largest M&A class action recovery in history. He has received numerous accolades, including being named Attorney of the Year by *California Lawyer*, a Litigation Star, National Practice Area Star, and State Litigation Star by *Benchmark Litigation*, a Winning Litigator by *The National Law Journal*, a Leading Lawyer by *The Legal 500*, a Super Lawyer by *Super Lawyers Magazine*, and has been twice named a Mergers & Acquisitions Trailblazer by *The National Law Journal*.

Lastly, **Rachel Jensen** is recognized as a Leading Lawyer for the third time this year. Previously appointed by Judge Chen to serve on the Plaintiffs' Steering Committee in an MDL against Fiat Chrysler and Bosch for installing and concealing defeat devices in "EcoDiesel" SUVs and trucks, Jensen aided with the recent agreed-upon $840 million settlement that includes provisions requiring Fiat Chrysler to repair more than 100,000 diesel vehicles. The company also agreed to a settlement that provides approximately $300 million to consumers. Jensen also represents drivers against Volkswagen in one of the most brazen corporate frauds in recent history; serves as one of the class counsel in a RICO action against Scotts Miracle-Gro for selling wild bird food products treated with pesticides that are hazardous to birds; and serves as one of the lead counsel on behalf of U.S. policyholders against certain Lloyd's Syndicates for collusive practices in the Lloyd's of London insurance market. Most recently, she was a member of the litigation team that obtained a $125 million settlement in *In re LendingClub Sec. Litig.*, a settlement that ranks among the top ten largest securities recoveries ever in the Northern District of California. Jensen has been named a Plaintiffs' Lawyer Trailblazer by *The National Law Journal*, a Top Woman Lawyer by the *Daily Journal*, a Super Lawyer by *Super Lawyers Magazine*, and has also received local recognition and commendation for her human rights work.

Robbins Geller and Co-Counsel Achieve $504 Million "Extraordinary" Settlement in ISDAfix Benchmark Litigation

In November 2018, the Honorable Jesse M. Furman of the United States District Court for the Southern District of New York granted final approval of a $96 million settlement with the 5 remaining financial firms in an antitrust class action against 14 of the largest banks and broker ICAP plc. The settlement brings the total recovery to $504.5 million for plaintiffs.

The lawsuit involved claims that defendants conspired to manipulate 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 antitrust laws, to benefit their own trading positions. Additionally, the case alleged that the broker ICAP assisted in the manipulation to earn brokerage commissions, all of which harmed plaintiffs and other counterparties to defendant banks. Defendants are part of a panel of banks that sets the ISDAfix rate each day, while buying and selling financial instruments that are priced off of ISDAfix. ISDAfix rates were supposed to reflect competitive forces of supply and demand in the trillion dollar interest rate derivatives market. Indeed, the banks are the leading dealers in this market and were supposed to compete with each other for the best possible terms for their customers – investors like plaintiffs. Instead of competing, however, defendants entered into a secret conspiracy to set ISDAfix rates at artificial levels. They did so in order to avoid paying investors what they were owed on interest rate derivatives while reaping illicit profits off their own proprietary holdings.

In approving the settlements, Judge Furman lauded the attorneys for doing "an extraordinary job here. . . . [I]t is fair to say [this was] probably the most complicated case I have had since I have been on the bench. . . . I cannot really imagine how complicated it would have been if I didn't have counsel who had done as admirable [a] job in briefing it and arguing as you have done. You have in my view done an extraordinary service to the class. . . . I think you have done an extraordinary job and deserve thanks and commendation for that."

"Once again, our Firm has shown the ability to stand up, fight and succeed on behalf of our clients against Wall Street banks whose anticompetitive business practices here took money from investors for years," said Robbins Geller partner **David W. Mitchell**, the Firm's lead attorney on the case.

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

Alaska Electrical Pension Fund v. Bank of America Corp., No. 1:14-cv-07126-JMF-OTW (S.D.N.Y.).

The Firm Recognized as "One of the Country's Best-Known Plaintiff Shops" by Benchmark Litigation

Benchmark Litigation lauded Robbins Geller as one of the Top Ten Plaintiffs Firms in America and awarded the Firm with several Tier 1 rankings for 2019, calling the Firm "[o]ne of the country's best-known plaintiff shops." Specifically, the publication named Robbins Geller Tier 1 in the categories of Plaintiff and Securities in California, and Tier 1 in San Diego. The Firm was also ranked highly nationally and in New York.

When researching Robbins Geller, the publication spoke with former opponents and peers regarding the Firm's reputation. One such opponent confessed that Robbins Geller has the "guts to take the good cases to trial, and by the time it goes, this firm has made a true investment and puts everything on the line." Another opponent called the Firm "relentless" and noted that its "lawyers really shine," while a peer asserted that Robbins Geller is "aggressive" and "taking on more cases and litigating them for longer."

Additionally, *Benchmark Litigation* named several Robbins Geller partners as California Stars, Litigation Stars, Local Litigation Stars, Future Stars, National Practice Area Stars, State Litigation Stars, Top Trial Lawyers and Top Trial Lawyers in California. **Darren J. Robbins**, **Samuel H. Rudman**, **Spencer A. Burkholz**, **Luke O. Brooks**, **Danielle S. Myers**, **Randall J. Baron**, **David A. Rosenfeld**, **Lucas F. Olts**, and **Daniel J. Pfefferbaum** were all honored for their impeccable track records.

Named a California Star and a State Litigation Star, Robbins has served as lead counsel in more than 100 securities actions and has recovered billions of dollars for injured shareholders. *Benchmark* lauded him for his work as "sole lead counsel, obtain[ing] a groundbreaking $215 million settlement for former HCA Holdings shareholders in [the largest] securities class action recovery ever in Tennessee. Reached shortly before trial was scheduled to commence, the settlement resolves claims that the Registration Statement and Prospectus HCA filed in connection with the company's massive $4.3 billion 2011 IPO contained material misstatements and omissions." Recently, Robbins led a shareholder derivative action brought by several pension funds in *Community Health Systems, Inc.*, which yielded a $60 million payment to Community Health Systems, as well as groundbreaking corporate governance reforms.

Rudman has been recognized as a Litigation Star, a National Practice Area Star and a Local Litigation Star in the practice area of Securities, among several others. With 22 years of experience in securities practice, he is a former attorney with the SEC, and has recovered hundreds of millions of dollars for shareholders. *Benchmark* emphasized Rudman's role as lead counsel on behalf of investors in *Silverman v. Motorola, Inc.*, in which he recovered $200 million two months before the trial was set to begin. "This outstanding result was obtained despite the lack of an SEC investigation or any financial restatement," extolled *Benchmark*. The publication also commended him for obtaining a $55 million recovery in *Intercept Pharmaceuticals*, which is believed to be the largest per-day recovery in the history of securities litigation.

Not only has *Benchmark* named Burkholz a California Star, State Litigation Star, a Top 100 Trial Lawyer, and a Top 20 Trial Lawyer in California, it also selected him as Plaintiff Attorney of the Year in 2018. Burkholz has successfully prosecuted several high-profile securities class actions that resulted in historic recoveries for investors. He litigated the 14-year-long *Household International* case that resulted in "an eye-popping $1.6 billion settlement on behalf of shareholders of HSBC Finance," and has also recovered billions of dollars for injured shareholders in cases such as *Enron* ($7.2 billion), *WorldCom* ($657 million), *Countrywide* ($500 million), and *Qwest* ($445 million). The publication emphasized that Burkholz is "one of [the Firm's] top guys in San Diego," as well as one of the top trial attorneys in the field.

Brooks has successfully prosecuted several high-profile securities class actions that have resulted in record-breaking recoveries. He served as "lead counsel in concert with a team of plaintiffs that secured a $388 million recovery in July 2015 on behalf of a class of investors in nine 2007 residential mortgage-backed securities offerings issued by JPMorgan," and served as lead trial counsel in *Jaffe v. Household International* in the Northern District of Illinois, a securities class action that obtained a record-breaking $1.575 billion settlement after 14 years of litigation, including a 6-week jury trial in 2009 that resulted in a verdict for plaintiffs. Most recently, he helped









Clockwise from top left: Darren Robbins, Randall Baron, Spencer Burkholz, Samuel Rudman, Danielle Myers, David Rosenfeld, Daniel Pfefferbaum, Luke Brooks, and Lucas Olts (center)

Continued **from page 26**

obtain a favorable ruling for plaintiffs in the United States Court of Appeals for the Ninth Circuit in *Mineworkers' Pension Scheme v. First Solar Incorporated*, a securities fraud class action on appeal from an August 2015 order by the United States District Court for the District of Arizona. Brooks was selected as a California Star and a State Litigation Star.

Named a Future Star, Myers oversees Robbins Geller's Portfolio Monitoring Program® and provides legal recommendations to the Firm's institutional investor clients in their options to maximize recoveries in securities litigation, both within the United States and internationally, from inception to settlement. In addition, she advises the Firm's clients in connection with lead plaintiff applications and has secured appointment of the Firm's clients as lead plaintiff in over 100 cases, including *Knurr v. Orbital ATK, Inc.*, No. 1:16-cv-01031 (E.D. Va.), *Evellard v. LendingClub Corp.*, No. 3:16-cv-02627 (N.D. Cal.), *In re Plains All American Pipeline, L.P. Sec. Litig.*, No. 4:15-cv-02404 (S.D. Tex.), *Marcus v. J.C. Penney Co., Inc.*, No. 6:13-cv-00736 (E.D. Tex.), *In re Hot Topic, Inc. Sec. Litig.*, No. 2:13-cv-02939 (C.D. Cal.), *Smilovits v. First Solar, Inc.*, No. 2:12-cv-00555 (D. Ariz.) and *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 1:10-cv-03461 (S.D.N.Y.).

Baron has been selected as a Litigation Star, California Star, National Practice Area Star, and a State Litigation Star. For almost two decades, he has headed up a team of lawyers whose accomplishments include obtaining instrumental rulings both at injunction and trial phases, and establishing liability of financial advisors and investment banks. Most notably, he recovered $200 million in *In re Kinder Morgan, Inc. S'holders Litig.*, the largest merger & acquisition class action recovery in history; $148 million in *In re Dole Food Co., Inc. Stockholder Litig.*, the largest trial verdict ever in a class action challenging a merger transaction; and $110 million for shareholders 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, to name a few. He is currently litigating *Hering v. Rite Aid Corporation*, which recently survived defendants' motions to dismiss.

Named a Future Star, Rosenfeld has spent more than 15 years practicing in the areas of securities litigation and corporate takeover litigation. He recently obtained a $34.5 million recovery in *Patel v. L-3 Communications Holdings, Inc.*, which represents a high percentage of 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. He also worked with Rudman to obtain a $34 million recovery in *In re OSG Sec. Litig.*, which represented an outsized recovery of 93% of bond purchasers' damages and 28% of stock purchasers' damages. Additionally, Rosenfeld achieved remarkable recoveries against companies in the financial industry, including a $70 million recovery in the securities class action on behalf of investors against Credit Suisse Group and a $74.25 million recovery in the securities fraud lawsuit against First BanCorp. Additionally, he settled claims against Barclays for $14 million, or 20% of investors' damages, for statements made about its LIBOR practices.

Ranked as a Future Star, Olts has extensive experience prosecuting structured finance-related actions. Over the past several years, he has played an integral role in securing several landmark victories in RMBS-related litigation, and has achieved unparalleled success in recovering losses for investors in RMBS and other structured finance-related investments. Olts was a lead attorney in the *Goldman Sachs* case, securing a $272 million recovery for shareholders, and worked with Brooks to achieve a recovery of $388 million for investors in *J.P. Morgan.* In addition, along with Brooks, he was a member of the litigation team that obtained what *Reuters* called "a landmark" settlement in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.* After vigorously prosecuting the case for nearly five years, the settlement was reached two weeks before trial was set to commence. Olts secured another important victory for shareholders in an action involving the subprime mortgage fraud debacle in *In re Wachovia Preferred Sec. & Bond/Notes Litig.*, which yielded a $627 million recovery, one of the largest credit-crisis class action settlements involving only Securities Act claims.

Benchmark ranked Pfefferbaum as a Future Star, and also included him in its 40 & Under Hot List in the category of Securities. He has recovered more than $100 million for investors and has served as lead class counsel in numerous notable cases that have resulted in substantial recoveries. Most recently, Pfefferbaum was a member of the litigation team that secured a historic recovery on a *pro bono* basis for Trump University students in two class actions against President Donald J. Trump, providing $25 million to approximately 7,000 consumers. He was also an integral member of the Robbins Geller litigation team in *Garden City Emps.' Ret. Sys. v. Psychiatric Sols., Inc.* in which, after more than four years of litigation and on the eve of trial, he led shareholders to a $65 million recovery. The settlement is the largest securities class action recovery in the Middle District of Tennessee in almost a decade.

Compiled by the publishers of leading financial news magazines *Institutional Investor* and *Euromoney*, *Benchmark* decides its rankings after examining recent casework handled by law firms over a period of four to six months. Sources are then asked to offer their professional opinions on the attorneys practicing within their state or national practice areas. To learn more about their methodology, visit *Benchmark*'s website.

Preliminary Approval of $160 Million Settlement Obtained in Securities Class Action Against Wal-Mart Stores, Inc.

On December 6, 2018, the Honorable Susan O. Hickey of the U.S. District Court for the Western District of Arkansas granted preliminary approval of a $160 million settlement in *City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc.*

Wal-Mart operates retail stores in various formats worldwide. The case arises from allegations published by *The New York Times* in an article released on April 21, 2012 describing an alleged bribery scheme that occurred in Mexico. The case charges defendants with unlawful and unethical conduct by issuing materially false and misleading statements during the class period. Wal-Mart portrayed itself to investors as a model corporate citizen that had proactively uncovered potential corruption and promptly reported it to law enforcement. In truth, a former in-house lawyer had blown the whistle on Wal-Mart's corruption years earlier, and Wal-Mart concealed the allegations from law enforcement by refusing its own in-house and outside counsel's calls for an independent investigation. As a result of defendants' misleading statements, investors were purchasing shares at artificially inflated prices, which crashed when the *Times* revealed the truth.

"The settlement ends a long, hard-fought litigation. It provides significant benefits to the class within months, whereas continuing to litigate would have likely meant years of the class waiting on a very uncertain recovery," said Robbins Geller partner **Jason A. Forge**, who is leading the team representing the **City of Pontiac General Employees' Retirement System**.

The final approval hearing is scheduled for April 4, 2019.

City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc., No. 5:12-cv-5162 (W.D. Ark.).

Robbins Geller Persists While the Battle Against the Nationwide Opioid Crisis Rages On

The legal battle against the nationwide opioid epidemic that has been plaguing the country for years still rages on. Widely considered a public-health emergency, the opioid epidemic has so far killed hundreds of thousands of Americans. According to the Centers for Disease Control and Prevention, "Opioids were involved in 47,600 overdose deaths in 2017 (67.8% of all drug overdose deaths)," with the highest death rates being found in West Virginia, Ohio, Pennsylvania, the District of Columbia and Kentucky. Out of all opioid-related deaths in 2017, more than 35% of them involved prescription opioids, with the highest overdose death rates reported in West Virginia, Maryland, Kentucky and Utah. In fact, "[f]rom 1999 to 2017, almost 218,000 people died in the United States from overdoses related to prescription opioids," and "[o]verdose deaths involving prescription opioids were five times higher in 2017 than in 1999." More than 1,000 counties and cities are seeking billions of dollars in damages in lawsuits against the pharmaceutical manufacturers, distributors and retail pharmacies responsible for creating and perpetuating this tragedy.

Robbins Geller continues to lead the fight against these corporations (including Purdue Pharma, Teva Pharmaceuticals USA Inc., Johnson & Johnson, Endo Health Solutions Inc., Allergan PLC, Mallinckrodt PLC, Cardinal Health, Inc., McKesson Corporation, and AmerisourceBergen Corporation, among others), 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, Rockville, Baltimore, and Montgomery County), California (the City of Los Angeles, Marin County, San Francisco, San Diego, Santa Cruz, Napa, and Sonoma), Arizona (Phoenix) and Florida (Broward County and Delray Beach), among others. Most recently, Robbins Geller has begun working with Grand Forks, North Dakota and San Francisco, California.

Additionally, founding partner **Paul J. Geller** was appointed by the Honorable Dan Aaron Polster to the team of elite lawyers spearheading some 1,500 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

Continued **from page 30**

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."

"Overdose deaths are higher than deaths from H.I.V., car crashes or gun violence at their peaks," wrote *The New York Times*. "The recent increases in drug overdose deaths have been so steep that they have contributed to reductions in the country's life expectancy over the last three years, a pattern unprecedented since World War II. Life expectancy at birth has fallen by nearly four months, and drug overdoses are the leading cause of death for adults under 55."

"These [pharmaceutical] companies and the people who own them put their greed ahead of human lives," said San Francisco City Attorney Dennis Herrera when the city recently filed a suit against the opioid manufacturers and distributors. "The companies that marketed these drugs manipulated and misrepresented medical science to serve their own agenda. They intentionally misled doctors and patients about the appropriate uses, risks and effectiveness of prescription opioids." Expected to be consolidated with the other coordinated lawsuits, the complaint specified that more than 318,000 opioid prescriptions were written in San Francisco in 2017.

"As alleged, defendants infiltrated medical science and education with false messaging on the safety and efficacy of opioids. They blurred the line between promotion and journalism, creating an epidemic of overprescribing, and then ignored their obligations to report and halt suspicious orders – all to maximize profits," noted Robbins Geller partner **Aelish Baig**, who has been assisting the City Attorney's office.

In December 2018, the city of Grand Forks, North Dakota also decided to join the MDL, and soon after, City Council members voted unanimously to work with Robbins Geller. "The opioid epidemic is kind of unique in that it's affecting so much of the country at once," Michael Dulitz, coordinator of the Opiate Response Project for Grand Forks Public Health, told *The Dickinson Press*. "It's not just small pockets of concern, you know, there's overdoses and overdose deaths happening throughout the country."

In a 2018 study done by Altarum, a nonprofit organization that creates and implements solutions to advance health among vulnerable and publicly insured populations, it was estimated that the cost of the country's opioid epidemic "exceeded $1 trillion from 2001 to 2017, and is projected to cost an additional $500 billion by 2020." The study further stated that the "annual cost of the opioid crisis increased from $29.1 billion in 2001 to an estimated $115 billion in 2017 (all cost estimates are shown in 2016 dollars)," and that the "growth rate between 2011 and 2016 was double the rate observed between the previous 5 years." Based on these numbers, Altarum estimates that the cost of this epidemic will exceed $500 billion by 2021 if action is not taken and the current mortality rates continue.

Individual 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 *Urban Institute*, between 2011 and 2017, the number of units paid for by Medicaid on treatment prescriptions "increased 183 percent, from 54.1 million units to 153.3 million units. The average annual increase in the number of units paid for by Medicaid over that time was 19 percent nationally, with faster growth in the later years." Additionally, Altarum found the overall cost of health care related to this crisis from 2001 to 2017 to be $215.7 billion.

Most recently, on January 2, 2019, it was announced that Maryland's Board of Public Works had approved a deal in which outside lawyers, including Robbins Geller, would help the state investigate the opioid industry for potential litigation. According to a report from the Maryland Department of Health, the first half of 2018 saw 1,185 opioid-related deaths, 15% more than the first half of 2017, making it very likely that the final total for 2018 will surpass 2017's total number of 2,009 opioid-related deaths.

In mid-2018, 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. The first of the federal cases is set for trial in October 2019.

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

California's New Law Requires Female Board Directors

Studies have shown that companies with higher levels of gender diversity have stronger financial performance, stronger governance practices and a more engaged workforce. Investors of all types have been putting pressure on corporate boards to increase the number of women on their boards through numerous avenues, including letter-writing campaigns, direct conversations with board members and the submission of shareholder proposals.

However, the pace of change has been slow, and larger companies in the U.S. have been making most of the changes. In the absence of significant, market-wide movement, independent groups and state legislators have taken action. Most notably, on September 30, 2018, California's Governor Jerry Brown signed a first-in-the-nation bill that requires publicly traded companies headquartered in the state to have women on their boards. This article discusses the history of the bill and the current state of gender diversity in California boardrooms.

History of California Legislation

In 2013, the National Association of Women Business Owners chapter in California worked with State Senator Hannah-Beth Jackson (D–Santa Barbara) to put forth a non-binding resolution. Senate Concurrent Resolution 62 called on boards of publicly traded companies based in the state to increase the level of gender diversity among the members of boards of directors over a three-year period.

Specifically, California companies were to have a specified number of female directors (ranging from one to three), depending on the size of the board, by December 31, 2016. However, there is no evidence that the resolution drove change; in fact, less than 20% of the Russell 3000 companies headquartered in California met the goals set forth in the resolution by the end of the three years.

Undeterred, Senator Jackson introduced Senate Bill 826 ("SB 826"), named for the date when the 19th Amendment was ratified giving women the right to vote (August 26, 1920). California Senate President pro Tempore Toni Atkins (D–San Diego) was a co-author of the bill, and Assemblywoman Lorena Gonzalez-Fletcher (D–San Diego) signed on as co-author as the bill moved to the Assembly floor. The bill was heard in the Banking and Financial Institutions Committee, the Judiciary Committee, and the Appropriations Committee in both chambers of the California Legislature. Despite facing opposition from the California Chamber of Commerce and other industry associations, SB 826 was passed by the California Senate with a vote of 22 to 11 on May 31, 2018. In the California Assembly, it passed with a vote of 41 to 26 on August 29, 2018. The Governor signed the historic bill into law on September 30, 2018.

Will the California Law Make a Difference?

SB 826 requires that companies headquartered in the state and traded publicly on a major stock exchange (*i.e.*, the NYSE or Nasdaq exchanges) (referred to as "California companies" hereafter) have at least one female director by December 31, 2019.

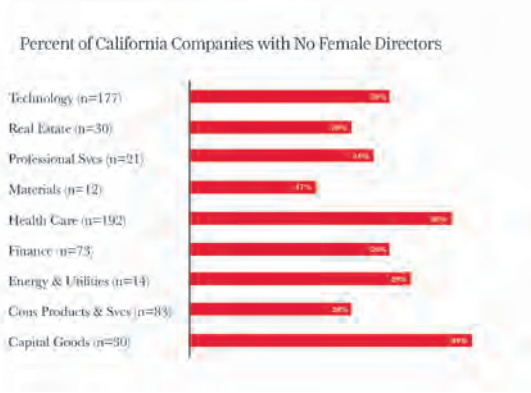
Furthermore, by December 31, 2021, California companies must have three or more female directors if their boards have six or more members and two female directors if their boards have five directors. If a company has four or fewer directors, which is relatively rare, the board must include one woman. If companies are not in compliance with the law, the Secretary of State will assess fines in the amount of $100,000 for the first offense and $300,000 for the second offense.

Preliminary findings from a forthcoming study by Board Governance Research LLC show that there are currently 632 companies headquartered in California and traded on the NYSE or Nasdaq

Continued **from page 33**

exchanges, and therefore subject to the bill. Nearly one-third (29%) of these companies have no female directors. In other words, there are 184 companies that must add a woman to their boards by December 31, 2019.

Given recent concerns over a lack of diversity in Silicon Valley, it might be expected that the high prevalence of technology companies headquartered in California contributes to the lack of board gender diversity. However, the following chart shows that the technology companies do not have the least diverse boards in California. Capital goods and healthcare companies are more likely to have all-male boards. The lack of diversity in the healthcare industry is heavily influenced by the prevalence of all-male boards in the biotech industry, which is a dominant industry in California.



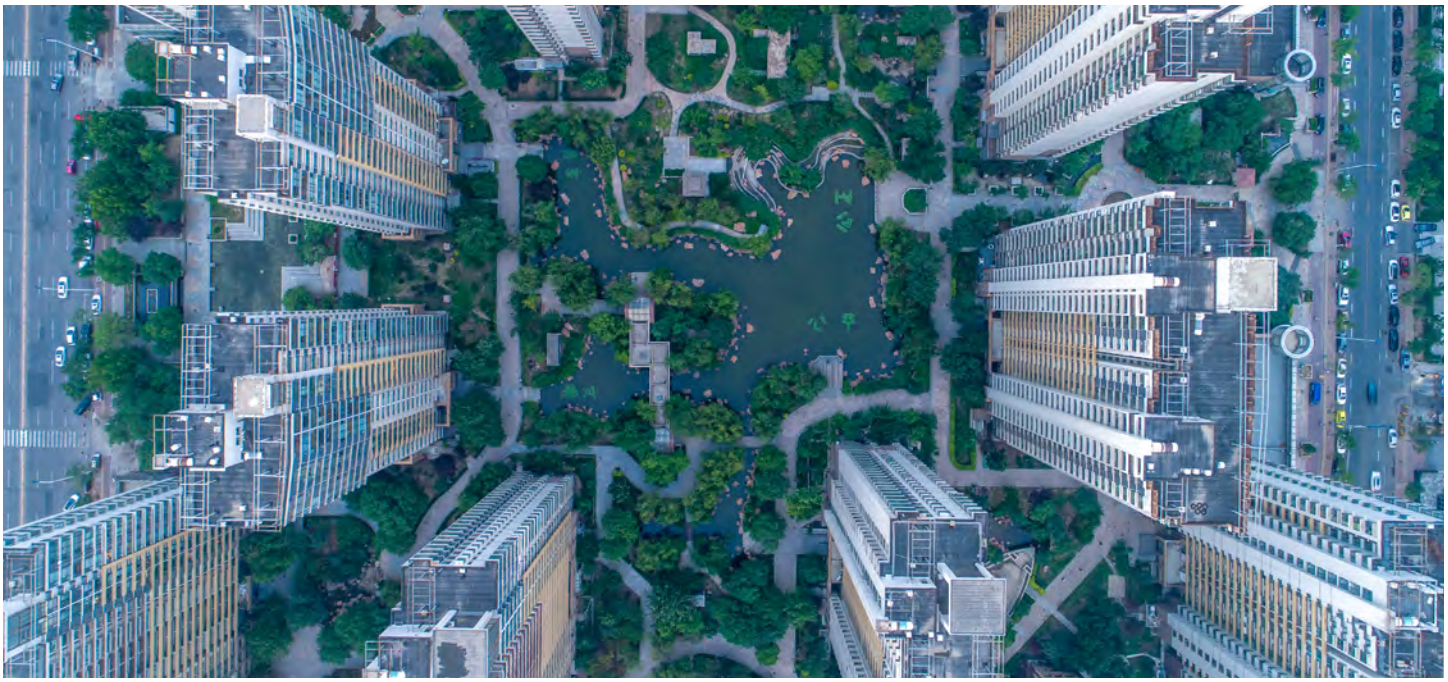
Notably, based on current board composition, only 12% of companies subject to the California law are currently in compliance with the requirements for the December 31, 2021 deadline. Companies already in compliance include Chevron Corporation, Cisco Systems, Inc., Sempra Energy, Williams Sonoma, Inc. and Zynga, Inc. However, in order for those California companies not in compliance to avoid fines, more than 1,000 board seats will need to be filled by women over the next three years (assuming current board sizes).

Conclusion

All eyes will be on California to see if the companies headquartered there add women to their boards to comply with the new law. If companies comply and other states follow California's lead, the U.S. statistics for board gender diversity will undoubtedly improve and more women will be given the opportunity to serve as corporate directors, many for the first time. Additionally, companies around the country may benefit from diversity around the boardroom table, which in turn can lead to success for all stakeholders.

Recovering Assets
Reforming Business
Restoring Confidence

Robbins Geller Rudman & Dowd LLP



ESG and Sustainability News

Japan has announced that it will be the first of the Group of Seven advanced nations to compile Environmental, Social and Governance ("ESG") guidelines to attract international investment, hoping that Japanese companies' disclosure of their efforts to meet the guidelines will draw in ESG investments from overseas and boost economic growth.[1]

The Qatar Stock Exchange ("QSE") is one of the first stock exchanges in the world to create an ESG reporting platform.[2] It has created an online Qatar Stock Exchange Sustainability and ESG Platform designed to accelerate its December 2016 Guidance on ESG reporting's objective to support listed companies' ESG reports. The platform allows all Qatari-listed companies to log in, upload their sustainability reports, and submit their data on the QSE's 34 ESG indicators. Investors have real-time access to publicly reported essential sustainability data, information, and reports organized by each issuer – all from a single source.

In his article "How Socially Responsible Stocks Could Protect Investors in a Bear Market," *Fortune* magazine's Matthew Heimer writes:[3]

> So-called ESG equity strategies – buying the stocks of companies that perform well on environmental, social-responsibility, and governance (ESG) metrics – can help you align your portfolio with your ethical values. But can they also help you ride out a down market, or even a bear market, with fewer losses? It seems 2019 may be the year that investors find out.
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> After a rough autumn during which the benchmark S&P 500 index has shed nearly 10% of its value, many commentators are predicting sluggish returns at best for next year.[4] Trade tensions between the U.S. and China are one troubling factor; the likelihood of rising interest rates and a slowdown in corporate earnings growth are others.
>
> But research does suggest that companies with strong ESG ratings may hold up better in a down market. And that could give investors a sense of security if 2019 turns out to be the year that the bull market party ends.

In a report titled "Pensions in a Changing Climate," ShareAction found that "[o]ver 60% of pension funds publish little or no information on their climate responses, placing them at risk of breaching their legal duties to their beneficiaries."[5] Some of their most significant findings:

- Leaders indicate they have a fiduciary duty to consider climate risk in their investment decisions.
- Pension funds are failing to communicate with members on climate change.
- The majority of pension funds lack basic climate governance.
- Only a quarter of assessed funds provide climate-related training for employees.
- Only 1% of the assets managed by the

1. http://annx.asianews.network/content/japan-compiles-guidelines-esg-investments-88583
2. http://www.mondovisione.com/media-and-resources/news/qatar-stock-exchange-launches-its-esg-platform/
3. http://fortune.com/2018/12/12/stocks-esg-investing-bear-market/
4. http://fortune.com/2018/12/10/blackrock-recession-2019-stocks-outlook/
5. https://shareaction.org/wp-content/uploads/2018/12/AODP-PensionsChangingClimate.pdf

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world's largest 100 pension funds are invested in low-carbon solutions.

• The vast majority of the world's largest pension funds have no low-carbon asset allocation target.

• Around one third of pension funds are measuring the carbon footprint of their investments.

A new Harvard Business School working paper by George Serafeim finds that "the valuation premium paid for companies with strong sustainability performance has increased over time and that the premium is increasing as a function of positive public sentiment momentum.[6] An ESG factor going long on firms with superior or increasing sustainability performance and negative sentiment momentum and short on firms with inferior or decreasing sustainability performance and positive sentiment momentum delivers significant positive alpha."

A recent Harvard Business School study quantifies the benefits of diversity.[7] The study focused on venture capital firms and found the following:

> VC firms are fairly flat in structure, composed primarily of investment partners and relatively few junior professionals. Every investor is a decision maker, and choices have clear business consequences. We know which firms make what investments, and for the most part we can identify the individuals leading those investments, because they usually take seats on the boards of portfolio companies. Using publicly available information, we can analyze VC professionals' "endowed traits," such as gender and ethnicity, and "acquired traits," such as schooling and work history. In other words, we can see how similar or different these decision makers are and compare the quality of their decisions on the basis of their investments' performance. . . .
>
> . . . [T]he evidence is clear: Diversity significantly improves financial performance on measures such as profitable investments at the individual portfolio-company level and overall fund returns. And even though the desire to associate with similar people – a tendency academics call homophily – can bring social benefits to those who exhibit it, including a sense of shared culture and belonging, it can also lead investors and firms to leave a lot of money on the table.

BlackRock is working with Wespath Benefits and Investments, which manages $23 billion on behalf of the United Methodist Church, to explore fresh ways to invest in the low-carbon economy as fund management groups hunt for opportunities that arise from the shift to sustainable energy use. They are also working with Thomson Reuters on an inclusion and diversity fund.

Then Acting New York Attorney General Barbara D. Underwood filed a **lawsuit against Exxon Mobil Corporation**, alleging that the company misled investors regarding the risk that climate change regulations posed to its business. As alleged in the complaint, Exxon for years assured investors that it was accounting for the likelihood of increasingly stringent regulation of greenhouse gas emissions – which are driving climate change and which Exxon emits in large quantity – by rigorously and consistently applying an escalating cost of those emissions to its business planning, investment decisions, calculations of the amount and value of company reserves and resources, impairment assessments, and projections of future demand for oil and gas. However, Exxon did not abide by these representations, and instead did much less than it claimed, deceiving investors as to the company's true financial exposure to increasing regulations and policies adopted to mitigate the adverse effects of climate change.

Investors and associated organizations representing more than $5 trillion in assets under management have submitted a "**Petition to SEC for Rulemaking** on Environmental, Social, and Governance (ESG) Disclosure,"[8] authored by Professor Cynthia A. Williams and Professor Jill E. Fisch, in which they state the following:

> Today, investors, including retail investors, are demanding and using a wide range of information designed to understand the long-term performance and risk management strategies of public-reporting companies. In response to changing business norms and pressure from investors, most of America's largest public companies are attempting to provide additional information to meet these changing needs and to address worldwide investor preferences and regulatory requirements. Without adequate standards, more and more public companies are voluntarily producing "sustainability reports" designed to explain how they are creating long-term value. There are substantial problems with the nature, timing, and extent of these voluntary disclosures, however. Thus, we respectfully ask the Commission to engage in notice and comment rule-making to develop a comprehensive framework for clearer, more consistent, more complete, and more easily comparable information relevant to companies' long-term risks and performance. Such a framework would better inform investors, and would provide clarity to America's public companies on providing relevant, auditable, and decision-useful information to investors.

6. https://www.hbs.edu/faculty/Publication%20Files/19-044_a9bbfba2-55e1-4540-bda5-8411776a42ae.pdf
7. https://hbr.org/2018/07/the-other-diversity-dividend
8. https://corpgov.law.harvard.edu/2018/10/09/petition-to-sec-for-rulemaking-on-environmental-social-and-governance-esg-disclosure/

Robbins Geller Obtains $125 Million Recovery for LendingClub Investors

Recently, the court entered a judgment in *In re LendingClub Securities Litigation*, finalizing the $125 million settlement Robbins Geller achieved for the court-appointed lead plaintiff **Water and Power Employees' Retirement, Disability and Death Plan of the City of Los Angeles** ("WPERP") and the class – a settlement that ranks among the top ten largest securities recoveries ever in the Northern District of California.

LendingClub Corporation, together with its subsidiaries, operates as an online marketplace that connects borrowers and investors in the United States. The case alleged that LendingClub had made a big splash with a December 2014 IPO fueled by promises of an opportunity to get in on the ground floor of a lending market that would revolutionize the banking industry by delivering the highest standards of transparency, honesty and integrity. As alleged, however, 18 months later, investors learned that LendingClub lacked even the most basic internal controls, which allowed its management to use the same old tactics that have caused many to have so little faith in the banking industry: manipulating its performance by engaging in self-dealing, altering loan applications and misleading institutional investors.

In 2016, the court appointed WPERP as lead plaintiff and Robbins Geller as lead counsel. In October 2017, the court certified WPERP's case as a class action and, in doing so, noted that "WPERP has vigorously prosecuted this action to date." In early February 2018, that vigorous prosecution culminated with the parties agreeing to a proposed settlement to resolve the case for $125 million. On July 20, 2018, the court approved the settlement.

In approving the settlement, the court noted Robbins Geller's experience in securities and other complex class action and concluded that this is "an excellent settlement for the class."

Robbins Geller attorneys **Darren J. Robbins**, **Jason A. Forge**, **Scott H. Saham**, **Rachel L. Jensen**, **Carissa J. Dolan**, and **Michael Albert** prosecuted this case for investors.

In re LendingClub Securities Litigation, No. 3:16-cv-02627-WHA (N.D. Cal.).

Institutional Investors Focus on the Firearms Industry

The increase in mass shootings in the U.S. has impacted countless Americans, many of whom have been spurred into action. While many of those taking action are individual citizens pressuring lawmakers or gun safety advocacy groups, another form of such activism has come from an unexpected place: the investment community.

In November 2018, a group of 13 institutional investors, managing nearly $5 trillion, signaled their entry into the national discourse on gun safety by releasing the *Principles for a Responsible Civilian Firearms Industry* (referred to as the "*Principles*" hereafter).[1] According to the press release announcing the launch, the *Principles* are designed to "provide a framework for institutional investors seeking to improve engagement with public and private companies globally that manufacture, distribute, sell or regulate products within the civilian firearms industry in order to address gun safety issues and reduce investment risk."[2]

As companies have been more willing to meet, or engage, with institutional investors in recent years, several investors groups like this have been created. Other issues addressed by similar coalitions include the opioid crisis, climate change, human capital management, and board diversity. Investors have found that by working together to encourage companies to change, they are better able to mitigate portfolio risks. Along these lines, Chris Ailman, the Chief Investment Officer of CalSTRS – one of the original signatories of the *Principles* – told *Chief Investment Officer* magazine that "[t]his is part of the holistic picture of being an asset owner. It's absolutely within our fiduciary duty to engage and try to bring about change."[3]

The signatories of the *Principles* are targeting companies all along the supply chain of the civilian firearms industry, including gun manufacturers and distributors, companies that sell civilian firearms and those who are involved in the enforcement of industry regulations. They feel that these companies "are well positioned to support pragmatic transparency and safety measures that contribute to the responsible use of firearms."[4]

1. *Principles for a Responsible Firearms Industry*, http://www.firearmsprinciples.com/.
2. *Institutional Investors and Asset Owners, Managers Representing Nearly $5 Trillion Launch Principles for a Responsible Civilian Firearms Industry,* Business Wire, November 14, 2018, https://www.businesswire.com/news/home/20181114005240/en/Institutional-Investors-Asset-Owners-Managers-Representing-5.
3. Michael Katz, *Institutional Investors Launch Firearms Industry Framework*, Chief Investment Officer, November 15, 2018, https://www.ai-cio.com/news/institutional-investors-launch-firearms-industry-framework/.
4. *Principles for a Responsible Firearms Industry*, http://www.firearmsprinciples.com/.

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The *Principles*

The investors are asking these companies to demonstrate and disclose compliance with the following *Principles*:

• Manufacturers should support, advance, and integrate the development of technology designed to make civilian firearms safer, more secure, and easier to trace.

• Manufacturers should adopt and follow responsible business practices that establish and enforce responsible dealer standards and promote training and education programs for owners designed around firearms safety.

• Civilian firearms distributors, dealers, and retailers should establish, promote, and follow best practices to ensure that no firearm is sold without a completed background check in order to prevent sales to persons prohibited from buying firearms or those too dangerous to possess firearms.

• Civilian firearms distributors, dealers, and retailers should educate and train their employees to better recognize and effectively monitor irregularities at the point of sale, to record all firearm sales, to audit firearms inventory on a regular basis and to proactively assist law enforcement.

• Participants in the civilian firearms industry should work collaboratively, communicate and engage with the signatories of these Principles to design, adopt and disclose measures and metrics demonstrating both best practices and their commitment to promoting these *Principles*.[5]

If gun industry companies do not disclose their progress with adhering to these *Principles*, the investor signatories have warned that they "will consider using all tools available to [them] as investors to mitigate [the] risks" these companies pose to the financial returns to the investors and to society as a whole.[6] One of these tools is engagement, which typically includes representatives from the governance and/or proxy voting team of the investor requesting meetings with the CEO, Chair, and key members of the board of directors of the company to discuss the investors' desired changes. Investors may also submit shareowner proposals to the companies, providing an opportunity for all of the company's shareowners to voice their support via their proxy vote.

Shareholder Proposals

During 2018, a few companies received shareowner proposals regarding issues related to gun safety.[7] American Outdoor Brands Corporation [Nasdaq: AOBC] (previously known as Smith & Wesson) received a proposal from Sisters of the Holy Names of Jesus and Mary, U.S.-Ontario, a member of the Interfaith Center on Corporate Responsibility ("ICCR"), which called on the company to publish a report by February 2019 which outlines the "company's activities related to gun safety measures and mitigation of harm associated with gun products."[8] The company aggressively urged its other shareowners to vote against the proposal in what became a heated exchange of letters filed with the Securities and Exchange Commission. Despite this, the proposal was supported by a majority of the votes cast at the company's September 2018 annual meeting. A similar proposal, submitted by Catholic Health Initiatives, another member of the ICCR, was successful at gun manufacturer Sturm, Ruger & Co., Inc. [NYSE: RGR]. Sister Judy Byron, the nun who leads the Northwest Coalition for Responsible Investing and led the ICCR's efforts to push for change in the gun industry, told *NBC News* that she "knows that Sturm Ruger and American Outdoor Brands are producing their reports begrudgingly."[9]

In addition to gun manufacturers, retailers that sell civilian firearms have received related shareowner proposals. In 2018, ICCR member Mercy Investment Services submitted a proposal at Dick's Sporting Goods [NYSE: DKS] asking the company to include in their annual report the actions they have taken to curb gun violence. In response to this proposal, representatives from Mercy Investment Services and Dick's Sporting Goods held discussions, and the proposal was withdrawn from the company's proxy statement. Subsequently, two weeks after the school shooting in Parkland, Florida, "Dick's announced it would end all assault-style weapons sales in all stores and stop selling guns or ammunition to anyone under 21. Other retailers, including Walmart Inc., followed suit later that day."[10,11]

Conclusion

The influence that investors can have in the companies in which they invest can be seen in these changes and others to come. We can expect more investors to pressure companies in the gun industry to make changes to improve gun safety, and we can expect this to be accomplished by investors' submitting shareowner proposals, signing on to the *Principles for a Responsible Civilian Firearms Industry* and engaging directly with companies' management and directors.

5. *Ibid*.
6. *Ibid*.
7. *Proxy Preview 2018*, https://www.proxypreview.org/.
8. American Outdoor Brands Corporation Proxy Statement, August 17, 2018.
9. Jon Schuppe, *How a Seattle Nun Led a Shareholder Revolt Against Gun Makers*, NBC News, September 30, 2018, https://www.nbcnews.com/news/us-news/how-seattle-nun-led-shareholder-revolt-against-gun-makers-n915006.
10. Sarah Nassauer, *How Dick's Sporting Goods Decided to Change Its Gun Policy*, Wall Street Journal, December 4, 2018.
11. *Proxy Preview 2018*, https://www.proxypreview.org/.

Lea Bays Appointed to the Sedona Conference Working Group 1 Steering Committee

In January, Robbins Geller attorney **Lea Bays** was appointed to the Sedona Conference Working Group 1 Steering Committee for a three-year term. The Steering Committee works to develop principles, guidance and best practice recommendations for information governance and electronic discovery in the context of litigation, dispute resolution, and investigations. Bays was selected to the Steering Committee because of her "capacity for dialogue and working to achieve consensus, subject matter expertise, [her] records of significant contributions to WG1 meetings and drafting team efforts, and demonstrated commitments to the mission of The Sedona Conference."

Before being appointed to the Steering Committee, Bays served on drafting teams for two WG1 papers published in 2017: *The Sedona Conference TAR Case Law Primer* and *The Sedona Conference Commentary on Proportionality in Electronic Discovery*.

Bays focuses on e-discovery issues, from preservation through production, and provides counsel to the Firm's multi-disciplinary e-discovery team consisting of attorneys, forensic analysts, and database professionals. Through her role as counsel to the e-discovery team, Bays has expertise with the various stages of e-discovery, including identification of relevant electronically stored information, data culling, predictive coding protocols, and privilege and responsiveness reviews, as well as having experience in post-production discovery through trial preparation. Through speaking at various events, she is also a leader in shaping the broader dialogue on e-discovery issues.

$840 Million Settlement Achieved Against Fiat Chrysler

Robbins Geller has aided in the agreed settlement of up to $840 million by Fiat Chrysler Automobiles NV to resolve *In re Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices and Products Liability Litigation*. The case involves allegations that the company advertised Jeep and Dodge diesel automobiles as environmentally friendly "EcoDiesel" cars, but in reality the company had installed defeat devices that hid the true emission levels that exceeded government standards.

The Honorable Edward M. Chen, United States District Judge for the Northern District of California, previously appointed Robbins Geller partner **Rachel L. Jensen** to the case's Plaintiffs' Steering Committee ("PSC") to work closely with lead counsel in a collaborative role. The court's decision on who was selected to the PSC was based on various factors, including "experience, resources, the scope of the class (*e.g.*, geographic spread, categories of class members), the support of other attorneys, and diversity." The recent agreed-upon $840 million settlement includes provisions requiring Fiat Chrysler to repair more than 100,000 diesel vehicles. The company also agreed to a settlement that provides approximately $300 million to consumers.

According to Jensen, "This is an excellent result for the class we are privileged to represent. This settlement was a true team effort, and it was my honor to work collaboratively with lead counsel Elizabeth Cabraser and other lawyers whom I respect so much."

The case is similar to the *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, in which Robbins Geller founding partner **Paul J. Geller** was appointed to the Plaintiffs' Steering Committee. That case yielded over $17 billion, the largest consumer auto industry class action settlement in history.

In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig., No. 3:17-md-02777-EMC (N.D. Cal.).

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