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CORPORATE GOVERNANCE AND THE HEALTHSOUTH DERIVATIVE LITIGATION

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Corporate Governance and the HealthSouth Derivative Litigation

By Ken Randall and Hunter Hill

On June 18, 2009, Jefferson County Circuit Judge Allwin Horn entered a judgment of nearly $3 billion against former HealthSouth CEO Richard Scrushy in the derivative action filed on the corporation's behalf. Scrushy used the company he founded, the industry leader in rehabilitative health care, to perpetuate a colossal fraud on the market. Scrushy and his CFOs overstated HealthSouth's net income by $3.1 billion over seven years and traded HealthSouth's stock in order to take advantage of this fraud, harming not only HealthSouth and its shareholders but the market as a whole. Following extensive litigation, involving perhaps the most blatant breach of corporate governance by a homegrown Alabama company, Judge Horn conclusively gave Scrushy the title "*CEO of the fraud.*" (*Tucker v. Scrushy*, No. CV-02-5212 at p. 25 (Jefferson County Cir. Ct., Ala. June 18, 2002) (memorandum opinion)).

The Structure of the Litigation

Three different trials compose the corpus of the HealthSouth fraud litigation. In 1998, a class of stockholders filed a direct securities fraud suit in federal court against HealthSouth and several insiders, including Scrushy, claiming that management materially misrepresented the effects of certain acquisitions and Medicare changes in 1997 on HealthSouth's financial position. In the wake of sharply declining earnings in the third quarter of 2002, several other securities fraud class actions were filed by various stockholder and bondholder groups. After the financial fraud at HealthSouth became public in March 2003, the old and new federal court securities fraud cases were consolidated into

a class-action dubbed *In re HealthSouth Corporation Securities Litigation*. While Scrushy refused to settle, HealthSouth and the other directors and officers settled the case for $445,000,000, covered by stock issuance and insurance.

Secondly, the SEC brought criminal charges against Scrushy, filed in federal court, with claims providing the first real test for provisions in the Sarbanes-Oxley Act ("SOX"), which were intended to assist the prosecution of accounting fraud. The business and legal communities viewed this proceeding as a relative failure. HealthSouth settled for only $100,000,000 in civil damages and was enjoined from further breaches of securities laws, while not admitting to any wrongdoing. As is well known by now, though five former HealthSouth CFOs, who had plead guilty, testified against the former CEO, Scrushy was acquitted on these securities fraud criminal charges.

Our focus, *Tucker v. Scrushy*, was a derivative action filed by shareholders on behalf of HealthSouth. The action began in August 2002, before the HealthSouth accounting fraud was made public, when a shareholder, Wade Tucker, filed suit against Scrushy, then CEO, and various other officers and directors in the Circuit Court for Jefferson County, Alabama, for various breaches of fiduciary duty stemming primarily from self-dealing transactions.[1] After the accounting fraud was announced, Judge Horn found that demand would have been futile and appointed Wade Tucker as the derivative plaintiff, who had authority to assert the claims of HealthSouth resulting from the accounting fraud that was discovered in March 2003. Several other suits were consolidated under this name and were placed under the care of Judge Horn. After a bench trial in May 2009, the court found that the damages that should be awarded against Scrushy totaled $3,115,103,000. After certain judgment credits related to previous recoveries on behalf of HealthSouth in this same derivative litigation, Judge Horn entered a judgment against Scrushy and in favor of Wade Tucker, derivatively for HealthSouth Corporation, in the sum of $2,876,103,000 for fraud, insider trading, negligence and self-dealing.

As in the Bernie Madoff case, efforts are now underway to identify, find and liquidate Scrushy family assets, the fruits of corporate waste and unjust enrichment from massive breaches of fiduciary responsibilities. It is doubtful that full recovery ever will be made.

These three proceedings, combined, found HealthSouth, Scrushy, other officers and directors, auditors, and investment bankers liable for well over $3 billion in damages and disgorgements.

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The Derivative Litigation: A Myriad of Fiduciary Violations

For publicly-traded corporations, the officers' and directors' ultimate responsibility is to the company's owners, the shareholders. In *The Wealth of Nations*, Adam Smith wrote that "being managers rather of other people's money than of their own, it cannot be well expected that they should watch over it with the same anxious vigilance with which . . . partners . . . frequently watch over their own." Functional capital markets require that investors turn over their capital to these managers, normally complete strangers. In fact, the U.S. Supreme Court held that the essence of a "security" is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[2] The security is the fundamental building block of our public markets, requiring investors to trust that other people will produce worthwhile financial returns. In other words, our very market economy is *defined* by trust.

Therefore, the law has imposed certain indispensable fiduciary duties on officers and directors to foster confidence that they will maximize the investors' returns.[3] Under standard corporate-governance nomenclature, fiduciary responsibility includes the "duty of care" and the "duty of loyalty." A case involving a breach of *care* "is essentially a negligence cause of action," according to Dr. Richard Thigpen's renowned treatise, while a breach of *loyalty* "relates more to the law of fraud."[4]

Scrushy's behavior was a tremendous breach of both the duty of care and the duty of loyalty. Courts have utilized a spectrum of standards in defining the duty of care, but Scrushy violated that duty from one end of the spectrum to the other. Delaware law governed the derivative litigation. Even if under Delaware's business judgment rule "director liability is predicated upon concepts of *gross* negligence,"[5] Scrushy clearly violated that standard of care. Similarly, the derivative action demonstrates Scrushy's complete disregard of his duty of loyalty to advance HealthSouth's best interests, through his multiple acts of self-dealing.

Forecast Failures

There were at least two motivations for the fabrication of HealthSouth's earnings. The first involved the company's failure to meet its financial forecast, which would have dismayed Wall Street and greatly reduced the value of Scrushy's own HealthSouth stock. While valuation methods typically involve discounting the *perpetual* cash flows to shareholders, a corporation's cash flows are only as good as the last quarter. Failing to meet earnings

reduces the expected future cash flows, naturally driving down the fundamental value of a company's publicly traded stock. As the largest shareholder of the company he founded, a great deal of Scrushy's wealth was tied to the share price.

Following multiple acquisitions, the 10-Q HealthSouth filed with the SEC in the second quarter of 1996 tells the story of a vibrant company, operating 643 outpatient care centers as of June 1996, compared with only 382 outpatient care centers a year earlier. There was growth reported, though less pronounced, in the number of surgical and inpatient facilities. Quarterly earnings per share were reported at $0.36, compared to just $0.08 a year earlier. The reality was much bleaker. According to the Special Audit Committee Report of May 26, 2005, the financials overstated pre-tax income by $7.9 million in Q2, $10.79 million in Q3 and $70.2 million in Q4. For FY1996, HealthSouth missed the board-budgeted net income by over 32 percent, but it reported that it beat the estimates.

It is difficult to imagine a more blatant violation of the duties of loyalty and care than Scrushy's actions. Granted, a higher stock price equally enhanced the value of every shareholder's stock during the period of the fraud, but the falsified financials imperiled the company's reputation and very existence. The fraud ultimately led to a great decline in the stock's value. At issue, of course, is not only the fabricated value of HealthSouth's stock, but a fundamental attack on the core of the public market: accurate and transparent pricing information. Choices to buy, hold or sell stock can be only as good as the data informing the decision.

Fraud is illegal in all business entities, but fiduciary duties must be contextualized. Federal and state laws distinguish between the application of regulations to privately and publicly held companies. In private (including closely held) corporations, operations often are informal, and often all shareholders are also directors. Delaware law even permits the behavior of LLC members to be governed by contract law, rather than by traditional fiduciary responsibilities.[6]

With a publicly traded company, however, stockholders have less direct board representation. Their knowledge base is framed by the company's earnings reports; few shareholders actually attend the company's annual meetings. It is said

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that shareholders can "vote with their feet," by walking away from an under-performing company. But when company executives perpetuate a fraud on the marketplace for securities, they do more than keep the company's owners in the dark—they blindfold and handcuff stockholders.

Judge Horn found that, through the exercise of stock options and the sale of stock, Scrushy received about $93 million from trades in 1997 and $54 million from trades in 2002—returns inflated by reporting.[7] On the other hand, the inflated earnings actually *cost* HealthSouth $614,146,000 in additional federal income tax on non-existent profit. Another overpayment of $105,218,000 was made for state income taxes. HealthSouth also overpaid $81,334,000 in taxation on fictitious personal property. Even though it eventually recovered the overpayment of federal and state income tax, HealthSouth lost use of money when it needed it; the "time value of money" exacerbated the damage from the overpayment.

With some irony, the bloated financials also hiked the price HealthSouth paid for the repurchase of its own publicly traded stock. Like any other shareholder, but at a larger scale, HealthSouth paid more than it should have for company stock. Though other courts have accepted expert testimony to evaluate the difference between the purchase price and a corrected fair market value of traded securities, Judge Horn found this calculation too speculative to award damages to the corporation. Besides, much of the class-action settlements centered on HealthSouth *benefiting* from the bloated pricing, which had enabled it to acquire other rehabilitative health care companies with a lower cost of capital.

When the fraud was exposed in 2003, HealthSouth experienced the most direct damage. The price of HealthSouth stock fell to less than $0.50 per share from

$19.55 the day before the FBI raid in March 2003. As the share price fell, the cost of debt increased, and HealthSouth incurred $1.5 billion in debt service and credit premiums. JP Morgan froze the $1.25 billion credit line it had opened for the company just days before some $300 million in debt principal was due. Fears raged that revelations of the fraud would force the company to file for bankruptcy, just as Enron and Worldcom had done. The New York Stock Exchange delisted HealthSouth shares. Just to reconstruct and restate the financials cost HealthSouth $692 million in accountants' fees; the sum of $622 million was included in the judgment for this expense.[8]

> A second motivation for falsifying HealthSouth's financials involved Scrushy's employment contract.

Bogus Bonus

A second motivation for falsifying HealthSouth's financials involved Scrushy's employment contract. Under his contract, Scrushy earned a bonus if HealthSouth's actual net income exceeded its budgeted net income. Similar bonuses often are used appropriately and effectively to incentivize C-suite performance and to create a metric for linking management compensation to corporate performance, thus reducing the so-called agency problem. Since stockholders have only a residual claim to earnings, greater earnings increase stock value and return. Tying compensation to performance incents the CEO to work more industriously.

In a setting of fraud, however, Scrushy's bonus incented him not to improve performance but to falsify earnings. Scrushy's FY1996 bonuses alone more than tripled the *total* amount that the average CEO of an S&P 500 portfolio company earned at the time[9]—and, of course, Scrushy did not actually meet the performance metric for his bonus. The court's judgment included $22,880,000 related to Scrushy's having illegitimately earned his 1996 bonus. The court previously had awarded more than double that amount for bogus bonuses for 1997-2002.[10]

Law school business organization courses devote much time to the subject of the business judgment rule. Though the business judgment rule has multiple meanings, it can help evaluate whether officers or directors met their duty of care. Management's reasonable care is equated with its having made at least *rational* business decisions. When seeking to determine whether a director used reasonable care, the burden of proof is on the plaintiff to show that the director's *ex ante* decision was either uninformed or made for some reason other than to benefit the shareholders.[11] But where officers and directors *intentionally* deceive or harm the entity and its shareholders, a breach of the duty of care becomes an outright fraud, an intentional tort and a violation of the securities laws, rather than just a negligent and bungled judgment. The business judgment rule obviously does not insulate an officer or director for liability from fraud intended to falsify the satisfaction of bonus metrics. Management certainly cannot claim they acted in good faith in such a situation.

Of all the evidence of Scrushy's fraud at HealthSouth—overcoming any possible defense of him having simply made a bad judgment in trusting his CFOs—Judge Horn focused on Scrushy's receipt of weekly and monthly consolidated income/tracking statements. Those statements contained the *real* monthly financial data, so anyone seeing them would have been aware of HealthSouth's *true* earnings and the level of concoction needed to reach the targeted numbers subsequently reported to the market. Scrushy's handwriting was contained on several pages of the tracking documents. With this evidence, even if Scrushy had not actively perpetrated the fraud (which the court found he had), his claim of being unaware of others' ongoing fraud logically evaporated. The regular "spiking" of tracking figures in the *third month* of each quarter—which would have looked suspect to even a novice at reading financial statements—also suggests knowledge of the fraud by the former HealthSouth CEO.

Yet Scrushy himself had signed the 10-Ks and 10-Qs, containing data that was different from the tracking statements he had seen. An obvious motivation for Scrushy's signing inaccurate filings was tied to his contractual bonuses. Reporting excess net income not only appeased Wall Street and enhanced Scrushy's own holdings, but also augmented his already sizable compensation.

Corroborating documentary evidence came from a notebook prepared by an unindicted former HealthSouth treasurer. Like the tracking statements, the notebook reported real earnings versus projected earnings, summarizing the level of fabrication needed to meet the latter. Two witnesses testified that the notebook had been shown to Scrushy, who became irate with the treasurer who had prepared it. After this confrontation, Scrushy failed to take any action to stop the fraud, and the treasurer promptly resigned.

Indeed, direct evidence that Scrushy himself had participated actively in the fraud came from the testimony of five convicted former HealthSouth CFOs. To those who found Scrushy's exoneration in the criminal trial to be unfathomable, it was the testimony of the CFOs that seemed most compelling of a guilty verdict. However, the CFO's testimony *was* dispositive in the derivative litigation. Each former CFO gave detailed testimony about Scrushy's active role in the fraud. Though the five of them are convicted felons, whose credibility may be in doubt, Scrushy is also a felon, even if in an unrelated criminal proceeding. As Judge Horn concluded straightforwardly, it is "inherently incredible that a CEO could fail to know or discover a fraud of this magnitude of almost seven years." (p. 28).

Scrushy, moreover, was thrust upon his own petard. The derivative action relied on testimony from a deposition that Scrushy had given ten years earlier in an unrelated case involving fraud by a company called MedPartners. HealthSouth was an investor in MedPartners, and Scrushy was on the MedPartners board. When the MedPartners CEO and HealthSouth director, Larry House, resigned over the fraud, Scrushy briefly filled this role at MedPartners.

In Scrushy's deposition in the MedPartners' case, he was asked who was responsible for the fraudulent

MedPartners financial statements. Scrushy answered: "It would be the top financial guys, which would involve the comptroller and the CFO *and it would be the CEO.*" (p. 7, emphasis added). Scrushy apparently hoped to be held to a lesser standard of CEO responsibility at HealthSouth than the standard he had articulated for the MedPartners CEO. Such an inconsistency rises to hypocrisy, given the affiliation between HealthSouth and MedPartners.

"Self-dealing" is one way that officers and directors can violate their duty of loyalty. Like much corporate governance terminology, "self-dealing" means what it says. Officers and directors *self-deal* when they use their positions with the corporation to enrich themselves, rather than the shareholders. Scrushy caused HealthSouth to do business with various entities in which he and family members had an interest. Such affiliated transactions are not *per se* illegitimate. If such a transaction involves a fair market value for the commodity being sold or traded, and if the officers or directors disclose their interest to the board of directors, a court easily may view the transaction to be appropriate. This is so especially where the board or shareholders approve or ratify a transaction. However, the cure-all of disclosure did not occur with regard to Scrushy's self-dealing transactions.[12]

Perhaps the worst example of Scrushy's self-dealing involved a company called MedCenterDirect.com ("MCDC"). HealthSouth owned 29.8 percent and Scrushy owned 28.3 percent of MCDC, which Scrushy formed during the dot com bubble. Scrushy actually tainted the entire HealthSouth Board of Directors with regard to MCDC, by facilitating every director's purchase of MCDC stock. All shareholders—Including HealthSouth, Scrushy and the other directors—paid a minimal amount for their stock in MCDC ($0.30 a share).

Under Scrushy's direction, HealthSouth loaned MCDC $10 million and guaranteed other loans of $20 million. However, by committing only HealthSouth to underwrite the loan and loan guarantees, and not Scrushy or the other shareholders, HealthSouth incurred a disproportionate amount of risk if MCDC was unsuccessful. On the other hand, all stockholders would share in the upside if MCDC succeeded and enjoyed a liquidity event, such as an IPO. So Scrushy and the other directors potentially could benefit from HealthSouth's capitalization of MCDC, but they would not suffer directly from MCDC's default on its loans. Scrushy and his board could lose their minimal equity investment, but they could not lose the value of the loans.

When MCDC became insolvent in 2003, HealthSouth incurred a judgment of nearly $32 million on the guarantee, including post-judgment interest. Judge Horn awarded the plaintiffs $57,709,000 (including interest) for the self-dealing involved in the MCDC transactions.

Another allegation involving a type of self-dealing—violating the fiduciary duty of loyalty—concerned insider trading. Having found Scrushy a knowing participant in the fraud, the court linked that inside information with Scrushy's profitable decision to sell HealthSouth stock in 1997 and 2002. Under *Brophy v. Cities Services Co.*,[13] any profits he made on trades using his special knowledge of the

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company rightly belong to HealthSouth. As noted earlier, those sales, including his exercise of stock options, profited Scrushy by $147,450,000, which Judge Horn included in the damages awarded in the derivative action, plus interest of $126,321,000.

Going Forward

If it is said that "hard cases make bad law," then there should be no danger of the HealthSouth derivative litigation generating bad precedent. Though the case involved billions of dollars, it did not involve a difficult fact pattern to follow; the case simply involved earnings and did not deal with complicated derivatives where the underlying assets are packaged, bundled and leveraged. In the world of corporate reorganization and restructuring, HealthSouth itself was organized fairly simply. Its inpatient and outpatient functions were part of the same corporate entity. There was no claim that the nuances of GAAP had caused a miscalculation of HealthSouth's EBIDTA.[14] Indeed, under stipulation, even Scrushy agreed with the former CFOs that fraud had occurred. The outcome of the HealthSouth derivative litigation primarily turned on the factual issue of whether, and, if so, how, Scrushy was involved in the fraud.

Delaware law primarily governed the HealthSouth derivative litigation. Like most publicly held corporations, HealthSouth was incorporated in Delaware, which has laws favorable to business. Although it is not up to Alabama lawyers to contemplate revisions to Delaware law, the Delaware General Corporation Law was more than adequate to govern and redress the kinds of activities in which Scrushy was engaged. The concept of transparency—essential to corporate governance—pervades Title 8 of the Delaware *Code* and Delaware case law. For example, section 144 concerns transactions involving interested officers and directors. It requires disclosure of material facts, plus director authorization or shareholder approval, or ratification of transactions fair to the corporation.[15] The HealthSouth CEO and CFOs spectacularly violated this and other statutes that help define the fiduciary duties of care, loyalty and fair dealing. The Delaware business judgment rule likewise did not insulate the officers' fraudulent accounting.

If the Delaware *Code* adequately outlawed Scrushy's behavior (not to mention the restrictions of federal and state securities laws), what or who should have stopped the fraud? Where the CEO and CFO of a publicly traded company—those responsible to report earnings accurately to the market—are complicit in fraudulent accounting, it is not easy for independent directors and shareholders to detect a problem. At HealthSouth, Scrushy dominated the information flow, not only founding the company, but serving as CEO and chairman of the board until he was forced out in 2003. Other board members, especially independent ones, at such a publicly-held company spend comparatively little time on the corporation's business. They have little recourse but to accept as true the financials being generated by management.

To be sure, the HealthSouth board bore a level of responsibility for the company's decline. Indeed, Wade Tucker recovered $100 million on behalf of HealthSouth in a settlement with HealthSouth's former directors and officers based on the accounting fraud. Nevertheless, there was no direct evidence that the outside directors of HealthSouth ever knew of or participated in the accounting fraud.

Since the CEO and CFO control the data that go into the financials, unless there is an obvious red flag, a board cannot easily detect falsified figures. At least in the short term, a public company's directors and shareholders are at the mercy of management's reporting. In other words, it is difficult for the outside directors of a public company to guard against an outright fraud perpetuated by a conspiring CEO and CFO and their subordinates.

The corporate culture at HealthSouth apparently accentuated the normal limits on outside directors. By all accounts, Scrushy ran the company with more than just an iron fist; he dominated it perhaps tyrannically. Founders of companies that go public often resent the fact that they no longer have controlling ownership, treating questions of their decisions or pronouncements as undercutting their authority. Evidence in the case showed that HealthSouth employees or directors who questioned the financials were exposed to Scrushy's anger and retribution. Scrushy screamed at the treasurer who tried to discuss the fabricated earnings with him: "Where do you get off telling me how to run my company? I've been running this company for 15 years." (p. 10). Such an intimidating culture at HealthSouth fomented the fraud, to the ultimate detriment of the shareholders.

It was the external accountants who had the best chance of uncovering HealthSouth's fraud. Ernst & Young was HealthSouth's outside auditor from the inception of the company and throughout the years of the accounting fraud. The derivative claims against Ernst & Young remain pending and will be decided in an arbitration proceeding. Ernst & Young settled its involvement in the securities fraud shareholders class action in federal court for $109,000,000.[16]

Of course, after the Enron crisis, Congress enacted new regulations of accounting firms, through *Sarbanes-Oxley*. *SOX* may, in fact, deter accounting fraud, but the 1996 origins of HealthSouth's fraud predated the law. Whatever deterrence *SOX* may provide has come, however, at no small cost: compliance has become a substantial corporate expense. Since the type of accounting fraud occurring at HealthSouth is

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relatively rare, it is questionable whether *SOX's* prevention of such instances of fraud outweighs the ongoing costs of *SOX's* implementation.[17]

Derivative Litigation as the Concluding Chapter

In the absence of effective and efficient *preventative* anti-fraud measures, attention turns, after the fact, to the effectiveness of litigation in making victims whole. A shareholder derivative suit is one brought, on behalf of the corporation, by shareholders against a third party. After making an unsuccessful demand that the corporation bring the suit, or showing demand futility, a shareholder may proceed with an action, in the corporation's name, against an officer, director and/or another party who allegedly injured the company.

A shareholder derivative suit is one brought, on behalf of the corporation, by shareholders against a third party.

Though instigated by shareholders, the proceeds from a successful derivative action go to the corporation rather than to the plaintiff-shareholders. Since the shareholders are owners of the corporation, they benefit from a positive litigation result. But this benefit to the HealthSouth shareholders is less direct than in class action litigation. The purpose of the derivative litigation is to restore the *company*, an independent legal entity, to its pre-injury state. By comparison, the direct, class-action litigation seeks to make whole those stockholders and bondholders who purchased securities at inflated prices during the time of the fraud. So the HealthSouth derivative litigation provided redress to the corporation and indirectly its *current* shareholders, while the direct class action repaid investors who owned HealthSouth stock from when it traded on pink sheets.

Thus, it is the combination of derivative and direct litigation that seeks to bring economic justice in the face of fraud, which is difficult to prevent. Since it also may be economically inefficient to prevent outright and complicit CEO and CFO fraud through regulation, litigation becomes a necessary resolution of management's *intentional* violation of its fiduciary duties.

The fraud at HealthSouth shook the foundations of trust on which the capital marketplace of securities is built. In the derivative litigation, Judge Horn's opinion provided the "last chapter in the HealthSouth/Scrushy saga . . . ." (p. 1). Now, attempting to leave behind these three trials, HealthSouth is working to re-establish itself as one of Alabama's corporate leaders. The judgment in the derivative action, even if not fully satisfied, is an important step forward in HealthSouth's rehabilitation. ▲▼▲

Endnotes

1. Tucker was represented by John Q. Somerville of Galloway & Somerville and John W. Haley of Hare, Wynn, Newell & Newton.
2. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).
3. Though a firm's leadership should maximize shareholders' multiple of return, it does not mean that a corporation must distribute dividends of every penny of net revenue. Consistent with the nature of the firm's business purpose and philosophy, their articles of incorporation, and state and federal laws, corporate boards establish levels of distributions and retained earnings. A board of directors is given great latitude, since "while always required to act in an informed manner, [it] is not under any *per se* duty to maximize shareholder value in the short-term . . . ." *Paramount Communications, Inc. v. Time, Inc.*, 570 A.2d 1140, 1150 (Del. 1989).
4. Richard A. Thigpen, Alabama Corporation Law 483 (3d ed. 2003). In fraud cases, the duty of loyalty often involves management's conflicts of interests, as discussed *infra*. *See generally*, *Symposium on Corporate Governance*, 8 Hofstra L. Rev. 1 (1979) (in which one of this essay's co-authors was involved as an editor).
5. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (emphasis added).
6. Del. Code Ann. tit. 6, § 18-405.
7. Scrushy used some of his stock as repayment of a $25 million loan from HealthSouth. Since the market price of that stock was too high, it allowed the value of the debt to be erased for fewer shares. The Delaware Supreme Court held that this transaction unjustly enriched Scrushy and required actual repayment of the debt. *In re HealthSouth Shareholders Litigation*, 847 A.2d 1121 (Del. 2004).
8. The court found that it could quantify at least $457,429,000 of the $692 million in damages caused proximately from the fraud. Including pre-judgment interest of about $165 million, the court awarded $622 million for reconstruction and remediation costs.
9. Michael Jensen, Kevin Murphy and Eric Wruck, *Remuneration: Where We've Been, How We Got Here, What Are the Problems, and How to Fix Them* 33 (ECGI Finance Working Paper 44, 2004, *available at* http://ssrn.com/abstract=561305).
10. Previously, summary judgment rendered nearly $48,000,000 in damages from Scrushy's 1997-2002 bonuses based on unjust enrichment, since Scrushy admitted that performance was not met in those years. Only the 1996 bonus was litigated at trial.
11. *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (1968) ("Courts may not decide [issues of business judgment] in the absence of a clear showing of the dereliction of duty on the part of the specific directors and mere failure to 'follow the crowd' is not such a dereliction.").
12. Self-dealing under Delaware law is described in the text accompanying note 15, *infra*.
13. 70 A.2d 5 (Del. Ch. 1949).
14. "EBIDTA" means earnings before interest, depreciation, taxes and amortization.
15. Del. *Code* Ann. tit. 8, §144.
16. UBS settled derivative claims for $133,000,000.
17. *See* Mark L. DeFond & Jere R. Francis, *Audit Research After Sarbanes-Oxley*, 24 Auditing: J. Practice & Theory 5-30 (2005).

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