FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
APR 12 2004
DAVID J. MALAND, CLERK
BY
DEPUTY

there is a purpose to create or maintain a monopoly, antitrust law does not restrict the right of a manufacturer to exercise its discretion as to the retailers to whom it will sell its product. In exercising its right, a manufacturer may announce in advance policies under which it will refuse to sell to retailers. Such a unilaterally formulated and enforced policy may include the requirement that retailers follow the suggested resale prices of the manufacturer. If you find that Leegin has acted pursuant to such a policy, you should find that the plaintiffs have not satisfied the first element.[22]

Requested by Defendant
Refused by the Court 04/12/04
T. John Ward

Request #1
①

[The plaintiffs contend that ~~combination or conspiracy~~ a price-fixing agreement is proved by certain written agreements that refer to Leegin's requirement that its retailers follow its suggested prices. Leegin contends that those documents are simply a restatement of its preexisting policy. It is your duty to interpret the language of those documents. You must decide the meaning by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties and the conduct of the parties.[23]]

Requested by Defendant refused by the Court. 04/12/04
T. John Ward

②

[Plaintiffs must present evidence that tends to exclude the possibility that Leegin and its retailers were acting independently. In other words, plaintiffs must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action.[24]]

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[22] *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

[23] Based on Texas Pattern Jury Charge 101.8 – Ambiguous Provisions.

[24] *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 588, 89 L. Ed. 2d 538, 162 S. Ct. 1348 (1986).

interests, do not necessarily establish proof of the existence of a conspiracy. Likewise, a mere similarity of competitive business practices of Leegin and its retailers, or the fact that retailers may have charged identical prices for the same goods and services, do not necessarily establish a conspiracy because such practices may be consistent with ordinary competitive behavior in a free and open market.[20]

The fact that a manufacturer and its retailers are in constant communication about prices and marketing strategy does not alone show that the retailers are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. Furthermore, complaints about price cutters are natural – and from the manufacturer's perspective, unavoidable – reactions by retailers to the activities of their rivals. You may not find an unlawful agreement merely from the existence of complaints, or even from the fact that termination came about in response to complaints. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. An antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.[21]

Request # 3

Requested by Defendant Refused by the Court 04/12/04 T. John Ward

Leegin contends that, rather than entering into a price-fixing combination or conspiracy with its retailers, it was operating pursuant to a unilateral policy. I instruct you that except where

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[19] Fifth Circuit Pattern Jury Instructions (1999) (Civil Cases) 6.1, as modified to reflect the holding in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L.Ed. 2d 628 (1984) and *Greenwood Utilities Comm. v. Mississippi Power Co.*, 751 F.2d 1484, 1496-97, n. 8 (5th Cir. 1985).

[20] Fifth Circuit Pattern Jury Instructions (1999) (Civil Cases) 6.1.

[21] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-64, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984).

___. **Second Element – Unreasonable Restraint of Trade**

Alternative No. 1 – Rule of Reason Analysis

Requested by the Defendant Refused by The Court 9/12/04 T. John Ward

(4)

The plaintiffs must prove that the combination or conspiracy resulted in an unreasonable restraint on interstate commerce. The question of whether the combination or conspiracy constituted an unreasonable restraint on interstate commerce must then be determined on the basis of full consideration of all of the facts and circumstances disclosed by the evidence, including the nature of the particular industry or the product or service involved, the market area involved, any facts that you find to be peculiar to that industry, product, service, or market area, the nature of the alleged restraint and its effect, actual or probable, and the history of the circumstances surrounding the alleged restraint and the reasons for adopting the particular practice that is alleged to constitute the restraint. In sum, the reasonableness of a restraint is judged by its general effect on the market, not by the circumstances of a particular application. An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a basis for antitrust liability.[25]

Accepted ___.

Rejected ___.

Modified ___.

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[25] Fifth Circuit Pattern Jury Instructions (1999) (Civil Cases) 6.1.

___. **Second Element – Unreasonable Restraint of Trade**

Alternative No. 2 – Rule of Reason Analysis Based on Exception to the Application of the Per Se Rule

The plaintiffs must prove that the alleged conspiracy resulted in an unreasonable restraint on interstate commerce. A conspiracy to fix prices in interstate trade or commerce is, in and of itself, an unreasonable restraint of trade. It is immaterial whether the prices agreed to be fixed were reasonable or unreasonable. A price fixing conspiracy may consist of any agreement or arrangement or understanding between two or more competitors, knowingly made, to sell at a uniform price, or to raise, lower or stabilize prices. There is a price fixing conspiracy and an unreasonable restraint on interstate commerce in violation of the antitrust laws if (1) there is a common plan or understanding, (2) knowingly made, or arranged, or entered into, (3) between two or more competitors, (4) who are engaged in interstate trade or commerce, (5) to adopt or follow or adhere to any price formula that results in raising, or lowering, or maintaining at fixed levels prices charged for goods or services sold in interstate trade or commerce.

Requested by Defendant Refused by the Court 08/12/04 T. John Ward

(5)

I have instructed you on price fixing and have instructed you that price fixing is unreasonable in and of itself. However, there are exceptions to this rule. If you find that this case involves an industry in which restraints on competition are essential if the industry (or service) is to be available at all, or if you find that Leegin's pricing practices are reasonably connected to an integration of productive activities or other efficiency-creating activity in such a manner as to require an inquiry into the net competitive effect, then the question of whether the alleged conspiracy constituted an unreasonable restraint on interstate commerce must then be

(5) (cont'd)

determined on the basis of full consideration of all of the facts and circumstances disclosed by the evidence, including the nature of the particular industry or the product or service involved, the market area involved, any facts that you find to be peculiar to that industry, product, service, or market area, the nature of the alleged restraint and its effect, actual or probable, and the history of the circumstances surrounding the alleged restraint and the reasons for adopting the particular practice that is alleged to constitute the restraint. In sum, the reasonableness of a restraint is judged by its general effect on the market, not by the circumstances of a particular application. An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a basis for antitrust liability.[26]

Accepted ___.

Rejected ___.

Modified ___.

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[26] Fifth Circuit Pattern Jury Instructions (1999) (Civil Cases) 6.1, as modified to reflect the holding and language of *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1367 (5th Cir. 1980).

___. **Fourth Element – Fact of Damage, Amount of Damage, and Antitrust Injury**

The fourth element that the plaintiffs must establish as a part of their claim is that they suffered injury in their business or property as a proximate result of the alleged combination or conspiracy. In the course of normal, lawful competition, some businesses may suffer economic losses or even go out of business. The antitrust laws are violated only when unlawful competitive practices cause such economic losses. An injury to a business is the "proximate result" of an antitrust violation only when the act or transaction constituting the violation directly and in natural and continuous sequence produces, or contributes substantially to producing, the injury. In other words, Leegin's alleged violation of the antitrust laws must be a direct, substantial and identifiable cause of the injury that plaintiffs claim to have suffered. Proof of an antitrust violation does not necessarily mean the plaintiffs are entitled to recovery of damages. Proof of an antitrust violation and antitrust injury must be shown independently. [Plaintiffs can recover only if their loss stems from a reduction in competition because of Leegin's behavior. There is no antitrust injury unless that behavior reduced competition, even if the behavior violated the antitrust law at issue.]

(6)

Requested by Defendant
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If you find that the plaintiffs are entitled to a verdict, the law provides that the plaintiffs are to be fairly compensated for all damage, if any, to their business and property, that was proximately caused by the Leegin's violation of the antitrust laws. In arriving at the amount of the award, you should include any damages the plaintiffs suffered because of any profits they lost as a proximate result of the violation by Leegin of the antitrust laws. <u>However, you should exclude any damages that the plaintiffs suffered as a result of other causes.</u>

___. **Mitigation of Damages**

In addition, plaintiffs are required to mitigate their damages.[29] This means that you must consider whether plaintiffs took reasonable steps to sell substitute goods. Plaintiffs that find alternative goods may still have been injured if they would have been better off without having to sell substitute goods, but the amount of damages would be reduced. If plaintiffs earned profits from selling substitute goods or reduced expenses, these profits and any reduction in expenses must be deducted from any award of damages.[30]

Requested by Defendant
Refused by the Court
04/12/04

(7)

Accepted ___.

Rejected ___.

Modified ___.

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[29] *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977).

[30] *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir. 1981).