

Case Digests

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Antitrust—Vertical Minimum Resale Price Maintenance Agreements

In *Leegin Creative Leather Prods v PSKS, Inc*, 127 S Ct 2705, 2007 US LEXIS 8668 (2007), the United States Supreme Court granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as per se unlawful under §1 of the Sherman Act, 15 USC 1. The case involved a leather goods manufacturer that stopped selling to a store that refused to stop discounting the leather products.

In *Dr Miles Medical Co v John D Park & Sons Co*, 220 US 373(1911), the U.S. Supreme Court had established the rule that it is per se illegal for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. Noting that the court has abandoned the rule of per se illegality for other vertical restraints a manufacturer imposes on its distributors and that respected economic analysts conclude that vertical price restraints can have pro-competitive effects, the Supreme Court in *Leegin Creative Leather Prods* overruled the per se rule and allowed resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of § 1 of the Sherman Act.

Securities Litigation—Pleading Requirements

In *Tellabs, Inc v Makor Issues & Rights, Ltd*, 127 S Ct 2499, 2007 US LEXIS 8270, petitioner Tellabs, Inc., manufactured specialized equipment used in fiber optic networks. Respondent shareholders were persons who purchased Tellabs stock between December 11, 2000, and June 19, 2001. They accused Tellabs and several Tellabs executives of engaging in a scheme to deceive the investing public about the true value of Tellabs' stock.

To prevent abusive litigation by private parties, congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737. Among the controlling measures were exacting pleading requirements. The act requires plaintiffs to state with particularity both the facts constituting the alleged violation and facts showing scienter, i.e., the defendant's intention "to deceive, manipulate, or defraud." This case involved the latter requirement, with the PSLRA requiring plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Congress did not define the key term "strong inference," and the federal courts of appeals have divided on its meaning. In *Tellabs, Inc*, the supreme court concluded that to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency,

a court must engage in a comparative evaluation; it must consider not only inferences urged by the plaintiff but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent, than other inculpable explanations for the defendant's conduct. To qualify as "strong" within the intentment of § 21D(b)(2), an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent.

Title VII – Pay Discrimination

In *Ledbetter v Goodyear Tire & Rubber Co*, 127 S Ct 2162, 2007 US LEXIS 6295 (2007), the supreme court granted certiorari to determine whether and in what circumstances a plaintiff may bring a Title VII illegal pay discrimination claim when the disparate pay received during the statutory limitations period is the result of discriminatory pay decisions that were made outside of the limitations period. The Plaintiff worked for the defendant corporation from 1979 to 1998. Raises were granted or denied based on performance evaluations during most of her employment. The plaintiff submitted a questionnaire to the EEOC in March 1998 and filed a formal charge in July of that year alleging that her supervisors in the early-1980s and mid-1990s had given her poor performance evaluations on the basis of her sex, which resulted in pay that was significantly lower than that of her male counterparts. Plaintiff retired early in November 1998 and filed suit, asserting a sex discrimination claim under Title VII, among other claims. The trial court awarded her back pay and damages. The Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the last pay decision made during the EEOC charging period.

The supreme court affirmed the judgment of the Eleventh Circuit. An employee is barred from challenging an alleged discriminatory practice in court if she did not file a charge with the EEOC within 180 or 300 days, depending on the state, after the practice occurred. This 180- or 300-day EEOC charging period runs from the discrete discriminatory act and not from the time the employee experiences the effects. Thus, since the plaintiff did not allege that the defendant had acted with actual discriminatory intent during the EEOC charging period but that evaluations made prior to the charging period led to her smaller paycheck, her claim was not timely. The court specifically rejected the plaintiff's "paycheck accrual rule" in which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period to permit the complainant to challenge any prior discriminatory conduct that impacted the amount of pay.

Single Business Tax Act – Services Performed Outside the State for Michigan Construction Projects

In *Fluor Enters, Inc v Revenue Div, Dep't Treasury*, 477 Mich 170, 730 NW2d 722 (2007), the plaintiff corporation chal-

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lenged the application of the Single Business Tax Act to receipts for services that it performed out-of-state for construction projects located in Michigan. The plaintiff did not include the receipts as Michigan receipts when filing its single business tax returns. However, after an audit, the defendant issued bills for taxes due on those receipts. The plaintiff paid under protest after an informal hearing and the commissioner's order to assess taxes as originally directed. It then filed action to recover the paid single business tax, plus additional statutory interest, costs, and attorney fees. The trial court entered judgment in the plaintiff's favor. On appeal, the court of appeals held that the receipts were Michigan receipts under MCL 208.53 but that this provision was unconstitutional because it violated the Commerce Clause.

The supreme court affirmed the judgment concerning the nature of the receipts but reversed the judgment concerning the constitutionality of MCL 208.53 and remanded. Pursuant to MCL 208.53(c), "[r]eceipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts." The court did not find this language ambiguous. Thus, receipts for the plaintiff's services, performed entirely outside Michigan for construction projects located in Michigan, were taxable sales under the statute. As for the constitutionality issue, the court found the statute constitutional because the tax was fairly proportioned and because the plaintiff's taxed activity had a substantial nexus with Michigan.

Michigan Vehicle Code – Timing of Title Transfer

In *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 729 NW2d 500 (2007), the plaintiff was injured when the purchaser of a vehicle from the defendant car dealership collided with a parked car within hours of possession. The plaintiff sued the defendant, asserting that defendant was still the owner of a vehicle and thus liable for the acts of its permissive user—although an application for the title had been signed, the title did not pass until the application was delivered to the secretary of state. The trial court granted summary disposition for the defendant. The court of appeals reversed, as finding a question of fact existed concerning the vehicle's ownership.

The supreme court reversed the judgment of the court of appeals and reinstated the grant of summary disposition for the defendant. Pursuant to MCL 257.37, unless a vehicle is leased, the owner is the one who holds the title. Former MCL 257.233(9) provided, "the effective date of the transfer of title or interest in the vehicle shall be the date of execution of ... the application of title..." Michigan caselaw has held that execution requires signing and that delivery is separate from execution. An application for title to a motor vehicle is "executed," and therefore, the title is transferred to the new owner at the time the application is signed, without regard to mailing or delivery to the secretary of state. This holding is consistent with current MCL 257.233(9), effective January 3, 2007, which provides

"the effective date of the transfer of title or interest in the vehicle is the date of signature on ... the application for title"

Contracts – Condition Precedent and Material Breach

In *Able Demolition, Inc v City of Pontiac*, No 273295, 2007 Mich App LEXIS 1297 (May 17, 2007), the plaintiff demolition firm alleged breach of contract, promissory estoppel, unjust enrichment, and quantum meruit. The plaintiff and the defendant entered a demolition contract that required plaintiff to obtain written permission to proceed before demolishing any home. The defendant refused to pay for eleven completed demolitions. In response to the plaintiff's complaint, the defendant filed a motion for summary disposition, arguing that the plaintiff had failed to obtain letters to proceed for those eleven houses, which omission was a material breach of the contract, and had thus forfeited payment. The plaintiff argued that it had substantially performed under the contract and that it had not materially breached the agreement. The trial court granted summary disposition for defendant, finding that the contract explicitly required a letter to proceed before plaintiff performed a demolition and before the plaintiff was entitled to payment.

The court of appeals affirmed the trial court's ruling. The plaintiff was clearly required by contract to obtain written permission before beginning demolition. This requirement was a condition precedent, and the plaintiff's failure to comply meant that it was not entitled to payment under the contract. Moreover, the plaintiff's failure to obtain written permission was a substantial breach of the contract, even if the "letter to proceed" provision was not a condition precedent. The "letter to proceed" provision was not a mere technicality since it protected property rights and protected the city from exposure to liability, so its violation constituted a substantial breach by the plaintiff. As the plaintiff substantially breached the contract, it was barred from bringing an action against the city for payment under the contract.

Contracts – Recovery of Attorney Fees

In *Fleet Bus Credit, LLC v Krapohl Ford Lincoln Mercury Co*, No 263170, 2007 Mich App LEXIS 572 (Mar 6, 2007), a third-party defendant software company appealed the trial court's denial of its motion for costs and attorney fees against a third-party plaintiff-appellee car dealership in its breach of contract suit. The car dealership leased certain software from the software company. The lease contract provided that the prevailing party would recover costs and reasonable attorney fees in any proceeding arising from or related to the agreement. However, the trial court held that a party must plead special damages to recover attorney fees and costs even though the contract provides for their recovery. It found the software company's "general reference to attorney fees in the affirmative defense to the general provisions of the contract" insufficient.

The court of appeals reversed the judgment of the trial court and remanded. When contract language specifically provides, in a litigation dispute concerning the contract, that the prevailing party shall recover attorney fees, attorney fees are not special damages. Therefore, these fees are generally recoverable by the prevailing party even if there was no specific prayer for their recovery in the complaint.

Use Tax Act – Assessment on Rental Receipts for Products Manufactured Outside Michigan

In *WMS Gaming, Inc v Department of Treasury*, No 269114, 2007 Mich App LEXIS 476 (Feb 27, 2007), the plaintiff corporation challenged the assessment of a use tax on gaming machines it manufactured out-of-state and then leased to three Michigan casinos. The defendant assessed the use tax on the receipts from the machine rentals, but the plaintiff asserted that it should be able to pay the use tax based on the cost of raw materials used to construct the machines rather than on the rental receipts. The plaintiff paid under protest and filed suit to recover the paid use tax. The trial court granted summary disposition to the defendant.

The court of appeals reversed the judgment of the trial court and remanded. The court concluded that a company that manufactures a product out-of-state and then leases the product to a Michigan customer may elect to either pay a use tax on the purchase price of the product's components, and thereafter owe no use tax on the rental receipts, or opt not to pay a use tax on the purchase price of the product's components and pay a use tax on the rental receipts. The use tax may not be imposed on rental receipts if the rental property had previously been subjected to a Michigan sales or use tax when purchased by the lessor. Thus, since the plaintiff had paid the use tax based on the purchase price of the machines, i.e., the aggregate cost of the machines' components, it could not also be assessed a use tax on the rental receipts.

National Resources and Environmental Protection Act – Tax Exemptions

In *Ford Motor Co v State Tax Comm'n*, 274 Mich App 108, 732 NW2d 591 (2007), the court of appeals consolidated multiple appeals to determine whether certain equipment installed by three manufacturers qualified for tax exemptions under part 59 of the National Resources and Environmental Protection Act, MCL 324.5901 et seq. Three Manufacturers had installed test cells to ensure that their vehicles and engines met certain Environmental Protection Agency (EPA) emissions standards. An engine manufacturer uniquely had also installed an engine line to build diesel engines that produced fewer emissions than the former model. All three manufacturers were initially denied tax exemptions by the Michigan Department of Environmental Quality. The State Tax Commission affirmed the denials. The various trial courts only reversed as to one of the manufacturer's test cells and affirmed all other denials.

The court of appeals concluded that the test cells qualified for a tax exemption because they were clearly "installed or acquired for the primary purpose of controlling or disposing of air pollution" and "designed and operated primarily for the control, capture, and removal of pollutants from the air." The court rejected arguments by the State Tax Commission and the Michigan Department of Environmental Quality that the test cells were only installed so that the manufacturers could sell their products since the manufacturers could have continued selling their products without test cells but for the EPA standards and requirements. The court also rejected the argument that because the test cells did not physically remove or control air pollution themselves, they should not qualify. The pertinent statutory provisions do not require the exempt facilities themselves to physically capture the pollutants. The court affirmed the exemption denial as to the engine line. It did not qualify for a tax exemption because the engine line primarily operated to produce engines for sale and not to control, capture, and remove pollutants.

Single Business Tax Act – Application to Duty-Free Stores

In *Ammex, Inc v Michigan Dep't of Treasury*, 273 Mich App 623, 732 NW2d 116 (2007), the plaintiff Michigan corporation challenged assessments on its operations of duty-free stores near the Canadian border in Detroit under the Single Business Tax Act (SBTA). The plaintiff claimed that its business activities were taxable both within and without Michigan and apportioned its sales so that all of its sales were non-Michigan sales. The defendant disallowed the apportionment and determined final assessments. The plaintiff paid under protest and filed suit to recover the paid single business tax, plus interest. The trial court determined that the sales were Michigan sales and granted summary disposition to defendant. The duty-free nature of the goods sold did not exempt the sales activity from single business tax liability.

The court of appeals affirmed the judgment of the trial court. It stated that the "focus of the SBTA is on taxing the economic activity itself rather than the goods." The plaintiff's facilities were located on Michigan soil and the plaintiff enjoyed the privilege of utilizing Michigan resources, such as police protection. The duty-free sales occurred within the state and were subject to the single business tax. As to apportionment, the plaintiff was not entitled to apportion any of its sales, either tangible or intangible, to Canada because its tangible sales were Michigan sales and services performed in Canada did not constitute the greater proportion of its business activities. The court also addressed the plaintiff's constitutional challenge to the SBTA. Under the Commerce Clause, the Supremacy Clause, and the Import-Export Clause, the imposition of the single business tax was constitutional.