

WINNING | A SPECIAL REPORT

Our request was simple: Tell us a story. We asked our readers to nominate litigators who prevailed during 2012 before a bench or jury trial. It helped if they had overcome tough odds and high financial stakes or a principle or precedent was at risk. We hereby share the five tales we liked the best.



Keker Team Won a \$1 Billion Bet for McKesson

The client insisted it was innocent of kickback charges, and these litigators proved that case.



JEFFREY CHANIN & DAVID SILBERT

| KEKER & VAN NEST

TRIAL TIPS

1. Although thorough witness preparation is essential for any trial, it is also critical for attorneys to know their witnesses' strengths and limitations. Some need to be led by the nose, but when they're credible and effective, the attorney's job is to get out of the way and let them shine.

2. Keeping complicated cases lively and interesting is a must. I make it a point to have as many in-person witnesses as possible and minimize testimony through videotaped depositions. I also try to make interim arguments to the court and talk about the evidence as it is introduced. —JEFFREY CHANIN

1. Boil complex facts down to a few simple themes. And once you've found them, hammer them home every day.

2. As a defendant, put in as much of your case as possible during the plaintiff's case-in-chief. Impressions are formed early.

3. Be the party that educates the fact-finder. Judges and juries want to get it right, and they trust—and reward—the side that empowers them to do so.

—DAVID SILBERT

KEKER & VAN NEST

WINNING

BY SHERRY KARABIN

It began as a whistleblower suit filed by a health care supplier in the Northern District of Mississippi in December 2004, but quickly grew into a U.S. Department of Justice lawsuit that had the potential to cost San Francisco-based McKesson Corp. and subsidiary McKesson Medical-Surgical MediNet Inc. nearly \$1 billion and bar them from doing business with the government.

When the Justice Department issued its complaint in 2008, it charged the pharmaceutical distributor and health care information technology company and MediNet, which prepared Medicare bills, with paying kickbacks to nursing home operator Beverly Enterprises Inc. in the form of underpriced services to encourage other business paid for by Medicare, and with submitting “legally false claims” to the government.

“Essentially, McKesson and its subsidiary were being accused of violating two federal statutes, the civil False Claims Act and the criminal Anti-Kickback Statute,” Keker & Van Nest partner Jeffrey Chanin said. “The allegations were very complex but one thing was clear: A judgment against our clients would mean enormous penalties and injury to their reputation, as well.”

When the stakes are this high, most businesses opt to settle, but the companies were convinced that their employees had done nothing wrong. McKesson entrusted Chanin and partner David Silbert to take the case to trial.

“It’s always difficult for large companies to try high-stakes cases, particularly against the Department of Justice, but we felt we could win,” Silbert said. “A lot of careful analysis was undertaken before they decided to go this route. But the settlement option was unpalatable and could have resulted in an automatic assumption of guilt. In fact, one person’s career had already been destroyed by allegations in the complaint that the court ultimately rejected as unfounded.”

The earliest victory came in March 2010, when U.S. District Judge Sharion Aycock in Aberdeen, Miss., dismissed whistleblower Thomas Jamison, who was represented

by Brad Pigott, the former U.S. attorney for the Southern District of Mississippi. The U.S. Court of Appeals for the Fifth Circuit affirmed the ruling in 2011. “The dismissal was key because, had the case gone forward with both the relator [Jamison] and the DOJ, we would have been facing two plaintiffs, each with their own attorneys, witnesses and arguments,” Chanin said.

The team delivered their second blow in March 2011 by winning dismissal of claims based on allegations that Beverly’s supplier subsidiary, for whom MediNet billed Medicare, was a “sham” supplier that failed to comply with Medicare supplier standards.

“This cut the case down to size, so that it could be reasonably tried,” Chanin said. “There were a lot of novel theories supporting these sham-supplier charges. The government contended that McKesson’s subsidiary was committing fraud by submitting Medicare claims for an unqualified supplier, even though Beverly’s subsidiary had been inspected and certified as a Medicare supplier.”

With a partial dismissal under their belts, the attorneys began preparing for a bench trial before Aycock on the False Claims Act and kickback allegations.

“In complicated cases like this one that involve a lot of financial information and allegations of defrauding the government with harm to taxpayers, it is sometimes best to forgo a jury trial,” Chanin said. “The Department of Justice routinely asks for bench trials in these cases, and with a careful and thoughtful judge like Sharion Aycock we were agreeable to do so in this case.”

The trial got underway in February 2012, lasting 14 days and featuring 24 witnesses, hundreds of exhibits and post-trial briefing. Aycock ruled in favor of McKesson in September 2012.

One key to the win, the attorneys said, was keeping the government’s expert witness, certified public accountant Kathleen McNamara, off the stand. According to Chanin, the government had designated McNamara as a rebuttal witness. Since the defense felt good about their case after the government’s fact witnesses finished what Chanin and Silbert considered weak testimony, they

elected not to enter any expert testimony for McNamara to rebut.

McNamara had “put forward very creative accounting theories involving kick-back violations and, although they were wrong, they would have taken an otherwise straightforward issue and complicated it. She had the potential to dress up the government’s case in a patina of apparent accounting expertise,” Chanin said.

Moreover, the trial team was “blessed with McKesson and MediNet employees who made outstanding witnesses,” Silbert said. One of the turning points came when the government called MediNet’s Gail Beske. “Her testimony lasted several days, including Jeff’s cross-examination. She gave incredibly detailed testimony that MediNet’s services were priced at fair market value, poring over data in dozens of spreadsheets. The government tried to show that the data supported their allegations, but Gail fought back and did not waver. She did a terrific job.”

Part of the strategy was to reinforce that everyone at McKesson and MediNet acted in good faith and with the best intentions. “We asked each witness at the end of their testimony whether they believed MediNet’s services were below fair market value and whether they would have done any deal that they thought was illegal,” Silbert said. “The answer was always a resounding ‘no.’ ”

The trial victory allowed McKesson and MediNet to avoid paying nearly \$1 billion in fines, not to mention the collateral penalties that government agencies can impose on companies found to have paid illegal kickbacks.

“We were very pleased that McKesson put its faith in us to try this case,” Chanin said. “And even more pleased to vindicate the employees who had been accused.”

The DOJ, represented by Tom Morris and Charles Biro, declined to comment.

Sherry Karabin is a freelance reporter.

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