Litigation Highlights 2012

DELIVERING SUCCESS ACROSS INDUSTRIES

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Litigating with an Industry-Specific Focus

Business leaders never see the world as a series of legal specialty silos; they see things through the lens of their particular industry. And so do we.

Not that we've abandoned the traditional notion of legal disciplines: Our litigators dedicate themselves to mastering the details of antitrust, employment, insurance, intellectual property, securities, tax, and every other area of law where you need our experience. But we have long taken a broader view, with a focus on appreciating how our clients see legal issues in the context of their industry.

We were one of the first law firms to create multidisciplinary Client Teams—teams of lawyers who meet on their own time to learn about and address the legal needs of particular clients. We have also long sponsored a wide variety of dedicated Industry teams, which gather attorneys across legal disciplines to identify the trends that may be affecting clients in a given sector.

This approach to client service is reflected in the layout of our 2012 Litigation Highlights report, which includes sections for cases we've handled in the Manufacturing, Technology, Financial Services, Energy, Real Estate, Consumer and Healthcare sectors.

We also see our successful industry focus in some of the top-name clients we serve. Among the companies whose cases we are highlighting this year are Apple, Bombardier, Chevron and Wells Fargo.

All of this comes, as it must, with a high-level command of the legal areas where you most need our assistance.

- In the 2012 edition of *Legal 500 US*, Pillsbury is cited for particular excellence in Antitrust, Construction Litigation, Environmental Litigation, Patent Litigation, Trademarks Litigation and Tax Controversy.
- In the 2012 edition of *PLC Which Lawyer?*, our lawyers are also singled out as market leaders in Employment Litigation.
- And in the 2012 edition of *Chambers USA*, Pillsbury has nationally ranked practices in Aviation Regulation, Energy, Environment, Food & Beverage Law, Government Contracts, Government Relations, Political Law, International Trade, Investment Funds, Venture Capital, Life Sciences, Native American Law, Privacy & Data Security, Renewables & Alternative Energy, Real Estate, Tax Controversy and Wealth Management.

Please contact us at any time for more information about our litigation practice or to discuss any situation you may be facing in your own industry.

Kenneth W. Taber
Litigation Co-Leader

Kirke M. Hasson
Litigation Co-Leader

Manufacturing

Global companies are well represented among Pillsbury's manufacturing sector litigation clients, which include Bombardier, Easton-Bell Sports, Mitsubishi Heavy Industries, Ltd., Sharp Corporation and Toshiba.

Winning a Jury's Speedy Rejection of a $40M Claim

Following a trial that extended over five weeks, a Dallas jury needed only three hours to reach a verdict of "no liability" for Pillsbury client Bombardier. The jury's decision was a rightful endorsement of both the company's business ethics and the quality of its aircraft.

Bombardier had been sued by Sky Capital, a British Virgin Islands company closely affiliated with a Russian billionaire who, in 2004, had contracted to purchase one of the first luxury jets produced in the Canadian company's Global 5000 series. After taking possession of the aircraft, Sky Capital contended that the luxury jet failed to meet the buyer's expectations due to alleged problems in the design and build of the cabin interior and the functionality of certain cabin management systems.

Sky Capital sought in excess of $40 million in damages, including rescission of the $33 million contract, lost profits on a supposed business plan to charter the aircraft and punitive damages for Bombardier's alleged misrepresentations in connection with the sales transaction.

In the course of the case, the billionaire attempted to distance himself from Sky Capital, claiming he was merely an outside "aesthetic consultant" to the company. Pillsbury capitalized on that tactic to gain access to communications between the billionaire and Sky Capital's counsel on the basis that he was not the client, and therefore not in a position to invoke the attorney-client privilege. Sky Capital twice sought protection from the Texas Supreme Court against production of those communications, but Pillsbury and Bombardier twice prevailed.

At trial, the Pillsbury team was able to undermine the billionaire's testimony and that of Sky Capital's other key witnesses on cross-examination, showing that there were no misrepresentations, that Bombardier fully honored its warranty and that the aircraft was not purchased for true third-party charter, but rather for personal use by the billionaire. After comparing Sky Capital's discredited claims with the testimony of Bombardier's employees, it took the jury little time to return a unanimous verdict in Bombardier's favor.

Client:	**Bombardier**
Industry:	Aviation
Area of Law:	Contracts
Venues:	Texas District Court; Texas state trial court, Dallas
Result:	Won a unanimous jury verdict of "no liability," denying $40 million in alleged damages

"Our litigation team from Pillsbury proved to be amazing and devoted lawyers, and a great pleasure to work with as well."

—Francis Lecomte, Bombardier Aerospace Director of Litigation

> "In sum, [Pillsbury's client] prevailed with a Final Award in its favor of €10,295,686 plus interest."
>
> —Arbitration panel's award to Pillsbury's client

Client:	**Scandinavian Equipment Manufacturer**
Industry:	Manufacturing Processes Equipment
Area of Law:	Contracts
Venue:	ICC Arbitration, Geneva, Switzerland
Result:	Won a unanimous decision awarding our client more than $13 million on its claim while rejecting virtually all of the opponent's counterclaim

In International Arbitration, Defeating a €20M Claim and Securing a €10M Award Instead

Pillsbury's client, a Scandinavian equipment manufacturer, outfitted a state-of-the-art manufacturing facility in central Europe. Claiming that the facility fell far short of contractual performance guarantees, the owner of the facility failed to pay the €8.1 million contract balance and attempted to enforce a €9.8 million bank guarantee triggered by the alleged performance issues.

Our client initiated arbitration proceedings in July 2009 to obtain the amounts owed to it and to defeat the attempted draw against the guarantee letter of credit. The owner then filed a counterclaim seeking €20 million for allegedly defective equipment and equipment allegedly missing from the delivery.

The arbitration proceedings were held in Geneva, Switzerland, before a tribunal composed of a Swiss national, a Swiss/U.S. national and a United Kingdom national. The tribunal credited the testimony of our client's witnesses, and largely discredited the testimony of the owner's witnesses based on the cross-examination, concluding that the failure to meet the performance specifications was, in fact, due to the owner's misuse of the equipment.

Pillsbury's client was awarded virtually its entire claim of €10 million. The tribunal rejected all of the owner's €20+ million counterclaim, except for a few hundred thousand euros, which our client had conceded.

The owner thereafter challenged the arbitral award in the Swiss courts, where Pillsbury, in association with Swiss counsel, succeeded in having the award confirmed.

Technology

Pillsbury has long served an extensive list of technology-focused clients, from AT&T to Xerox, including the latest startups in innovation centers ranging from Silicon Valley to Silicon Alley, from San Diego to Shanghai.

"Two researchers at The University of Kansas Center for Research won the right to be named as co-inventors on the formulation of the cancer drug Velcade due to research they conducted for the National Institutes of Health."

—Bloomberg News

Client:	**The University of Kansas and the University of Kansas Center for Research, Inc.**
Industry:	Pharmaceuticals
Area of Law:	Intellectual property
Venues:	U.S. District Court for the District of Kansas, arbitration
Result:	Won co-inventorship for two University of Kansas researchers whose critical contributions to a blockbuster cancer drug went unrecognized for 10 years

Garnering Proper Credit for a Life-Saving Pharmaceutical Breakthrough

Velcade® is a proteasome inhibitor drug—the first of its kind to be approved by the FDA—and is currently used in the treatment of at least two types of cancer: multiple myeloma and mantle cell lymphoma. Since 2002, at least 160,000 patients have been treated with Velcade, which reportedly now generates $1.9 billion in annual sales.

Two researchers at the University of Kansas, working under a contract with the National Institutes of Health, developed aspects of the critical drug delivery formulation for turning the unstable chemical compound used in Velcade into a stable, and effective, medication. But the researchers did not receive inventorship credit on NIH's patents—until Pillsbury litigators stepped in.

Pillsbury filed a lawsuit against NIH in 2008, after the agency denied the university's repeated requests for inventorship credit. The litigation challenge expanded when two drug companies that had licensed Velcade—a subsidiary of Takeda Pharmaceuticals and a subsidiary of Johnson & Johnson—intervened in the case on the side of NIH.

In 2010, the parties agreed to submit the case to binding arbitration. After a lengthy arbitration in November and December 2011, the three-arbitrator panel ruled in favor of the university researchers in 2012, determining that both deserved to be added as co-inventors on the two formulation patents for Velcade. All parties then jointly moved in the federal court case to enter the arbitral award as a consent judgment.

For universities and other research institutions, the case highlights the importance of tenacity in working with our federal government, and the importance of having counsel who understand the nuances of the Federal Acquisition Regulations.

A Tax Precedent Benefiting All Multinational Corporations in California

Since at least 1988, California has applied a narrow interpretation of permissible interest expense deductions. The state assumes that, if a multinational corporation borrowed money in the U.S., some of that money must be flowing to its overseas subsidiaries. That money would then flow back to the U.S. in the form of non-taxable dividends, which would make the interest deductions an impermissible "double-dip."

The problem with that interpretation, in Apple's case and the case of many others, is that it was contrary to fact: Apple was predominantly borrowing funds for U.S. purposes, such as manufacturing and R&D, and paid California taxes on those activities. The interpretation was also contrary to California law: Under the standard set by the state's Tax Appeals Board in its 1998 decision in *Appeal of Zenith National Insurance Corp*—a case Pillsbury also litigated—interest deductions are allowed whenever the taxpayer can demonstrate that the dominant purpose of the borrowing is for taxable purposes.

Pillsbury had prevailed over the state's theory in several cases at the administrative level, but the state persisted in disallowing the deductions. And because the state never appealed beyond the trial court level, there was no published decision in place to keep the state from returning to the same questionable interpretation. That is, until the courts took up the case of Apple's 1989 taxes, in *Apple Inc. v. Franchise Tax Board*.

Pillsbury joined the case in 2008, when it was already almost 20 years old. This made proving the underlying facts no small task, particularly given the burden of accounting for all the funds borrowed nearly two decades earlier, as well as proving a negative—that the money did not go overseas.

But, at trial, Pillsbury proved exactly that, even forcing the state's own witness to admit that she found no evidence the money had gone overseas. The trial court, as well as the California Court of Appeal, agreed with Apple on both counts, granting a full refund of the disallowed deductions, plus interest.

The victory helped Apple avoid millions in potential exposure for 1989 and all subsequent years, and set an important precedent for all multinational corporations.

Client:	**Apple Inc.**
Industry:	Consumer electronics
Area of Law:	Tax
Venues:	California Court of Appeal, First District; California Superior Court, San Francisco
Result:	Saved Apple from a potential multimillion-dollar exposure in the first published decision on California's longstanding—and controversial—interpretation limiting tax deductions for interest expense

"FTB characterizes this case as an attempt by Apple to avoid, or indefinitely defer, California taxes and to secure an improper 'double benefit.' Apple argues that this is instead a case of 'double taxation.'"

—California Court of Appeal, in its decision upholding a lower court in *Apple Inc. v. Franchise Tax Board*

"Securities litigation remains an unwelcome but expected component of almost any public company acquisition. The Pillsbury team prepared Atheros and its Board for that reality and provided zealous representation and a grounded sense of what to expect at every turn, right through resolution."

—Adam Tachner, VP & General Counsel, Atheros Communications, Inc.

Client:	**Atheros Communications**
Industry:	Mobile computing
Area of Law:	Securities litigation
Venues:	Delaware Chancery Court, California Superior Court, U.S. District Court for the Northern District of California
Result:	Established a precedent requiring plaintiffs to show loss causation whenever alleging violations of federal securities laws through proxy disclosures

Setting an Important Precedent in Securities Litigation Over Proxy Disclosures

When the mobile computing company Atheros agreed in 2011 to be acquired by Qualcomm Inc. in a $3.1 billion deal, the transaction was well received by the market. The price of Atheros shares jumped 19% on the news, and 99.6% of 54.7 million shares later voted in favor of the deal.

But that success didn't stop the filing of 14 separate shareholder class actions, in three different venues, with allegations that the directors of Atheros had failed to disclose information relevant to the merger in the company's proxy statements. Pillsbury securities litigators helped the company quickly put an end to all those actions.

After the company provided certain additional proxy materials, the Delaware Chancery Court allowed the shareholder vote on the merger to proceed. Seeing the Delaware result, those plaintiffs who had sued in California state court voluntarily dismissed their suits.

But that still left a class action filed with the U.S. District Court in San Jose, claiming that, despite the company's additional disclosures, Atheros's proxy was supposedly still false and misleading. Pillsbury argued otherwise, and the court agreed.

"The [complaint] does not connect any ... misstatements or omissions with an actual economic harm," Judge Lucy Koh wrote in her May 2012 decision, granting Atheros's motion for dismissal of all claims with prejudice.

The court's requirement that plaintiffs must show that their claimed loss was caused by a proxy statement or omission was particularly important, and may now dissuade other shareholders from filing such suits. The decision also provided a victorious coda to Atheros's strong relationship with Pillsbury, whose attorneys helped first incorporate the company in 1998, and advised Atheros on every milestone up to and including its $3.1 billion merger.

Helping a German Company Dispose of an Unexpected Claim in Texas

Once a foreign company makes its product available on the Internet, can it then be sued wherever in the U.S. its customers may reside? No, ruled the Fifth Circuit, at Pillsbury's urging.

Lexware GmbH proudly serves a niche customer base, producing German-language-only software for filing German tax returns. International litigation therefore isn't part of Lexware's business plan, or its budget.

The goal then, when Lexware was sued in Texas by one of its software module suppliers, was to get the case resolved as quickly and cost-effectively as possible. Lexware contacted its counsel at Pillsbury in London, who immediately referred the company to Pillsbury litigators in Houston.

Lexware was sued for breach of contract by Pervasive Software, an Austin, Texas-based developer of database modules. At issue was a Pervasive module Lexware had purchased 15 years earlier, from a third-party vendor, for use in its tax software. The product's off-the-shelf license agreement included a provision stating that disputes would be governed by Texas law.

But Lexware's subsequent purchases from Pervasive were all made in Germany directly through Pervasive's representatives. Thus, Pervasive's attempt to litigate in Texas state court was surprising, to say the least.

Pillsbury's first step was to remove the case from state court to the federal district court. There, the federal district judge, after allowing extensive jurisdictional discovery, granted Pillsbury's motion to dismiss the case for lack of personal jurisdiction over Lexware.

When Pervasive appealed, the Fifth Circuit affirmed the dismissal, rejecting Pervasive's argument, in particular, that Lexware's globally accessible website, and its relatively few sales of its software in Texas, were sufficient to establish the intentional targeting of Texas as a market for its products.

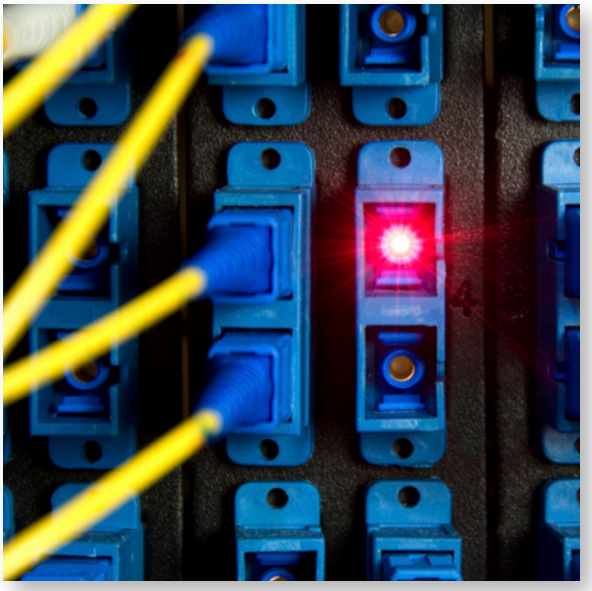
"[I]t was Pervasive, rather than Lexware, that reached out of its own state in order to purposefully sell its product and create a contractual relationship with Lexware in Germany," the court wrote, endorsing Pillsbury's arguments for dismissal.

Client:	**Lexware GmbH**
Industry:	Software
Area of Law:	Contracts
Venues:	U.S. Court of Appeals for the Fifth Circuit; U.S. District Court for the Western District of Texas; Texas state court, Travis County
Result:	Won dismissal of a suit filed in Texas for lack of jurisdiction, a victory affirmed by the Fifth Circuit

> "[T]he assertion of specific personal jurisdiction over Lexware for [the plaintiff's] claims in Texas would offend due process."
>
> —U.S. Fifth Circuit, ruling in favor of Pillsbury's client

> "Plaintiffs have had three opportunities to amend their complaint in the face of two rounds of motions to dismiss, but have provided few, if any, additional allegations against these defendants. The court finds that litigation against these individual defendants should be put to rest, and thus grants their motions to dismiss with prejudice."
>
> —U.S. District Court Order regarding Pillsbury's clients

Client:	**Six Officers, including the CFO, of Finisar Corporation**
Industry:	Fiber-optic communications
Area of Law:	Shareholder derivative litigation
Venues:	U.S. Court of Appeals for the Ninth Circuit; U.S. District Court for the Northern District of California
Result:	Overcame a remand decision from the Ninth Circuit by persuading the District Court to dismiss virtually all claims against multiple individual defendants, for a second time



Demonstrating Plaintiffs' Failure to State a Claim in a Successful Defense of Corporate Officers

When Finisar Corporation announced that it had to restate its financial results from 1999-2006 to reduce net earnings by $112 million, plaintiffs' attorneys quickly filed suit. Derivative shareholder litigation was filed against Finisar's individual directors and officers, six of whom turned to Pillsbury for their defense.

Pillsbury won dismissal of all claims against five officers, and a substantial limiting of the claims against the former CFO.

Plaintiffs had asserted 14 causes of action against the individual defendants. The U.S. District Court dismissed the case in September 2009 and found that the plaintiffs had failed to show that they were excused from making their demand on the board prior to filing suit. The Ninth Circuit reversed, however, and remanded the case.

On remand, the District Court analyzed each specific claim as made against each individual defendant, requiring a detailed presentation of individual defenses by Pillsbury. Despite the previous appellate reversal, Pillsbury won dismissal of all claims against five of our clients and nine of the 14 causes of action against the sole remaining client, the former CFO.

Financial Services

From key locations around the globe, we litigate for top financial services clients such as Bank of New York, Bank of Tokyo-Mitsubishi UFJ, Capital One, Crédit Agricole, Deutsche Bank, Wells Fargo and Zions Bancorporation.

"Under the allegations of the complaint, [Wells Fargo]'s determination was reasonable."

—U.S. District Judge Claudia Wilken, in agreement with Pillsbury's argument

Client:	**Wells Fargo**
Industry:	Financial Services
Area of Law:	Financial regulations
Venue:	U.S. District Court for the Northern District of California
Result:	Definitively prevailed in the first court test of an issue created by a new federal law that affects many financial institutions

Precedent-Setting Dismissal of $200 Million in Claims Related to Dodd-Frank Act Changes

One important way that banks reassure regulators about the strength of their financial institutions is by holding sufficient amounts of so-called "Tier 1" capital. So, when the new Dodd-Frank Act said bank-issued trust preferred securities could no longer be counted as Tier 1 capital, those securities suddenly became a lot less valuable.

Wells Fargo responded to the new law by exercising its right to early redemption of the securities—a move that drew lawsuits from holders of those securities, who had expected a longer maturity. It was the first test of the impact of Dodd-Frank on bank capital treatment, with Pillsbury's victory setting an important precedent.

Trust preferred securities are a hybrid security issued by many bank holding companies to increase their Tier 1 capital. At issue in this case were two sets of such securities Wells Fargo offered to investors beginning in 2007, which were set to mature decades later. They could not be redeemed at will by Wells Fargo without cause—but one permissible cause was a "capital treatment event" as defined in the securities' indenture agreements.

Plaintiff's attorneys argued Dodd-Frank was not a "capital treatment event" until 2016, when the phase-out period for Tier 1 treatment of such securities ends. They alleged that the earlier redemption, on Oct. 3, 2011, resulted in damages of more than $196 million—the amount of interest the outstanding units would have paid had Wells Fargo waited until later optional redemption dates specified in the indenture agreements.

But U.S. District Judge Claudia Wilken agreed with Pillsbury's argument that a capital treatment event, as defined in the indenture, occurred when President Obama signed the Dodd-Frank Act on July 21, 2010, triggering Wells Fargo's contractual right to redeem the securities after that date. She dismissed the complaints without leave to amend, denied the plaintiffs' motions for class certification as moot, and awarded Wells Fargo its costs.

Recovering Millions for a Hedge Fund Client

When our client Passport Capital made its investment in Terralliance Technologies, it thought it was buying into a fast-growing startup with a promising idea for optimizing oil field exploration. According to *Fortune* magazine, Terralliance had previously received large investments from Goldman Sachs and the venture capitalists at Kleiner Perkins.

Passport's investment in Terralliance was comparatively modest, but sizeable for the young San Francisco hedge fund. So when Terralliance collapsed amid allegations of mismanagement and misappropriation of funds by its founder, Passport turned to Pillsbury for help.

Passport had made significant bridge loans to Terralliance while the startup was waiting for a $1.1 billion financing from a Singaporean sovereign wealth fund. Investors were attracted by the compelling concept that Terralliance had developed an algorithm for successfully identifying underground oil fields based primarily on satellite data.

But the Singapore investors balked after finding out that Terralliance founder Erlend Olson, a charismatic former NASA engineer, had wired himself substantial amounts of company money without documenting any business justification. Olson had also reimbursed himself for family vacations, for visits to gentlemen's clubs, and for tens of thousands of dollars in jewelry purchases.

Terralliance defaulted on its loans and assigned to Passport various promissory notes from Olson. When Passport's lawsuit for nonpayment finally came to trial in 2012, Olson boldly argued he was the victim of a conspiracy on the part of Terralliance's investors.

After a nine-day trial, Pillsbury defeated all of Olson's defenses and secured an award in excess of $6 million, plus attorney's fees and costs.

Client:	**Passport Capital**
Industry:	Financial Services
Area of Law:	Contracts
Venue:	California Superior Court, Orange County
Result:	After a nine-day bench trial, won an award of more than $6 million plus attorneys' fees and costs

"The lesson on this case is that perseverance pays off."

—William Alberti, General Counsel and Chief Compliance Officer for Passport Capital

Energy

We work with energy clients around the globe and across the full spectrum of energy sources, from oil and gas, coal and nuclear to electricity and all forms of renewable and alternative energy.

Continuing 100 Years of Investment in the San Francisco Bay Area

Covering 1,600 square miles in Northern California, the San Francisco Bay is the largest Pacific estuary in the Americas, and an unparalleled environmental, aesthetic and economic treasure. Maintaining any commercial presence on the Bay must therefore take into account the region's strict environmental laws and concerned environmental activists.

When Chevron USA faced a challenge in renewing the lease on a vital bayside marine terminal, the company turned to Pillsbury for its command of litigation involving the California Environmental Quality Act (CEQA) and the Public Trust doctrine. Chevron uses the marine terminal for deep-water docking of ships that off-load crude oil for processing and take on refined products for transportation to domestic and international markets. The terminal has been operated on the Bay since at least 1905 by Chevron and its predecessor, the Standard Oil Co., and received a major seismic upgrade in 2004.

This long history meant that the terminal significantly predated CEQA, passed in 1970. Thus, when Chevron sought to renew its lease with the state, the State Lands Commission had to consider the first-ever CEQA analysis of a pre-existing property. After closely examining the environmental impact of the operations under current conditions, the Commission approved a new lease.

Environmental activists still sued, however, arguing that the analysis should have compared the impact of the terminal operations versus no terminal operations—conditions that haven't existed in more than 100 years. That argument was rejected in every court in favor of the position advocated by Pillsbury.

"The Lands Commission and Chevron maintain the California Supreme Court has made it clear the baseline for a CEQA analysis must reflect current conditions at a project site, and the baseline selected by the commission was both legally proper and supported by substantial evidence," wrote the state appellate panel. "We agree with the Lands Commission and Chevron." The court also rejected all challenges under the Public Trust Doctrine, finding the terminal an appropriate Public Trust use.

Client:	**Chevron USA Inc.**
Industry:	Energy
Areas of Law:	Environmental, regulatory
Venue:	California Court of Appeal, First District
Result:	Resolved regulatory and citizen challenges to a lease extension on a San Francisco Bay Area oil terminal, a vital component of Chevron's U.S. operations

> "A California state appeals court on Friday upheld a lower court's decision greenlighting the California State Lands Commission's approval of Chevron USA Inc.'s 30-year lease renewal."
>
> *—Law360*

> “The evidence adduced during the three-month trial amply supports the jury’s awards for excess cost damages, liquidated damages, and statutory penalties under the False Claims Act.”
>
> —California Court of Appeal decision, upholding the $54 million jury award won by Pillsbury

Client:	**Sacramento Municipal Utility District (SMUD)**
Industry:	Utility
Areas of Law:	Contracts, appellate
Venue:	California Court of Appeal, Third District
Result:	Secured a 133-page appellate decision upholding a record-breaking award for our client

Preserving a $54 Million Jury Award on Appeal

In 2003, the Sacramento Municipal Utility District hired Fru-Con Construction to build a new 500-megawatt power plant to meet the rapidly growing electricity needs of California’s Central Valley.

Two years later, SMUD terminated its contract with Fru-Con after the construction company refused to replace a deficient concrete foundation that was supposed to support the plant’s cooling tower. SMUD completed the $155 million project with other contractors and sued to recover losses caused by Fru-Con’s failure to deliver the plant on time and on budget.

Pillsbury and co-counsel served as SMUD’s attorneys throughout the extensive litigation that followed. That included, most notably, presenting SMUD’s case in a three-month trial that resulted in a $42 million jury award plus an additional $12 million in interest for the client—the biggest award in the history of Sacramento County.

Fru-Con appealed with “multiple arguments as to every component of the judgment against it,” as the California Court of Appeal noted. But the appellate court rejected those arguments, including claims that SMUD had failed to produce sufficient evidence to support the jury’s multimillion-dollar award.

Fru-Con’s subsequent petition to the California Supreme Court was also denied and, soon thereafter, SMUD recovered $70 million (the original $54 million, plus post-judgment interest). That award remains the largest ever in Sacramento County.

Real Estate

Pillsbury's real estate litigation clients—including Boston Properties, Shorenstein and Cerberus Real Estate Capital Management—are leading the reinvigoration of this sector.

> "[Federal Realty] is a clear win for employers in the Fourth Circuit, which covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia."
>
> —1099 Compliance Blog

Client:	**Federal Realty Investment Trust**
Industry:	Real Estate
Area of Law:	Employment
Venues:	U.S. Court of Appeals for the Fourth Circuit, U.S. District Court for the District of Maryland
Result:	Won Fourth Circuit affirmation of the summary judgment rejecting an employee's claim for overtime pay under the Fair Labor Standards Act

In a Rare Court Test, Holding the Line on Exempt Status Under Federal Labor Laws

The number of lawsuits filed annually under the Fair Labor Standards Act has increased four-fold over the last 20 years. But correctly determining which employees should be exempt from overtime pay still remains a challenge because such a large percentage of cases settle before creating any case law.

So Pillsbury's 2012 precedent-setting victory in an FLSA suit before the Fourth Circuit received a lot of attention from both sides of the employment law bar. Plaintiffs and defense attorneys agreed that the decision bodes well for employers.

Federal Realty's case arose from a challenge to the exempt classification of an executive assistant working for the CEO. Although as many as 10 other "executive assistants" worked at Federal over the same time period, the CEO's assistant was the only one classified as an exempt employee.

Nonetheless, the district court found, and the Fourth Circuit agreed, that she was legitimately exempt from the FLSA's overtime requirement, based on a number of factors in her particular employment situation.

Among those factors were: Her base salary was at least $20,000 higher than all other executive assistants; she was the only one in a higher-tier bonus pool (making her total pay nearly double that of the others); and she was the only one given the option to purchase Federal Realty stock or receive stock options as compensation.

Pillsbury helped set an important new precedent for addressing employee claims in such cases, while still keeping the client's costs down by defeating the plaintiff's request for additional discovery, winning the lower court decision on a motion for summary judgment, and garnering the Fourth Circuit victory on the strength of the filings alone.

Defending a $16M Gain and Defeating the Lower Court's Unwarranted Expansion of Liability for All LLC Members

The limited liability company structure has grown increasingly popular in recent years because of the protections from liability that it can afford members and managers. When a decision by a lower state court cast a cloud over those limits, however, Pillsbury took the issue up on appeal to New York's highest court.

In this case, three real estate investors had created an LLC to hold a 50-year lease to property in downtown Manhattan, which they planned to develop. After a series of disputes among the three investors, Steve Tzolis bought out the other two for $1.5 million.

As part of the buyout agreement, the selling investors confirmed in writing that they had "performed [their] own due diligence in connection with [the] assignments," that they were not relying on any representations by Tzolis, and that Tzolis had "no fiduciary duty to [the other investors] in connection with such assignments."

But when Tzolis resold the lease for $17.5 million just six months later, those same investors sued him for allegedly breaching his fiduciary duty to them by not disclosing allegedly pending plans for a sale. The state trial court dismissed all of the plaintiffs' claims based on the language in the parties' LLC agreement and the buyout agreement, but the New York Appellate Division's First Department, in a split decision, resurrected four of those claims. The First Department expressed the view that the fiduciary duties of a manager of an LLC, under these circumstances, could not be waived or released.

Pillsbury took the case on appeal to the New York Court of Appeals, the state's highest court. In a unanimous decision, that court agreed the plaintiffs had validly disclaimed any fiduciary duties in the buyout. The court noted the plaintiffs were "sophisticated businessmen represented by counsel" when they agreed to the buyout.

With its decision, the Court of Appeals confirmed the ability of LLC members to control the risk of fiduciary liability in buyouts and similar transactions in which they sit across the table from other LLC members. The Court of Appeals also moved New York LLC law closer to that of Delaware on the key issue of whether fiduciary duties can be relinquished by agreement. Observers predict this will lead more LLCs to incorporate in New York.

Client:	**Steve Tzolis**
Industry:	Real Estate
Area of Law:	Contracts
Venue:	New York Court of Appeals
Result:	A complete victory for the client and an important new precedent for LLC governance through a unanimous reversal from New York's highest court

"New York's highest court on Tuesday reversed a ruling that entitled two Manhattan real estate investors to sue for damages after their partner bought them out of a lease for $1.5 million, then turned around and sold it to a third party for nearly 12 times that much."

—*Law360* coverage of Pillsbury's victory

Consumer

From groceries to luxury goods and everything in between, our consumer and retail litigation clients include Petco, Anheuser-Busch, Bass Pro Shops and Stanley Black & Decker.

Scoring a Concession from the Department of Justice

In 2011, the U.S. Fish and Wildlife Service raided the offices and factories of Gibson Guitar for the second time in two years. Armed agents seized documents, computer hard drives and materials, including hardwoods slated for the company's world-famous instruments.

The Justice Department alleged that Gibson's importation of rosewood and ebony from India and Madagascar violated the Lacey Act, originally passed in 1900 to stop the trade in poached game and wild birds, and expanded a century later to encompass illegally logged wood. The raids and grand jury subpoenas disrupted Gibson's supply lines and production schedules, and placed the company's officers under the threat of criminal prosecution.

Pillsbury attorneys immediately engaged with the government's lawyers and agents to demonstrate the factual deficiencies and overreaching by the prosecution. For instance, as *The New York Times'* Dot Earth blog later noted, "the most recent federal raid of the company was probably unjustified," because the legal status of the 2011 wood shipment that was seized was "far from obvious."

In its unusual criminal enforcement agreement with Gibson, the U.S. government also conceded that it would not "undertake enforcement actions related to Gibson's future orders, purchases, or imports of [wood] from India, unless and until the Government of India provides specific clarification" regarding its legality or illegality. So, in addition to stopping any criminal charges in this instance, Pillsbury also substantially reduced the likelihood of further investigations of Gibson.

Amplifying this success, Pillsbury's Insurance Recovery attorneys helped Gibson look to its directors and officers (D&O) liability policy for much of the cost of their legal defense. Pillsbury developed an innovative theory that the carrier initially resisted, but with persistence, convinced the carrier to pay a significant portion of Gibson's defense costs.

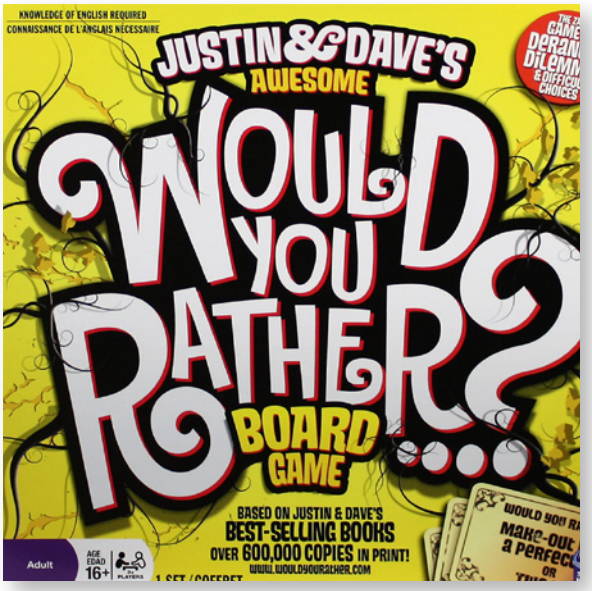
In addition, the government agreed its seizure of Gibson's rosewood from India had been unwarranted and the wood would be returned. Pillsbury attorneys traveled to pick up the wood and deliver it back to Gibson USA headquarters in Nashville. Through this symbolic action, they highlighted Pillsbury's passion about what we do for our clients and that we, literally and figuratively, deliver.

Client:	**Gibson Guitar**
Industry:	Consumer
Areas of Law:	Environmental regulation, white collar defense
Venues:	U.S. Department of Justice, U.S. Fish and Wildlife Service investigations
Result:	Comprehensive resolution of all potential civil and criminal liabilities, avoiding any charges against Gibson's officers, directors and employees, and obtaining insurance coverage for their defense

> "This allows us to go back to the business of making guitars."
>
> —Gibson CEO Henry Juszkiewicz, on Pillsbury's resolution of U.S. government investigations

> “The level of preparation, determination and enthusiasm demonstrated by the team at Pillsbury was impressive. Their drive and desire for a positive result was extraordinary.”
>
> —Spin Master General Counsel Christopher Harrs

Client:	**Spin Master Ltd.**
Industry:	Entertainment
Areas of Law:	Intellectual property, trademark
Venues:	U.S. Court of Appeals for the Ninth Circuit, U.S. District Court for the Central District of California
Result:	Won a Ninth Circuit reversal of summary judgment, followed by a federal jury award of trademark protection and $8.6 million in compensatory and punitive damages for our client



Protecting the Value of a Trademark

Among the hundreds of products offered by our client Spin Master Ltd., a children’s entertainment company, is a board game called “Would You Rather…?”—a phrase first submitted for trademark protection by Spin Master’s predecessor in 1997. In the game, players ask each other bizarre questions such as “Would you rather kiss a jellyfish or step on a crab?”

Another company, Zobmondo Entertainment, began producing a “Would You Rather…?” game in 1998, even though its trademark application had been rejected by the U.S. Patent & Trademark Office because of the likelihood of confusion with the 1997 application.

When Zobmondo sued Spin Master’s predecessor for trade-dress infringement and other claims, Spin Master countered with a suit against Zobmondo for trademark infringement. Claims from both sides ended up before the U.S. District Court for the Central District of California, where a judge ruled that the “Would You Rather…?” mark was not protectable because it was “merely descriptive” of the game.

Pillsbury appealed to the Ninth Circuit on behalf of Spin Master, arguing that whether the “Would You Rather…?” mark is “descriptive” or protectable as “suggestive” was not suitable for resolution by summary judgment. The Ninth Circuit agreed, reversing the lower court and remanding the case for trial.

That trial proceeded before a federal jury in 2012. The jury concluded that “Would You Rather…?” was indeed a distinctive, protectable trademark, and awarded Spin Master $5 million in compensatory damages and $3.6 million in punitive damages for Zobmondo’s infringement.

Healthcare

From pharmaceuticals and medical devices to healthcare providers, Pillsbury's litigation clients include Stanford Hospital and Clinics, Health Net, Merck and McKesson.

"The agreement has cleared the federal regulatory review process, enabling North Shore-LIJ to establish its 16th hospital in the metropolitan area."

—Press release from Pillsbury's client, the North Shore-LIJ Health System

Client:	**North Shore-LIJ Health System**
Industry:	Healthcare
Area of Law:	Antitrust and competition
Venue:	U.S. Federal Trade Commission
Result:	Based on preparation that anticipated regulators' concerns, the FTC cleared the proposed transaction without any conditions

Securing FTC Clearance for a Healthcare Merger

As healthcare's importance in the U.S. economy continues to grow, those charged with enforcing antitrust laws have stepped up their scrutiny of any plans by healthcare providers to combine forces. By anticipating the concerns of antitrust regulators and proactively showing how these concerns had been addressed, Pillsbury helped an important merger quickly earn a clean bill of health.

North Shore-LIJ is the largest health system in its region, providing inpatient and ambulatory behavioral health services in Manhattan, Staten Island, Queens and Long Island. In 2012, North Shore-LIJ was joined by The Long Island Home, adding a 16th hospital to the system, as well as an additional long-tem, sub-acute rehabilitation facility in Suffolk County.

Mindful that in recent years the FTC has challenged similar combinations, Pillsbury attorneys started working closely with both parties several months before their respective boards approved the transaction.

The Pillsbury team conducted interviews with a wide range of personnel—CEOs, strategic planners, treating psychiatrists, admissions officers and nursing administrators—to demonstrate important differences in the nature of the services offered and the patients admitted to their respective facilities.

Pillsbury also helped the buyer develop plans for further increasing the quantity, scope and quality of services in the region as a result of the merger. This preparatory work anticipated the FTC's concerns before the agency's review even began, and promptly led to a favorable result.

Pro Bono & Public Policy

We proudly take on high-profile causes that draw the attention of policymakers in Washington, DC, as well as cases for indigent clients who need legal assistance in our communities.

Client:	**The Senior Executives Association, the American Foreign Service Association, the Assembly of Scientists, the National Association of Immigration Judges, and several individuals, together representing thousands of federal employees**
Areas of Law:	Constitutional, privacy
Venue:	U.S. District Court for the District of Maryland
Result:	Secured an injunction blocking the online posting of confidential financial information gathered from tens of thousands of federal employees

"These federal employees could face substantial harm because of the disclosure of their financial information, and the vehicle of disclosure—the Internet—exacerbates these risks."

—*Law360*, citing the judge's opinion in favor of Pillsbury's clients

Protecting the Financial Privacy Rights of More Than 30,000 Americans

On August 2, 2012, Pillsbury and co-counsel from the American Civil Liberties Union of the Nation's Capital filed a landmark privacy protection lawsuit against the United States. At issue was the STOCK (Stop Trading on Congressional Knowledge) Act, which mandated Internet publication of the private financial information of thousands of Executive branch employees by August 31.

Pillsbury and the ACLU persuaded a U.S. District Judge to block the Internet publication, arguing that these sweeping disclosures would violate the constitutional right to "informational privacy" for these employees, their spouses and their children.

Tens of thousands of senior military and civilian employees of the U.S. government are already required to file financial disclosure forms with the government every year. These disclosure forms cover everything from the employees' salaries and real estate transactions, to their stock holdings, pension plans, savings and life insurance contracts.

The STOCK Act would have made this information easily accessible by anyone around the world. Internet users could access this sensitive data anonymously. Making such private information available to foreign intelligence operatives, in particular, would put national security at greater risk.

As suggested by its full name, the STOCK Act was originally supposed to make members of Congress and their staffs subject to insider trading laws. But, with the expanded application of the law to tens of thousands of others, Pillsbury noted, the reach of this law and its potential for mischievous consequences were unprecedented.

U.S. District Judge Alexander Williams agreed, enjoining the Act's implementation. "At this stage in the litigation, these [plaintiffs' privacy] interests outweigh the United States' compelling interest in combating conflicts of interest and corruption," he said.

Congress has now postponed the Internet publication deadline three separate times, giving itself additional time to address the Act's problematic provisions. Pillsbury is also working for its clients to secure legislative solutions to prevent the law's devastating elements from ever going into effect.

Persevering and Prevailing for a Seventh Circuit Precedent

Winning a case of first impression in a Circuit Court—especially when the decision helps create a new Circuit consensus—is a notable achievement. But knowing that your victory will help protect the constitutional rights of countless other citizens—that's priceless.

In *Ray v. Clements*, Pillsbury represented a man wrongly convicted of felony murder following a trial where his constitutional rights were violated through the admission of damaging hearsay evidence—evidence the defense could not rebut because the supposed accusers were never brought into court as witnesses. The Seventh Circuit had been persuaded in 2010, when we first appeared on Ray's behalf, that this was an egregious Sixth Amendment violation that warranted Ray's release.

Yet Ray remained in prison because of a procedural barrier. The State of Wisconsin maintained that Ray's federal appeals were moot because state officials never received the initial state-level appeal Ray tried to mail while housed at a privately run prison in Oklahoma.

With no access to postal services while his cell block was on lockdown, Ray asked a prison social worker to mail his appeal. Under the bright-line "prison mailbox" rule established by the U.S. Supreme Court's 1988 decision in *Houston v. Lack*, this handoff should have sufficed as a timely and proper filing effort.

But Wisconsin contended that it had rejected—and wasn't required to follow—the mailbox rule for its state prisoners. Considering the issue *de novo*, the Seventh Circuit agreed with Pillsbury's argument that the mailbox rule should apply to all prisoners' state *habeas* appeals.

The Seventh Circuit's decision cemented an emerging consensus among the circuits and ordered the release of Pillsbury's pro bono client.

Client:	**Elliot D. Ray**
Areas of Law:	Constitutional, criminal appellate, pro bono
Venues:	U.S. Court of Appeals for the Seventh Circuit, U.S. District Court for the Eastern District of Wisconsin
Result:	Secured two successive reversals from the Seventh Circuit, which ordered the lower court to release Pillsbury's client from prison

> "We think Ray's counsel hit the nail on the head in his briefs and at oral argument."
>
> —Seventh Circuit's majority opinion on Pillsbury's pro bono work in *Ray v. Clements*

About Our Litigation Practice

Pillsbury has more than 200 litigators handling complex commercial cases, matters of substantial public interest, sophisticated technology disputes and a wide variety of other assignments. We offer the depth and breadth of knowledge across industries necessary to help our clients avoid disputes and, when necessary, resolve disputes favorably and efficiently, either by trial or settlement. Our practice often involves large-scale, complex litigation with multiple parties, in multiple proceedings and forums.

The firm's litigators appear regularly in U.S. federal and state courts, and also before regulators, arbitrators and mediators, both domestically and internationally. Our attorneys also regularly assist clients with internal corporate investigations and potentially sweeping e-discovery requests.

About Pillsbury

Pillsbury is a full-service law firm with a keen industry focus on energy and natural resources, financial services, real estate and construction, and technology. Based in the world's major financial, technology and energy centers, Pillsbury counsels clients on global regulatory, litigation and corporate matters. We work in multidisciplinary teams that allow us to anticipate trends and bring a 360-degree perspective to complex business and legal issues—helping clients to take greater advantage of new opportunities and better mitigate risk. This collaborative work style helps produce the results our clients seek.

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