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Litigators of the Week: After a Six-Year Earnout Fight With J&J, an $811M Payout for Surgical Robot Investors

By Ross Todd
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Our Litigators of the Week are **Philippe Selendy**, **Jennifer Selendy**, **Sean Baldwin** and their team at **Selendy Gay.**

They landed runners-up honors back in September 2024 after Delaware Vice Chancellor Lori Will found that Johnson & Johnson owed their clients—their clients, former investors in Auris Health Inc.—more than $1 billion in damages and interest in an earnout dispute. Will found that J&J failed to honor its agreement to make «commercially reasonable efforts» for Auris› surgical robot iPlatform to meet certain earnout milestones after a 2019 acquisition.

Earlier this month, the Delaware Supreme Court reversed Will's ruling that J&J breached its implied obligation to pursue FDA clearance under a heightened standard for iPlatform's first milestone. But the court otherwise affirmed Will's decision, letting the majority of damages stand.

This week, Will entered stipulated final judgment of nearly $811 million for Fortis, the largest ever earnout-related damages award in Delaware history.

Lit Daily: Who did you represent and what was at stake here?

Sean Baldwin: We represented Fortis Advisors, a representative for the former shareholders of Auris, which was a medical robotics start-up founded by the great Dr. [Frederic] Moll, the founder of Intuitive Surgical. Under the terms of the Merger Agreement, J&J agreed to pay $3.2 billion up front with an additional $2.35 billion in earnouts. As the Court of Chancery found after a full trial, J&J took the Auris technology and cannibalized it to try to salvage its internal robotics programs launched by its former CEO. Because the sales earnouts were rendered infeasible, our core mandate was to recover the $1.35 billion of regulatory earnouts, as well as to assess fraud by J&J.

Courtesy photos

L-R: Philippe Z. Selendy, Jennifer Selendy, and Sean Baldwin of Selendy Gay.

How did this matter come to you and your firm?

Philippe Selendy: Peter Hébert of Lux Capital approached me at the very onset of the COVID

pandemic and said he was looking for a modern **David Boies** on a matter that was both important for the medical industry and, at the same time, highly personal to the Auris shareholders, who felt betrayed by what they saw as J&J's dishonesty and destruction of transformative robotic technology. We then developed a strategy and pitched the case against perhaps a dozen other firms.

Who was on the team and how did you divide the work, both during the trial at the Chancery Court and on appeal at the Supreme Court?

Jennifer Selendy: The three of us were joined by an exceptional team, including our partner **Oscar Shine**, our new partners **Meredith Nelson** and **Julie Singer** and associates **Jeff Zalesin**, **Aine Carolan**, **Milo Hammer** and **Jack Collins**, among others. Our appellate specialist, **Corey Stoughton**, joined us for the appeal. The complexity of the matter, both under the contract and due to the technology, led us to conclude that each of us should master the entirety of the case, rather than run the risk of having inconsistent understandings or objectives among the team. This proved essential when we were preparing for direct and cross-examinations at the 10-day trial. The Court of Chancery's magisterial 145-page opinion was so heavily fact-intensive that, for the same reason, we kept continuity of representation for the appeal. J&J, by contrast, used three different sets of counsel over the life of the matter.

The nature of the underlying contracts can make earnout disputes inherently complex. What sorts of complications did having regulatory issues overlay this dispute add to making your case here?

Philippe Selendy: This case was complicated by two critical issues: (1) the iPlatform technology never achieved regulatory approval, by contrast to earnout cases where the approval was achieved but too late for the milestones to be met, and thus our proof of causation had to be highly rigorous, and (2) the contract specifically required 510(k) approval, which the FDA made unavailable for first-generation medical robots, so we had to show that the Merger Agreement nonetheless required J&J to secure De Novo approval on a predicate iPlatform device in order to satisfy its efforts obligations for all milestones after the first one.

Baldwin: Moreover, J&J used the FDA's regulatory change as a post-hoc excuse for its failure to honor its express obligations under the contract, effectively seeking a right to walk away from the entire deal rather than honoring its obligations and achieving what we proved to be the functionally equivalent De Novo approval for that first device. J&J further complicated our causation showing by withholding literally hundreds of lab reports and videos showing the actual operations of the next-generation iPlatform robot, which was more than capable of satisfying the FDA's safety and efficacy requirements.

During the trial at the Chancery Court, you called seven J&J witnesses during your case-in-chief. What was the thinking behind that approach and how did it help you get the result you achieved in front of Vice Chancellor Will?

Jennifer Selendy: We had formed our trial strategy in many respects by the time we filed our complaint. When we took the depositions of J&J witnesses, we knew the facts cold and made certain that those witnesses had to live by the record. Because so much of the history concerned the post-merger conduct by J&J, it was critical that we tell the story through those J&J witnesses. Further, there was a sharp contrast between, on the one hand, the transparency and consistency of the Auris witnesses and, on the other, the different narratives attempted by the J&J witnesses to hide their breaches and misconduct. I believe that showing this to the Court of Chancery was fundamental to the outcome, especially as the Court sought to untangle the truth of the reasons why J&J pursued a path so different from what the contract required.

Were you at all concerned that pressure on the Delaware's Supreme Court to uphold its "contractarian" reputation would weigh on its decision in your case?

Philippe Selendy: Yes, though we saw this as both risk and opportunity. We believed very

strongly in each of the three areas of our trial victory: express contract, fraud by J&J's former CEO and implied covenant.

The express contract case required a faithful application of the bespoke terms of the Merger Agreement, and particularly the enforcement of the "priority" CRE clause, and the fraud claim depended upon respect for the one-sided anti-reliance clause negotiated by the seller. On the other hand, the implied covenant case depended upon recognition that the alternative regulatory pathway was, in all functional respects, identical to the pathway named in the contract—and here, we were concerned that Delaware would adopt an "ultra-contractarian" position in the aftermath of the Tesla case (which was argued to the Delaware Supreme Court immediately before our own argument), despite the fact that the parties never intended such a result, as J&J admitted at trial.

What can other plaintiffs in earnout disputes take from what you accomplished in this case? Is there precedent here you can use in the case you're handling for Albertsons against Kroger?

Jennifer Selendy: The Supreme Court reaffirmed in our case that clear contract terms between highly sophisticated entities will be enforced, regardless of equitable concerns. This is directly relevant to our $8 billion case for Albertsons against Kroger, because the Merger Agreement in that case has a series of escalating efforts clauses culminating in an "any or all efforts" (or "hell or high water") clause that has no exceptions, except for a limit on the number of stores that Kroger would have to divest in order to make the merger succeed. The Supreme Court has made clear that this obligation must be strictly enforced, whatever constraints Kroger may have internally imposed to benefit its own shareholders. Kroger may have opted for an efficient breach in not taking "any and all efforts," but the consequence is that it is now liable under the contract for the lost Albertsons shareholders' premium.

You handled this case partially on a contingency fee basis. What kind of financial impact is that going to mean for the firm?

Sean Baldwin: The equity partners took extraordinary risks on this six-year odyssey of a case to press it to conclusion, where J&J spent hundreds of millions on its defense. The most significant impact for the firm is the validation of our unique litigation approach and the values and commitment of our partners to our clients and to each other, all of which made this outcome possible. It will also better enable our pursuit of worthwhile contingency matters in the future.

What will you remember most about this matter?

Jennifer Selendy: Every aspect of this trial was memorable, but watching Selendy Gay associates whom Sean, Philippe and I had mentored deliver powerful direct and withering cross-examinations, to the amazement of our adversaries and co-counsel, was especially gratifying.

Sean Baldwin: It was a privilege and a pleasure to work closely in developing the case with Dr. Moll and the extraordinary team he put together at Auris, including COO Josh DeFonzo, chief iPlatform engineer David Mintz and chief surgical advisor Dr. Barry Gardiner. And our Delaware co-counsel at **Ross Aronstam & Moritz**, led by **Brad Aronstam** and **Roger Stronach**, were extremely important partners in the endeavor.

Philippe Selendy: Jennifer and Sean are my two oldest friends in law. I am humbled and moved by the way in which we worked together, after knowing each other for over three decades. The depths of this partnership led to a rare perfection in strategizing, building and trying this extremely difficult case, together with our remarkable team, where our collective thinking, discipline and engagement lifted all of us.