



Law.com Home    Newswire    LawJobs    CLE Center    LawCatalog    Our Sites    Advertise

**Sign Out**

An **ALM** Web site

# THE AM LAW LITIGATION DAILY

This Site | Law.com Network | Legal Web

Search the Legal Web **Go >>**

**HOME    THE AM LAW DAILY    THE AMERICAN LAWYER    RANKINGS    VIDEOS    MAGAZINE    ADVERTISE    SUBSCRIBE    FREE ACCESS    CONTACT US**

Font Size: **+** **-**    Print    Email    Comment    Reprints & Permissions

## Second Circuit Tosses Conviction of Royal Ahold Executive

By **Victor Li**

July 02, 2010

It's been a rough couple weeks for federal prosecutors, what with the U.S. Supreme Court curtailing the honest services law, prosecutors dropping criminal cases against two former Bristol-Myers Squibb executives, and the Securities and Exchange Commission losing an insider trading case. The prosecutor woes continued Thursday as the U.S. Court of Appeals for the Second Circuit threw out the 2006 conviction of Mark Kaiser for overstating the profits of U.S. Foodservice (USF), one of the largest food distributors in the country.

Kaiser, who had been marketing chief in the American unit of USF's parent company, Royal Ahold NV, was sentenced to seven years in prison after he was convicted of securities fraud, conspiracy, and making false filings with the SEC from 2000 to 2003. According to the government, Kaiser had masterminded a plot to artificially inflate USF's earnings by recording anticipated profits from rebates (known as "promotional allowances") as income.

Kaiser's attorneys argued on appeal that Manhattan federal district court judge Thomas Griesa erred in his jury instructions regarding the so-called conscious avoidance theory, which equates a deliberate failure to learn information with actual knowledge.

"There was a danger that if the jury found he was negligent in his dealings with others, then that would be enough to convict," said Kaiser's lawyer, Daniel Brown of Washington D.C.'s Murphy & McGonigle, who worked with a team of lawyers at his old firm, Mayer Brown. To convict his client, the government had to prove he knew about the fraud, Brown argued in his appeal.

In its opinion, the Second Circuit agreed that the jury instructions were flawed. It also held that a statement by USF's general counsel should have been excluded as hearsay. Judge Rosemary Pooler, who wrote the decision for a unanimous court, noted that, because of the judge's unclear instructions regarding conscious avoidance, "it is possible that the jury could have convicted Kaiser even if it concluded he had an actual belief that the [promotional allowance] numbers were correct."

"We were all elated to receive the court's decision," said Brown.

The Manhattan U.S. Attorney's office has not announced whether it will re-try Kaiser. "We are reviewing the opinion and considering our options," said spokesperson Yusill Scribner.

Advertisement

**How Many Steps Does It Take to Get the Business Development Information You Need?**

Get the **Facts** and **Figures** without the Legwork:

**Redwood Analytics' Business Development Module**

lawjobs.com

**TOP JOBS**

**\*\*HIGH PROFILE CORPORATE PARTNER WITH \$500,000 IN PORTABLE BUSINESS FOR THRIVING FULL SERVICE FIRM\*\***

Hiretrends, Inc.  
New York, New York

**\*\*ULTIMATE DISTRESSED REAL ESTATE FIRM SEEKING PARTNER WITH \$500,000 ++ IN PORTABLE BUSINESS\*\***

Hiretrends, Inc.  
New York, New York

**MORE JOBS >>  
POST A JOB >>**

Advertisement

**STAND OUT**

from **1,000,000** Other Attorneys

Follow me to **martindale.com**® to find out how

Terms and Conditions | Privacy Policy