

The Importance of Private Enforcement of Federal Securities Laws: Institutional Investors Continue to Outpace SEC

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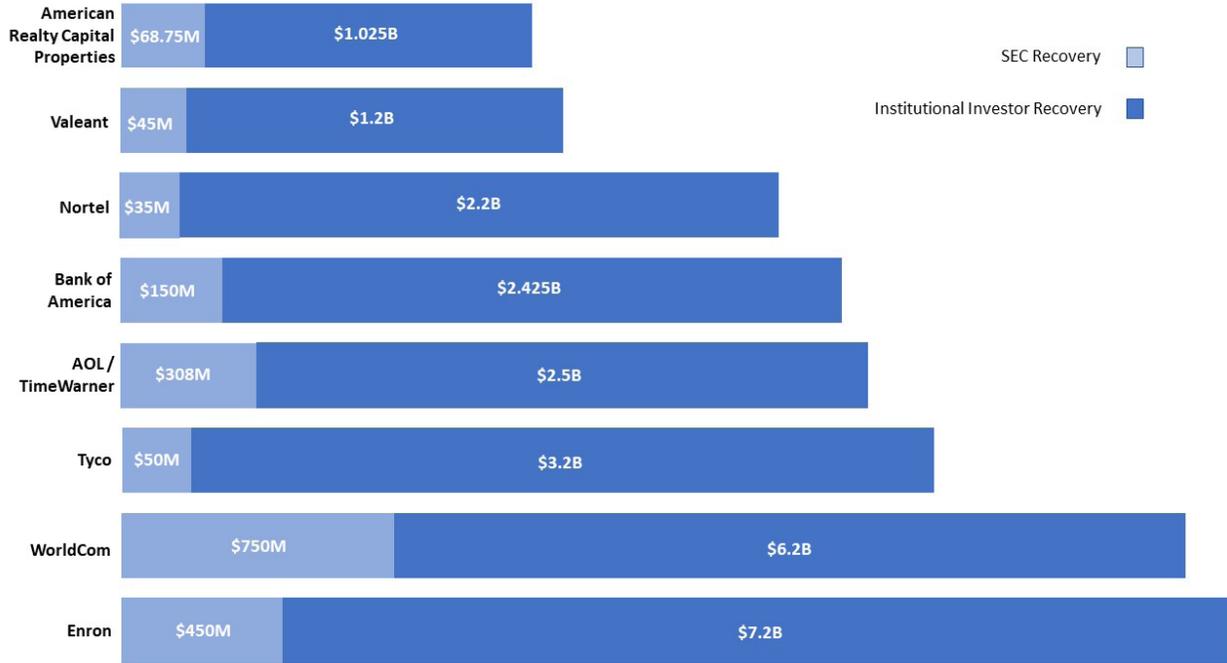
Pension trustees have the fiduciary responsibility to act in the best interests of plan participants. One of the most important responsibilities is to oversee fund investments. Trustees often seek to fulfill this oversight role, in part, by establishing procedures to monitor and participate in securities class action lawsuits that impact the fund's portfolio. By participating in these matters, a pension plan can recover funds lost as the result of misconduct and can enhance the value of plan assets.

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The SEC serves as an important line of defense for investors against corporate malfeasance. However, since Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"), expressing its clear preference that institutional investors lead shareholder actions, public pension plans have repeatedly demonstrated that they play an indispensable role protecting investors and recovering for corporate misconduct. Since the passage of the PSLRA, institutional investors have achieved tens of billions of dollars in recoveries. In many instances, the recoveries outpace those achieved by the SEC in related matters. The chart below shows the disparity.

This trend of outperformance has continued and suggests that institutional investors' participation in securities litigation is as important as ever. Take for example, the recent securities class action *The Police Retirement System of St. Louis v. Granite Construction Incorporated*, 19-cv-4744 (N.D. Cal.). In March 2022, a federal district court approved a \$129 million resolution in the case, which concerned allegations of accounting fraud perpetrated by Granite and several of its senior executives.

FIGURE 1: Investor vs. SEC Recoveries



Consistent with the historical trend, on August 25, 2022, the SEC announced that it resolved similar claims of financial reporting fraud against Granite and several former executives for approximately 90 percent less than what investors achieved. Specifically, Granite agreed to pay \$12 million to resolve the SEC’s claims and the company’s former CEO and two former CFOs agreed to return a total of roughly \$1.9 million in bonuses and compensation to Granite. While the SEC is continuing to pursue claims against another former Granite executive, the results the SEC has achieved to-date suggests that the agency will not reach the level of remuneration achieved in the class action.

The disparity in the results achieved shows that it is not in pension plans’ best interests to rely solely on public enforcement. Indeed, the SEC has different goals when instituting an action as compared to private investors. In private securities litigation, the goal of a plaintiff is generally to achieve the largest possible monetary recovery. The SEC has a broader mission which, in addition to protecting investors, includes maintaining fair, orderly and efficient markets and facilitating capital formation. Significantly, the SEC states that “[w]hile in some cases, ill-gotten gains disgorged by defendants are returned to defrauded investors,” that is not always the case as it is with successful securities class actions.

The resolution of the Granite matters demonstrates that it remains essential for public pension funds to continue to monitor and participate in securities litigation matters, when warranted, so that plan assets can be maximized. ♦

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