

Columbia/HCA Derivative Litigation (McCall v. Scott)

COURT: United States District Court for the Middle District of Tennessee

CASE NUMBER: 97-cv-838

CASE LEADERS: Max W. Berger, Avi Josefson

A derivative action filed on behalf of Columbia/HCA Healthcare Corporation (now known as HCA Inc.) against certain former senior executives and current and former members of HCA's Board of Directors seeking to cause HCA to reform its corporate governance processes, and to hold the defendants responsible for directing or enabling HCA to commit the largest healthcare fraud in U.S. history. The firm represents the New York State Common Retirement Fund, the California Public Employees' Retirement System ("CalPERS"), the New York City Pension Funds, the New York State Teachers' Retirement System and the Los Angeles County Employees' Retirement Association ("LACERA").

Although the district court initially dismissed the action, the United States Court of Appeals for the Sixth Circuit reversed that dismissal and upheld the complaint in substantial part, and remanded the case back to the district court.

On February 4, 2003, the New York State Comptroller, the sole trustee of the New York State Common Retirement Fund, announced that the parties had agreed in principle to settle the action, subject to approval of the district court. As part of the settlement, HCA will adopt a corporate governance plan that goes well beyond the requirements both of the Sarbanes-Oxley Act and of the rules that the New York Stock Exchange has proposed to the SEC, and also enhances the corporate governance structure presently in place at HCA. HCA also will receive \$14 million. Under the sweeping governance plan, the HCA Board of Directors will be substantially independent, and will have increased power and responsibility to oversee fair and accurate financial reporting.

Some of the more significant provisions are:

- Two-thirds of the Board of Directors must be independent. In addition to not having been employed by the Corporation in the last five years, an independent director must not have performed any significant consulting work for HCA within the last five years. Independent Directors may retain legal counsel and other consultants to advise them. The entire Board, or appropriate committees consisting entirely of independent directors, will monitor internal control and corporate compliance.
- HCA's Audit Committee will be comprised solely of independent directors and have at least two members with accounting or financial experience. The Audit Committee must also meet with management and the external auditors prior to the filing of each annual report and quarterly report.
- The external auditing firm must be rotated every seven years unless the Audit Committee affirmatively determines that rotation is not in the Company's best interests. This determination must be made every three years.
- Candidates for election or re-election to the Company's Board are restricted in the number of other company boards on which may serve.
- Specific internal control and corporate compliance responsibilities, including specific procedures in the event the Board becomes aware of any material departure from corporate compliance programs or internal

control programs, or of material violations of established corporate policies or legal and regulatory requirements.

- Shareholders must be given the opportunity to vote on the issuance of any equity compensation to any executive who, at the time of such issuance, is one of the Company's five highest paid executives, unless the equity compensation is issued pursuant to a plan previously approved by the Company's shareholders.
- Heightened Core Competencies, which must be considered in connection with election and the re-election of directors.

There is no waiting period for the implementation of the enhanced provisions; they become effective immediately upon the Effective Date of the settlement.

In granting final approval of the settlement on June 3, 2003, the Honorable Senior Judge Thomas A. Higgins of the District Court said that the settlement "confers an exceptional benefit upon the company and the shareholders by way of the corporate governance plan."