

price competition in the retail sales of Playmobil toys. Playmobil determined whether an accused dealer was in fact discounting beyond the "suggested" limits, and if it was, Playmobil forcefully "discussed" its resale pricing policy with the offending dealer.

If, after such discussions, the dealer did not agree to raise its prices, Playmobil responded with various threats—additional stores in the immediate area might begin carrying Playmobil toys, Playmobil might improperly process orders, a variety of shipping problems could occur. In some instances, Playmobil refused to sell additional toys to a dealer until after that dealer agreed to adhere to Playmobil's price ranges.

The volume of commerce affected by Playmobil's illegal conduct is difficult to estimate. Playmobil's illegal conduct was concentrated in the more than one dozen states where, at the urging of retail dealers that wanted to prevent price competition, it obtained illegal resale pricing agreements with potential discounters. Thus while it is difficult to estimate the total volume of commerce affected by Playmobil's violations, it clearly was substantial although significantly less than the entire \$35 million in annual, nationwide, retail sales of Playmobil toys.

Playmobil, by using the devices described, was usually successful in inducing dealers to raise their prices. Indeed, the power of these actions was such that Playmobil never had to permanently sever its relationship with a dealer because of that dealer's continued discounting. Thus, the result of Playmobil's activities was to fix, raise and stabilize the prices at which toy retailers sold Playmobil products. The courts have routinely found conduct such as Playmobil's here to be a *per se* violation of the prohibition on agreements in restraint of trade under section 1 of the Sherman Act.

III

Explanation of the Proposed Final Judgment

The parties have stipulated that the Court may enter the proposed Final Judgment at any time after compliance with the APPA. The proposed Final Judgment states that it shall not constitute an admission by either party with respect to any issue of fact or law.

The proposed Final Judgment enjoins any continuation or renewal, directly or indirectly, of the type of combination or conspiracy alleged in the Complaint. Specifically, Section IV A prohibits Playmobil from entering into any agreement or understanding with any

dealer to fix, stabilize or maintain any dealer's prices for Playmobil products in the United States.

The law permits a manufacturer unilaterally to announce and unilaterally to implement a policy of terminating discounters. *Colgate, supra*. The manufacturer may not, however, secure a dealer's agreement on retail price levels. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). If a dealer discounts, the manufacturer must choose either to continue to supply that dealer, knowing of its discounting practices, or to forego that retail outlet for its products in the future.

In this case, the Complaint alleges that Playmobil reached illegal agreements with its dealers in the course of discussions about discount pricing. Although discussions between a manufacturer and a dealer about resale pricing do not always result in an agreement about those prices, see *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the evidence in this case showed, and the Complaint alleges, that Playmobil's discussions clearly led to, and in fact included, illegal agreements. *Isaksen v. Vermont Castings*, 825 F.2d 1158, 1164 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988). To avoid a repetition of such episodes, Section IV B bars Playmobil from discussing, explaining, or encouraging dealers to adhere to suggested prices, threatening to terminate a dealer for discounting, or discussing a dealer's termination with another dealer. This prohibition addresses the central offense in this case and extends for the entire ten-year life of the decree.

The proposed Final Judgment not only bars Playmobil's unlawful practices, but also contains additional provisions that are remedial in nature, intended to restore competitive conditions in retail toy markets and in dealer relationships, both of which have been distorted by Playmobil's conduct from 1990 through August of 1994, as set forth in the Complaint. These provisions bar some activities that are not, in and of themselves, illegal, but which could nevertheless serve the same purpose as Playmobil's outright agreements to fix resale prices—preventing Playmobil dealers from selling or advertising at discount prices.

To establish a new pricing regime to replace the former illegally enforced regime, and to encourage retailers of Playmobil toys that previously could not offer Playmobil products at discount prices, because of Playmobil's illegal conduct, to exercise their ability to discount if they so wish, Sections IV C and D of the Final Judgment prohibit

Playmobil for the first five years of the decree from reestablishing its resale price policy in any form, even forms that would be legal if Playmobil had never engaged in the illegal conduct alleged in the Complaint. Thus, Section IV C bars Playmobil from announcing policies to (1) sell only to non-discounting dealers, (2) terminate or hinder dealers for discounting, or (3) control the duration or frequency of a dealer's discounting. Section IV D 3 further ensures that regardless of its stated policies, Playmobil will not terminate or otherwise take actions against any dealer because of discounting. Under the decree, the only thing Playmobil may continue to do is to publish truly suggested retail prices, together with the clear statement that dealers are free to ignore the suggestions.

When it is clear that a manufacturer's suggested retail prices are informational only and strictly optional, they can serve useful market functions without adversely affecting competition. In such an environment, dealers become fully aware of and accustomed to exercising their pricing rights.

Since the problem with Playmobil's policy lay in the implementation of the policy rather than in the policy itself, the prohibition on adopting such a policy extends only for five years. Similarly, since Playmobil never improperly terminated any dealers, the prohibition on terminations also extends only for five years. Playmobil will thereafter regain its *Colgate* right unilaterally to announce a resale pricing policy and unilaterally to terminate non-complying dealers. Throughout the period, Playmobil will be able to disseminate its suggested retail prices, but it must make clear that actual retail sales prices will be set entirely at its dealers' discretion.

Subsections 1 and 2 of Section IV D of the Final Judgment also prohibit Playmobil from accepting dealer complaints about other dealers' pricing. In some cases, Playmobil was acting in response to dealers' complaints when it pressured other dealers to agree to charge higher retail prices. The complaints about discounting were the proximate cause of much of the illegal conduct alleged in the Complaint. Although a manufacturer's merely listening to a dealer's complaint about another's pricing does not necessarily violate the law, *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), the evidence here showed that the dealer complaints led directly to Playmobil's violations. Accordingly, in order to establish a period of time during which Playmobil's