



Case in Point

Procaps S.A. v. Patheon Inc. et al

In January 2012, Patheon, a leading global provider of outsourced pharmaceutical development and manufacturing services, entered into a collaboration agreement with Colombia-based Procaps, a corporation that develops, manufactures and commercializes pharmaceutical products, veterinary, nutritional supplements and cosmetics. The joint venture sought to provide softgel development and manufacturing services to customers worldwide. Later that year, Patheon acquired Procaps' competitor Banner Pharmacaps, a softgel specialist company, for \$255 million.

Acquisition sparks antitrust battle

After Patheon notified Procaps that it was acquiring Banner, Procaps filed suit in the federal District Court for the Southern District of Florida, alleging that the acquisition would transform the parties' agreement into a per se illegal market division agreement that violated the antitrust laws. Procaps sought over \$380 million in damages and substantial equitable relief, including a divestiture of Banner Pharmacaps, disgorgement and restitution. The complaint also included state law claims (e.g., unfair competition and deceptive trade practices). Patheon turned to Cooley to defend the company.

During discovery, Patheon learned that Procaps largely ignored its ediscovery obligations. For instance, it never issued a litigation hold, failed to preserve potentially relevant evidence, allowed its employees to self-collect documents and used only one search term to search for documents. Accordingly, the court ordered a forensic analysis of Procaps' computer systems and appointed a Special Master to oversee its implementation. Over the following 18 months, Procaps supplemented its original production with 150,000 documents.

In early 2014, Cooley moved for summary judgment, and in July 2014, the court entered summary judgment in Patheon's favor on the per se, quick look and state law claims.

Perspectives

"[T]he cases cited by Patheon are a powerful indication that predictions and general theories are insufficient" to prove that Patheon's conduct had an actual adverse effects on competition."

– US Magistrate Judge
Jonathan Goodman

From order granting Patheon's
Motion for Summary Judgment

Key facts

Procaps accused former JV partner Patheon of violating state and federal antitrust statutes and various other state laws as a result of Patheon acquiring Banner Pharmacaps.

Procaps sought \$380 million in damages from Patheon and substantial equitable relief, including the divestiture of Banner Pharmacaps.

After a three-year contentious litigation, and two weeks before a lengthy trial was scheduled to begin, Cooley secured summary judgment in full for Patheon.

Cooley

Round two

Afterward, the court allowed Procaps to pursue a “rule of reason” claim, which effectively restarted the antitrust claims. The court granted Patheon the right to seek additional discovery and file another motion for summary judgment. Procaps fought “rule of reason” discovery every step of the way by, among other things, refusing to produce relevant documents or identify its rule of reason theory of harm, which required Patheon to file numerous motions and reconvene depositions. This second round of discovery added another 18 months to the case.

In August 2015, Patheon moved for summary judgment on the grounds that Procaps had failed to prove Patheon’s conduct had resulted in actual adverse effects on competition under the rule of reason standard in the 11th Circuit. Two weeks before a lengthy trial was set to begin in November 2015, the court granted Patheon’s summary judgment motion, resulting in a complete victory for our client on all claims.

Victory in appellate court

On a de novo appeal, after briefing and oral argument, and after conducting a detailed and exhaustive review of the record, the United States Court of Appeals for the 11th Circuit affirmed the federal district court’s summary judgment rulings in Patheon’s favor, holding that “Procaps failed to establish the foundational requirement of concerted action necessary to maintain a Section 1 claim under the Sherman Act, and because Procaps also failed to show any actual anticompetitive effects.” The 11th Circuit further held that Procaps’ antitrust claims were “intrinsically hopeless” and that Procaps could not demonstrate any actual competitive harm.

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