1973

# Unfair Trade Practices: Final Examination (May 1973)

William & Mary Law School

UNFAIR TRADE PRACTICES
Professor Collins

Final Examination
May, 1973

The examination is of four equally weighted questions. They are intended to be factually complete except where the answer requires statements of additional information needed for litigation. If you need more facts to answer fully, state and assume them.

Respond to all issues raised. Style will be considered in evaluation. In allocating time, question four seems to me shorter in time required than 1, 2 and 3.

GOOD LUCK!!

1. (25 Points)

In 1962 (when it registered EDLCO as its trademark) Educational Laboratories and Development Company created a highly successful line of educational toys, books and other materials for preschool children and children in the elementary grades. Indeed, tests quickly established that the total line was superior to any other education materials for this age group. Seeking to avail themselves of this, ELDCO began franchising preschools (ELDCO Schools). ELDCO took care to avoid conspiracy or combination problems under the antitrust laws and relied only on franchising fees and sales of its goods to its franchisees for profit. To insure purchase of its goods, ELDCO agreed to sell to franchises at 20% less than other retailers, 10% less than other schools and 50% less than to the public by direct sale. ELDCO uses no sales staff to service its franchises, salesmen to approach other non-competing schools, and salesmen and mail order to reach parents directly. It makes no sales to retailers whatsoever.

Is there a course of action against ELDCO? Is it likely to succeed? What information would you need to defend ELDCO?

2. (25 Points)

ASSUME ALL FACTS OF QUESTION ONE.

In 1969 Marshall Elder formed a company, Elder Education Services Company. He entered the educational toy business and began a vigorous effort of wholesale toys to retail businesses. He used a letterhead of Elder Co., marked his containers Elder Co. and utilized many of the innovations of ELDCO (as were all other manufacturers of educational materials), but, unlike others, used ELDCO's red, black and white coloring scheme in a design distinctly different from that of ELDCO. In its advertising, Elder asserted repeatedly that it was the first in its field, and that others followed it, using a picture of a large maze which Elder had in fact (alone among its products) originated, and similar mazes of ELDCO and others which it labeled "second rate" and "inferior" copies, though ELDCO's maze had been widely praised in psychological literature.

Are there any private or public causes of action against Elder? If this prevails, what remedy might be available?

3. (25 Points)

McMillan and Company and The John McIntosh Company were intense competitors in the sale of marine dredging equipment. Patents had long ago expired in the industry and new developments were limited. The margin of profit was slight because entry was not restricted by technology but only by the competition. In 1956 McMillan employed three men, Hatfield, Lloyd and Smithers. Hatfield was at that time a highly successful salesman of marine engines, Lloyd a recent graduate of an engineering college and Smithers an experienced marine engineer. Hatfield was assigned the Gulf

Coast area as sales supervisor, where he had sold marine engines to 200 of a potential 670 customers of McMillan. McMillan then had only 92 customers in the area of which 30 were also Hatfield customers. Lloyd was put into a training program and assigned two development projects, one on filtration systems with the Company's director of research and one on metallurgy with Smithers, who's previous experience was in this area.

Over the next years, McMillan acquired 418 customers on the Gulf of whom 121 were former Hatfield customers. Hatfield has developed an outstanding four person sales force for the area, which has contributed to the success. Also contributing are a new filtration system and light weight metal components, the first developed by Lloyd the second by Lloyd and Smithers. Neither were patentable, both were themselves disclosed but their process of manufacture was carefully protected. McIntosh has hired Hatfield, Lloyd and Smithers. Hatfield is known to be talking to his sales force while Lloyd and Smithers are working on filtration and metallurgy problems.

McMillan wishes to protect itself. May it? Suggest possible remedies.

4. (25 Points)

The Dairymen's Cooperative Association is made up of a group of dairy farmers in the rural area of Marshall adjacent to the Wythe City metropolitan area. A substantial number of its members over a period of years have been adversely affected by the Wythe Water Project which has flooded all or part of their farms. As a result, the Dairymen's Processing Plant at Marysville has closed, and remaining members who sent their milk to Marysville now send it to Columbus. As a result, after 1969 only two of five independent milk haulers were retained by the farmers, who orally contracted individually, but of necessity together with Dairmen's coordination, to have their milk carried on a day-to-day basis. Dairymen's had paid each truck a subsidy since the Marysville plant closed. In the fall of 1972, due to the drop in the quantity of milk shipped, McGraw, one of the two truckers, protested to his 17 farmers and Dairymen concerning his compensation, demanded an increase, but indicated a desire to continue. Dairymen's arranged a conference in December, 1972 and again on Friday, January 12, 1973. Both ended in angry inferences, with McGraw charging bad faith by Dairymen. On Monday, January 14, 1973, Dairymen did not return the containers (which Dairymen owns) needed to carry milk to McGraw, but gave them to the other trucker Seitz, and informed the farmers that Seitz would carry their milk. All but five now utilize Seitz's service. Has McGraw a remedy against anyone?