

11th Circ. Nixes Procaps' Bid To Revive \$255M Antitrust Suit

By **Dani Kass**

Law360, New York (January 3, 2017, 7:46 PM EST) -- Patheon Inc. didn't make its joint venture with Procaps SA anti-competitive by buying one of Procaps' rivals in the softgel capsule business because there has been no actual harm from the acquisition, the Eleventh Circuit said Friday in upholding a district court's dismissal of Procaps' \$255 million suit.

Procaps had alleged Patheon's acquisition of Banner Pharmacaps Europe BV made the previously agreed-upon Procaps-Patheon collaboration on development of a softgel capsule for pharmaceutical products a restraint on trade. But the three-judge panel said Procaps couldn't prove any harm that would justify a Sherman Act suit, such as a reduction in output, increase in prices or decrease in quality.

"We have held that a contract can serve as the basis for a Section 1 claim only if it embodies an agreement to unlawfully restrain trade," the panel said, referencing the Sherman Act. "Were this not the case, contractual partners would potentially be on the hook for any future conduct the other party engages in under color of the contract. Such a rule could dissuade firms from pursuing joint ventures in the first place."

Procaps had said the magistrate judge who dismissed the case should have used a per se standard, not a rule-of-reason standard, in evaluating whether Patheon's conduct flouted the Sherman Act, but the panel shot down that argument. Under the rule-of-reason standard, the court would balance pro-competitive against anti-competitive effects, whereas under the per se standard, the court would just have to agree that conduct that was inherently illegal occurred.

"Our precedent makes clear that just because an agreement is capable of being characterized as a market allocation agreement does not mean that the per se rule applies," the panel said in its opinion.

Procaps launched its suit against Patheon in December 2012, alleging that Patheon's \$255 million purchase of Procaps rival Banner might lead to an unlawful market allocation because of Procaps' joint venture deal with Patheon.

Procaps contended that the acquisition effectively would turn the joint venture into a violation of the Sherman Act. The suit alleged further that, if the collaboration between Patheon and Procaps continued, the acquisition would force Patheon to remove certain Banner products in some regions, resulting in an unlawful allocation of the market.

In October 2015, U.S. Magistrate Judge Jonathan Goodman put an end to the suit with a 100-page

opinion that said Procaps couldn't show that any actual competitive harm had occurred because of the merger.

Judge Goodman agreed with Patheon's contention that Procaps had to show evidence of actual damage done to consumers in the market, such as a reduction of output or increases in price, and that presenting only theories about possible damage wasn't enough for Procaps to defeat summary judgment.

But even had Procaps been able to present evidence of actual adverse effects on competition, it could not show that they affected more than a few isolated customers, according to the judge.

“It was very clear to Patheon from the beginning of this case that Procaps was manufacturing antitrust claims to try and extract undeserving concessions from Patheon. Thus, we are very pleased that the court of appeals soundly rejected Procaps’ claims and theories, and otherwise characterized them as ‘intrinsically hopeless,’” said Michael J. Klisch of Cooley LLP. “Patheon never violated the antitrust laws, and is happy to be vindicated by the district court and the court of appeals, and we greatly appreciate the attention the courts paid to this case.”

Counsel for Procaps didn’t immediately respond to request for comment.

U.S. Circuit Judges Stanley Marcus and Joel Fredrick Dubina, and Judge Richard W. Goldberg of the U.S. Court of International Trade, sat on the panel for the Eleventh Circuit.

Procaps is represented by Alan Rosenthal, Natalie J. Carlos, Chris S. Coutroulis and D. Matthew Allen of Carlton Fields, and Karen L. Hagberg and Michael B. Miller of Morrison & Foerster LLP.

Patheon is represented by Michael J. Klisch, Robert T. Cahill, M. Howard Morse, Marc G. Schildkraut and Mazda Antia of Cooley LLP, and Robert M. Brochin of Morgan Lewis & Bockius LLP.

The case is Procaps SA v. Patheon Inc., case number 15-15326" >15-15326, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Vin Gurrieri and Carolina Bolado. Editing by Aaron Pelc.