

Health Care Antitrust & Competition

“Usual and customary” is fast becoming the exception rather than the rule, as the health care sector continues to evolve. While health care reform has spurred industry consolidation, the Federal Trade Commission and U.S. Department of Justice continue to bring intense scrutiny to mergers, acquisitions, joint ventures, strategic affiliations, and other competitive collaborations in the sector. This wave of reform will impact all members of the health care industry as regulators examine the tension between the benefits of coordinated care and the possible consequences of market power.

What will the future bring? If history is any indication, it is during times of great change when regulated markets are redefined and firms must adapt, that antitrust guidance plays an increasingly critical role.

As regulators attempt to harmonize health care policy and competition law, Pillsbury’s lawyers are focused on preparing our health care clients for a new level of scrutiny in this highly regulated sector.

We counsel hospitals and health systems, pharmaceutical and device manufacturers, medical groups, specialty providers, tissue and blood banks, pharmacy benefit managers, trade associations and ancillary businesses on key issues such as:

- Litigation in state and federal courts
- Mergers, acquisitions and joint ventures among competitors (e.g., hospital-to-hospital)
- Investigations before the Federal Trade Commission, Department of Justice and State Attorneys General
- Legislative and enforcement developments
- Vertical integration between providers and payers
- Traditional messenger models
- Pricing (vertical, horizontal or mixed)
- Exclusive dealing
- Most favored nations clauses

Representative Consumer Class Actions and Multi-District Litigation

- ***In re Brand Name Prescription Drugs Antitrust Litigation.*** Represent major pharmaceutical manufacturer in consolidated federal class actions and various state court actions claiming price fixing of brand name prescription drugs, and individual actions alleging price-fixing of brand name prescription drugs and illegal discrimination in pricing between sales to HMOs, hospitals, and retail pharmacies. Also represented client in federal opt-out cases and state court actions. Settled Sherman Act claims on eve of trial, and negotiated successful resolutions of all class and state court actions.
- ***In re Synthroid Marketing Litigation.*** Represent a pharmaceutical company in federal multidistrict class action and attorney general litigation alleging concealment of information regarding lower-priced bioequivalent drugs for the treatment of certain thyroid disorders. State Attorneys General and plaintiff classes comprised of consumers, pharmacies and insurers alleged monopolization, unfair competition and state law claims and sought billions of dollars in damages. After extensive discovery, successfully settled.
- ***In re Vitamins Antitrust Litigation.*** Represent a client in national antitrust class action litigation, multiple associated opt-out direct actions and nationwide state court indirect purchaser actions alleging participation in a cartel that inflated the price of vitamins used as a supplement in animal and pet feeds.
- ***In re Pharmaceutical Industry Average Wholesale Price Litigation.*** Represent a pharmaceutical company in consolidated class actions concerning whether the pharmaceutical defendants engaged in fraudulent marketing, sales and/or billing schemes by unlawfully inflating the average wholesale price of their Medicare covered prescription drugs.
- Represent companies in a class action alleging conspiracy among health care companies to exit the California HMO Medicare market. Plaintiffs claimed that defendants violated antitrust and unfair competition laws, including § 17200 and § 17500, and committed fraud.

Representative Antitrust & Unfair Competition Litigation

- Represent a leading health care services provider in a lawsuit alleging the defendants disseminated false and misleading advertising and related unlawful conduct in an effort to promote their competing services.

- Represent a **university research center** in an unfair competition and patent infringement case involving the use of canine DNA for certain genetic disorders.
- Represent Virginia-based hospital in challenge by physician alleging antitrust and other violations related to termination and revocation of hospital privileges. Summary judgment for defendants granted.
- Defend **Nucletron Corporation**, a leading radiotherapy company that distributes medical equipment used for cancer treatment, in monopolization, tying and state unfair competition claims brought by an aftermarket service rival. Retained two years after the antitrust counterclaims were filed, the counterclaim was settled for zero dollars after moving for summary judgment, retaining new experts, and obtaining several favorable discovery rulings.
- Represent pharmacy benefits manager in consolidated class action proceedings brought by putative class of pharmacies alleging violations of California state statutes and California's Unfair Competition Law.
- Lead counsel defending **CareCore National Corporation** against a challenge by a specialty radiology provider involving allegations of price fixing, boycott, tying and monopolization under the Sherman Act. Plaintiffs agreed to dismissal rather than answer our motion to dismiss all claims, but opposed motions filed by other defendants (whom we did not represent) on different theories, however, and the court denied those motions.

Representative FTC, State AG and Other Investigations

- Represent **Oreck Corporation** in a FTC advertising investigation in which the FTC alleged that Oreck made false and deceptive claims to consumers that two of its products, a vacuum and air cleaner, reduced the risk of flu and other illnesses, and eliminated common germs and allergens. We resolved the matter by a settlement in which Oreck did not agree to any wrongdoing.
- Investigating and analyzing antitrust and unfair competition claims on behalf of a medical device company against its primary competitor.
- Lead counsel for **Interstate Bakeries Corporation** in an FTC advertising substantiation investigation regarding the effects of calcium in Wonder Bread on children's memory and brain function. Worked with numerous scientific and economic experts on substantiation and materiality issues. Negotiated favorable terms for consent decree and prepared subsequent compliance report.

- Lead counsel for putative expert endorsers of dietary supplement in non-public FTC investigation concerning advertising substantiation claims as to the efficacy of the product. Investigation was closed without any action against client-endorsers.
- Represent medical device manufacturer in an investigation by coalition of California district attorneys alleging deceptive practices and unfair competition.
- Represent a medical association in an antitrust investigation conducted by the Connecticut Attorney General's Office with respect to the association's Lyme disease guidelines. Obtained favorable settlement.
- Represent **Dermaquest, Inc.** in an antitrust investigation by the State of California alleging the company engaged in vertical price-fixing of Dermaquest's cosmeceuticals and related products in violation of the Cartwright Act and Unfair Competition Law.
- Lead counsel representing **Cancer Treatment Centers of America** in advertising substantiation case arising from claims about cancer therapies. Negotiated favorable consent decree without any redress.
- Represent a leading vertically integrated eyewear provider in its recent acquisition of the e-commerce business glasses.com, as well as previous acquisitions of leading wholesale and retail eyewear brands.
- One of our attorneys represented **Evanston Northwestern Healthcare** and **ENH Medical Group, Inc.** as lead antitrust counsel and co-lead trial counsel in an FTC post-consummation challenge to a hospital merger and a physician price fixing challenge. Obtained a unanimous FTC order reversing an ALJ's earlier divestiture order in the hospital case, and defeated a government summary judgment motion which paved the way for a favorable settlement on the physician case.
- Secured clearance for **NorthShore University Health System** (formerly Evanston Northwestern Healthcare) to acquire Rush North Shore Medical Center—one of its closest rivals—less than one year after the FTC issued its Final Order arising from its challenge to NorthShore's acquisition of another area hospital.
- **US v. Long Island Jewish Medical Center and North Shore Health System, Inc.** One of our attorneys represented North Shore Health System in its acquisition of Long Island Jewish Medical Center in New York. The DOJ challenged the proposed combination of the two so-called "anchor" hospitals in a then-novel challenge that has become a key component of hospital merger analysis. After 13 days of trial, the judge denied the DOJ's request for an injunction and dismissed the case on the merits thereby allowing the transaction to be finalized.
- Advise **McKesson** on antitrust issues in connection with the sale of its acute care business to a competitor, Owens & Minor.

Representative Mergers & Acquisitions

Our attorneys have extensive experience with the most complex, precedent setting transactional antitrust investigations and litigation, as well as routine Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR Act) matters. We have advised health care firms in numerous proposed M&A transactions over more than 20 years, including in the following:

- Represent **US Healthworks** in its \$455 million acquisition by Dignity Health in the emerging field of occupational medical health care.
- Advise **McKesson Corporation** as antitrust counsel in its purchase of MED3000, a privately-held, third-party medical billing company.
- Lead antitrust counsel for **North Shore-LIJ Health System** in two recent transactions that allowed the largest integrated health care delivery system in New York to welcome two hospitals, Lenox Hill Hospital (tertiary care) and The Long Island Home (psychiatric care), into its network of hospitals.

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