UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

PSKS, Inc. d/b/a Kay's Kloset...Kay's Shoes; and Toni Cochran, L.L.C., d/b/a Toni's	§	
Plaintiffs,	§	
v.	§	Civil Action No. 02-03CV-107 TJW
Leegin Creative Leather Products, Inc.	§	
Defendant.	§	

MOTION TO LIMIT THE TESTIMONY OF KENNETH G. ELZINGA

The Plaintiffs, PSKS, Inc., d.b.a. Kays Kloset. . .Kay's Shoes ("Kay's Kloset") and Toni Cochran, L.L.C., d.b.a. Toni's ("Toni's") move for an order limiting the testimony of Kenneth G. Elzinga ("Elzinga") as an expert for the defendant. In this case, Elzinga proposes to testify concerning economic justifications for the allegedly unlawful acts of the defendant, as may be appropriate under a rule of reason. The allegations in this case, however, are that Defendant committed *per se* violations of the Sherman Act. For this reason, Elzinga's testimony will not assist the trier of fact to determine whether an agreement existed to illegally restrain prices, and if so, whether Plaintiffs suffered antitrust injuries as a result of Defendant's unlawful agreements.

INTRODUCTION

This case presents an antitrust claim that the defendant, Leegin Creative Leather, Inc., ("Leegin") entered into a series of contracts and agreements with retailers to fix the price of women's accessories produced by Leegin. The contracts or agreements that violate the antitrust laws take the form of (1) "Heart Store Agreements" in which retailers are requested by Leegin to agree to follow their pricing policy; (2) Trademark License Agreements, in which the retailer agrees to follow the obligations created by the Leegin Pricing and Promotional Policy; or (3) oral agreements arrived at

between Leegin and retailers. In all these cases, the retailers agree to charge the price designated by Leegin for Brighton products, and, in return, Leegin promises not to do business with retailers that do not comply with the policy.

The plaintiffs in this case sold Brighton products below the price set by Leegin in its Pricing and Promotional Policy. Leegin stopped selling to the plaintiffs when it discovered the discounting. Leegin made it clear that it would resume selling to the plaintiffs if they agreed to raise their prices to the level fixed by Leegin. Because the plaintiffs did not agree to increase their prices, Leegin stopped selling to the plaintiffs, causing them to lose profit that they otherwise would have made.

The rule of reason is not applicable to vertical price maintenance schemes. Vertical price restraints are *per se* illegal. In order to utilize the *per se* analysis, the plaintiff only needs to show an "agreement on price or price levels." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 735-36, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). Some agreements are so dangerous to competition that they are *per se* unreasonable without any further "inquiry into the effect on the market . . . ." *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215 (5th Cir. 2001).

The Supreme Court has recognized that resale price maintenance agreements which establish a minimum price floor are *per se* illegal: "Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands." *White Motor Co. v. U.S.*, 83 S.Ct. 696, 704 (1963). The Supreme Court has also recognized that "[l]ow prices benefit customers regardless of how those prices are set, and so long as they are above predatory levels . . . ." *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 340, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990).

It is this *per se* violation that the present case alleges. Because the conduct alleged is illegal *per se*, no inquiry is required – or should be permitted – into the effect on the market of the particular restraint.

PROFESSOR ELZINGA'S TESTIMONY WILL NOT ASSIST THE TRIER OF FACT

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

As part of its analysis into an expert's proposed testimony, the trial court must determine whether the testimony is relevant to the issues to be decided in the case. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-92, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993): "Expert testimony which does not relate to any issue in the case is not relevant and, *ergo*, non-helpful." (quoting 3 Weinstein & Berger ¶ 702[02], p. 702-18). *See also* Fed.R.Evid. 402. Therefore, "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 591-92.

In part VII of his report, Elzinga confronts the issue: "RPM [Retail Price Maintenance] and Antitrust Injury: Rule of Reason versus *Per Se* Analysis." In his report, Elzinga beseeches the Court to ignore the law that consistently places vertical price agreements in the *per se* category. Elzinga instead proposes the Court conduct a rule of reason analysis. Elzinga asks the Court to adopt an

completely new rule that provides that "RMP would be *per se* illegal when it is associated with a horizontal combination. In the absence of any horizontal component, vertical arrangements on price would be viewed under the rule of reason." Elzinga Report, p. 22.

The Elzinga rule is not part of antitrust law. According to the Supreme Court, and the Fifth Circuit, agreements fixing the minimum retail price of goods are per se illegal. Because it does not matter whether the agreement arose out of a horizontal combination, Elzinga's opinions are not relevant. Elzinga's opinion and testimony is unnecessary because it will not be relevant or helpful to the trier of fact in determining whether Defendant has committed *per se* violations of the Sherman Act.

In this case, Leegin conspired with its dealers to establish a minimum resale price for Leegin's products and prevent consumers from receiving the lowest possible price for Brighton products. Such actions are vertical price restraints and, thus, amount to *per se* violations of the Sherman Act. Accordingly, the rule of reason analysis and Elzinga's expert testimony is unnecessary. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 979 (5th Cir. 1977)("it is unnecessary to further analyze the evidence to determine whether there was shown to have been an unreasonable restraint of trade. This is so since a *per se* violation is ipso facto an unreasonable restraint of trade."); *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002)("If application of the *per se* rule is appropriate, competitive harm is presumed, and further analysis is unnecessary."); *Chawla v. Shell Oil Co.*, 75 F. Supp.2d 626, 656 (S.D. Tex. 1999)(market analysis is unnecessary if agreement is *per se* illegal).

Elzinga also has proposed testimony concerning "antitrust injury." That requirement is defined in a dealer termination cases. In such a case, the Fifth Circuit has held that the plaintiff need only show that his or her gross sales declined after the termination in order to create a jury question

as to fact of antitrust damage. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435-36 (5th Cir. 1985)(citing *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975)("there was sufficient evidence for the jury to conclude that Greene's business had been injured in fact because of the termination, if only in that his gross sales immediately declined by some $207,000 in the next fiscal year"), *cert. denied*, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 113 (1981); *Graphic Products Distributors v. Itek Corp.*, 717 F.2d 1560, 1579 n. 35 (11th Cir. 1983)("decline in gross sales in the year following termination of a distributorship . . . [is] sufficient evidence of causation of antitrust injury in fact"); *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1199 (11th Cir.), *cert. denied*, 510 U.S. 1012, 114 S.Ct. 604, 126 L.Ed.2d 569 (1993)(holding that a plaintiff establishes antitrust injury by simply showing that the plaintiff's dealership was terminated and its sales and profits declined as a result).

Instead of focusing on this requirement, Elzinga's report focuses instead on the illegal agreements' impact on the market and competition. As such, Elzinga's testimony will not assist the jury and, in fact, his testimony is likely to cloud the real issues and confuse the jury. Elzinga's report fails to address the outstanding issues before this Court. Instead, he professes his disagreement with the controlling authority that holds that vertical pricing restraints are so devoid of any consumer or competitive benefit that they are *per se* illegal. Because of this, Elzinga should be disqualified as an expert in this matter or, at the very least, he should be precluded from testifying concerning the affect that the defendant's unlawful scheme has had on the market and competition.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of March, 2004, a true and correct copy of the above and foregoing Motion to Limit the Testimony of Kenneth G. Elzinga was mailed, postage prepaid and properly addressed, through the United States mail, to the following:

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EXHIBITS NOT SCANNED

ORIGINALS ARE IN THE

CLERK'S OFFICE