In The

United States District Court

For The
Northern District of Illinois,
Western Division

SPRAY-RITE SERVICE CORPORATION, an Iowa Corporation, *Plaintiff,* vs. MONSANTO COMPANY, a Delaware corporation, *Defendant.*	NO. 72 C 12 W

Transcript of Proceedings
February 20, 1980
Volume XXIII

[Excerpts from Jury Instructions]

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This antitrust lawsuit is brought by the plaintiff under Section 1 of the Sherman Antitrust Act, which deals with restraints of trade and provides that:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal . . . ."

All business contracts restrain trade to some degree, but the Sherman Act does not prohibit all contracts. By prohibiting restraints of trade, the antitrust laws mean that unreasonable restraints of trade are prohibited; reasonable restraints of trade are not prohibited by the antitrust laws.

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In order to recover under Section 1 of the Sherman Act, the plaintiff has the burden of proving each of the following propositions:

1. That there was an agreement, conspiracy or combination between the defendant and one or more non-defendant co-conspirators to accomplish one or more of the alleged violations of Section 1 of the Sherman Act;

2. That one or more of these alleged antitrust violations by the defendant was a direct and material cause of injury to the plaintiff's business and property;

3. That the plaintiff thereby sustained damages in an amount capable of reasonable ascertainment.

If you find from your consideration of all the evidence that each of these propositions have been proved, your verdict should be for the plaintiff, but on the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, your verdict should be for the defendant.

The plaintiff in this case seeks damages for injury to his business and property claimed to have been suffered or sustained as a result of alleged violations by the defendant of the antitrust laws of the United States.

Specifically, the plaintiff claims:

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1. That defendant and one or more of its distributors conspired or combined to fix, set or stabilize the resale price of defendant's product;

2. That pursuant to and as a part of, this resale price maintenance plan the defendant has imposed, and the non-defendant co-conspirators have acquiesced in, certain customer and territorial restrictions regarding the distribution of defendant's product;

3. That plaintiff was terminated as a contract distributor by defendant as a result of said conspiracy or combination;

4. That after plaintiff's termination defendant and one or more of its distributors conspired or combined to restrict plaintiff's access to defendant's products.

The defendant Monsanto denies these claims. Monsanto contends that it made the decision not to renew plaintiff, Spray-Rite's contract independent and unilaterally for its own business reasons and that plaintiff's business was affected by normal competitive forces and not by any conspiracy.

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A conspiracy is a combination of two or more persons, by concerted action or by coercion resulting in acquiescence to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of partnership, in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or to disregard the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other and may have assembled together and discussed common aims and interest, does not necessarily establish proof of the existence of a conspiracy. However, such business behavior is circumstantial evidence which you may consider with all the other evidence in the case in arriving at your verdict.

The evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by word spoken or in writing, stated

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between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What a preponderance of the evidence in the case might show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods set forth in the plaintiff's complaint were agreed upon to carry out the alleged conspiracy; nor that all means or methods which were agreed upon were actually used or put into operation; nor that all persons alleged to have been members of the claimed conspiracy were such. What a preponderance of the evidence in the case must show is that the alleged conspiracy was formed; and that one or more of the means or methods described in the complaint was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy alleged in the plaintiff's complaint; and that two or more persons, including the defendant, were knowingly members of the conspiracy alleged in the complaint.

A conspiracy requires proof that there be a single plan and purpose, the nature and general scope of which is known to each person who is claimed to be a member

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of the conspiracy. Unless the individuals involved understood from something that was said or done that they were in fact committed to the purposes of the conspiracy, there is no violation. There is no such thing as an unknowing or unwitting conspirator.

There cannot be a conspiracy unless there is a commitment between two or more persons working for different companies. To prove a conspiracy here, plaintiff must prove by a preponderance of the evidence that Monsanto employees conspired with persons who did not work for Monsanto.

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The fact that distributors complain about prices or anything else does not in itself mean that a conspiracy existed. Even if you find that Monsanto acted in exactly the way that complainants would have wished, that does not prove the existence of a conspiracy; it would, however, be evidence that you can take into consideration in deciding whether or not a conspiracy existed.

In your consideration of the evidence in the case as to the conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the complaint. If you conclude that the conspiracy did exist, you should next determine whether or not the defendant, or one or more of its distributors were knowingly members of the conspiracy.

If it appears from a preponderance of the evidence in the case that the conspiracy alleged in the plaintiff's complaint was knowingly formed, and that the defendant or one or more of its distributors, normally became members of the conspiracy, either at the inception or beginning of the plan, or afterwards, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial, so long as the plaintiff sustained some damage as a result of the conspiracy.

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Under Section 1 of the Sherman Act, there are agreements, conspiracies and combinations whose nature and effect on competition are conclusively presumed to be unreasonable and therefore illegal, without any inquiry as to the harm they have caused or the business excuse for their use—they are "illegal per se."

Among the practices which the courts have declared to be per se illegal, and therefore unlawful in and of themselves, are price-fixing or resale price maintenance and concerted refusals to deal. If you find that the defendant participated in any agreement, conspiracy or combination to fix or stabilize resale prices or to refuse to deal with the plaintiff,

then the defendant has violated Section 1 of the Sherman Act. Once the existence of such an agreement, conspiracy or combination has been established, no evidence of actual public injury is required, and no evidence of reasonableness can be considered in justification. Such actions violate the antitrust laws.

Any conspiracy or combination formed for the purpose and with the effect of raising, depressing, fixing,

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rigging or stabilizing the price of any commodity in interstate commerce is illegal per se.

Where a manufacturer undertakes to distribute its goods through a chain of independent dealers, the consumers' ability to purchase at a free market price will be enhanced by the retailer's unrestricted ability to set his retail price at the level he feels most commensurate with local demand.

If you find that the defendant conspired or combined with one or more of its distributors to raise, depress, fix, peg or stabilize the resale price of defendant's products, then the defendant violated Section 1 of the Sherman Act.

It is also per se illegal for a manufacturer to utilize customer or territorial restrictions pursuant to or as a part of, a comprehensive price-fixing plan or an agreed refusal to deal. Therefore, if you find that the defendant conspired or combined with one or more of its distributors to utilize the defendant's customer or territorial restraints in order to effectuate price stabilization or resale price maintenance, or to detect and prevent resale price-cutting, or to effectuate any restriction on plaintiff's access to defendant's products, then the defendant has violated Section 1 of the Sherman Act.

It is also unlawful for a manufacturer to

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terminate or threaten to terminate one of its distributors for the reason that the distributor objected to, or departed from either the manufacturer's price-fixing or stabilization plan or

any customer or territorial restraints which are part of that plan. Therefore, if you find that termination or threat of termination was utilized by the defendant as a coercive tool against the plaintiff or any other distributor or defendant to force adherence to any aspect of a resale price maintenance plan, such termination or threat of termination is unlawful. It does not matter whether the defendant initiated the coercion, or whether it was done in response to pressure or complaints from one or more of its distributors.

A termination or threat of termination to compel adherence to any aspect of a resale price maintenance plan is unlawful, whether or not there was any reasonable justification.

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The law recognizes a limited right in the manufacturer to select its distributors, but that right is neither absolute nor exempt from regulation. If the manufacturer's selection is accompanied by unlawful purpose, conduct or agreement, it violates the Sherman Act.

A manufacturer may announce suggested resale prices and refuse to sell to a distributor which refuses to abide by those suggested prices. However, the manufacturer's conduct must be totally independent. In deciding whether the manufacturer's conduct was completely independent and unilateral, you should look to what the participants did, rather than the words they used.

Therefore, the defendant's limited right to choose its distributors does not include the right to, in any way, conspire or combine with one or more of its distributors to fix or stabilize resale prices, or to refuse to deal, or to commit any other act which has been described in these instructions as a per se violation of the antitrust laws.

A manufacturer has the right to print suggested prices on its products, to advertise those prices, to issue lists of suggested resale prices, and to send those price lists to its distributors or other customers. A manufacturer may also ask its customers to follow such suggested prices. However, a manufacturer may not conspire

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or combine with its distributors so that the distributors are required to sell at the suggested prices or to raise, fix or stabilize the prices charged by the distributors to their customers.

The fact that a program may have an effect on prices, even raising them, does not mean that it is part of a price-fixing plan. Imposing normal competitive requirements on a distributor, such as encouraging a distributor to advertise, may affect the distributor's costs, thereby indirectly affecting the price at which the distributor will sell the product. That does not necessarily mean that those requirements are part of a price-fixing conspiracy or combination, although you may find that they are part of a conspiracy or combination.

Defendant has the right to assign distributors to areas of primary responsibility and to assign points where distributors can pick up products or take delivery, so long as the decision to do these things is independent and not because of a price-fixing conspiracy or combination.

The defendant has a right to select distributors that it thinks will do the best job for it provided that in doing so the defendant's decision not to renew the plaintiff's contract was not made pursuant to a price-fixing conspiracy or combination.

Once plaintiff was not renewed as a Monsanto

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distributor, defendant had no obligation to sell to it on the same terms that it offered to its distributors who had contracts, unless its decision not to sell to Spray-Rite was a part of a conspiracy or combination to refuse to deal with Spray-Rite. The fact that some of Monsanto's policies may have affected the price paid by all non-contract sellers, including plaintiff, does not necessarily establish a conspiracy, but may be evidence which you can consider along with all the other evidence in the case in deciding whether a conspiracy existed.

Defendant has the right to implement incentive programs in order to encourage its distributors to perform certain marketing functions unless those programs are part of a price-fixing conspiracy or combination.

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