

3rd Circ. Upholds Chocolate Giants' Win In Price-Fixing Row

By **Brandon Lowrey**

Law360, Los Angeles (September 15, 2015, 8:20 PM ET) -- The Third Circuit on Tuesday upheld a Pennsylvania federal judge's dismissal of class actions accusing Nestle USA Inc., The Hershey Co. and Mars Inc. of conspiring to raise the price of chocolates, saying the plaintiffs' evidence was too weak to prove an international conspiracy.

The appellate court concluded that while the plaintiffs offered a credible theory as to the chocolate companies' motives and showed instances where the companies appeared to behave inconsistently with a competitive market, they failed to present evidence showing the companies conspired.

"Evidence of a disconnected foreign conspiracy, limited possession of advance pricing information, mere opportunities to conspire without suspect meetings or conversations about pricing, conduct that is consistent with pre-conspiracy conduct, and a weak showing of pretext do not support a reasonable inference of a conspiracy," the court said in its opinion.

The long-running multidistrict litigation began as a wave of class actions against the chocolate makers in early 2008, after Canadian and German investigations into the industry were revealed.

The suits, which were brought by Walgreen Co., The Kroger Co. and other major grocers and retailers, claimed that Mars, Hershey, Nestle and Cadbury Schweppes PLC had begun colluding to fix chocolate prices in 2002.

According to the plaintiffs, the chocolate companies knew about each other's planned price hikes in advance of the formal announcements and were motivated by the success their Canadian affiliates had achieved by pursuing lockstep list-price increases.

Cadbury settled the case in 2011 for \$2 million, paying roughly \$1.3 million to the direct purchaser plaintiffs and \$550,000 to the indirect classes.

The appellate decision Tuesday affirmed U.S. District Judge Christopher C. Conner's decision in February 2014 to grant summary judgment to the chocolate companies in the suits, brought by several individual-purchaser plaintiffs, including CVS Pharmacy Inc., Giant Eagle Inc. and Rite Aid Corp., as well as a certified class of direct purchasers.

The judge found that although Nestle, Hershey and Mars couldn't deny that their prices had increased in a "synchronized and parallel" fashion during the time of the alleged price-fixing plot, the plaintiffs didn't have

adequate evidence to back up their claims.

"Despite diligent efforts on the part of plaintiffs' counsel and nearly unfettered access to defendants' records, plaintiffs are before the court with nothing more than speculation as to the who, what, when, where and how of the communications that allegedly facilitated the parallel price increases," Judge Conner wrote.

He entered a final order in favor of the chocolate makers on the individual and direct purchasers' claims in April 2014, clearing the way for the plaintiff groups **to file appeals**.

In Tuesday's opinion, the Third Circuit panel said the plaintiffs required more than pretext to survive summary judgment, as it must be supported by traditional conspiracy evidence or economic evidence.

"Because such other evidence is lacking here, any evidence of pretext is insufficient to preclude summary judgment," the Third Circuit said in its opinion.

Chocolate company attorney Carmine Zarlenga of Mayer Brown LLP said he was thrilled with the decision.

"I think it will be useful in cross-border conspiracy cases or cartel cases, depending on what kind of lingo you want to use, where the allegations are that a conspiracy in one place must have spilled over into another place," he said. "I think it's a very well-reasoned ruling and it seemed very logical."

Representatives for the plaintiffs did not immediately respond to requests for comment Tuesday.

The Kroger Co., Safeway Inc., Walgreen Co., Hy-Vee Inc., Albertsons LLC, The Great Atlantic and Pacific Tea Co. Inc. and HEB Grocery Co. LP are represented by Scott E. Perwin of Kenny Nachwalter PA and Steve D. Shadowen of Hilliard & Shadowen LLP. Giant Eagle is represented by Moira E. Cain-Mannix, Brian C. Hill, Scott D. Livingston and Bernard D. Marcus of Marcus & Shapira LLP, and Joseph T. Lukens of Faruqi & Faruqi LLP. United Supermarkets LLC is represented by Daniel H. Gold of Haynes and Boone LLP. Meijer Inc., Meijer Distribution Inc., Publix Super Markets Inc., Super Valu Inc. and Affiliated Foods Inc. are represented by Richard L. Coffman of the Coffman Law Firm; David P. Germaine, Alberto Rodriguez and Joseph M. Vanek of Vanek Vickers & Masini; and Steve D. Shadowen of Hilliard & Shadowen LLP. Card & Party Mart II Ltd., Jones Wholesale Grocery Inc., PITCO Foods and The Loraine Novelty Co. Inc. are represented by Ruthanne Gordon, Michael J. Kane and H. Laddie Montague Jr. of Berger & Montague PC; Hilary K. Scherrer of Hausfeld LLP; and Roberta D. Liebenberg and Adam Pessin of Fine Kaplan & Black. CVS Pharmacy, Longs Drug Stores California Inc., Rite Aid Corp., Rite Aid Hdqtrs. Corp. and the Golub Corp. are represented by Eric L. Bloom of Hangley Aronchick Segal Pudlin & Schiller.

Hershey is represented by William F. Cavanaugh Jr., Stephanie M. Gyetvan, Adeel A. Mangi and Vivian R.M. Storm of Patterson Belknap Webb & Tyler LLP. Mars is represented by Nicole L. Castle, David Marx and Stefan M. Meisner of McDermott Will & Emery LLP. Nestle is represented by Daniel J. Howley and Peter E. Moll of Cadwalader Wickersham & Taft LLP, and Adam L. Hudes, Stephen M. Medlock and Carmine R. Zarlenga of Mayer Brown LLP.

The case is In re: Chocolate Confectionary Antitrust Litigation, case numbers 14-2790 through 14-2795, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Allissa Wickham. Editing by Aaron Pelc.

All Content © 2003-2015, Portfolio Media, Inc.