

Health Care Litigation

Pillsbury's Health Care Litigation team works closely with other health care-related practices within the firm to deliver a 360-degree view to better understand the business and legal needs of the client and to address the legal challenges that apply to this growing and complex industry.

Pillsbury's Health Care Litigation practice combines our deep professional experience in complex, high-stakes litigation with extensive knowledge and insight of the health care industry. The practice features more than 20 attorneys who regularly represent hospitals and health care providers, managed health care organizations, pharmaceutical and biotechnology companies, medical device manufacturers and many others. We have counseled our clients on dispute issues such as antitrust, qui tam provisions of the False Claims Act, privacy, payment and insurance disputes, bankruptcy and IP litigation.

False Claims Act and Whistleblower Defense

One of the fastest growing areas of federal litigation involves the False Claims Act (FCA). Of the \$2.8 billion recovered in Fiscal Year 2018, \$2.5 billion came from companies and individuals in the health care industry for allegedly providing unnecessary or inadequate care, paying kickbacks to health care providers to induce the use of certain goods and services, or overcharging for goods and services paid for by Medicare, Medicaid, and other federal health care programs. This is the ninth consecutive year that the department's civil health care fraud settlements and judgments have exceeded \$2 billion. The recoveries included in the \$2.5 billion reflect only

federal losses. In many of these cases, the Department of Justice was instrumental in recovering additional millions of dollars for state Medicaid programs.

The majority of these cases are now initiated under the Act's qui tam provision by private plaintiffs (known as relators) in the name of the United States. Relators have historically been whistleblowers with inside information, but their profile is rapidly changing. Complicating this emerging risk is the announcement that all new qui tam complaints will be shared with both the Civil and Criminal Divisions of DOJ, so they can consider pursuing parallel investigations.

Pillsbury's collective governmental and prosecutorial experience combined with the dozens of FCA and qui tam cases matters the group has handled provides valuable insight into government strategy and decision-making and lays the groundwork for effective negotiations and with the DOJ and relevant agencies. Examples of our work in the health care sector include:

- Represented the owners of a **Florida-based Medicare Advantage Plan** in a FCA action by the DOJ and Centers for Medicare and Medicaid Services. Defendants were alleged to have falsely increased the severity of beneficiary diagnoses to obtain higher

Medicare payments. Under the Medicare Advantage Program, participants are paid more to provide services to members with serious and/or chronic medical conditions. This was the first claim brought under the Risk Adjustment System for the Medicare Advantage Organization.

- Assisting a **faith-based health care system** in responding to a Civil Investigative Demand and litigation in connection with allegations of potential violations of the False Claims Act regarding Medicare and Medicaid reimbursements.
- Representing one of the country's **largest providers of respiratory care** in a FCA action by the DOJ alleging that the company submitted fraudulent bills as a result of deliberately manipulating and falsifying pulse oximetry tests to generate the appearance of low oxygen saturation levels so that it could provide Medicare-covered oxygen to patients that were not qualified to receive it.

Antitrust and Unfair Competition

Pillsbury's health care litigation practice counsels 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 advertising claims, price fixing, cartels, unfair competition and many others.

- **United Biologics LLC, et al. v. Academy of Allergy, Asthma & Immunology, et al.** Representing the largest allergy services company in the United States and a national association of primary care physicians practicing allergy care in their Section 1 and Section 2 Sherman Act antitrust claims against the global leader of allergy blood tests as well as allergy societies participating in the market for allergy testing and immunotherapy. This case represents a series of disputes that have appeared in federal and state courts over the provision of allergy care that has appeared in numerous national and local journals and publications.
- Defending a **national durable medical equipment distributor** in a private antitrust lawsuit in federal district court in the Eleventh Circuit. The allegations include group boycott and conspiracy to monopolize claims under Sections 1 and 2 of the Sherman Act, and analogous state antitrust law claims.
- Represented **ENH Medical Group** in a Federal Trade Commission physician price-fixing challenge. The trial team successfully defeated the government's summary judgment motion, paving the way for a favorable settlement.
- Representing **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.
- Defended **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.
- Defending **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, Pillsbury's legal team settled the counterclaim for zero dollars after moving for summary judgment, retaining new experts, and obtaining several favorable discovery rulings.
- Successfully represented a **Fortune 500 pharmaceutical company** in a parallel SEC/DOJ FCPA investigation.
- Represented **Luxottica Group** in obtaining unconditional FTC clearance for its \$56 billion combination with Essilor.
- Successfully represented a **large health care network** in its efforts to obtain antitrust clearance for multiple hospital acquisitions.
- Successfully represented a **provider of respiratory therapy services** in connection with antitrust action brought by a supplier.

Joint Venture and M&A Disputes

“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. 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 matters. We have advised health care firms in numerous proposed transactions over more than 20 years, including the following:

- ***U.S. v. Long Island Jewish Medical Center and North Shore Health System Inc.*** Represented North Shore Health System in its acquisition of Long Island Jewish Medical Center in New York. The DOJ objected to 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, allowing the transaction to be finalized.
- Represented a **local hospital district** in a highly-publicized dispute with a private hospital corporation related to a hospital lease and option to purchase that involved closing emergency room services, potentially impacting tens of thousands of district residents. After the district found evidence that certain officers and board members who negotiated and approved the agreement had a conflicting “financial interest” in the agreement, Pillsbury was retained to prosecute the matter and attempt to invalidate the agreement.
- ***Campagnuolo v. IDEC Pharmaceuticals.*** Successful defense and resolution of the plaintiff’s challenge of the merger between IDEC Pharmaceuticals and Biogen.
- Represented **Evanston Northwestern Healthcare** in the FTC’s long-anticipated post-consummation challenge to a hospital merger in a major metropolitan area. The FTC ultimately reversed an administrative law judge’s earlier order requiring divestiture.

Health Care Privacy Litigation

Pillsbury helps hospitals and other health care facilities address litigation arising out of data privacy violations, including unauthorized disclosure of health care information. In addition to litigation, our attorneys can assist clients facing disputes

or governmental investigations arising out of HIPAA and other medical privacy laws. We have also represented various health care entities in recovering insurance proceeds arising out of data breach lawsuits. Our work includes the following:

- Defended a **major hospital** in class action lawsuits arising from unauthorized disclosure of patient health information by a hospital vendor. We also advised the same institution in litigation with a general liability insurer to obtain coverage for class action litigation arising out of alleged release of protected health information.
- Defended an **academic medical center** against a variety of privacy claims, including alleged violation of the California Confidentiality of Medical Information Act, because of information disclosed to the patient’s insurer.
- Represented a **national managed care organization** in successful prosecution of coverage claims under its cyber and professional liability insurance policies for data security breach lawsuits arising out of the alleged loss of server drives containing confidential medical information of over a million patients and potentially seeking billions of dollars in damages.

Payment and Insurance Coverage Disputes

Pillsbury represents clients on payment disputes with medical insurance companies and other parties. In addition, we also represent health care organizations in recovering insurance proceeds from property and casualty insurance companies in connection with property and business interruption, executive liability insurance and other types of insurance claims. Our experience includes:

- Representing **NYU Hospitals Center and NYU School of Medicine** to recover money from various sources related to its losses from Hurricane Irene and its loss of more than \$1.4 billion in property damage, business interruption, and other losses during Superstorm Sandy, including from (1) FEMA for federal assistance, (2) Factory Mutual Insurance Company for insurance coverage, and (3) Turner Construction for failing to properly protect a construction site at the hospital site in advance of Sandy’s landfall.
- Defended a **supplier of respiratory equipment company** in a payments-related litigation brought by United Healthcare.

- Defended **numerous health care providers** in their successful defense of recoupment claims based on an erroneous interpretation of a preexisting national insurance company policy and contracts misconstrued by competitors and suggested to that carrier in the same industry.
- Represented **one of the largest providers of rehabilitation services** in litigation filed against 27 health care facilities that have not paid for services rendered by our client.

Insolvency Disputes

In working collaboratively with our Insolvency & Restructuring team, we represent a diverse range of clients in dealing with complex, sophisticated, distressed financial situations, from debtors to those who deal with them. Our team has represented more than 60 health care entities in the last 20 years, and has extensive experience representing hospitals and health systems, lenders, trade creditors and other parties in health care-related matters. Our experience includes the following:

- Represented **Specialty Hospitals of America and affiliates**, in its Chapter 11 case which involved a quick all-asset sale of debtors' assets.
- Represented the **Official Committee of Unsecured Creditors of Baxano Surgical Inc.** in Chapter 11 case of this publicly traded medical device company.
- Represented **Regen Biologics Inc.** and its affiliates as debtors in their Chapter 11 proceedings.
- Represented **St. Vincent's Catholic Medical Centers** as a reorganized debtor and served as Chapter 11 counsel.

IP and Trade Secrets Disputes

Pillsbury regularly represents health care and life sciences companies in disputes arising from patent and trademark infringements, licensing agreements and trade secrets. Our experience and technical depth positions us to serve clients in areas such as health care, medical devices and pharmaceutical companies. Some of our experiences are listed here:

- ***Bailey, et al v. Laser Spine Institute LLC, et al.***
Served as lead trial counsel for group of plaintiffs in a significant business theft case, including the theft of the venture's trade secrets and other proprietary information. After a six-week bench trial and years of proceedings, the Second District Court of Appeal—in an unprecedented decision—not only reversed and

remanded, but required the trial judge to enter judgment for our disgorgement demand of \$264 million, plus \$6.8 million in out-of-pocket losses for one of the plaintiffs. These amounts are in addition to the \$5.75 million in punitive damages. In July 2019, the trial court entered a final judgment that, with interest, exceeded \$370 million.

- ***University of Kansas v. National Institute of Health (NIH).*** Following years of litigation in a case involving inventorship credit on patents NIH owns covering cancer drug formulations, Pillsbury successfully convinced an arbitration panel to rule in our client's favor.
- ***Immunex Corporation and Amgen Inc. v. Trustees of Columbia University and related action.*** Represented pharmaceutical companies with respect to challenging Axel patents regarding co-transformation of mammalian cells to produce proteins of interest.
- ***In re: BRCA1- and BRCA2-based Hereditary Cancer Test Patent Litigation.*** Represented Invitae Corporation in prosecuting action against Myriad Genetics to declare invalid certain patents related to genetic screening for breast cancer. In the resulting MDL case, Myriad abandoned its efforts to enforce the patents, thus paving the way to competition and price reduction.

About Pillsbury

Pillsbury Winthrop Shaw Pittman LLP is an international law firm with a particular focus on the technology & media, energy, financial services, and real estate & construction sectors. Recognized by legal research firm BTI Consulting as one of the top 20 firms for client service, Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their authoritative commercial awareness.

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