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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3rd Circ. Agrees \$50M Suit Against Nestle Doesn't Hold Water

By **Dan Packel**

Law360, Philadelphia (January 07, 2015, 5:27 PM ET) -- The Third Circuit on Wednesday affirmed a New Jersey federal court ruling that threw out a putative class action suit accusing Nestle Waters North America Inc. of charging exorbitant late fees to its customers.

The court rejected lead plaintiff Gary Ciser and his company Ciser Computer Consulting's claims that the bottled water giant charges its customers unreasonably high and illegal late fees on deliveries through its Poland Spring, Arrowhead and Deer Park brands.

"Without more information, a \$15 late fee on its face does not plausibly suggest an unfair penalty or an unconscionable practice — especially when competitive with an industry standard," Senior Judge Franklin Van Antwerpen said in the opinion.

Ciser had appealed to the Third Circuit after U.S. District Judge William J. Martini **dismissed the suit with prejudice** in October 2013, finding that the company lacked standing to bring the suit and that Ciser had made conclusory allegations about Nestle's late fee system that he did not support with facts.

He had alleged in the complaint that the late fees were sometimes as high as 132 percent of the overdue amount — far higher than the late charge rates customarily used by other bottled-water delivery companies — and called them "so stratospheric they smack of usury."

But, like Judge Martini, the Third Circuit panel said that the complaint — even after being amended twice — was insufficient, referring to it as "threadbare."

The panel was unpersuaded by Ciser's reference to the 132 percent difference, noting that relying solely on a percentage standard didn't make sense when applied to small-value consumer contracts such as Ciser's.

"Under that standard, any business offering goods and services of nominal value would be prevented from assessing any meaningful late fee," Judge Van Antwerpen said.

Ciser alleged that Nestle assessed its typical late charge of \$15 per month, no matter the size of the overdue payment or how many days that payment is overdue and that the fees bore no reasonable relationship to the costs Nestle incurs as a result of a customer's untimely monthly payment.

Seeking damages of more than \$50 million, Ciser brought claims for consumer fraud, liquidated damages and unjust enrichment, and sought to represent a subclass of Nestle

customers in New Jersey and a subclass of customers in all states who were assessed a late fee from August 2005 until a judgment was issued in the suit.

"The opinion accepted all of the arguments we've been making since the beginning of this lawsuit," said Jeffrey M. Garrod of Orloff Lowenbach Stifelman & Siegel PA, representing Nestle.

Ciser's attorney said that while he was disappointed in the court's ruling, he did not intend to pursue a U.S. Supreme Court appeal.

"We were very surprised that the Third Circuit ignored longstanding precedent allowing consumers to vindicate their rights when they are charged exorbitant liquidated damages," Steven Wittels told Law360. "The Third Circuit erected an insuperable pleading hurdle to not only our case but many consumer cases which set forth extensive reasons why a practice violates both the common law and the consumer fraud law."

The plaintiffs are represented by Steven L. Wittels and J. Burkett McInturff of the Law Offices of Steven L. Wittels PC.

Nestle is represented by Jeffrey M. Garrod of Orloff Lowenbach Stifelman & Siegel PA.

The case is Ciser et al. v. Nestle Waters North America Inc., case number 13-4509, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Kelly Knaub. Editing by Patricia K. Cole.

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