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Judge Upholds \$1.7M Sears Fine In Wishbone Case

By **Liz McKenzie**

Law360, New York (October 29, 2008) -- A federal judge dismissed a motion for judgment as a matter of law on Tuesday, reaffirming a \$1.7 million jury verdict against Sears Roebuck & Co. in a copyright case over plastic turkey bones used in a Thanksgiving promotion for Sears.

A jury in the U.S. District Court for the Western District of Washington ruled July 9 that Sears and advertising agency Young & Rubicam had infringed Lucky Break Wishbone Corp.'s copyright, and ordered the companies to pay \$200,000 in actual damages and \$1.5 million in profits attributable to infringement.

Sears and Young & Rubicam filed a motion for judgment of law later that month, asking the judge to review the verdict and damages based on the facts of the case.

The defendants said the jury verdict was decided "completely contrary to the great weight of the evidence."

"No reasonable jury could have found in favor of Plaintiff Lucky Break Wishbone Corporation ("Lucky Break") on this claim, or could have found the damages awarded by the jury," the defendants said in the motion.

The defendants also requested a remittitur of the jury's damages that would lower the fines against Sears and Young & Rubicam.

However, Judge Thomas S. Zilly dismissed the motions and entered the jury verdict as the final judgment on Oct. 28.

"The Court will not substitute its computations or otherwise disturb the jury's verdict, which is supported by substantial evidence and is not grossly excessive in light of the record in this case," Judge Zilly wrote.

Lucky Break's suit, filed in March 2006, alleged that in June 2005, Young & Rubicam expressed interest in distributing Lucky Break's wishbones as part of a Thanksgiving promotion for Sears. Lucky Break provided a sample of its product – a plastic wishbone designed to break like a real turkey bone – but no deal was reached.

Instead, Young & Rubicam hired a company called Apex Products LLC to produce one million plastic wishbones, which Lucky Break said were “substantially similar or virtually identical” to its copyrighted product, for the Sears campaign.

Sears and Young & Rubicam maintained that the wishbone used in their promotion was an imitation of a real turkey bone, not any competing plastic wishbone.

“Any originality inherent in a replica of a wishbone was invested so by nature, by a supreme being, or by the turkey itself,” the companies wrote in a legal filing. “By any account, however, it was not done by Lucky Break.”

However, key testimony in the five-day trial came from experts in avian osteology – that is, bird bones – who testified that Lucky Break's product differs substantially from actual turkey bones in several important ways.

As a result, the experts said, the plastic wishbone used in the Sears promotion could not have been copied from nature and must have been copied from Lucky Break's product.

Sears said in a statement that it is disappointed in the verdict and is “exploring our post-trial options.”

Lucky Break owner Ken Ahroni told the Seattle Times after the verdict that Sears “got caught with their hands in the cookie jar this time ... They kept claiming independent creation and never presented any evidence.”

Sears' “Wish Big Wishbone” promotion, which ran in 2005, distributed the plastic wishbones to shoppers who made a purchase at Sears on Nov. 19. If they returned to the store within the following four days, they could redeem their wishbones for \$10 off their next purchase of \$100 or more.

Lucky Break advertises its product as a “revolutionary advance in plastic wishbone technology.” Its tagline is, “Tired of fighting over the turkey wishbone? Now, finally, there are enough to go around.”

The wishbones retail for \$4 for a four-pack and \$196 for 400. They were sold in 1,000 stores in 2006, and are now sold in about half that number, a fact Ahroni attributed to Sears' infringement. The copyright at issue is U.S. Copyright Registration Number VA 1,325,348.

Darby & Darby PC represented Lucky Break in this matter.

Davis & Gilbert LLP and Yarmuth Wilsdon Calfo PLLC represented

Sears. Perkins Coie represented Young & Rubicam.

The case is Lucky Break Wishbone Corp. v. Sears Roebuck and Co et al., case number 06-cv-00312, in the U.S. District Court for the Western District of Washington.