



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Appriva Investors Win \$250M Jury Award In Contract Fight

By **Kurt Orzeck**

Law360, Los Angeles (May 01, 2013, 11:01 PM ET) -- A Delaware state jury on Wednesday awarded \$250 million to Appriva Medical Inc. shareholders claiming that medical company ev3 Inc. and private equity backer Warburg Pincus had skipped out on \$175 million in milestone payments ev3 had promised when it bought Appriva and its groundbreaking stroke-prevention technology.

The jury decided that ev3 had never planned to make good on the promised payments, as reflected by internal documents from April 2003 showing the Minnesota company had never had them on the books, a source said Wednesday. Thus, ev3 didn't act in good faith when pursuing the milestones, breaking the stated terms of its merger agreement.

"We are very pleased that the jury recognized that the Appriva shareholders were entitled to the benefit of their bargain when they sold their pathbreaking anti-stroke medical device to ev3," the plaintiffs' lead counsel, Eric Leon of Kirkland & Ellis LLP, said Wednesday.

Appriva was a California medical device company whose new device, which could be placed in a heart to prevent a stroke, proved promising at early clinical trials, according to the shareholders' complaint.

After drawing interest from Warburg-backed ev3, Appriva in July 2002 agreed to a deal in which ev3 would pay \$50 million up front and \$175 million in milestone bonuses to Appriva founders Michael Lesh and Erik van der Burg, their venture capitalist backers, and Appriva's employees. As part of the merger contract, ev3 could define the terms of the four milestones, so long as the company did so in good faith with Appriva's shareholders.

The milestone payments were tied to U.S. Food and Drug Administration regulatory approvals and other achievements in the commercialization of the device, known as a percutaneous left atrial appendage transcatheter occlusion device, according to court documents.

But ev3 never reached any of the milestones with the technology — including the first, in which ev3 aimed to file an application for an FDA clinical trial by January 2005.

After ev3 found out that getting FDA approval would take longer than expected, Warburg lost interest in the technology and shifted its focus and investments to other ventures, a source said.

In April 2009, Appriva shareholders sued ev3, claiming breach of contract, fraud and other allegations. The lawsuit sought damages to be determined at trial, in accordance with the companies' merger agreement.

At the trial, which took place four years later, plaintiffs' attorneys showed through ev3's internal documents that the company had never intended to distribute any of the promised milestone payments, a source said.

The trial took nine days, after which the jury reached its verdict. The jury found that ev3 had breached its 2002 merger agreement and that the Appriva shareholders were entitled to all the promised milestone payments related to the development of the device, according to Kirkland & Ellis.

In addition to the \$175 million in milestone payments, the jury awarded the plaintiffs an additional \$75 million to \$80 million in interest payments dating back to 2005.

Counsel and a representative for ev3 did not immediately respond to requests for comment Wednesday.

The plaintiffs are represented by Jon E. Abramczyk and Matthew R. Clark of Morris Nichols Arsht & Tunnell LLP, with Eric F. Leon, Joseph Serino Jr., Jay P. Lefkowitz and John Del Monaco of Kirkland & Ellis LLP of counsel, and Robert A. Goodin and Francine T. Radford of Goodin MacBride Squeri Day & Lamprey LLP of counsel.

The defendant is represented by Matt Neiderman and Benjamin A. Smyth of Duane Morris LLP, with Jeffrey J. Bouslog, Bret A. Puls, Dennis E. Hansen and Cynthia S. Wingert of Oppenheimer Wolff & Donnelly LLP of counsel, and Matthew A. Taylor and Seth A. Goldberg of Duane Morris LLP of counsel.

The cases are Michael Lesh et al. v. ev3 Inc., case numbers 05C-05-218 and 05C-11-208, in the Superior Court of the State of Delaware in and for New Castle County.

--Editing by Kat Laskowski.

All Content © 2003-2013, Portfolio Media, Inc.