

*Requested by Plaintiff and refused
by the court
T. John Ward
04/12/04*

INSTRUCTION 9: WITHDRAWAL FROM CONSPIRACY

If you find that the defendant joined the alleged conspiracy, you should presume that the defendant remained a member of the conspiracy. The defendant has the burden of convincing you by a preponderance of the evidence that it withdrew from the conspiracy. For you to find that the defendant withdrew from the conspiracy, the evidence must show that the defendant did some affirmative act inconsistent with the object of the conspiracy and that the defendant communicated it was withdrawing in a manner reasonably designed to reach its co-conspirators.

Even if a defendant withdraws from a conspiracy, that defendant remains liable for any illegal acts it or any other member of the conspiracy committed while the defendant was a member of the conspiracy up until the time of the withdrawal.

Authorities:

Adapted from FJIP § 150.84.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
APR 12 2004
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*Request by Plaintiff and Refund
by the Court*
J. John Ward
09/12/04

INSTRUCTION 3: CONTRACT, COMBINATION OR CONSPIRACY

A contract is an agreement between two or more persons consisting of a set of promises. In this case, you are instructed that the "Heart Store Agreements" and the "Trademark License Agreements" entered into between Leegin and various Brighton Retailers are contracts to fix retail prices.

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A combination or conspiracy is formed when two or more persons knowingly join together to accomplish some unlawful purpose by joint action. A person acts knowingly if he acts voluntarily and intentionally, and not by mistake or accident. The essence of a conspiracy is an agreement between two or more persons to violate or disregard the law. This does not mean that the members of an alleged conspiracy must enter into any express or formal agreement. The required combination or conspiracy may be established by showing that the defendant and its retailers knowingly came to a common and mutual understanding to accomplish or attempt to accomplish an unlawful purpose. The required agreement may be shown by showing that a retailer communicated its acquiescence or agreement to a pricing plan, and that this was sought by Leegin.

In fact, a conspiracy can be inferred from a course of conduct and business dealings and, once established, a conspiracy is presumed to continue until its termination is affirmatively shown. A conspiracy cannot be formed unless at least two separate persons or corporations reach an agreement or understanding. A single corporation cannot agree, combine or conspire with its own officers or employees.

In considering the evidence as to the conspiracy charged, you must first determine whether or not the conspiracy existed. It is no defense that the conspirators actually competed with each other in some manner, or that they did not eliminate all competition between themselves. In fact, the plaintiffs need not show that a conspirator received any benefit from its participation in the

conspiracy. The mere agreement to fix, raise, or maintain retail prices is unlawful—even if it was never carried out. If you conclude that the conspiracy did exist, you should next determine whether or not the defendant was a knowing member of the conspiracy.

Authorities:

Adapted from Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Civil Cases, Instruction 6.1 (1999).

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).