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Quarterly Report – Life Sciences Securities Litigation Activity in Q1 2018

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The first quarter of 2018 saw continued significant securities-suit filing activity against life sciences companies with more than 10 actions filed, including several filed by some of the leading "emerging" law firms that are driving increased activity in the life sciences sector and beyond. While most of the new filings were event-driven and involve claims specific to life sciences companies (such as claims related to clinical trials, FDA actions, and drug safety and efficacy), several involve more traditional accounting-based securities claims, serving as a reminder that life sciences companies remain targets for more traditional types of securities claims, as well.

Settlement activity during the quarter increased compared to the fourth quarter of 2017, with litigants seeking court approval of several settlements in the range of approximately $15 million to $20 million, significantly above the median settlement amount for cases against pharmaceutical and healthcare companies between 2008 and 2017.

Courts issued nearly a dozen decisions on motions to dismiss in the first quarter with mixed outcomes for the defendants. More than half of the decisions held that the plaintiffs' cases could move forward, at least in part.

The most notable decision of the quarter was issued by the Fourth Circuit Court of Appeals in a case against a medical-device company accused of failing to disclose an allegedly fraudulent reimbursement scheme. According to the plaintiff, the company instructed surgeons to use an improper billing code to increase the likelihood of reimbursement for their use of the company's system for minimally invasive spine surgery. The district court dismissed the complaint, holding that the plaintiff had not adequately pleaded that (i) the company made any material misrepresentation when it disclosed its reimbursement practices or (ii) the defendants knew that the practices were illegal.

On appeal, a split panel reversed the dismissal and reinstated the action. The court reasoned that because the company had informed the market that it was training surgeons on how to obtain appropriate reimbursements, it was also required to further disclose its allegedly fraudulent reimbursement scheme—*i.e.*, that it was allegedly instructing the surgeons to use an improper billing code. The court rejected the company's argument that it did not have a duty to disclose simply because it did not assert compliance with any specific law, holding that its choice to speak about its reimbursement requirements triggered an obligation to tell "the whole, material truth." The panel majority distinguished the Sixth Circuit's decision in *Omnicare*, concluding that the allegations in this case were not the type of generic assertions of legal compliance at issue in *Omnicare*, but rather more specific statements about the appropriateness of the company's reimbursement process that were arguably rendered misleading by the failure to disclose alleged efforts (detailed in a *qui tam* action) to generate inappropriate reimbursements. Because it viewed the allegations before it as different than those at issue in *Omnicare*, the panel majority determined that it did not need to address the subsequent proceedings in *Omnicare*, including the Supreme Court's decision in that case.

Additionally, the court concluded that the plaintiff had pleaded loss causation based on an "amalgam" of the corrective-disclosure and materialization-of-the-concealed-risk theories. According to the court, the combination of the company's announcement that it had received a subpoena from the government and an analyst report addressing that subpoena together revealed facts sufficient to connect the alleged misstatements to a subsequent drop in the stock price. In reaching that conclusion, and in relying on its "amalgam" approach, the court did not contend with decisions from other circuits suggesting that the mere disclosure of a subpoena or investigation is insufficient for purposes of loss causation, at least in the absence of a finding of actual wrongdoing.

Please click the link below for a digest containing comprehensive summaries of notable decisions, settlements, and filings in the first quarter. If you would like to discuss any questions or issues regarding securities litigation against life

sciences companies, any of the Davis Polk partners identified in the column on the right and at the end of the digest linked below would be happy to discuss them.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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