

In ‘Especially Unpleasant and Nasty’ Suit, Carlton Fields Client Must Pay \$18.5M Legal Bill from Cooley

By Jenna Greene

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Litigation is rarely nice. But sometimes it’s so ugly that you just have to stop and gawk.

The antitrust battle between pharmaceutical manufacturing and marketing companies Procaps SA and Patheon Inc. is one of those cases.

Defendant Patheon and its lawyers from Cooley were fully vindicated last week when a federal magistrate judge in Miami awarded them \$18.5 million in legal fees and costs.

Considering the Cooley team had gotten the case dismissed on summary judgment, that’s a pretty hefty tab. Then again, there were 1,165 docket entries, more than 100 contested motions and an appeal.

Scorched earth adds up.

It actually could have been worse—the court discounted Cooley’s rates by 47 percent, which meant lead lawyer Michael Klisch’s regular rate, for example, was knocked down from \$1,195 an hour to \$630, based on South Florida prices. (See below for a full list of billing rates.)

“For more than four-and-a-half years, Patheon has been defending a lawsuit it should not have needed to defend in the first place,” wrote Magistrate Judge Jonathan Goodman on Aug. 17 in an 80-page fee ruling. (The parties consented to full magistrate judge jurisdiction earlier in the case.)

Klisch from Cooley said his call to Patheon’s general counsel to share the news of the fee award was one of the best ever. “He had to pull over on the side of the road,” he said. “We are all thrilled.”

And relieved. “This was the most contentious case I’ve ever had,” Klisch said. “I’ve never seen anything like it.”

In getting stuck with their opponent’s legal bill, you could say Procaps and its lawyers at Carlton Fields Jordan Burtwere hoisted by their own petard. It’s one of those great Shakespearean phrases that seems to be spot-on here.

Because if Procaps had limited its antitrust suit to federal antitrust law, Cooley and Patheon would have been out of luck. The Sherman Act allows legal fees to be awarded to prevailing plaintiffs, but not prevailing defendants.

But Procaps also sued under Florida’s Deceptive and Unfair Trade Practices Act for essentially the same antitrust claims,



Mike Klisch, Cooley LLP

and that statute gives the court discretion to award fees to either winning side.

Goodman had high praise for Cooley’s work. “Patheon’s counsel obtained an excellent result,” he wrote. “Patheon was well served by a dedicated effort from a well-coordinated legal team.”

As for 320-lawyer Carlton Fields? Not so much.

“Suffice it to say that the court is, at a minimum, extremely disappointed in the way that Procaps and its counsel handled many aspects (both substantive and procedural) of this complex case,” Goodman wrote. “Procaps and its counsel made this case far more difficult than it had to be.”

He called the litigation “unreasonably contentious” and “extremely adversarial,” not to mention “expensive, bitter, time-consuming and hard-fought.”

Oh there’s more. “Nothing was easy in this case. Nothing. Basically, the parties fought about anything and everything,” Goodman wrote. “The litigation was especially unpleasant and nasty. Counsel routinely launched personal attacks against each other, and the motions and memoranda were routinely riddled with insults, allegations of bad faith and unprofessionalism, and, in general, purple prose.”

Um, wow.

Carlton Fields litigator Alan Rosenthal did not respond to a request for a comment, but a firm spokesperson in an email said, "We strongly disagree with the magistrate's decision, which we believe is directly contrary to applicable law on these issues and not supported by the record in this case. We are evaluating our appellate remedies."

Morrison & Foerster was also listed on the docket along with Carlton Fields as counsel to Procaps during some of the litigation, but had withdrawn before the fee order.

So what the heck happened in this case?

Here's the short version: Procaps sued Patheon in U.S. District Court in the Southern District of Florida in December 2012. The two companies had teamed up earlier that year to develop, manufacture and market softgel capsules for prescription drugs.

But soon after signing the agreement, Patheon acquired Procaps' principal competitor, Banner Pharmacaps.

To Procaps, this was "gross disloyalty," and their outrage is understandable. As Goodman wrote when he dismissed the case on summary judgment in 2015, the company could have had a good claim—if it was a breach of contract suit. Procaps had developed evidence, he wrote, that might have supported "a compelling narrative about a company wronged by a business partner who should have been working with it."

Except it wasn't a breach of contract claim. Because Procaps couldn't sue for breach of contract in federal court—the companies agreed in advance that such disputes would be subject to arbitration. According to Patheon lawyer Klisch, the arbitration agreement also barred Procaps from suing for lost profits in the event of a contract breach.

One exception to the arbitration provision was antitrust claims, which could still be brought in federal court. And—bonus—if Procaps won, it would be entitled to treble damages, which by its calculations would have meant a \$390 million payday. Plus throwing around a number like that can be a good way to leverage a settlement.

Or not.

Because no matter how you slice it—per se or rule of reason violation—the claims didn't fly under antitrust law.

"Intrinsically hopeless," was how the U.S. Court of Appeals for the Eleventh Circuit put it last year when it upheld Goodman's decision to dismiss the case on summary judgment.

Cooley partner Howard Morse took the lead on the antitrust aspects of the case.

Still left for Goodman to decide was the question of fees.

Procaps argued that because its claim under Florida's Deceptive and Unfair Trade Practices Act was not the primary

one in the suit, but rather a "tag-along" claim, a fee award would be inappropriate.

After an exhaustive analysis (the kind that reads like it was written with the overriding goal of surviving appellate review), Goodman invoked the court's "considerable discretion" to issue "a defendant-friendly decision under the unique circumstances of this acrimonious litigation."

"The approximate \$18.5 million it seeks for fees and non-taxable costs is an extremely large number, to be sure, but the mere fact that the request is substantial does not somehow mean that the two requests should be denied or reduced even further. Indeed, it could easily be argued that the award here, large as it may be, should be even higher because, among other reasons, the 47.25% discount on Cooley's fees should either have been lowered or completely eliminated."

It's not one of those symbolic awards either, where the losing side is flat-broke and the winner will never collect. According to court documents filed by Patheon in December 2015, Procaps' market value was \$238.9 million, and it had total assets of \$187.6 million.

Also, the judge noted that Procaps had limited its grounds to object. "Procaps challenged only Patheon's entitlement to attorneys' fees. It did not in any way challenge the amount of time or the hourly fees or the legitimacy of the costs. In fact, it specifically declined to offer its own attorneys' hourly rates or submit its counsel's billing records. Therefore, it may not object to the amount of this award of fees and costs."

For those of you who are wondering (i.e. all of you), these are the undiscounted billing rates of the Cooley team in 2017, excluding junior associates.

Partner Michael J. Klisch: \$1,195 (based in Washington, D.C.; JD 1990)

Partner Robert T. Cahill: \$990 (based in Reston, Virginia; JD 1995)

Partner Mazda K. Antia: \$910 (based in San Diego; JD 2000)
Special counsel Joshua M. Siegel: \$850 (based in Washington, D.C.; JD 2006)

Associate Deepti Bansal: \$835 (based in Washington, D.C., JD 2010)

Associate Dana Moss: \$835 (based in Washington, D.C., JD 2010)

Associate Scott W. Stemetzki: \$595 (based in Reston, Virginia; JD 2013)

Local counsel Robert Brochin, partner at Morgan, Lewis & Bockius: \$610 (based in Miami, JD 1980)

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