



Corporate Governance Litigation Within a Fiduciary Framework

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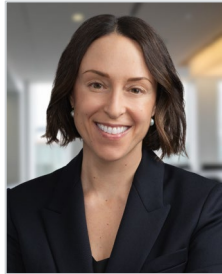
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Presenters



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Anya Freedman is a partner in BLB&G's Los Angeles office. She advises institutional investors on fiduciary law and governance matters. Bringing insights gained as general counsel to public pension funds, she empowers leaders to build best-in-class policies and make sound strategic decisions in securities and corporate governance litigation.

Before joining BLB&G, Anya served for nearly a decade as the principal legal advisor to the City of Los Angeles public pension systems, which cumulatively invest roughly \$70 billion in trust funds and administer retirement and healthcare programs on behalf of Los Angeles police officers, firefighters, municipal employees, and their families. She previously served as a judicial law clerk for the U.S. Court of Appeals for the Ninth Circuit and as a litigator in private practice.

Anya serves on the Council of Institutional Investors' Markets Advisory Council and has served on the Fiduciary and Plan Governance Committee of the National Association of Public Pension Attorneys ("NAPPA") since 2019.



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Christopher J. Orrico, a partner in BLB&G's Corporate Governance practice, represents shareholders in breach of fiduciary duty litigation against boards and senior executives. Christopher has recovered hundreds of millions of dollars for investors, improved corporate governance practices at companies, and vindicated shareholder voting and franchise rights.

Christopher has led and been a key member of teams prosecuting some of the firm's most significant litigations. Highlights of his litigation experience include *In re Columbia Pipeline Group, Inc. Merger Litigation* and *In re Mindbody, Inc., Stockholders Litigation*.

Christopher frequently presents at conferences and seminars and serves as a guest lecturer on shareholder rights and corporate governance litigation at law schools. He has also been recognized as a leading litigator in the industry by publications such as *The Legal 500*, *Law360*, *Benchmark Litigation*, *Thomson Reuters Super Lawyers* and *Lawdragon*.



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Michael Herrera is Senior Counsel to the Los Angeles County Employees Retirement Association, the largest county pension fund in the United States, with over \$70 billion in assets under management and over 175,000 members.

As Senior Counsel, Michael serves as principal legal advisor to the fund, represents the fund in complex litigation and administrative proceedings, and is responsible for the fund's global securities litigation program, including oversight and prosecution of domestic and international securities cases. He frequently speaks on various retirement, technology, and investment-related topics, and is nationally recognized for his work in the areas of securities litigation and corporate governance.

Michael is a former president and board member of NAPPA. He currently co-chairs NAPPA'S Securities Litigation Committee and New Member Education Committee. He received his B.S., *cum laude*, from the University of Southern California, and his J.D. from UCLA School of Law.



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Michael Calabrese is a corporate lawyer providing counsel to institutional investors and government agencies, particularly pension funds. He is a partner in the firm's Fund Formation & Investment Management Practice, regularly counseling both governmental clients and private sector clients who have dealings with the public sector, helping them navigate challenges specific to the public sector.

Prior to joining Foley, Michael was chief counsel for the San Bernardino County Employees' Retirement Association, where he served as general counsel to the more than 30,000-member pension system. He also served as the chief deputy county counsel and pension fund general counsel for the County of Merced, and as chief deputy city attorney for the City of San Diego. He gained experience as an associate attorney at three law firms in California and Michigan after graduating from law school.

Roadmap

- Fiduciary framework
- Overview of corporate governance litigation
- Case studies
- Delaware legislative update
- Advice for strengthening policies and operational practices

Fiduciary Framework

- Public pension boards are fiduciaries responsible for prudently investing billions of dollars to fund retirement benefits for their members.
- Their fiduciary obligations extend to actively monitoring, evaluating, and, where necessary, leading litigation involving their securities investments.
- Traditional federal securities class action litigation is now addressed by most public funds in formal board policies.
- But pension funds may be less familiar with the opportunities for both financial recoveries and governance improvements presented by corporate governance litigation.
- Legal claims are assets—the same fiduciary principles apply.

Differences Between Federal Securities Class Action Litigation and Corporate Governance Litigation

Securities Class Action Litigation

- Claims brought in connection with purchases or sales of securities.
- Claims brought under federal securities laws.
- Lead plaintiff appointed pursuant to the Private Securities Litigation Reform Act of 1995 (“PSLRA”) (i.e., investor with largest financial interest that is typical and adequate).
- Securities fraud claims required to be pleaded with particularity (i.e., subject to a heightened pleading standard).
- Fraud-on-the-market theory to satisfy reliance requirement for claims on open-market purchases
- Any money recovered distributed to harmed class members on a pro rata basis.
- Since SCOTUS decision in *Morrison*, fiduciaries must also monitor non-U.S. securities actions.

Corporate Governance Litigation

- Claims brought by holders of shares.
- Stockholder can use a demand to inspect company’s books and records (e.g., pursuant to Section 220 of Delaware General Corporation Law) to obtain evidence to support claims.
- Claims brought under the laws of the state of incorporation (often Delaware).
- Corporate governance lawsuits not governed by the PSLRA.
- Non-fraud claims not subject to heightened pleading standard but reviewed under judicially created standards, depending on claim type.
- Any money recovered flows back to the company in derivative suits but can be paid to shareholders in direct suits.

Two Main Types of Corporate Governance Litigation

- **Shareholder Derivative Actions:**

- Shareholders seek recovery on behalf of corporation when corporation is harmed
- **Company receives the recovery and governance reforms to improve long-term value**
- Demand futility requirement
- Standing: shareholder is required to have held company stock at the time of the alleged wrongdoing and throughout the pendency of litigation
- Examples: executive compensation, oversight, related-party transactions, insider trading

- **Direct Actions (frequently arising from M&A transactions):**

- Shareholders' personal rights infringed
- **Shareholders receive a direct monetary recovery**
- Standing: shareholder is required to hold company stock through the closing of the potential transaction
- Examples: M&A challenges, corporate control issues, voting rights claims, statutory violations

Key Procedural Considerations

- **First conduct a confidential investigation:**
 - To determine how best to proceed and whether litigation is warranted, serve a stockholders' demand for inspection of books and records under Delaware General Corporation Law ("DGCL") Section 220 (or the equivalent statute in another jurisdiction).
 - This investigation allows shareholders, with a proper purpose, to demand corporate books and records relating to the matter to determine whether legal action may be warranted.
- **Legal claims and property interests travel with the shares:**
 - If the litigation achieves an increase in the share price above the deal value—either in the form of a settlement or a damages award—that value goes to the shareholders who own the shares when the deal closes.
 - Delaware courts will consider the size of a plaintiff's stock holdings when determining who to appoint as lead plaintiff for a class of shareholders in a direct action.

Case Study: Shareholder Derivative Action

- *Columbia/HCA Healthcare Corporation*
 - Public pension funds filed a derivative action on behalf of Columbia/HCA Healthcare Corporation (now known as HCA Healthcare) against former senior executives and current and former members of HCA's board of directors seeking to hold the defendants responsible for directing or enabling HCA to commit the largest healthcare fraud in U.S. history.
 - The case was led by the Los Angeles County Employees Retirement Association ("LACERA"), the California Public Employees' Retirement System ("CalPERS"), the New York State Common Retirement Fund, the New York City Pension Funds, and the New York State Teachers' Retirement System.
 - LACERA and the other public pension funds obtained significant and comprehensive corporate governance reforms, increasing the board of directors' power and responsibility to oversee internal controls and financial reporting.

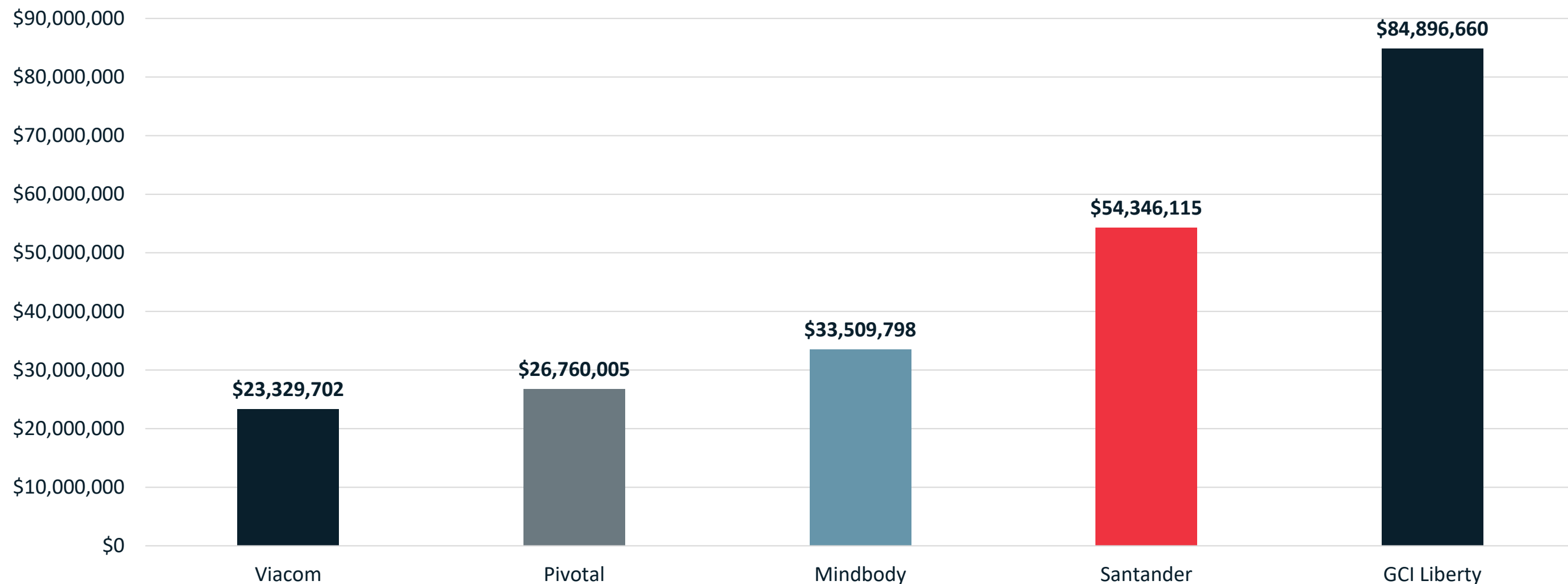
Case Study: M&A Litigation (Direct Action)



- *Viacom/CBS Merger*
 - CalPERS led a class action against Viacom corporate fiduciaries challenging the 2019 merger of Viacom and CBS Corporation.
 - The action alleged that the merger between Viacom and CBS provided unfair financial consideration to Viacom shareholders and was negotiated by a conflicted special committee that served the interests of Viacom's controlling shareholder, Shari Redstone. In doing so, Ms. Redstone surrendered hundreds of millions of dollars of value, or more, that rightfully belonged to all Viacom stockholders.
 - CalPERS defeated defendants' motions to dismiss almost in their entirety and negotiated a financial recovery of \$122.5 million.

Fiduciary and Financial Stakes in Recent Direct (M&A) Cases

Estimated Money Left on Table by Shareholders



Delaware SB 21: New Law Enacted Over Significant Investor Opposition

- On March 27, 2025, Delaware Senate Bill 21, which significantly amends the DGCL, passed the General Assembly and was signed into law by Governor Meyer. These provisions apply retroactively to February 17, 2025.
- 75+ institutional investors as well as the Council for Institutional Investors (“CII”), the Managed Fund Association, and the International Corporate Governance Network, opposed SB 21 in letters to the governor and/or legislature.
- More than 400,000 individuals also sent letters to the Delaware legislature expressing concerns about SB 21.
- 26 corporate law scholars, including from UCLA School of Law, Columbia Law School, and Stanford Law School, sent a letter to the Delaware legislature proposing an amendment to SB 21 that would have made the new legal regime subject to shareholder approval.
- CII General Counsel Jeff Mahoney, Columbia Law Professor Eric Talley, and former SEC Commissioner Rob Jackson testified to express their concerns and support this “opt-in” amendment.
- Unfortunately, none of these efforts were successful, and SB 21 was passed as proposed without any amendment.

SB 21: Lower Guardrails for Deals With Corporate Controllers

- Going-private transaction:
 - 1) Approved “**in good faith and without gross negligence**” by majority of disinterested directors on committee; **and**
 - 2) Approved by “**informed, uncoerced, affirmative vote** of a majority of the votes cast by the disinterested stockholders”
- All other controlling stockholder self-dealing: **either** (1) or (2)
- Not defined as a controlling stockholder, unless hold **33.3%** of voting power
- Heightened presumption of independence for directors
 - Rebutted with “substantial and particularized facts”
- Limits on DGCL Section 220 demands for inspection of corporate books and records

SB 21: Lower Legal Guardrails Require Increased Vigilance

- The legislation that Governor Meyer has signed into law creates new safe harbors that:
 - lower guardrails for conflict transactions with controlling shareholders,
 - erode standards for board independence, and
 - restrict the information that institutional investors can obtain to investigate wrongdoing at the companies they invest in.
- It may be prudent to assess pension funds' investments in companies with controlling shareholders that are incorporated in Delaware to weigh the increased risk that corporate insiders of Delaware companies may attempt to extract private benefits of control through self-dealing transactions.
- General counsel, with assistance from expert outside counsel, should evaluate how to adapt investigations, venues, and claims to continue to protect plan equity investments under new law.

Strengthening Policies to Monitor M&A Transactions and Guide Fiduciary Decisions

1. Establish monitoring mechanisms
2. Engage trusted legal experts
3. Conduct confidential investigations
4. Articulate clear factors for fiduciary decisions
5. Ensure litigation readiness
6. Develop guidelines and investment manager communications regarding shareholding
7. Clearly document the fund's decisions
8. Integrate into investment management agreements, if applicable

Closing Thoughts & Your Questions

For more information,
scan here 



Questions? Contact us.



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