



# IMLA's 88th Annual Conference

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*Juan Carlos Sanchez*

September 2023



# IS IT 2008 ALL OVER AGAIN?: RECENT MARKET FAILURES AND SCANDALS

# RECENT MARKET FAILURES AND SCANDALS

**FT**

FINANCIAL  
TIMES

**Credit Suisse's fate casts a shadow  
over the European banking sector**

**FT**

FINANCIAL  
TIMES

**UK prepares cash lifeline for  
tech companies hit by Silicon  
Valley Bank collapse**

**The Telegraph**

**FTX collapse worse than Enron, claims  
cryptocurrency firm's liquidator**

**svb** 

 **FTX**

 **BINANCE**

**The  
Guardian**

**How Binance played a key  
role as FTX collapse unfolded**

# RECENT MARKET FAILURES AND SCANDALS



**Credit Suisse's fate casts a shadow over the European banking sector**



**UK prepares cash lifeline for tech companies hit by Silicon Valley Bank collapse**



**How Binance played a key role as FTX collapse unfolded**

**The Telegraph**

**FTX collapse worse than Enron, claims cryptocurrency firm's liquidator**

# RECENT MARKET FAILURES AND SCANDALS



- **One of the world's largest train operators**
- **Trains derailed near East Palestine in Ohio USA, a working-class community**
- **30 cars' worth of chemicals were drained and "burned," creating a toxic cloud over the area**

# RECENT MARKET FAILURES AND SCANDALS

“a mangled and charred mass  
of boxcars and flames”

“an ecological disaster”

# RECENT MARKET FAILURES AND SCANDALS



“Norfolk Southern’s [Precision Scheduled Railroading], including its use of longer, heavier trains staffed by fewer personnel, had **led to the Company suffering increased train derailments** and a materially increased risk of future derailments[.]”

– First-filed federal securities class action lawsuit

# THE THROUGH-LINE: OWNERLESS CORPORATIONS?

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- Management stalks a short-term gain at the expense of long-term value.
  - Predictors of long-term value – sustainability, attentiveness to a broader set of stakeholders, attention to sentinel risks – are discounted.
  - Costs of failure and tragedy are socialized and principally internalized by shareholders.
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# THE THROUGH-LINE: OWNERLESS CORPORATIONS?

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The ownerless corporation is being blamed in part for the corporate ills that the Government and others are trying to tackle, spiraling executive pay, *short-term thinking, narrow strategic focus*, a lack of diversity and so on. The bosses have been able to award themselves stratospheric pay packages because shareholders haven't been able to say no with any force.

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*~ Peter Timberlake ~*

*Former PR Manager for Legal & General*

How can asset owners enforce some focus on *long-term value*?

What *tools* are fit for purpose?

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***US Litigation*** – an ***under-used tool***  
for a muscular account of shareholder  
ownership and leadership

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RESPONSIBLE OWNERSHIP,  
LITIGATION AND CORPORATE  
REFORM

# SECURITIES FRAUD LITIGATION CAN ADVANCE SOUND GOVERNANCE

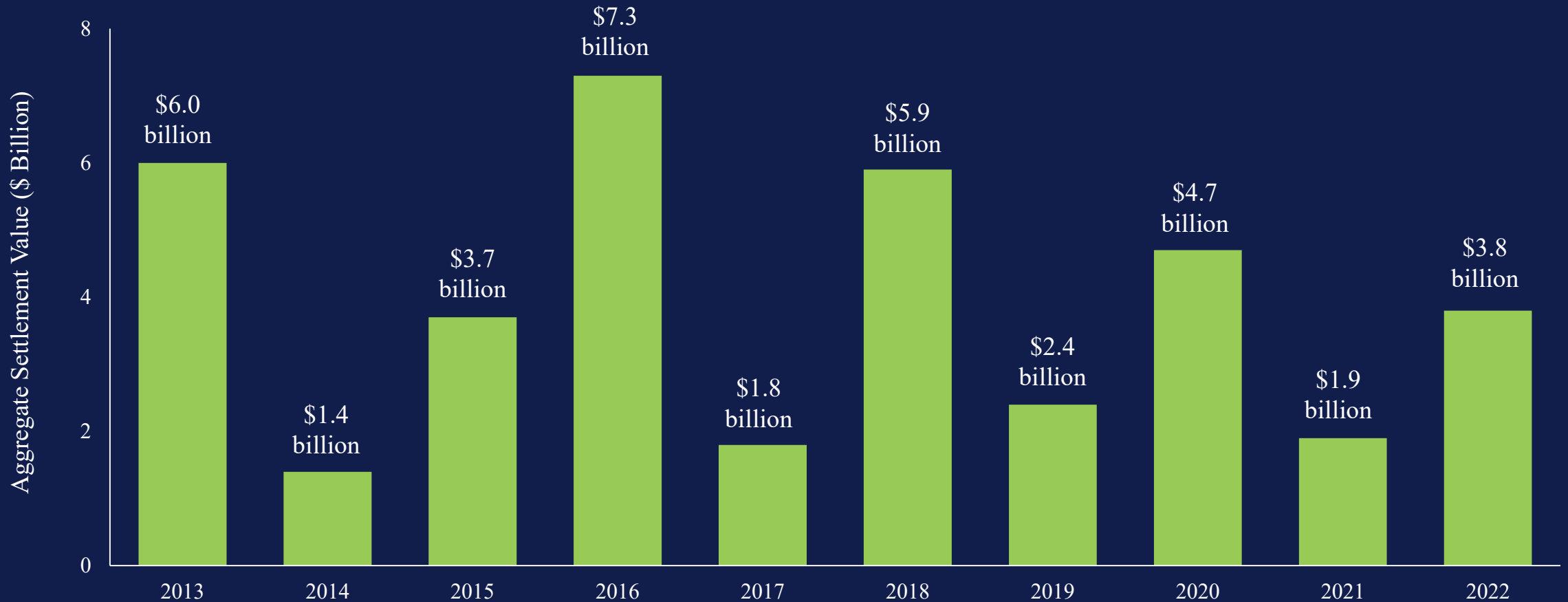
**Over \$100 billion recovered and returned to investors over last 25 years**

Corporate governance reforms include:

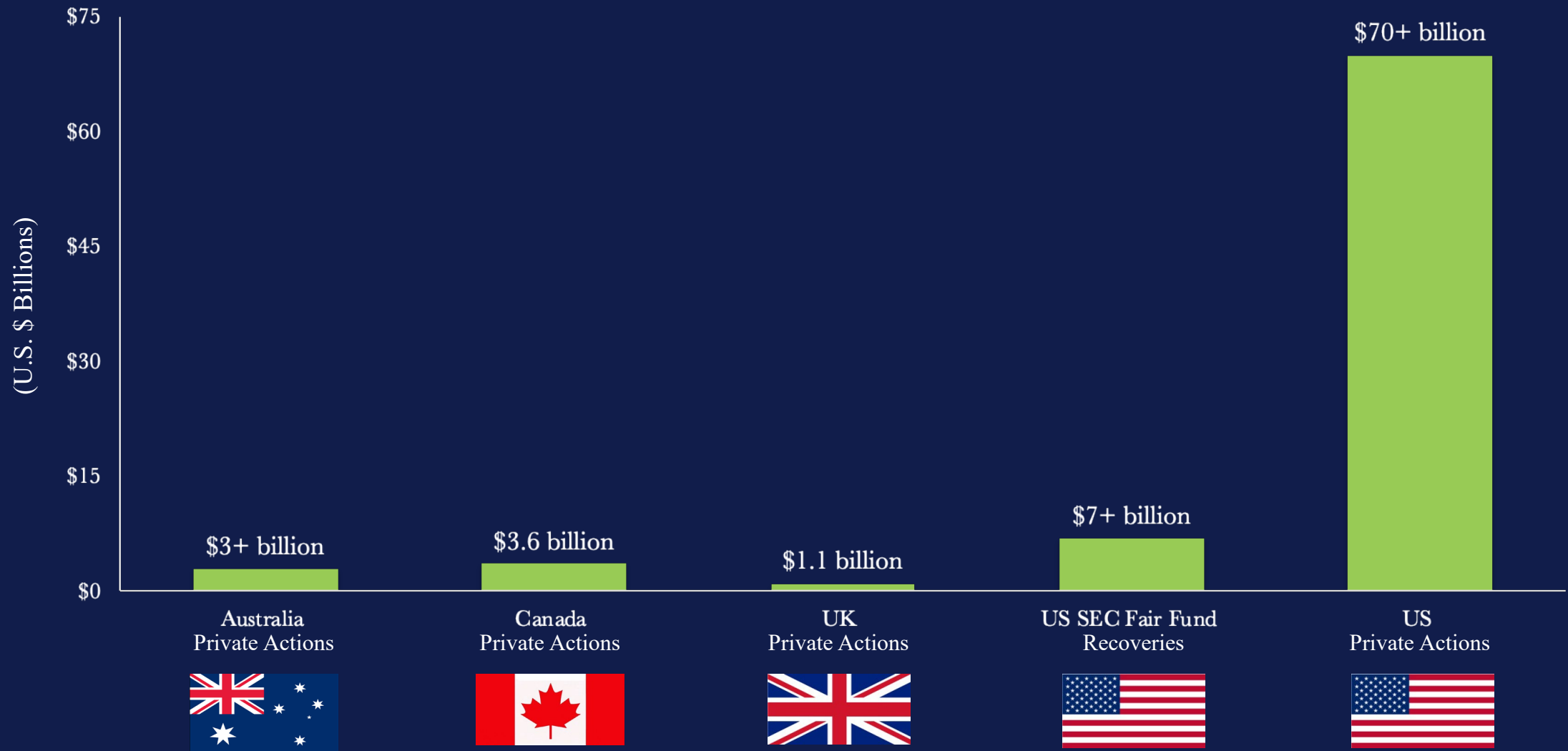
- separation of CEO and Chairperson positions
- limitations on staggered boards
- rotation of auditors
- appointment of shareholder nominated directors
- installment of ethics officers
- strengthened internal audit function
- trading compliance protocols and officers
- FCPA compliance protocols and codes
- limiting numbers of boards on which directors may sit

# SIGNIFICANT IMPACT: TOTAL ANNUAL RECOVERY VALUE

(Snapshot - January 2013–December 2022)



## Comparison of Recoveries Shared by Investors 2005-2017



# How Robbins Geller Beat the Feds in Walmart Settlement

By Jenna Greene  
June 25, 2019

Looking for the real winner in last week's \$282 million settlement between Walmart, the Justice Department and U.S. Securities and Exchange Commission that resolved charges of overseas bribery?

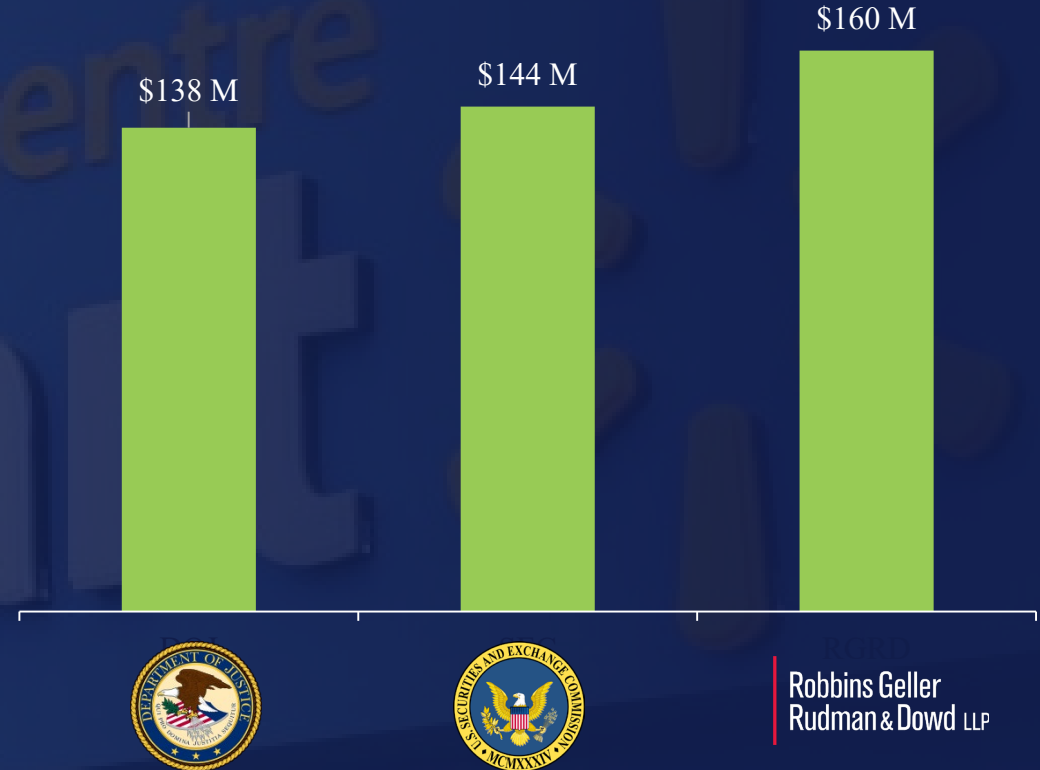
Looking for the real winner in last week's \$282 million settlement between Walmart, the Justice Department and U.S. Securities and Exchange Commission that resolved charges of overseas bribery?

Robbins Geller Rudman & Dowd.

Because while government officials in press releases were busy patting themselves on the back . . . they neglected to mention one thing: **Robbins Geller lawyers extracted a bigger settlement from Walmart than either the DOJ or SEC for the same underlying misconduct, and they did it more quickly.**

Act, while the DOJ settled FCPA criminal charges for \$138 million. The federal cases also covered alleged wrongdoing in India, Brazil and China. allegedly disclosed in an SEC filing a few months prior to publication that it had launched an internal investigation into its FCPA compliance.

### Walmart Settlements



It's like backwards day. Usually the class action rides on the coattails of the federal case, and the DOJ or SEC gets the biggest payout.

So what happened here?



# CASE STUDY: HOME DEPOT



## The Problem

- Shareholder value destroyed by aggressive and extraordinarily expensive move away from core business to new, untested model.
- CEO Nardelli forced out with “obscene” retirement package.



By Sara Stefanini Law360, New York (January 5, 2007)

## Shareholders Want Home Depot Board Members Out

Just days after the much criticized Home Depot CEO Robert Nardelli resigned, shareholders are asking that some board members be axed for the OKs they gave to his massive paychecks. Ken Langone, the retailer’s director, has come under fire for initially luring Nardelli, who resigned on Wednesday and received a \$210 million severance package. He has also been linked to stock option backdating, which an internal investigation found was routine practice from 1981 to 2000. Other board members on the chopping block include John Clendenin, Claudio Gonzalez and Milledge Hart, who have all reached the 72-year retirement



By Elaine Chow New York (January 11, 2007, 12:00 AM EST)

## Home Depot Shareholders Sue To Stop CEO Pay

Home Depot shareholders have brought the home improvement retailer to court in an attempt to stop CEO Robert Nardelli from collecting any more of his \$210 million severance package. In a suit filed in Georgia’s Fulton County Superior Court on Wednesday, shareholders sought an injunction to block Home Depot from paying Nardelli. Nardelli, who joined the company in 2000 and resigned January 3, has been paid \$225 million during his six years at Home Depot. The severance package, which will be paid out over the next four years, includes \$20 million in cash, \$77 million in unvested stock awards, \$32 million in retirement benefits and \$18 million of other entitlements, according to Home Depot. In the meantime, Home Depot’s stock has fallen about 7.9% since December 2000, losing market share to second place competitor Lowe’s Co., and will post its smallest annual gain in profit in the last nine years. “Nardelli’s tenure has been marked by abuse of shareholders and disappointing shareholder returns... Nardelli’s severance package is a final, indefensible step by the board of directors in wrongly overcompensating an unsuccessful CEO,” shareholders said in the complaint. The suit is the latest move by shareholders fed up with the massive amount of Nardelli’s severance package compared to the company’s mediocre performance in recent years. The group is now demanding greater say in determining executive compensation practices. The company drew more criticism in May, when Nardelli was the only director of the 11 member board to attend a shareholder meeting on executive compensation. Shareholders were forced to limit their questions and the meeting was adjourned in less than an hour, leading to complaints that the board was trying to avoid the matter. Last week, shareholders asked that certain members of the board be axed for signing off on Nardelli’s massive paychecks. Ken Langone, director of the board, came under fire for initially hiring Nardelli. Langone has also been linked to stock option backdating, which an internal investigation found was a routine practice at the retailer from 1981 to 2000. Shareholders also called for the heads of John Clendenin, Claudio Gonzalez and Milledge Hart, all who have reached the mandatory retirement age of 72 but were spared by the company’s decision to waive it this year. “We think Langone, Gonzalez and Hart should leave after the next the meeting and that the retirement age should be enforced,” said Richard Ferlauto, director of pension and benefit policy at American Federation of State, County and Municipal Employees, adding that Langone also turns 72 this year. “We have held the board culpable for the outsized pay package that Nardelli received. It was not performance based. It was a beauty contest, in that they were trying to lure Nardelli, theoretically one of the best and the brightest,” Ferlauto added. In June, two shareholder groups sent letters demanding that as a pre-condition to any stock options granted to Nardelli, that Langone be ousted after resigning as the company’s chairman. But

# CASE STUDY: HOME DEPOT



## The Solution

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Corporate Governance Reforms that:

- Require two-thirds of directors be independent
- Adopt enhanced director independence standards
- Permit large shareholders to nominate directors

# CASE STUDY: HOME DEPOT



## EXHIBIT 1

### BEST VALUE CONTRACTING POLICY TO BE IMPLEMENTED BY HOME DEPOT

#### Best Value Contracting Policy

This Best Value Contracting Policy as adopted will apply only to construction, maintenance and service contracts (other than contracts awarded under emergency circumstances where normal bid processes must be suspended in order to respond to exigent circumstances with a value of \$500,000 or more involving Home Depot, its affiliates and/or its subsidiaries whether such contract is awarded directly by Home Depot or through its agents. Home Depot will implement the following contracting policies:

(c) Staffing/Training/Safety Plans. Provider's plan must demonstrate its capability to recruit, deploy and retain sufficient numbers of qualified construction craft personnel for the project. The Project Staffing/Training/Safety Plan shall include:

(i) Staffing: significant weight will be given to firms that utilize reliable staffing sources, such as local union hiring halls or referral systems;

(ii) Training: consideration should be given reliability of the training providers, the facilities and resources used and the degree to which the firm participates in a bona fide registered apprenticeship training program (a bona fide registered apprenticeship training program is one registered with the U.S. Department of Labor or a State Apprenticeship Council).

(iii) Safety: pro-active safety measures by the provider, including formal safety training programs, such as the OSHA Construction Safety and Health courses, written health and safety plans, accident-prevention programs and substance abuse programs, should be given consideration.

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

CITY OF PONTIAC GENERAL EMPLOYEES' ) Civil Action No. 2006-cv-122302  
RETIREMENT SYSTEM, PATRICIA CAPIZZI, )  
SAVINO CAPIZZI, SHARON STARK, STEVEN )  
STARK, SCOTT BRYAN STARK, SARAH )  
KLEINMAN, NICHOLAS WEIL, ARNOLD )  
WANDEL and TRACIE SCOTTO, Derivatively on )  
Behalf of THE HOME DEPOT, INC., )

Plaintiffs, )

vs. )

KENNETH G. LANGONE, ROBERT L. )  
NARDELLI, CAROL B. TOMÉ, LABAN P. )  
JACKSON, JR., DENNIS M. DONOVAN, FRANK )  
L. FERNANDEZ, THOMAS V. TAYLOR, JOHN L. )  
CLEDENIN, CLAUDIO X. GONZÁLEZ, )  
BONNIE G. HILL, GREGORY D. BRENNEMAN, )  
MILLEDGE A. HART, III, ANGELO R. MOZILO, )  
THOMAS J. RIDGE, LAWRENCE R. JOHNSTON, )  
BERRY R. COX, RICHARD H. BROWN and )  
RICHARD A. GRASSO, )

Defendants, )

- and - )

THE HOME DEPOT, INC., a Delaware corporation, )

Nominal Defendant. )

DEMAND FOR JURY TRIAL

PLAINTIFFS' JOINT AMENDED COMPLAINT

# CASE STUDY: UNITED HEALTH



UnitedHealth Group<sup>SM</sup>

## SACRAMENTO Business Journal

By Carissa Wyant

### CalPERS requests freeze on UnitedHealth CEO's options

A federal court has frozen millions of dollars worth of unexercised stock options and benefits owned by William **McGuire**, the departing chief executive



## Cost of UnitedHealth's options fiasco soaring

Price tag will be much more than the \$286 million estimate

**MINNEAPOLIS — UnitedHealth Group Inc. warned investors on Wednesday that its stock option fiasco will cost much more than the \$286 million it previously estimated, and said it would restate earnings all the way back to 1994.**

The company's chief financial officer also resigned but will be assuming unspecified operational duties at the nation's second largest health insurer.

UnitedHealth said it has found problems with its handling of stock options as late as the end of 2005.

The company said it expects to take paper losses on prior earnings to account for stock options, and that it would take cash charges to pay the potential tax bill. It said it doesn't yet know how much those charges will be.

RECEIVED

CLERK, U.S. DISTRICT COURT  
ST. PAUL, MINNESOTA

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM, On Behalf of  
Itself and All Others Similarly Situated,

Plaintiff,

vs.

UNITEDHEALTH GROUP INC,  
WILLIAM W. MCGUIRE, STEPHEN J.  
HEMSLEY, PATRICK J. ERLANDSON,  
ROBERT J. SHEEHY, DAVID J.  
LUBBEN, WILLIAM A. MUNSELL,  
TRACY L. BAHL, LOIS E. QUAM,  
JAMES A. JOHNSON, THOMAS H.  
KEAN, MARY O. MUNDINGER,  
WILLIAM C. BALLARD, JR.,  
DOUGLAS W. LEATHERDALE,  
WILLIAM O. SPEARS, GAIL R.  
WILENSKY, RICHARD T. BURKE,  
DONNA E. SHALALA and ROBERT L.  
RYAN,

Defendants.

DEMAND BY

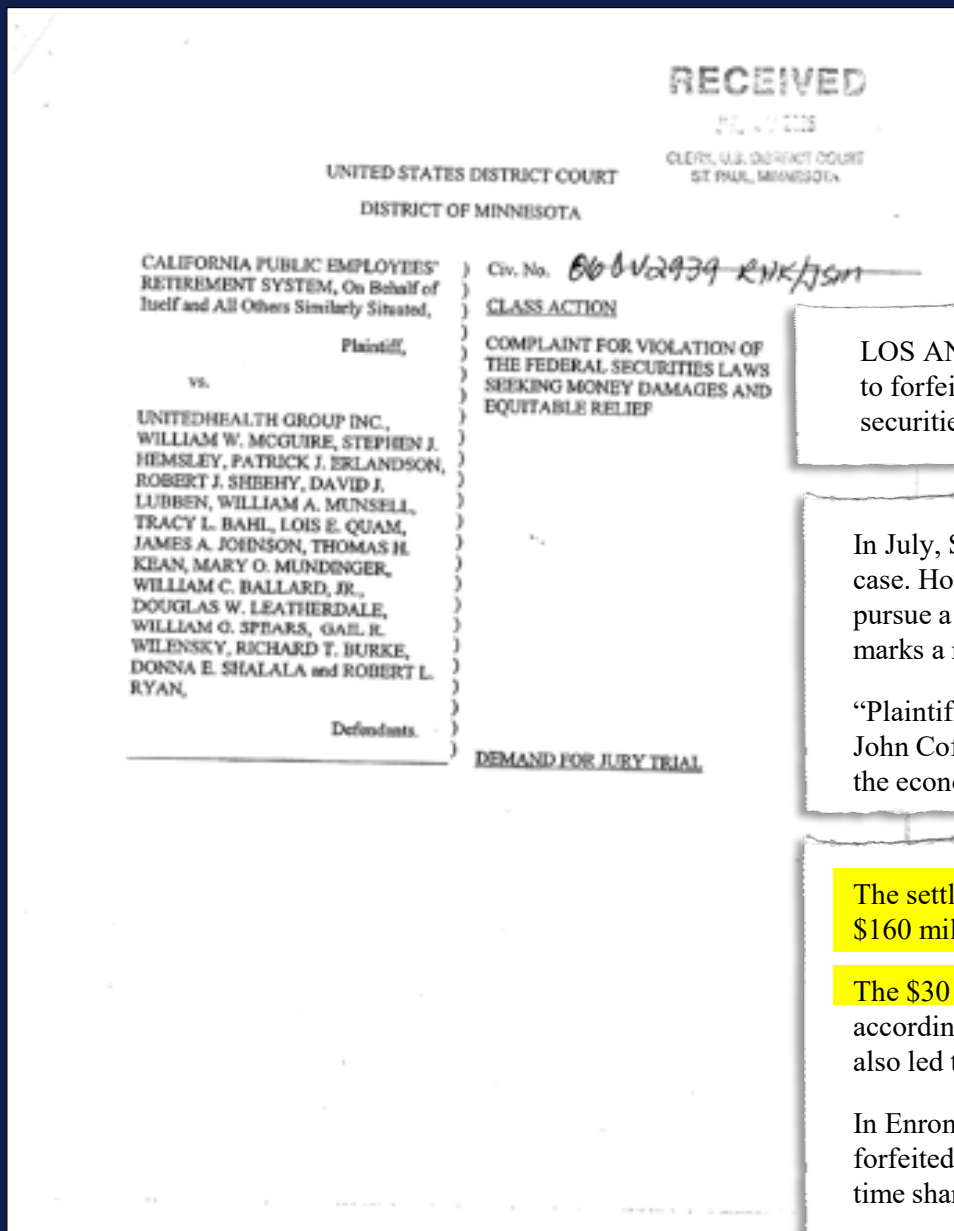
Civ. No. 06-02939-RNK/JSN

CLASS ACTION

COMPLAINT FOR VIOLATION OF  
THE FEDERAL SECURITIES LAWS  
SEEKING MONEY DAMAGES AND  
EQUITABLE RELIEF



# Former CEO Coughs Up Record Payout Defendants Must Dip Into Personal Funds to Settle



LOS ANGELES — The former CEO of one of the nation’s largest health insurers agreed Wednesday to pay \$30 million and to forfeit 3.7 million unexercised stock options in what likely marks the largest cash payout by an individual to settle securities fraud claims with shareholders.

In July, San Diego's [Robbins Geller Rudman & Dowd] negotiated an \$895 million settlement with UnitedHealth in the same case. However, the company did not release McGuire or the former general counsel from liability, and the firm continued to pursue a settlement with them. The combined sum now dwarfs the monetary size of every other stock options settlement, and marks a rare instance of an individual paying cash to settle a shareholder lawsuit.

“Plaintiff attorneys are interested in maximizing the aggregate settlement” and not extracting payments from individuals, said John Coffee, a professor at Columbia University School of Law in New York. “You could say that’s a weakness, but that’s the economic incentive.”

The settlements in the UnitedHealth securities class-action now total about \$925 million, more than five times higher than the \$160 million obtained by shareholders in the Brocade stock options backdating case.

The \$30 million payment also stands out as the largest cash payment ever made by an individual in a securities fraud suit, according to CalPERS and other lawyers. The shareholder litigation stemming from the collapse of Enron and WorldCom also led to large cash settlements with individuals. None came close to the size of McGuire’s contribution.

In Enron, 10 directors paid a total of \$13 million. In WorldCom, former CEO Bernie Ebbers paid \$5.6 million but also forfeited nearly \$28 million in other assets by some estimates. In both cases, Coffee said executives had few assets by the time shareholder litigation began.

# CASE STUDY: UNITED HEALTH



UnitedHealth Group<sup>SM</sup>

## \$925 Million Recovery

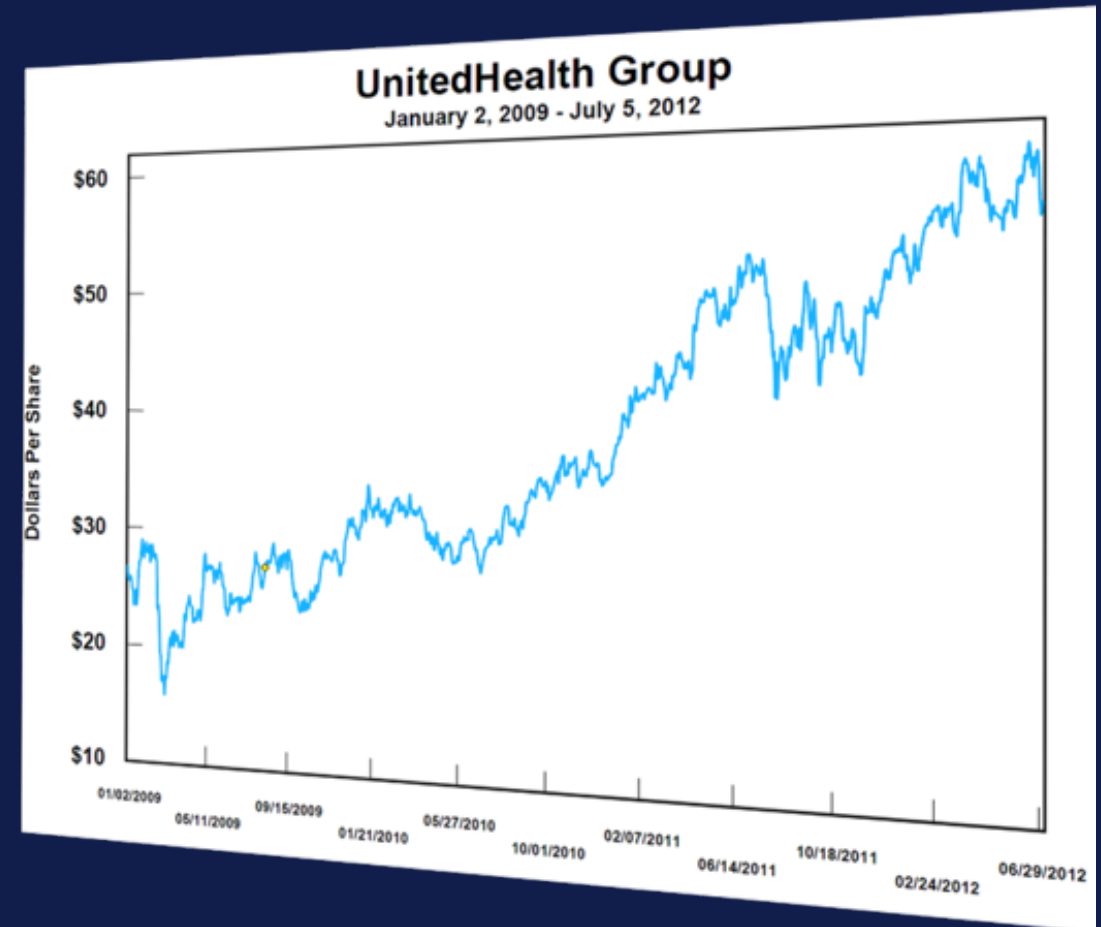
- 18 times greater than average
- 4 times next largest backdating recovery
- \$30 million in cash paid from CEO's own pocket

## Corporate Governance Reforms

- Shareowner-Nominated Director
- Lead Independent Director
- Executive Compensation Directly Linked to Performance

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UNH's market capitalization tripled subsequent to the announcement of these reforms.



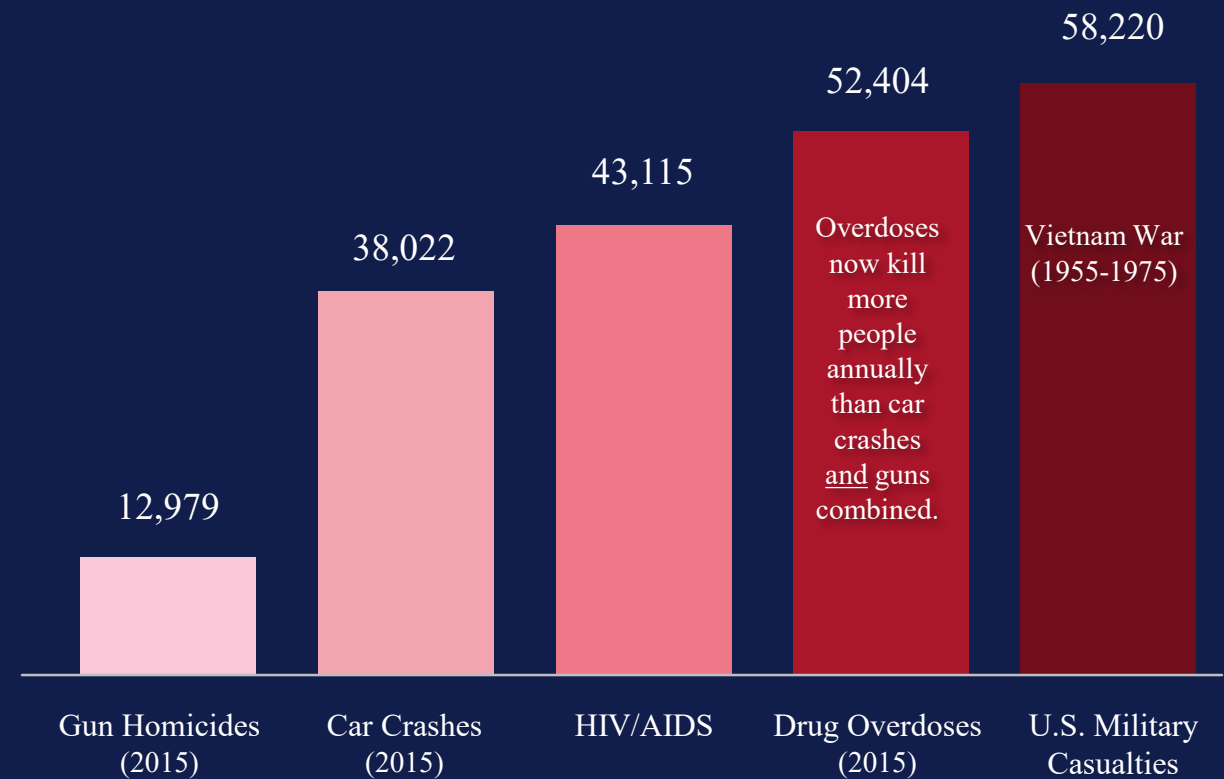
# DRUG MANUFACTURERS' MARKETING SCHEME

## THE MESSAGE

Campaign devoted to the “Catastrophic” “Crisis” of the “Under-Treatment of Pain.”

- Market opioids as rarely (less than 1%) addictive.
- Market opioids as being safe and effective for all kinds of pain, including chronic long-term pain.
- Market cancer drugs to non-cancer physicians.

## Total Deaths by Category



# Walgreens helped fuel San Francisco's opioid crisis, judge rules

By Meryl Komfield

Updated August 10, 2022 at 4:04 p.m. EDT | Published August 10, 2022 at 1:28 p.m. EDT

Walgreens helped fuel the opioid epidemic in San Francisco by shipping and dispensing the addictive drugs without proper due diligence, a federal judge ruled Wednesday, in what attorneys suing the retailer called a “wake-up call for companies.”

## THE RECORDER

ALM | LAW.COM

NEWS

### A 'Fifteen-Year Failure': Walgreens Liable for Contributing to Opioid Crisis in San Francisco, Judge Rules

The bench ruling from U.S. District Judge Charles Breyer marks the first bench trial to find Walgreens liable for public nuisance claims in the nationwide multidistrict litigation stemming from the ongoing opioid epidemic, according to San Francisco City Attorney David Chiu.

August 10, 2022 at 03:27 PM

Retail

**Aleina Lancaster**  
Litigation editor

Walgreens Co. is liable for substantially contributing to the opioid epidemic in San Francisco as the city's largest dispenser of prescription opioids, a California federal judge ruled.

## Walgreens Fueled SF Opioid Epidemic, Judge Rules

By Jeff Overley

Law360 (August 10, 2022, 11:41 AM EDT) -- Pharmacy giant Walgreens dispensed hundreds of thousands of suspicious prescriptions for narcotic painkillers in San Francisco without proper screening and is liable for ensuing opioid problems in the Bay Area, a California federal judge ruled Wednesday.

The ruling from U.S. District Judge Charles Breyer followed a bench trial this year that initially

In addition to assessing Walgreens' conduct, Judge Breyer cataloged the local ravages of opioid addiction, observing that it has “strained the city’s hospitals,” has “forced streets, parks and public spaces to close,” and has “exacerbated crime and homelessness.”

Paul Geller of Robbins Geller Rudman & Dowd LLP, counsel for San Francisco and a top plaintiffs lawyer in the MDL, told Law360 on Wednesday that Judge Breyer’s opinion offers “a sobering, comprehensive indictment of the callous practices that harmed so many people.”

“I hope this decision and this story will be read in Big Pharma boardrooms all across the country,” Geller said.





## CITY ATTORNEY OF SAN FRANCISCO

DAVID CHIU, CITY ATTORNEY

### San Francisco wins landmark opioid trial against Walgreens

August 10, 2022

*Federal judge finds Walgreens liable for substantially contributing to the opioid crisis in San Francisco*

SAN FRANCISCO (August 10, 2022) — San Francisco announced today that San Francisco acting on behalf of California won its landmark opioid trial against Walgreens. U.S. District Judge Robert Breyer of the U.S. District Court for the Northern District of California found Walgreens is liable for substantially contributing to the opioid crisis in San Francisco.



The Court found Walgreens over-dispensed opioids and failed to identify, report, and halt suspicious orders. The bench trial to decide in plaintiff's favor in the national bench trial to find Walgreens liable.

## CITY ATTORNEY OF SAN FRANCISCO

DAVID CHIU, CITY ATTORNEY

### San Francisco City Attorney announces \$230 million settlement with Walgreens after victory in opioid litigation

*was the first opioid bench trial in U.S. to be decided in favor of the city as yielded over \$350 million*

San Francisco City Attorney David Chiu announced today a \$230 million settlement agreement with Walgreens. The settlement is the result of a bench trial against the pharmacy chain and opioid manufacturer. Walgreens will pay \$229,610,000 over the course of 14 years, with the first eight years. Settlement funds will go towards addressing the opioid crisis in San Francisco.

“Opioids have wreaked havoc across our nation leading to immense suffering and untold damage,” said City Attorney Chiu. . . . **“Thousands of attorneys, public health officials, and advocates have spent nearly two decades trying to hold the opioid industry accountable for creating this public health crisis. I am proud our office was able to prove in court that the opioid industry perpetuated this problem.”**

**“San Francisco and the Department of Public Health will use these critical funds to save lives and bring people into treatment,”** said Dr. Grant Colfax, San Francisco Department of Public Health Director. “As we address the serious and continued impacts of fentanyl to our city, we can help many San Franciscans on their journey to wellness and recovery.”



*Thank You*

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*Juan Carlos Sanchez*

September 2023