

1972

Unfair Trade Practices: Final Examination (Spring 1972)

William & Mary Law School

Repository Citation

William & Mary Law School, "Unfair Trade Practices: Final Examination (Spring 1972)" (1972). *Faculty Exams: 1944-1973*. 300.
<https://scholarship.law.wm.edu/exams/300>

Copyright c 1972 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/exams>

FINAL EXAMINATION

Unfair Trade Practices

Professor Collins

This examination has four questions of equal value. The questions are intended to be factually complete, but you may assume additional facts. You should cover all issues raised by the questions.

1. As you may know, most bourbon whiskey is produced in Kentucky, although some of very high quality is distilled in Tennessee. For our purposes, assume that a group of Kentuckians migrated to Wyoming in the last part of the nineteenth century and settled in a valley in that state which they named Kentucky Valley because of its similarity in climate, horticulture, et cetera to Kentucky. They immediately began distilling whiskey which they called Kentucky Bourbon, and which was substantially lighter and milder than that produced in the State of Kentucky and sold it in the mountains and pacific regions of the country. A few years later these earlier emigrants were joined by a group from Tennessee who settled near a group of springs they named the Tennessee Springs. The second group (as fate would have it) likewise began producing whiskey, which they marketed as Tennessee Bourbon whiskey. Unlike the Kentucky variety, their whiskey was not distinguishable from the State of Tennessee product. However, unlike the Kentucky product, their marketing was initially limited to the area of Wyoming.

All of this little worried the eastern distillers until after World War II for a variety of reasons. Because of its special nature the Wyoming made Kentucky Bourbon command a limited special market, while the Kentucky variety was vigorously promoted and sold to a larger market, accounting for 95 percent of all bourbon sales in the western markets. The eastern Tennessee was not sold in the west to any extent because of lack of population and limited production capacity, and the Wyoming product was sold only in its immediate area. However, after World War II, this changed. California's earlier substantial growth increased. At the same time, liquor consumption in the region progressed even more rapidly. Initially, the eastern producers, because of production limitations, could not supply the market. By 1955, the Wyoming Kentucky Bourbon held 25 percent of the western market while the Wyoming Tennessee Bourbon had entered the entire market and sold many times the eastern Tennessee's share, though the latter had entered the market with force. In the next years, the eastern producers grew to regard the western producers not as amusing topics of conversation but dire threats. The Kentucky Bourbon Distillers Union and the Tennessee Association of Bourbon Distillers, which together represent substantially all of the eastern producers, wish to end the threat by legal action before either a court or an administrative agency. What are the reasonable possibilities of either? (You may assume the agency or agencies will cooperate.)

2. If Section 2(a) of the Clayton (Robinson-Patman) Act were amended as follows:

A discrimination shall be unlawful only when the person granting the discrimination is in competition with others serving significantly more limited areas (territories or classes of customers which are relevant lines of commerce), the discrimination is restricted to one or more such limited areas (representing a small part of the total area served by the person granting the discrimination), the consideration exacted in such limited areas is less than the reasonably anticipated long-run average cost of serving those areas (including capital costs), and the discrimination imminently threatens to eliminate from such a limited area one or more competitors whose survival is significant to the maintenance of competition in that area. Provided, however, that the survival of a competitor is not significant to the maintenance of competition where, in the line of commerce or area affected, the number of competitors remaining, or the ease with which new competitors may enter, indicates that effective competition will not be suppressed for an appreciable period of time.

Would it (1) accord with present law, and (2) be a desirable change?

3. National Food Products Company is a nation-wide producer of various food products, including evaporated milk which it markets country-wide under its National label, which is one of the three largest selling labels in the field. In 1956 Kroger Stores, a large midwestern chain, approached National requesting that it be sold evaporated milk to market under its house brand. National agreed and has done so at a price which varies but is substantially below its own label price. National has since acquired several other private brand customers. Beginning in 1961, seven dairy producers of evaporated milk sold exclusive as private brands located in Chicago, Milwaukee and other Wisconsin cities have discontinued production, none could consistently match the National private brand prices and all lost a major volume of business to National. Has National violated the Robinson-Pattman act? What other information would be necessary for a complete defense of National and how might it be generated?

4. Gillespie Manufacturing Company, which manufactures widgets, distributes them to retailers through two channels. To some wholesales the widgets are sold by brokers for \$150 per hundred, with a \$7 per hundred payment to the broker. The other widgets are transmitted by the Creighton Company, who performs all functions which the broker does and receives \$7 per hundred. Consider the following as to Robinson-Patman violations:

(a) Creighton takes title to the goods, but they are shipped directly by Gillespie to the retailers, who pay Gillespie who in turn pays Creighton the \$7 per hundred. What result? Would it matter if Creighton received and stored the goods? What if Creighton also establish its price to the wholesaler?

(b) What if Creighton buys on its own amount for \$143 and sells to wholesalers at the prevailing market price which during the time in controversy was always approximately \$150? What if the price varied for Creighton from \$140 to \$144? What if the price to Creighton was constant but the price from Gillespie varied from \$146 to \$151?

(c) Creighton is owed by 40 small wholesalers and Gillespie ships directly to those wholesalers on contracts made in the name of Creighton. Gillespie claims that Creighton gave it a sum equal to the \$7 discount to \$143 to Creighton because it assures a steady volume of business, eliminates billing expenses and reduces credit risks. Is the Robinson-Patman Act violated?