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HCA to Pay $215M in Latest Big Securities Class Settlement

By Jenna Greene
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For the first six months of the year, it looked like securities class actions were in the doldrums.

Between January and June, the median settlement was a mere $5.2 million, the lowest in a decade, according to a midyear report by Gibson, Dunn & Crutcher.

New filings were down too, whether compared with the preceding six months or the 15-year historical average, another study found.

But since June 30, there have been a series of big-ticket settlements in securities class actions brought by Robbins Geller Rudman & Dowd. Among them: a pending $388 million settlement by JP Morgan Chase & Co., and a $272 million settlement by Goldman Sachs.

On Wednesday, the firm struck again, when Hospital Corporation of America agreed to pay $215 million to settle a securities class action stemming from its initial public offering in 2011.

The case is a bit different from the parade of suits against banks based on residential mortgage-backed securities.

Filed in Nashville federal court in 2011, the suit pitted the class action specialists against counsel from Latham & Watkins for HCA and Davis Polk & Wardwell for the underwriters.

By way of background: HCA is the largest for-profit hospital chain in the country. In 2000, it paid $1.7 billion to settle Medicare fraud charges by the Justice Department., and in 2012 was slammed in a New York Times article for performing medically unnecessary procedures.

At a crucial hearing in the class action—a motion to dismiss before Chief Judge Kevin Sharp of the U.S. District Court for the Middle District of Tennessee in 2013—the big dogs were out. Robbins Geller name partner Darren Robbins argued for the plaintiffs, and Everett "Kip" Johnson Jr., at the time the chair of Latham's litigation department, made the case for the defense.

The key point of contention: Did the hospital giant fail to disclose material facts before it went public on March 9, 2011? At the time, it was the largest ever private equity-backed IPO in the U.S., with $4.3 billion in securities issued.

Johnson called the allegations "typical rearview mirror, fraud by hindsight. You disclosed it on Tuesday; you must have known it on Monday. It was fraud not to disclose it on Monday. That's what this case is about," he said, according to a transcript of the proceedings.

"In this case, the only thing that's in dispute is whether HCA failed to disclose certain known trends that it was aware of before March 9, 2011, and which it reasonably believed would have an unfavorable—material unfavorable—impact on its revenues," he said.

The trends included a decline in Medicaid revenue per admission and movement away from cardiac surgical treatment into less expensive medical treatment.

"Those things are constant in medicine," Johnson argued. "There is always movement from one treatment to another. Every time somebody invents a drug or a device, there is movement. But this is like counting nosebleeds, your honor. These kinds of movements don't have any real significant effect until they become very significant over a very long period of time."

When it was Robbins' turn, he responded, "These aren't nosebleed treatments or earaches. We're talking about, you know, implants into people's hearts and cardiothoracic surgeries that were being done and were not medically necessary."

Robbins continued, "We heard a broad-brush presentation. But when you look and drill down into the cases supporting this, they don't support the law as articulated by the defendants."

Darren Robbins

He pointed to Item 303 of Regulation S-K, which requires a registrant to disclose "any known trends or uncertainties" that could affect its revenue or profits.

"This is a strict liability claim," he said. "And, in fact, that strict liability claim applies to HCA for any misrepresentation."

He continued, "Would a reasonable shareholder care that in your largest market over a quarter of your hospitals are now dramatically reducing unnecessary—medically unnecessary—procedures?"

The judge let the case, which was brought by the New England Teamsters & Trucking Industry Pension Fund and individual plaintiff Karsten Schuh, go forward, though he trimmed some of the claims. Last year, he certified it as a class.

With a January trial date looming, the parties moved to settle. Robbins in an interview said that negotiations took a year.

"It was either trial or a substantial premium recovery," Robbins said, adding that the settlement "represents one of the largest percentage recoveries" for investors.

Still, there was a bittersweet element to the win for Robbins. In 1997, he tried his first case in Nashville—another suit against HCA, which is based there—teaming up with local counsel George Barrett. He continued to work with Barrett many times over the years and counted him as "my dear friend."

A lion of the bar and civil rights crusader who led the fight to desegregate Tennessee universities, Barrett was a name partner at Barrett Johnston Martin & Garrison.

He and Robbins appeared in court together on Aug. 7, 2014, successfully convincing Sharp to certify the class.

The next day, Barrett checked into a hospital (St. Thomas, not a HCA facility). He died on Aug. 26, 2014, of acute pancreatitis. He was 86.

"George Barrett was instrumental to the prosecution of this case and the incredible result we ultimately achieved for shareholders. George Barrett was truly a great American," Robbins said.

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