

Litigation Powerhouse: Covington & Burling

By Jody Godoy

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 - In a 12-month stretch, Covington & Burling LLP racked up three back-to-back trial victories, continued an unbroken appellate streak for two pharmaceutical industry giants and won decisions that affect how federal laws are applied, putting it among Law360's Litigation Powerhouses.

The Washington, D.C.-headquartered firm is known for its formidable regulatory practice. But the firm also has a robust presence in the courtroom: 65 percent of Covington's more than 850 attorneys spend most of their time on litigation, including some 60 trials in the past three years.

"What we have that other firms don't have is this incredible depth of regulatory and prior government experience that we bring to bear in almost all of our matters," said John Hall, chair of Covington's global litigation practice.

The firm's marquee life sciences practice showcases those strengths. Late last summer, a small Covington team won three trials in the space of a month for Eli Lilly. The patients in those cases had sued over health issues they attributed to withdrawal from Cymbalta, a drug used to treat fibromyalgia, a muscular disorder.

The short trial schedules meant the three-partner, four-associate team had to make their limited courtroom time count.

"We were able to try three cases back-to-back



Covington & Burling

Litigation Attorneys: 550

Litigation Partners: 166

Big Wins:

U.S. v. Gilead — HIV treatment producer Gilead avoided billions in False Claims Act penalties when a California federal judge found the case couldn't rely on alleged regulatory violations, a landmark ruling with implications for other federal contractors.

McCarrell v. Hoffmann-La Roche — Covington attorneys bagged their 13th-straight appellate win for Roche in Accutane litigation, upending a \$25 million jury verdict in the reputedly plaintiff-friendly New Jersey appellate court.

Cardona v. Chiquita — Chiquita Brands defeated Alien Tort Statute claims over extortion payments by banana farmers to Colombian paramilitary groups. The U.S. Supreme Court declined to disturb an Eleventh Circuit ruling tossing the claims.

CBS v. FCC — CBS, Disney and others won a D.C. Circuit ruling preventing the Federal Communications Commission from publishing media companies' confidential information in telecommunications mergers.

In Re: Zinc Antitrust Litigation — Goldman Sachs and JPMorgan Chase beat claims that they conspired with zinc warehouse operators to drive up the price of the metal before the same Manhattan federal judge who greenlighted a similar suit involving aluminum.

Trial Tip: "Know your core common-sense points and be nimble in expressing them throughout the trial." — Paul Schmidt

because we have a really strong team,” said Paul Schmidt, one of the Covington partners who led the defense. “We work really well together and pride ourselves on being able to adapt quickly.”

At the first trial, a bellwether in California, the team found that the jury responded well to hearing that the patient had come off the drug more abruptly than her doctor had planned. That information, along with litigation partner Phyllis Jones' careful cross-examination of the patients, helped the team in the next two trials, the lawyers said.

The second case ended in a directed verdict after partner Michael Imbroscio got the patient's doctor to testify that he generally didn't read drug labels and couldn't remember reading the Cymbalta label before prescribing it. The Covington defense team also won the final round in Virginia, even though the judge had allowed the patient to draw from a broader set of facts.

In the same month, a New Jersey appeals court overturned a \$25 million verdict against Hoffmann-LaRoche Inc. — Covington's 13th straight appellate win for Roche in the long-running litigation.

Imbroscio, who co-chairs the firm's product liability and mass tort practice, said while each case has presented different challenges, experience helps. And Covington has experience — its streak of overturned plaintiffs wins and upheld defense victories in cases alleging various side effects from the acne drug go all the way back to 2003.

“We bring to our appeals a combination of knowing this medicine well and knowing the kinds of issues that are important to press at trial and ultimately on appeal,” Imbroscio said.

Another win under the firm's belt came in June 2015, when Covington pharmaceutical and white collar practice leader Ethan Posner and his team convinced a California federal judge to toss a multibillion-dollar False Claims Act case against Gilead Sciences. In that case, whistleblowers claimed Gilead committed government health care fraud by using an unapproved Chinese facility to produce tainted HIV medication.

U.S. District Judge Edward Chen held that alleged violations of U.S. Food and Drug Administration regulations can't form the basis for FCA claims, a ruling that makes it harder to make similar allegations against pharmaceutical companies.

Deputy litigation chair Stephen P. Anthony said the firm's in-depth knowledge of the industry is a major part of successful litigation work for the world's largest pharmaceutical companies.

"Our thorough knowledge of the life sciences industry is something that not only our food and drug regulatory lawyers can be proud of — it also helps our litigators handle our clients' most complicated cases," Anthony said.

But Covington's wins are by no means limited to the life sciences arena. The firm has racked up other notable victories where its trial and regulatory abilities intersect.

In May 2015, Covington successfully represented CBS Corp., The Walt Disney Co., Time Warner Cable and a slew of other media companies in a challenge to the Federal Communications Commission in the D.C. Circuit. The regulator had proposed to publicly disclose programming contracts and other sensitive information in reviewing AT&T Inc.-DirecTV and Comcast Corp.-TWC mergers. The court said the disclosure proposal, which gave the companies a mere five days to reply, was “substantively and

procedurally flawed,” a ruling that should serve as an obstacle to similar regulatory data dumps.

Briefs by Covington attorneys also guided the U.S. Supreme Court on matters of national importance last year, contributing to rulings that same-sex marriage is constitutionally protected and that Affordable Care Act subsidies are available in all 50 states.

The firm also shut down several large matters in the initial stages. In December, Covington defeated prosecutors' allegations that AECOM/URS, a government contractor, did unnecessary tire changes on vehicles at the Kennedy Space Center, which prosecutors said added up to thousands of false claims violations. U.S. District Judge Gregory A. Presnell tossed the suit after Covington's Benjamin Razi argued that seven tire changes on two vehicles were not enough to support the government's sweeping allegations.

In another instance, the firm's attorneys convinced U.S. District Judge Katherine Forrest to shut down claims that JPMorgan Chase & Co. conspired with metal storage facility operators to manipulate the price of zinc. The ruling was a surprise given that Judge Forrest let claims against the banks go forward in another similar suit over aluminum.

On the firm's horizon lies what could be scores of trials in the Takata Corp. air bag litigation. Covington is working with Dechert LLP to defend the auto parts maker from driver claims that rapidly inflating airbags caused injury or economic loss.

Overseas, Covington partner David Pinsky and a team won the business of Ukrainian state-owned oil and gas firm NJSC Naftogaz, which is arbitrating a dispute with the Russian government over assets seized in Crimea. That representation builds on Covington's work for Spanish investors in Yukos Oil Co. after Russia expropriated the company.

And the firm is advising Disney, ABC and ESPN around tie-ups with DraftKings as federal and state regulators suss out whether anti-gambling laws apply to the fantasy sports site.

Going forward, the firm is looking to expand in California and New York, according to Hall. Last year, the firm opened a Los Angeles office that has since grown to include 19 attorneys, eight of them partners.

“Our position with the classic Washington regulatory practice is quite salable in markets across the country,” Hall said.

Part of the firm's success is due to its high-profile former government attorneys. Hall said former U.S. Department of Justice criminal division head Lanny Breuer has been a rainmaker for the firm, as have two other former criminal division bosses, Mythili Raman and Michael Chertoff. Raman was the latest to join the firm, coming aboard in 2014.

Hall and Anthony are both former prosecutors themselves. But Anthony was quick to note that the firm's successful “home-grown” litigators — including the Cymbalta defense team — draw clients with their track records.

“They live and breathe working in a courtroom and communicating to judges and juries all around the country,” Anthony said. “When clients see them in action and see the results they get, they want to send us more work.”

But the Covington formula wouldn't be what it is without structural choices like doing without origination credits in determining attorney pay or attributing clients to the firm as a whole instead of individual attorneys, firm leaders say.

“Everything in our firm is designed to promote collaboration and cooperation towards achieving the best result for the client,” Hall said. “More and more in recent years, that aspect of how we operate has become its own advantage.”

--Editing by Christine Chun and Philip Shea.

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