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Likelihood Of Injury To Business Reputation-A Liberal Standard Of Proof In Unfair Competition?

injury.[23] Consequently, it is inevitable that an increased number of claims are going to arise under the limitation clauses now contained in the majority of medical coverage provisions.

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LIKELIHOOD OF INJURY TO BUSINESS REPUTATION— A LIBERAL STANDARD OF PROOF IN UNFAIR COMPETITION?

It is scarcely a novel observation that courts have been hard pressed to maintain the delicate balance between social interests in preserving competition and equally important social interests in prohibiting unfair trade practices. *Clairol, Incorporated v. Cody's Cosmetics, Incorporated*,[1] decided under common law principles of equity and Massachusetts' "anti-dilution and injury to business reputation" statute, calls attention to a unique fact situation in determining the scope of protection to be given against unfair trade practices in that state. The case presents an issue of first impression: Can a manufacturer who sells identical products, except for labels and packaging, in two different channels of trade at different prices, enjoin a noncontracting party, in this instance a discount house, from violating its marketing system? Clairol asserted that this violation would result in likelihood of injury to its business reputation and thereby placed principal reliance on a statute providing:

> Likelihood of injury to business reputation or of dilution of the distinctive quality of a trade name or trade-mark shall be a ground for injunctive relief in cases of trade-mark infringement or unfair competition notwithstanding the absence of competition between the parties or of confusion as to the source of goods or servies.[2]

Clairol sought to enjoin Cody from selling certain of Clairol's products marked for "Professional Use Only" to general consumers. Clairol sells the product in two different channels of trade and at different prices. One channel is through retail jobbers for ultimate resale by retail establishments to the public for home use; the other is through beauty supply jobbers for resale to professional hair-

[23] 1 L. GORDY, R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE, ¶ 10.70 (3d ed. 1967). *See generally* Fickling, *Long Term Treatment of Facial Injuries*, 22 J. ORAL SURGERY 142 (1964).

[1] 231 N.E.2d 912 (Mass. 1967).

[2] MASS. ANN. LAWS ch. 110 § 7A (1947).

dressers and beauty schools. The contents of each type are exactly the same. The retail bottles, however, are individually packaged in a distinctive yellow carton with which the product has become associated in the minds of consumers. Each carton has a pamphlet of easily understood instructions and its label contains warnings as to use. Cody bought professional bottles from wholesalers and then sold them to the general public. Clairol distributed these bottles uncovered in cartons of six rather than individually packaged, which contained only one instruction sheet per carton. Cody sold these at a price substantially lower than the other retail sales of Clairol products.

Clairol's product deteriorates upon exposure to heat or light, therefore the plaintiff has adopted a standard shelf life. Each carton sold at retail and each professional bottle bears a stamp date beyond which the product cannot be safely used. There is some evidence that some of Cody's sales bore use expiration dates that had expired. Furthermore, it is quite possible that because Cody's merchandising procedure caused exposure of bottles to heat and light the expiration date did not reflect the true life expectancy of the product. In addition, the restricted professional use bottles were formerly marketed to conform in exact detail with those to be sold at retail to the public. Clairol later abandoned this procedure as an economy move.

The trial court found that there was no evidence of complaints or injuries to consumers arising out of Cody's sales. Nevertheless, it found that Cody's sales of professional products were extremely likely to injure Clairol's business reputation or dilute the distinctive qualities of its trade name or trademark.[3] The court concluded that Clairol was at fault in failing to exercise sufficient control over its wholesalers to prevent sales to discount houses like Cody. However, being uncertain of the law, the trial judge reported the case to the Supreme Judicial Court for review and instructions.

The reviewing court agreed with the assessment of the lower court that there had been no adulteration of Clairol's product by Cody in the usual sense.[4] It also pointed out that Clairol might have benefited by self-help in returning to its original marketing method or by policing its wholesalers. It concluded that compliance with the state Fair Trade Act might have solved Clairol's problem. But the court recognized the possibility that Clairol's reputation may be injured in the event of a substantial number of poor results arising from inex-

[3]231 N.E.2d at 915.

[4]*See* Coca-Cola Co. v. Bennett, 238 F. 513 (8th Cir. 1916); Coca-Cola Co. v. J. G. Butler & Sons, 229 F. 224 (E.D. Ark. 1916).

perienced use of the professional bottles. While refusing an absolute injunction, it granted Clairol limited relief. The court felt that reasonable protection would be given if Cody were enjoined from selling the product unless it furnished with each professional bottle sold at retail: (1) a legible printed statement containing precise state and federal statutory warnings, (2) a statement indicating in enumerated ways how Cody's marketing methods differ from those of Clairol and (3) a specified statement as to satisfactory use and health hazards.

Clairol reveals the uncertainty that pervades the whole area of unfair competition. It raises a basic question of what practices will constitute unfair competition and what measure of relief should be given in a specific instance. In meeting this problem, the courts have had no exhaustive list of practices which fall below accepted standards of commercial morality to guide them in reaching an equitable result. The tendency seems to be in the direction of enforcing increasingly higher standards of fairness and commercial morality among businessmen.[5]

Absent statutory changes, early common law cases of unfair competition turned on whether there had been a "palming off," that is, a passing off of the product of one producer as that of another.[6] Today the law of unfair competition has been extended to apply to misappropriation of property; *i.e.*, appropriating to one's use and commercial advantage the results of the enterprise and efforts of another.[7] Clearly, there was no attempt by Cody to palm off the products of Clairol. The problem here is one of possible misappropriation.

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[5]*See* Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483, 488 (Sup. Ct. 1950). In *Metropolitan* the court commented that the law of unfair competition developed within the framework of a society dedicated to free competition, and to deal with business malpractice offensive to the ethics of that society. For a discussion of the philosophy underlying the development of the law of unfair competition see RESTATEMENT OF TORTS, Introductory Note ch. 35 at 535 (1938); Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927); Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936).

[6]International News Service v. Associated Press, 248 U.S. 215 (1918); Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483, 489 (Sup. Ct. 1950).

[7]"With the passage of those simple and halcyon days when the chief business malpractice was 'palming off' and with the development of more complex business relationships and, unfortunately, malpractices, many courts, including the courts of this state, extended the doctrine of unfair competition beyond the cases of 'palming off'. The extension resulted in the granting of relief in cases where there was no fraud on the public, but only a misappropriation for the commercial advantage of one person of a benefit or 'property right' belonging to another." Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483, 489 (Sup. Ct. 1950).

Perhaps the leading common law case that broadened the scope of protection under the rubric of misappropriation is *International News Service v. Associated Press.*[8] There the plaintiff at great expenditure of labor and capital gathered and distributed the news among its members. The defendant, a rival, pirated the news and sold it in the West after the initial publication by the plaintiff in the East. There was no palming off, since credit was given to Associated Press, and the case presented additional difficulty because of the public interest in the dissemination of news. The court held, however, that one who gathers news at great expense for the purpose of publication may be said to have a quasi-property right in the results of his enterprise, as against a rival in the same business, irrespective of the public interest. In strong language, the court branded defendant's conduct as an attempt to reap where it had not sown. The rationale was that a court of equity will protect against unauthorized interferences with the normal operation of a legitimate business precisely at the point where profit is to be reached. *International News* was not specifically cited by *Clairol,* but it would seem to be applicable to the facts of the case. The court in *Clairol* allowed Cody to benefit from Clairol's efforts and suggested that reasonable standards of fairness would be met if Cody were to make a disclosure of the true facts.

The court in *Clairol* placed much emphasis upon disclosure, but interferences with the operation of a legitimate business have been frowned upon even where there is full disclosure by the defendant. In *Bayer Company v. Sumner Printing Company,*[9] aspirin tablets distributed by the producer in large packages were sold by the defendant in packages of two under a facsimile of the original trademark. While there may be elements of confusion in the case, the court appeared to be more concerned with the effect of defendant's activities upon the plaintiff's right in his regular retail sales. The court put the matter this way:

> The plaintiff is not required to submit to a new and wider use of its product by a merchandising practice which tends to confuse or deceive the public, and which will impair or prejudice its regular sales under its trade-mark and standard display, and in its original packages.[10]

The court concluded this method constitutes unfair competition even though defendant placed a strip across the front of the package stating the real facts in small print.

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[8]248 U.S. 215 (1918).
[9]7 F. Supp. 740 (N.D. Ohio 1934).
[10]*Id.* at 742.

A basic consideration in *Clairol* was whether a manufacturer has any rights in the product once it has been released for sale. There are common law authorities that have answered this question affirmatively, and have granted absolute relief against an unauthorzed use upon the ground that such restrictive legends as "Professional Use Only" impose an implied equitable servitude upon the chattel that binds the defendant.[11] In a leading Pennsylvania case,[12] records bearing the legend "not licensed for radio broadcast" were broadcast in violation of the restriction. The court cited with approval *International News* and observed that the publication of the records was limited to purchasers for home use.

Thus, the protection of enterprise and good will have been secured by various judicial devices. In recent years, however, the Supreme Court has somewhat unsettled the premise that one may not share in the good will of a manufacturer of a trademarked product. The Court in *Sears, Roebuck & Company v. Stiffel Company*[13] and *Compco Corporation v. Day-Brite Lighting, Incorporated*[14] denied relief even though there was a strong likelihood of confusion and an implicit misrepresentation of the origin of the goods involved. In both, the defendant copied the plaintiff's design and produced a product identical to the one copied. While the court acknowledged that a state may, in appropriate circumstances, require precautionary measures such as labeling, it is powerless to prevent the actual copying of the unpatented article itself. These decisions have been interpreted as permitting a sharing of the good will of the producer as well as that of his product.[15]

While the contours of general common law principles under which Clairol sought relief are unclear, there have been statutory advances

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[11]*See* Nadell & Co. v. Grasso, 175 Cal. App. 2d 420, 346 P.2d 505 (1959). *Nadell* held that dealers in goods damaged in transit, which had agreed with the carrier not to permit such goods to enter retail outlets under manufacturer's label, had created an enforceable equitable servitude which could be enforced against persons who had notice of the restriction even though they were not in privity with the contractual agreement. *See also* Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels,* 69 HARV. L. REV. 1250 (1956); Chafee, *Equitable Servitudes on Chattels,* 41 HARV. L. REV. 945 (1928); 17 WASH. & LEE L. REV. 272 (1960).

[12]Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631, 638 (1937). *See also* Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950).

[13]376 U.S. 225 (1964).

[14]376 U.S. 234 (1964).

[15]Handler, *Product Simulation: A Right or a Wrong?,* 64 COLUM. L. REV. 1178, 1183 (1964).

in dealing with the problem of unfair trade practices. The statute relied upon by Clairol may be seen as another attempt to broaden the scope of available protection. Under the statute, it is no longer necessary to show that the parties are engaged in direct competition[16] or that there is confusion as to the source of goods.[17] Yet in *Clairol* the court was unable to find any preceding cases decided under the statute that did not involve some element of possible confusion. The court appeared to be upon the horns of a dilemma: "We do not suggest that such possible confusion is essential either to general equitable relief or to relief under § 7A, but thus far no authority indicates what other equitable considerations will justify granting injunctive relief under § 7A."[18]

Thus the Massachusetts court was not inclined to grant a permanent injunction against the sales by Cody even in view of the fact that the statutory changes had liberalized the common law. A liberal reading of the statute would appear to require a mandatory injunction once Clairol had successfully shown likelihood of injury to business reputation. In refusing to use the statute to break new ground, the court appeared to be relying upon the balancing of hardships that has characterized traditional equity relief. This doctrine has been followed in such a variety of circumstances that limited relief in unfair competition cases may be said to be a rule of practice.[19] Moreover, in *Esquire, Incorporated v. Esquire Slipper Manufacturing Company*,[20] a federal court retained the discretionary element in the construction of the Massachusetts statute. It construed § 7A as permitting, but not requiring, injunctions grounded on dilution, consistent with the traditional flexible equity practice of granting or withholding relief in the exercise of sound judicial discretion. The court held that the question

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[16]Food Fair Stores, Inc. v. Food Fair, Inc., 177 F.2d 177 (1st Cir. 1949).

[17]*Compare* Esquire Inc. v. Esquire Slipper Mfg. Co., 139 F. Supp. 228, 232-33 (D. Mass. 1956) *with* Polaroid Corp. v. Polaroid, Inc., 319 F.2d 830 (7th Cir. 1963). Cir. 1963).

[18]231 N.E.2d at 916. For early cases decided under the statute see Massachusetts Mut. Life Ins. Co. v. Massachusetts Life Ins. Co., 351 Mass. 283, 218 N.E.2d 564 (1966); Great Scott Food Mkt., Inc. v. Sunderland Wonder, Inc., 348 Mass. 320, 203 N.E.2d 376 (1965); Skil Corp. v. Barnet, 337 Mass. 485, 150 N.E.2d 551 (1958); *see also* Polaroid Corp. v. Polaroid, Inc., 319 F.2d 830 (7th Cir. 1963).

[19]S.M. Spencer Mfg. Co. v. Spencer, 319 Mass. 331, 66 N.E.2d 19 (1946); Cain's Lobster House, Inc. v. Cain, 312 Mass. 512, 45 N.E.2d 397 (1952). *See* Skil Corp. v. Barnet, 337 Mass. 485, 150 N.E.2d 551 (1958); Gould Eng'r Co. v. Goebel, 320 Mass. 200, 68 N.E.2d 702 (1946); Associated Perfumers, Inc. v. Andelman, 316 Mass. 176, 55 N.E.2d 209 (1944); Staples Coal Co. v. City Fuel Co., 316 Mass. 503, 55 N.E.2d 934 (1944).

[20]139 F. Supp. 228 (D. Mass. 1956).

in each instance is the "quantum" of the protection to be accorded the plaintiff and such is purely a matter of discretion.

Clairol sought to bolster its case for broad protection by introducing evidence of the scope of protection available in other jurisdictions. While a majority of the statutes of other states are merely codifications of the early common law,[21] six states have adopted the statutory scheme which exists in Massachusetts.[22] The New York courts, partly on the

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[21]*E.g.*, ALA. CODE tit. 57, § 93 (1960); KY. REV. STAT. ANN. § 365.140 (1963); MO. REV. STAT. § 417.030 (1959); ARIZ. REV. STAT. ANN. §§ 44-1442, 1443 (1956). These statutes deal with the general problem of unfair competition and are mainly concerned with counterfeiting or imitating a trademark or trade name. Most of the statutes have the same general language with only slight variations in draftsmanship. Perhaps the most common language is:

> (1) uses, without the consent of the registrant, a reproduction, counterfeit, copy, or colorable imitation of a trademark registered under... his [sic] chapter in connection with the sale, offering for sale, or advertising of goods on or in connection with which the use is likely to cause confusion or mistake or to deceive as to the source of origin of the goods; or (2) reproduces, counterfeits, copies or colorably imitates the trademark and applies the reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in conjunction with the sale or distribution in this state of the goods; except that under (2) of this section the registrant may not recover profits or damages unless the acts are committed with knowledge that the trade-mark is intended to be used to cause confusion or mistake or to deceive.

ALASKA STAT. § 45.50.170 (1962).

See also COLO. REV. STAT. ANN. §§ 141-1-11, -1-12 (1963); DEL. CODE ANN. tit. 6, §§ 3307, 3308 (1953); D.C. CODE ANN. § 48-402 (1967); FLA. STAT. ANN. §§ 506.10, -11 (1962); HAWAII REV. LAWS § 204-4 (1955); IDAHO CODE ANN. §§ 44-602, -605 (1948); IND. ANN. STAT. §§ 66-142, -143 (1961); IOWA CODE ANN. § 548.10 (1950); KANSAS GEN. STAT. ANN. §§ 81-121, -122 (1964); LA. REV. STAT. §§ 51-215, -216 (1950). ME. REV. STAT. ANN. tit. 10 § 1508 (1964); MD. CODE ANN. art. 41, §§ 100, 101 (Rep. Vol. 1965); MICH. STAT. ANN. § 18.638(11) (Rev. Vol. 1957); MINN. STAT. ANN. §§ 333.28, -29 (1966); MISS. CODE ANN. §§ 4227-11, -12 (1956); MONT. REV. CODES ANN. § 85-104 (Rep. Vol. 1964); NEB. REV. STAT. §§ 87-109, -110 (R.R.S. 1943); NEV. REV. STAT. § 600.020 (1963); N.H. REV. STAT. ANN. § 350-12 (Rep. Vol. 1966); N.J. STAT. ANN. §§ 56:3-10, -:3-11 (1964); N.M. STAT. ANN. § 49-4-11 (1953); N.C. GEN. STAT. §§ 80-8, -9 (Rep. Vol. 1965); N.D. CENT. CODE §§ 47-22-11, -22-12 (1960); OHIO REV. CODE ANN. §§ 1329.65, -.66 (Baldwin 1967); OKLA. STAT. ANN. tit. 78, §§ 31, 32 (1965); ORE. REV. STAT. §§ 647.095, -.105 (1965); PA. STAT. ANN. tit. 73, §§ 23, 24 (Purdon 1960); R.I. GEN. LAWS ANN. §§ 6-2-2, -2-3 (1956); S.C. CODE ANN. §§ 66-212, -213 (1962); TENN. CODE ANN. §§ 69-507, -509 (1955); TEX. REV. CIV. STAT. art. 850 (Vernon 1948); UTAH CODE ANN. §§ 70-3-13, -3-14 (1953); VA. CODE. ANN. §§ 59-189.13, -189.14 (Supp. 1966); VT. STAT. ANN. tit. 9, § 2529 (1958); WASH. REV. CODE §§ 19.77.140, -.77.150 (Supp. 1965); W. VA. CODE ANN. §§ 47-2-3, -2-5 (1966); WIS. STAT. ANN. §§ 132.02, -.033 (1957); WYO. STAT. ANN. § 40-3 (1957).

[22]ARK. STAT. ANN. § 70-550 (Supp. 1967); CAL. BUS. & PROF. § 14340 (West's Supp. 1967); CONN. GEN. STAT. ANN. § 35-11i(c) (Supp. 1966); see also GA. CODE ANN. § 106-115 (1956); ILL. ANN. STAT. ch. 140 § 22 (1964); N.Y. GEN. BUS. § 368-d (1968).

basis of a penal statute[23] and partly on the basis of a statute somewhat similar to the Massachusetts statute,[24] have given a greater measure of relief in circumstances quite similar to those in *Clairol.*

A leading New York case is *Clairol, Incorporated v. L. H. Martin Value Center, Incorporated,*[25] where the court held that defendant's sales to the general public of single bottles of Clairol products labeled for the beauty trade violated the state's penal and statutory unfair competition laws. The specific ground upon which relief was granted was that the defendant was selling products of the plaintiff to the public without the packaging and labeling which plaintiff had designed. Since this could cause unsatisfactory results and cheapen the product in the public eye, the injunction forbade the defendant from retailing any product bearing Clairol's trademark which departed in any way from the manner approved by Clairol.[26]

It is manifest that the Supreme Judicial Court of Massachusetts did not believe that *Clairol* was a proper case for broad relief, either under general common law principles or under the state statute. The court determined that three major considerations weakened Clairol's case: first, the court's view that Clairol could return to its prior practice of complete uniformity in professional and retail products, and that this could be done at a difference of only about two cents per bottle; second, the court's assertion that Clairol could also protect itself by rigid supervision of its professional wholesalers to prevent sales to Cody; third, the court's view that Clairol has failed to take advantage of the state Fair Trade Act, under which it could have executed contracts with its wholesalers setting the minium sale and resale price of its products.[27] Such a contract would be binding upon

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[23]N.Y. PEN. § 2354(6) (1967).

[24]The New York statute provides:

> Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or tradename shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

N. Y. GEN. BUS. § 368-d (1968).

[25]40 Misc. 2d 875, 244 N.Y.S.2d 210 (1963).

[26]*See* Clairol, Inc. v. Carlton Drug, Inc., 27 App. Div. 2d 652, 278 N.Y.S.2d 177 (1967) (mem.). *See also* Lanvin Parfums, Inc. v. Le Dans Ltd., 9 N.Y.2d 516, 215 N.Y.S.2d 257 (1961). In *Lanvin* the defendant bought the plaintiff's product, rebottled and repackaged it and sold it under the plaintiff's trademark at prices far less than those charged by the plaintiff. The court held that such sales under the plaintiff's trademark may be enjoined even though the labels used by the defendant disclosed the fact of rebottling and the identity of the rebottlers.

[27]The pertinent provision provides:

> No contract relating to the sale or resale of a commodity which bears,

anyone purchasing the product from wholesalers with knowledge of the contractual agreement.[28]

The language of the opinion indicates that noncompliance with the Fair Trade Act might well have been the decisive factor in deciding the measure of relief to be given Clairol. The court observed that "[w]here there has been no compliance with a statute directly dealing with price protection, we perceive no reason for applying c.110, § 7A, or general equitable principles, to afford such protection."[29]

The court's justification for its position is not entirely persuasive. It gives little weight to the fact that a legitimate business operation on the part of Clairol is involved. Clairol has perfected its present marketing system with a view toward assuring quality and efficiency in the distribution and use of its product. To this end it has expended a great deal of time and money and has acquired substantial good will and business reputation. It must be remembered that the Clairol product is a sensitive product to merchandise. There is evidence that women are extremely timid about coloring their hair because it might tend to affect their status, reputation and appearance.[30] Clairol has successfully overcome this timidity by marketing its product in such a manner as to insure the best possible results. The distinctive yellow carton, which has become associated in the public's mind, serves not only as attractive packaging, but also preserves the product from the deteriorating effects of heat and light. The lack of this packaging could be detrimental to both the quality of the product and the brand image. As far as proper instructions are concerned, Clairol has provided them at retail, and there is reason to believe that hair-dressers do not need them because of their professional knowledge. In light of the efforts that have been expended, it is questionable whether Clairol should be required to alter its marketing method.

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or the label or container of which bears, or the vending equipment from which said commodity is sold to consumers bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the commonwealth by reason of any of the following provisions which may be contained in such contract: (1) That the buyer will not resell such commodity except at the price stipulated by the vendor. (2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee. MASS. GEN. LAWS ch. 93 § 14A (1954).

[28]*See* Eastman Kodak Co. v. E.M.F. Electric Supply Co., 36 F. Supp. 111 (D. Mass. 1940); *see also* Eli Lilly & Co. v. Schwegmann Bros. Giant Super Mkts., 109 F. Supp. 269 (E.D. La. 1953).

[29]231 N.E.2d at 918.

[30]*Id.* at 914.

The impact of the court's decision upon Clairol leaves it with several alternatives, each equally undesirable from Clairol's point of view. Clairol may accept the decision and allow Cody to continue the sales, but this would risk product liability under the doctrine of *Carter v. Yardley & Company*.[31] Carter held that the manufacturer must show that he fulfilled his duty to exercise reasonable care to protect the public. The danger of liability cannot be lightly dismissed.

The court also suggests that a second avenue open to Clairol is that of policing its wholesalers to prevent sales to discount houses like Cody. This course would be fraught with danger of violating the Sherman Anti-Trust Act, and in view of recent developments the legality of such a course seems highly questionable. *United States v. Arnold, Schwinn & Company*,[32] decided by the Supreme Court in 1967, questions the legality of customer restriction as a means of preventing harm to a party in Clairol's position. In *Schwinn* the Court held that the mere existence of such restrictions was sufficient to constitute a violation of Section 1 of the Sherman Anti-Trust Act.[33] Under "the rule of reason" Clairol would have to establish a case for an exceptional need to impose these restrictions. But it could only rely upon this rule in cases where it retained the title to the products under a consignment arrangement with its wholesalers. The disadvantage is that in retaining the title, Clairol would also be retaining the risks.

Finally, compliance with the Fair Trade Act would drive Clairol into an anti-competitive situation which would deprive it of the opportunity to maintain flexible pricing. This would also damage the public interest in having Clairol free to discount its prices.

There is always the danger that salutary efforts to prevent business malpractices may subvert the competitive process itself, but the interests of manufacturer and competitor must be balanced. Where the court is free to exercise its discretion, the situation before the court should be more carefully scrutinized so that a fair and equitable result will be reached.

LESLIE D. SMITH, JR.

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[31]319 Mass. 92, 64 N.E.2d 693 (1946).
[32]388 U.S. 365 (1967).
[33]*Id.* at 382.