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## OHIO FAIR TRADE—FAIR OR FOUL

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*The author traces the chaotic pattern of fair trade legislation and litigation in Ohio, urges the reconsideration of its constitutionality, points out the need for appropriate standards in testing its applicability in future cases, and identifies problem areas that the courts must still confront.*

Resale price maintenance, or what is more commonly known as price fixing, when sifted through Madison Avenue came out as "fair trade" legislation in the various states beginning in 1931 with California.<sup>1</sup> After more than twenty-five years of turbulent judicial and consumer history another attempt was made in 1958 to establish, through federal legislation, a national fair trade program.<sup>2</sup> The original Madison

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<sup>1</sup> The California Fair Trade Act of 1931, Cal. Bus. and Prof. Code §§ 16900-16905 (West 1964). The nonsigner provision of the California statute, Cal. Bus. and Prof. Code § 16904 (West 1964), was added by amendment in 1933. The first law resembling present state laws on resale price maintenance was the so-called Notice Act passed in New Jersey in 1916. This statute was upheld in *Robert H. Ingersoll & Bro. v. Hahne & Co.*, 89 N.J. Eq. 332, 108 A. 128 (1918). This act was superseded in 1935 by a standardized fair trade act. Oregon adopted a similar law in 1933, and in 1935 there were ten states with fair trade laws. By the end of 1936, fourteen states had passed such laws; by 1937, twenty-eight states. This increase was due in part to a decision of the United States Supreme Court in *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), which upheld the constitutionality of the Illinois Fair Trade Act, including the nonsigner provision thereof, as applied to interstate commerce.

<sup>2</sup> The first national resale price maintenance bill was introduced in the 63d Congress on February 12, 1914, H.R. 13305, 63d Cong., 1st Sess. (1914), after the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), had held that resale price maintenance contracts violated the Sherman Antitrust Act, 15 U.S.C. § 1-3 (1964). Thereafter, bills on national resale price maintenance were introduced in every session of Congress until the 73d Congress. In the 73d Congress the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), was passed under which

Avenue title affixed to price fixing was changed to "quality stabilization." Regardless of what name is affixed to resale price maintenance legislation, the result has been to bring about a morass of complicated litigation. The socio-economic debate goes on as to whether such legislation strikes at the heart of our free enterprise system by restricting freedom of contract, the right to transfer private property, and subverting the principles of free competition.<sup>3</sup> The Antitrust Division

retail codes were adopted establishing resale price maintenance. Following the decision of the United States Supreme Court in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), declaring the National Industrial Recovery Act to be unconstitutional, new federal legislation to legalize resale price maintenance contracts was sought. This resulted in the enactment of the Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937), in the form of an amendment to § 1 of the Sherman Act, 15 U.S.C. § 1 (1964). In general, this amendment provided that vertical price fixing contracts, legal under state law, were exempt from the federal antitrust laws. In 1951 the Supreme Court of the United States in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), held that the Miller-Tydings amendment did not make binding upon nonsigners resale prices fixed in contracts under state fair trade laws, insofar as interstate commerce was concerned. In an attempt to rectify this development, the McGuire Act, ch. 745, 66 Stat. 631 (1952), was enacted on July 14, 1952, as an amendment to § 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1964). It provided that nothing in any of the federal antitrust acts shall render unlawful the nonsigner clause in such state laws. In 1958 the broader brand name control bills began to appear. See H.R. 10527, 85th Cong., 2d Sess. (1958); H.R. 1253, 86th Cong., 1st Sess. (1959); H.R.J. Res. 636, 87th Cong., 2d Sess. (1962); H.R. 3669, 88th Cong., 1st Sess. (1963); S. 774, 88th Cong., 1st Sess. (1963); H.R. 7841, 89th Cong., 1st Sess. (1965); and S. 1484, 89th Cong., 1st Sess. (1965). None of these latter bills have come to a vote. See Alexander, "Quality Stabilization and the Crisis in Fair Trade," 51 *Geo. L.J.* 783 (1963); Address by Senator Miller, "The Future of Fair Trade Legislation," 109 *Cong. Rec.* 2532 (1963).

<sup>3</sup> The debate on the socio-economic nonjustification or justification of fair trade legislation continues. The legislative arguments for and against fair trade are summarized in congressional reports on the McGuire Act, S. Rep. No. 1741, 82d Cong., 2d Sess. (1952); H.R. Rep. No. 1437, 82d Cong., 2d Sess. (1952); and in similar reports on the Quality Stabilization legislation. See House Comm. Report Accompanying H.R. 1253, 86th Cong., 1st Sess. (1959) [H.R. Rep. No. 467, 86th Cong., 1st Sess. 10-15 (1959)]; see also Statement of Consumers Advisory Council of June 4, 1963, on S. 774, Hearings on S. 774 Before a Subcomm. of the 88th Cong., 1st Sess. (1963). Federal Trade Commission, Report on Resale Price Maintenance (1945); The Report of Att'y Gen. Nat'l Comm. to Study Antitrust Laws, 149-55 (1955). The most recent and extensive reappraisal of this aspect of the issue appears in Comment, "Fair Trade: The Ideal and Reality," 27 *Ohio St. L.J.* 144 (1966). The Nevada and Pennsylvania Supreme Courts both recently cited the socio-economic arguments of Shulman, "The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels," 49 *Yale L.J.* 607 (1940); Fulda, "Resale Price Maintenance," 21 *U. Chi. L. Rev.* 175 (1954). See also *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 80 *Nev.* 483, 396 P.2d 683 (1964); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 *Pa.* 95, 199 A.2d 266 (1964). For further analysis of pro and con of fair trade see *General Electric Co. v. Thrifty Sales, Inc.*, 5 *Utah* 2d 326, 301 P.2d 741 (1956); Comment "A Symposium on the Fair Trade Laws," 27 *Fordham L. Rev.* 68 (1958).

of the Department of Justice, in documented testimony before the Senate in 1964, strongly opposed<sup>4</sup> the Quality Stabilization Act, as not in the public interest, and resulting in higher prices for consumers. "The bill might more aptly be named 'The Consumer High Price Act'.<sup>5</sup>"

Fair trade lobbyists once again mobilized their legislative influence approximately at the time the Supreme Court of Wyoming noted that "the pendulum of state decisions has now definitely swung from the constitutional to the unconstitutional side."<sup>6</sup> Failing in their concerted attempt to have the Quality Stabilization Act enacted into federal law, the powerful fair trade lobby concentrated their forces in two states, Ohio and Virginia, where nonsigner fair trade acts failed to survive constitutional attack. The proponents labled a "'new-type' fair trade theory as being embodied in the Ohio and Virginia laws."<sup>7</sup> An examination will follow as to whether the adjective "new" is a misnomer, whether in reality the same debatable constitutional objections remain, and whether additional constitutional objections are presented.

## I. HISTORY OF FAIR TRADE LEGISLATION IN OHIO

In 1936 Ohio joined the fair trade movement of the nineteen-thirties.<sup>8</sup> The first Ohio Fair Trade Act was not seriously challenged

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<sup>4</sup> Fair Trade legislation has generally been supported by numerous trade associations and organizations representing certain segments of manufacturers, wholesalers and retailers. The traditional opponents of the legislation consist, among others, of the American Bar Association, the American Farm Bureau Federation, the AFL-CIO and several consumer organizations. The following agencies of the federal government have opposed such legislation: Department of Justice, The Federal Trade Commission, Department of Agriculture, Department of Commerce and the Small Business Administration.

<sup>5</sup> Statement of William Orrick, Jr., Assistant Attorney General, Antitrust Division, Department of Justice in "Hearings on S. 774 Before the Special Subcomm. of the Senate Comm. on Commerce," 88th Cong., 2d Sess. at 374 (1964). For comment on the situation in Ohio see "Hearings on H.R. 3669, Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce," 88th Cong., 1st Sess., at 43 (1963). See also Att'y Gen. Nat'l Comm. Antitrust Rep. 153-54 (1955).

<sup>6</sup> *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 371 P.2d 409 (Wyo., 1962).

<sup>7</sup> Gorrell & Brown, "A Re-examination of Fair Trade Legislation in the Context of the New Ohio Fair Trade Act and the Decision in *Hudson Distribs., Inc. v. Upjohn Co.*," 15 W. Res. L. Rev. 84 (1963). The authors of this article were involved in drafting the original legislation when it was introduced into the General Assembly and were involved in defending, in subsequent litigation, its constitutionality. The new statutory approach was proposed in MacLachlan, "A New Approach to Resale Price Maintenance," 11 Vand. L. Rev. 145 (1957); see also "Hearings on H.R. 10527 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce," 85th Cong., 2d Sess. (1958).

<sup>8</sup> Ohio Rev. Code Ann. § 1333.05-.10 (Page 1962). The 1959 Act did not repeal the 1936 Act and both are contained in the Ohio Rev. Code.

until 1954, when Union Carbide and Carbon Corporation<sup>9</sup> sought an injunction against two small discount houses to restrain them from selling antifreeze bearing the trade name "Prestone" at a price less than the minimum resale price set under the 1936 Ohio Fair Trade Act. The case was tried on its merits and a permanent injunction was issued against the discount houses by the lower court and affirmed by the court of appeals. On appeal to the Supreme Court of Ohio, the non-signer provision, Ohio Revised Code section 1333.07, of the Ohio Fair Trade Act of 1936, was declared unconstitutional.<sup>10</sup> Six judges found that the act violated the Ohio constitution because it: (1) represented an unauthorized exercise of power in a matter unrelated to the public safety, morals and general welfare; (2) delegated legislative power to private persons; and (3) unconstitutionally denied the owner of property the right to sell it on terms of his own choosing in contravention of the due process provision of the Ohio Bill of Rights. Judge Taft concurred in a separate opinion, concluding that there was a failure of consideration even though the written contract between Union Carbide and its retailers made an actual recital and definition of consideration. The consideration was the right and privilege to use the so-called proprietary interest of Union Carbide in its trademark or trade name. Five years later Judge Taft found the same consideration sufficient, though not recited in any written contract.<sup>11</sup>

In the *Bargain Fair* decision, the Supreme Court of Ohio referred to representative cases invalidating the nonsigner provisions of fair trade acts in six states.<sup>12</sup> Following that trend, four states have since repealed their fair trade acts.<sup>13</sup> Pennsylvania has reversed its 1955

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<sup>9</sup> By 1954 nearly 20% of fair trading manufacturers accounted for about 82% of all sales of fair goods. Herman, "A Statistical Note on Fair Trade," 4 Antitrust Bull. 583, 588 (1959).

<sup>10</sup> *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E. 2d 481 (1958).

<sup>11</sup> *Hudson Distribs., Inc. v. Upjohn Co.*, 174 Ohio St. 487, 190 N.E.2d 460 (1963) (consolidated with *Hudson Distribs., Inc. v. Eli Lilly & Co.*), declaring the 1959 Ohio Fair Trade Act constitutional. Judge Griffith was somewhat more consistent than Judge Taft. Judge Griffith, as a member of the Court of Appeals of Lake County, held the 1936 Ohio Fair Trade Act constitutional in the *Bargain Fair* case and in 1963 wrote the minority opinion in the *Hudson Distrib.* case holding the 1959 Act constitutional.

<sup>12</sup> *Union Carbide & Carbon Co. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 185, 147 N.E.2d 481, 483 (1958), referring to Arkansas, Nebraska, Colorado, Louisiana, Oregon and New Mexico.

<sup>13</sup> Nebraska, 1959; Kansas, 1963; Nevada, 1965; Hawaii, 1963 (nonsigner), 1967 (remainder of act). Puerto Rico repealed its territorial Fair Trade Law in 1958. The States of Alaska, Missouri, Texas, Vermont and the District of Columbia never enacted such laws.

holding of constitutionality,<sup>14</sup> and courts in eleven additional states have declared their nonsigner provision unconstitutional. Of the forty-five states adopting fair trade acts from 1931 to 1941, twenty-six have either nullified them in their entirety or as they pertained to nonsigner provisions, or have repealed them in total.<sup>15</sup> With the exception of Ohio, none of the above states have attempted to avoid or override the decisions of their respective highest courts by enacting a new fair trade law. Virginia, while enacting a new fair trade law,<sup>16</sup> did not directly override a holding of unconstitutionality by its supreme court.<sup>17</sup> On the other hand, at the session of the Ohio General Assembly following the *Bargain Fair* decision, the proponents of fair trade introduced a new Fair Trade Act<sup>18</sup> which was passed over the Governor's veto.<sup>19</sup> The principal draftsman of the 1959 Ohio Fair Trade Act was also the major spokesman for the legislation before the Ohio House and Senate Judiciary Committees in 1959.<sup>20</sup> A member<sup>21</sup> of the Ohio Judiciary Committee in 1959, who was subsequently elected to the Supreme Court of Ohio, seriously questioned the methods employed in attempt-

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<sup>14</sup> *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964), *overruling*, *Burche Co. v. General Electric Co.*, 382 Pa. 370, 115 A.2d 361 (1955).

<sup>15</sup> Alabama, Arkansas, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Washington, Wyoming and West Virginia. See 2 Trade Reg. Rep. ¶ 6041. See also note 13 *supra*.

<sup>16</sup> Va. Code Ann. ch. 1.1, § 59-8.1 to 8.9 (Supp. 1966).

<sup>17</sup> *Benrus Watch Co. v. Kirsch*, 198 Va. 94, 99, 92 S.E.2d 384, 388 (1956). The Supreme Court of Appeals of Virginia voided the Virginia nonsigner act as in conflict with Virginia's Anti-Monopoly Act. "[W]e do not reach the very serious questions raised as to the constitutionality of the Fair Trade Act. . . ." See also notes 67-69 *infra*.

<sup>18</sup> Amended House Bill No. 318, Ohio Rev. Code Ann. § 1333.27-34 (Page 1962).

<sup>19</sup> Former Governor DiSalle in his veto message questioned the constitutionality of the enactment and the justification of "attempting to fix prices at a level established by manufacturer, distributor and retailer, . . . where no contractual relationship exists . . ."

<sup>20</sup> The late James A. Gorrell of Columbus, Ohio. At Mr. Gorrell's request, a stenographic transcript of the hearings was made for later use in defending the constitutionality of the Act when challenged. While there is no official record of full proceedings of the Ohio legislature or of hearings before committees, the attorneys defending and attacking the constitutionality of the 1959 Ohio Fair Trade Act managed to place the unofficial stenographic transcript before the various courts. Brief for Appellee, Vol. II, Supplemental Record, at 9, *Hudson Distribs., Inc. v. Upjohn Co.*, 174 Ohio St. 487, 190 N.E.2d 460 (1963). Brief for Appellee at 40-56, *Corning Glassworks v. Ontario Store of Columbus, Inc.*, No. 6769 (Franklin County Ct. App., filed July 31, 1962).

<sup>21</sup> Louis J. Schneider, Jr., former legislator, tax commissioner and present member of Ohio Supreme Court. Judge Schneider as a member of the House Judiciary Committee abstained on April 29, 1959 from voting a motion that House Bill 318 be reported out and recommended for passage as amended. See note 51 *infra*.

ing to subvert the *Bargain Fair* decision. While the draftsman for the fair trade interests admitted that the new Fair Trade Act had the same purpose as the old, he felt compelled to ask the legislature to include a purpose clause in the act, a procedure previously unknown to the Ohio legislature. This self-serving purpose clause then became the main defense of the proponents of fair trade against the anticipated onslaught of constitutional attack.<sup>22</sup>

## II. COMPARISON OF OHIO'S NEW AND OLD FAIR TRADE ACTS

The 1936 Ohio Fair Trade Act consisted of six relatively short sections, the pertinent sections of which allowed the producers or owners of trademarked commodities to enter into contracts establishing a minimum resale price for the items.<sup>23</sup> Anyone who knowingly and willfully advertised, offered for sale, or sold any commodity for less than the stipulated price was declared to be engaging in unfair competition and trade practices and was liable to any person damaged thereby. Section 1333.07 of the 1936 Ohio Fair Trade Act, the so-called nonsigner clause, imposed the same liability upon a retailer even if he

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<sup>22</sup> In the legislative hearings, Mr. Schneider (then a state representative) questioned Mr. Gorrell's attempt to include a purpose clause, Ohio Rev. Code Ann. § 1333.27 (Page 1962), in which he attempted to spell out findings on behalf of the legislature. Mr. Gorrell admitted by incorporating the purpose clause he was attempting to guarantee that the court would find the provisions of the law constitutional. "Hearings on H.B. 318 Before the Ohio House Judiciary Comm.," 103d Gen. Assembly 9, 36-37, 39-42 (1959). Mr. Gorrell indicated that if some members of the House Judiciary Committee felt strongly about the purpose clause he would not insert it. The transcript indicates that the amendment was withdrawn from House Bill 318. Apparently, the amendment was inserted on the floor of the Senate or in some other manner since it was enacted as Ohio Rev. Code § 1333.27. As the committee reports reveal, this recital of the purpose of the law was not legislative findings of fact. The draftsman in a subsequent law review article referred to *his* efforts with respect to the inclusion of the purpose clause as follows:

To assure that no mistake or misinterpretation would be made, *the legislature took pains* to include in the new act a purpose clause, section 1333.27, of the Ohio Revised Code, in which *it* spelled out *its* findings and those specific considerations which prompted the enactment of the new Fair Trade Act . . . (Emphasis added.)

Gorrell & Brown, *supra* note 7 at 92. However, as Mr. Schneider pointed out, as a member of the Judiciary Committee, it was Mr. Gorrell's purpose clause and not the legislature's. It was "really merely pompous statements that . . . don't mean anything," and "these are not findings." Hearings on H.B. 318, *supra* at 39-40 (1959). The hearings further disclose that Mr. Schneider felt that the Act would not meet the constitutional objections of the most "liberal judge" on the Supreme Court, Judge Zimmerman, who if at all possible would hold something constitutional. Hearings on H.B. 318, at 106, *supra* 108-09 (1959).

<sup>23</sup> Ohio Rev. Code Ann. §§ 1333.05-1333.10 (Page 1962), formerly Ohio Gen. Code §§ 6402-3 to 6402-9 (1936).

was not a party to a stipulated-price contract. The court in *Bargain Fair* interpreted that section of the Act as prohibiting those with notice, who were not parties to the stipulated-price contract, from selling trademarked items at a price lower than that stipulated by the manufacturer. Only those with actual or constructive notice would be so prohibited since it had to be done knowingly and willfully. Thus under the 1936 Fair Trade Act notice was necessary to bind a nonsigner.

Under the new Fair Trade Act, a proprietor (producer or distributor) of a commodity identified by a trademark or trade name, which is in competition with commodities of the same general class produced by others, may unilaterally set minimum resale prices for these commodities.<sup>24</sup> Under the old act, the legislature delegated the right to set the minimum price to only the producer of the trademarked item, while now there would appear to be a double delegation of price fixing power: the producer and any other person whom the producer may select.<sup>25</sup> Thus under the new act a person with absolutely no interest in the manufacture, sale or distribution of the commodity, or in the trademark or trade name, is authorized to fix the price to retailers with whom no dealings are required.

The proprietor need merely decide unilaterally upon a price and give the retailer notice of his decision.<sup>26</sup> The same type of notice was a prerequisite under the old statute;<sup>27</sup> after notice, the retailer became bound to adhere to the prescribed minimum resale prices. Under the

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<sup>24</sup> Ohio Rev. Code Ann. § 1333.29 (Page 1962).

<sup>25</sup> Ohio Rev. Code Ann. § 1333.28(K) (Page 1962). A "proprietor" is defined to include a person who "identifies a commodity" produced by him "by the use of his own trade-mark or trade name." Ohio Rev. Code Ann. § 1333.29(C) (Page 1962) then has the following third party beneficiary provision:

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

<sup>26</sup> Ohio Rev. Code Ann. § 1333.29 (Page 1962). This section contains three subparagraphs. The first subparagraph (A) sets forth two alternative methods for the proprietor to establish and control resale prices by notice to distributors or by contract. Notice is defined by Ohio Rev. Code Ann. § 1333.28(J) (Page 1962) as "actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence." Ohio Rev. Code Ann. § 1333.30 (Page 1962) provides five methods for conveying to a distributor notice of the establishment of minimum resale prices, which, following the acceptance of a commodity, will create a contract pursuant to Ohio Rev. Code Ann. § 1333.28(I) (Page 1962).

<sup>27</sup> Ohio Rev. Code Ann. § 1333.07 (Page 1962). The defendant in *Bargain Fair*, 167 Ohio St. 182, 147 N.E.2d 481 (1958), acquired the Prestone in question with full knowledge of such minimum resale prices, and the decision of the Supreme Court of Ohio was not based on any lack of knowledge at the time of acquisition.

new act, as under the old, the retailer's consent to this price is neither sought nor required.<sup>28</sup> The retailer is bound by a contract statutorily created even though he may seriously question the validity of the producer's trademark or trade name or the reality of the prices. The new statute, in substitution for the old nonsigner clause, simply declares that the retailer has made a contract to abide by the producer's price.<sup>29</sup> It creates a contract imposed by unilateral notice, irrespective of whether such notice be employed to set resale prices or to make such prices binding upon nonsigners, and regardless of whether the commodity is acquired directly from the proprietor or otherwise. Actually it amounts to notice of intent and certainly is the same contract that was imposed upon nonsigners under the 1936 Act. The legislative definition that creates the contract also furnishes the consideration by legislative decree,<sup>30</sup> and no course of dealing, past or future, is required between the proprietor and retailer. No distinction is made concerning whether the commodities are acquired in Ohio or in a state having no fair trade law.<sup>31</sup> The retailer, when sued, has no standing to attack the terms of the statutorily imposed contract to which he is not a party, but by which he is forcibly bound. Ohio Revised Code section 1333.33 sets forth several meaningless defenses to an alleged violation of section 1333.32, such as removal of "all traces" of the identifying trademark or trade name, closing out of the distributor's stock of the commodity, advertisement and sale of second hand or damaged merchandise, and sales by an officer acting under an order of court.

Ohio Revised Code section 1333.31 of the new Act is created to justify the manufacturers' continued unilateral control over retail price. It vests in the proprietor of a trademark or trade name a proprietary interest in commodities so identified after they have been sold

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<sup>28</sup> Ohio Rev. Code Ann. §§ 1333.29, 1333.32 (Page 1962).

<sup>29</sup> Ohio Rev. Code Ann. § 1333.28(I) (Page 1962). This section defines contract to mean "any agreement, written or verbal, or arising from the acts of the parties." This section also refers to consideration. The contract and the consideration consist of the "establishment by a proprietor of a minimum resale price for any commodity" and "the proprietor's interest in the trade-mark or trade name in selling the commodity." On the question of consideration compare Judge Taft's concurring opinion in *Bargain Fair*, 167 Ohio St. 182, 187, 147 N.E.2d 481, 484 (1958), with the statement of the author of the new Fair Trade Act that the consideration was the same under the 1959 Act as under the 1936 Act. Hearings on H.B. 318 Before the Ohio House Judiciary Comm., 103d Gen. Assembly, Reg. Sess., 131-32 (1959).

<sup>30</sup> Ohio Rev. Code Ann. § 1333.29(I) (Page 1962).

<sup>31</sup> *But cf.* *General Electric Co. v. Masters Mail Order Co. of Washington, D.C., Inc.*, 244 F.2d 681 (2d Cir.), *cert. denied*, 355 U.S. 824 (1957), which recognized that the intention of the parties governed the time and place of the passage of title between them.



to others in the market place. This is tantamount to a legislative declaration that the trademark owner retains forever an untransferable and extraterritorial property interest in his products so long as they bear his mark. The Act casts aside the common law rule that when an individual bought and paid for property he was to be its owner for all purposes. The Ohio Legislature invests trademark owners with continuing and inalienable property interests superior to all subsequent owners thereof.<sup>32</sup>

Resale price maintenance at the wholesale level is also authorized although the proprietor sells to retailers in competition with his wholesale distributors.<sup>33</sup> Thus the new act goes beyond the old in that it authorizes horizontal price fixing not previously permitted.

Subparagraph (B) of section 1333.23 of the new Act authorizes the resale price notice or the resale price contract to contain various provisions limiting the buyer's channels of distribution and imposing requirements upon both buyer and seller with respect to the resale of the commodity and the imposition of marketing restrictions upon subvendees. Under this provision, delegation of authority exercised by a manufacturer or anyone he designates can be foisted upon all channels and levels of distribution ad infinitum. Ohio Revised Code section 1333.30 provides that a person with *actual* notice of any applicable minimum resale price is also charged with notice that such a price is subject to change.

By Ohio Revised Code section 1333.32(A), sale below the stipulated resale price is made "unlawful and an act of unfair competition," and actions to enforce the statute are authorized. Ohio Revised Code section 1333.32(B) affords relief to the enforcer only in the form of damages sustained, injunctive relief (regardless of whether there is an adequate remedy at law) and costs of suit, including attorney fees. The enforcer may not boycott, blacklist, threaten or coerce, though such procedure is common. The alleged violator is afforded no standing even to the recovery of attorney fees if the action is not sustained.

The legal battles in Ohio have revolved basically around whether the new act has the same operation and effect as the old statute which was previously declared unconstitutional in *Bargain Fair*.

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<sup>32</sup> Such property interest would appear to be subject to personal property tax. *Bulova Watch Co. v. Ontario Store of Columbus, Inc.*, 18 Ohio Op. 2d 221, 229, 176 N.E.2d 527, 536 (Ohio C.P. 1961).

<sup>33</sup> Ohio Rev. Code Ann. § 1333.29(A) (Page 1962). This section appears to contravene the United States Supreme Court's ruling in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), and conflict with § 5(a)(5) of the McGuire Act, 66 Stat. 632, 15 U.S.C. § 45 (1964). Ohio Rev. Code Ann. § 1333.34 (Page 1962) prohibits horizontal price fixing "except as otherwise specifically provided in § 1333.29."

## III. HISTORY OF FAIR TRADE LITIGATION IN OHIO

The ink was hardly dry on the new Ohio Fair Trade Act when it faced its first constitutional test;<sup>34</sup> the first two decisions held it unconstitutional.<sup>35</sup> In a two to one decision, the Court of Appeals of Cuyahoga County reversed the *Hudson Distributors* case and held the new act constitutional.<sup>36</sup> Meanwhile, three cases filed by manufacturers against a retailer were consolidated for argument on the constitutional question before the Common Pleas Court of Franklin County. In the most exhaustive opinion to date, Judge Leach, speaking for that court, held the new Fair Trade Act unconstitutional in *Bulova Watch Co. v. Ontario Store of Columbus, Inc.* This decision was unanimously affirmed by the Court of Appeals of Franklin County.<sup>37</sup> At this point in the litigation over the Ohio Fair Trade Act, a unique situation developed. The retailer, Hudson Distributors, appealed its adverse decision<sup>38</sup> from the Cuyahoga County Court of Appeals to the Supreme

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<sup>34</sup> In Cuyahoga County, Ohio, a nonsigner drug chain, Hudson Distribs., Inc. commenced, before the effective date of the new Fair Trade Act, a declaratory judgment action against Upjohn Co. and Eli Lilly & Co. In Hamilton County, a fair trade manufacturer, Helena Rubenstein, Inc., sought an injunction against a Cincinnati, Ohio, drug retailer who raised the question of the constitutionality of the fair trade laws of Ohio. Both courts in written opinions held the 1959 Ohio Fair Trade Act unconstitutional. *Helena Rubenstein, Inc. v. Cincinnati Vitamin & Cosmetic Distrib. Co.*, 12 Ohio Op. 2d 199, 167 N.E.2d 687 (Ohio C.P. 1960); *Hudson Distribs., Inc. v. The Upjohn Co.*, 1960 Trade Cas. ¶ 69,778 (Ohio C.P. 1960).

<sup>35</sup> *Hudson Distribs., Inc. v. The Upjohn Co.*, 1960 Trade Cas. ¶ 69,778 (Ohio C.P. 1960); *Helena Rubenstein, Inc. v. Cincinnati Vitamin & Cosmetic Distrib. Co.*, 12 Ohio Op. 2d 199, 167 N.E.2d 687 (Ohio C.P. 1960).

<sup>36</sup> *Hudson Distribs., Inc. v. Upjohn Co.*, 117 Ohio App. 207, 176 N.E.2d 236 (1961), with Judge Hurd writing a strong dissent.

<sup>37</sup> 18 Ohio Op. 2d 221, 176 N.E.2d 527 (Ohio C.P. 1961), *aff'd*, *Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distrib., Inc.*, 1962 Trade Cas. ¶ 70,360 (Ohio Ct. App. 1962) (consolidated with *Corning Glass Works, Inc. v. Ontario Store of Columbus, Inc.* and seven other cases).

<sup>38</sup> While the opponents of Fair Trade appealed every adverse decision, the supporting manufacturers such as Bulova Watch, Rubbermaid, Parke Davis & Co. and Helena Rubenstein did not appeal decisions of lower Ohio common pleas courts declaring the act unconstitutional. *Corning Glass Works, Mead Johnson & Co., Shulton, Johnson & Johnson, Revlon, Coty, Lanvin-Parfums, and Faberge*, with adverse decisions at the appellate level, did not appeal their cases to the Supreme Court of Ohio. Other fair trade manufacturers when faced with the first adverse decision dismissed or failed to prosecute pending actions. The action by these manufacturers raises interesting and unanswered questions where they continued to attempt to impose their minimum fair trade prices upon unwilling retailers in counties where they received adverse decisions on constitutionality of the Ohio Fair Trade Act and did not exhaust their appeals thereby tacitly consenting to such rulings. At least one civil treble damage action was initiated as a result of activities conducted by one manufacturer against a retailer subsequent to

Court of Ohio, despite the monumental obstacle provided by Ohio's Constitution requiring six votes to declare a statute unconstitutional which has been declared constitutional by a court of appeals.<sup>39</sup> Meanwhile, the manufacturer, Corning Glass, did not appeal its adverse decision from the Franklin County Court of Appeals which held the 1959 Ohio Fair Trade Act unconstitutional. The retailer (defendant-appellee), Ontario Store of Columbus, filed a motion with the court of appeals to certify the case to the Supreme Court of Ohio as being in conflict with the appellate decision in the *Hudson Distributors* case. The application to certify was denied "for the reason that the Cuyahoga County Appellate Court's decision is not final and is now pending before the Supreme Court of Ohio."<sup>40</sup> This questionable decision not

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final rulings in Franklin County, Ohio, that the new Ohio Fair Trade Act was unconstitutional. The Ontario Store of Columbus, Ohio, Inc. v. Corning Glass Works, Civil No. C62-744 (N.D. Ohio, dismissed with prejudice July 22, 1965). This case was settled and dismissed before trial on its merits. See Diamond, "Antitrust Problems of Fair Trading," 1 Antitrust Bull. 97, 102 (1955).

<sup>39</sup> Art. IV, § 2 of the Ohio Constitutional Convention of 1912. The Ohio Supreme Court consistently condemned this provision beginning with the case of Morton v. State, 105 Ohio St. 366, 138 N.E. 45 (1922). See *State ex rel. Jones v. Zangerle*, 117 Ohio St. 507, 511, 159 N.E. 564, 565 (1927). *Board of Educ. v. City of Columbus*, 118 Ohio St. 295, 299, 160 N.E. 902, 903 (1928); *Johnson v. O'Hara*, 156 Ohio St. 117, 100 N.E.2d 223 (1951); *Mele v. Mason*, 156 Ohio St. 118, 100 N.E.2d 224 (1951); *State ex rel. Wesselman v. Board of Elections*, 170 Ohio St. 30, 162 N.E.2d 118 (1959); *State ex rel. Graf v. Brown*, 170 Ohio St. 37, 162 N.E.2d 123 (1959). See also Pogue, "Hudson Fair Trade Case—The Need for Constitutional Amendment," 12 Clev.-Mar. L. Rev. 513 (1963). Art. IV, § 2 of the Ohio Constitution was held constitutional in *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1929). Cf. *Gibson v. Sabina Lodge*, 10 Ohio Misc. 299, 302, 224 N.E.2d 917, 919 (C.P. 1967).

<sup>40</sup> Art. IV, § 6 of the Ohio Constitution provides that:

whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

Under this constitutional provision whoever brings the conflict to the court's attention is unimportant, nor does this provision cease to be effective if one of the conflicting decisions is pending in the Supreme Court of Ohio. In *Corning Glass Works Inc. v. Ontario Store of Columbus, Inc.*, No. 6769 (Franklin County Ct. App., July 31, 1962, *appeal dismissed*, 174 Ohio St. 486, 190 N.E.2d 34 (1963)), it was the winning party (defendant-appellee, Ontario Store of Columbus, Inc.) who urged that its favorable decision be certified to the supreme court for decision. When a constitutional question is involved a losing party in Ohio will not want to appeal because he has a better chance of winning in one of the nine other appellate districts by taking no action and then having the overwhelming advantage afforded by Art. IV, § 2 of the Ohio Constitution. The winning party in *Corning Glass* filed a motion to certify the record with the Supreme Court of Ohio. This motion was pending when argument was had in the *Hudson Distribs.* case and could have enabled the Supreme Court of Ohio to make a majority decision on unconstitutionality uniformly ap-

to certify *Corning Glassware* on grounds of conflict was fateful. When the court finally decided the *Hudson Distributors* case a majority of four judges were in favor of holding the Act unconstitutional, and a minority of three judges were of the opinion that it was constitutional. Article IV, section 2 of the Ohio Constitution prevented the majority holding of unconstitutionality from being effective throughout the entire state, with the result that the law was constitutional only in Cuyahoga County, Ohio.<sup>41</sup> The primary issue before the supreme court in *Hudson Distributors* was whether the 1959 Fair Trade Act still violated the Ohio Constitution in any of the three respects that the 1936 Fair Trade Act violated the Constitution in the *Bargain Fair* case. The majority decided this issue in the *Hudson Distributors* case as follows:

[T]he reasons for holding a part of the old act unconstitutional, as expressed in the case of . . . Bargain Fair . . . are still valid in relation to the new act.<sup>42</sup>

Judge Zimmerman, speaking for the majority, found that the new act, as did the old, attempted to arbitrarily bind "non-signers of price-fixing contracts by artificial and unauthorized legislative fiat" where there is absolutely no relationship between the retailer and the manufacturer. The minority took the position that the 1959 Act cured the constitutional defects by introducing a new concept of notice which it found to amount to nothing more than simple contract law. The minority concluded that the new Act: (1) represented a valid exercise of the police power in protecting the small-business man and the owner of a trademark; (2) cured the delegation of legislative power by not amounting to price-fixing; and (3) eliminated the prohibition against one disposing of his own property on his own terms.<sup>43</sup>

Following the *Hudson Distributors* decision, there was no enforcement of fair trade, except minimal attempts in Cuyahoga County.<sup>44</sup>

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plicable throughout Ohio by applying such a decision to the *Corning Glass* case which was not hamstrung by Art. IV, § 2. Unfortunately the court rejected this opportunity to make its majority decision uniformly applicable and in so doing added more confusion by dismissing the appeal for "reason that no debatable constitutional question is involved." *Corning Glass Works, Inc. v. Ontario Store of Columbus, Inc.*, 174 Ohio St. 486, 190 N.E.2d 34 (1963).

<sup>41</sup> *Board of Educ. v. City of Columbus*, 118 Ohio St. 295, 299, 160 N.E. 902, 903 (1928).

<sup>42</sup> *Hudson Distribs., Inc., v. Upjohn Co.*, 174 Ohio St. 487, 498, 190 N.E.2d 460, 466 (1963) (dissenting opinion).

<sup>43</sup> For observations as to the minority decision see, Note 24 Ohio St. L.J. 665, 668, 670-671 (1963). *Contra*, *Gorrell & Brown*, *supra* note 7, at 99, where the minority decision is characterized as "well-reasoned" and the majority decision as containing "no statement of the legal rationale or reasoning which led to their conclusion."

<sup>44</sup> Following the decision in *Hudson Distribs.*, no temporary or permanent injunctions in a contested fair trade case have been granted.

However, in 1965 Olin Mathieson Chemical Company filed two actions under the 1959 Fair Trade Act in Hamilton and Lucas Counties.<sup>45</sup> Demurrers were filed in both cases raising constitutional questions; in each case the lower court held the Act to be unconstitutional.<sup>46</sup> On appeal the decisions were affirmed by the respective courts of appeals<sup>47</sup> and both cases were then properly certified to the Supreme Court of Ohio as being in conflict with the *Hudson Distributors* case. The case of *Olin Mathieson Chemical Corp. v. Ontario Store of Price Hill, Ohio, Inc.*<sup>48</sup> was briefed and argued before the supreme court in October, 1966.<sup>49</sup> Unfortunately, not all of the seven elected judges participated. Johnson,<sup>50</sup> a court of appeals judge, sat by designation in the place of Judge Schneider, Jr., who disqualified himself from this case.<sup>51</sup> On February 1, 1967, the Ohio Supreme Court in a four to three decision declared the 1959 Ohio Fair Trade Act to be constitutional.<sup>52</sup> Three of the four majority justices in the *Hudson Distributors* case dissented in this case because they believed that the Act was unconstitutional.<sup>53</sup> Prior to this latter decision some twenty judges in Ohio had ruled that the 1959 Ohio Fair Trade Act was unconstitutional with nine of these

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<sup>45</sup> *Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Ohio, Inc.*, No. A207,405 (Hamilton County C.P., filed Jan. 8, 1965); *Olin Mathieson Chem. Corp. v. Ontario Store of Toledo, Ohio, Inc.*, No. 197,890 (Lucas County C.P., filed Jan. 13, 1965).

<sup>46</sup> *Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Ohio, Inc.*, 1965 Trade Cas. ¶ 71,377 (Ohio C.P. 1965), *aff'd* 1966 Trade Cas. ¶ 71,693 (Ohio Ct. App. 1966) (unanimously), the late Judge Bell (former member of Ohio Supreme Court) held the act unconstitutional in denying a motion for temporary injunction, while Judge Schneider also declared it unconstitutional in ruling on the defendant's demurrer.

<sup>47</sup> *Id.*

<sup>48</sup> 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967).

<sup>49</sup> By agreement of counsel the case of *Olin Mathieson Chem. Corp. v. Ontario Store of Toledo, Ohio, Inc.*, No. 40,298 (Sup. Ct. of Ohio, decided June 9, 1966) was to be held in abeyance for subsequent briefing and oral argument after a decision was rendered in the *Ontario of Price Hill* case. There was no agreement to be bound by decision in the latter.

<sup>50</sup> Judge Johnson, a judge from the Seventh Ohio Appellate District was designated by Chief Justice Taft to sit in the place of Judge Schneider. Art. IV, § 2 of the Ohio Constitution does not make such designation mandatory yet the Chief Justice appointed an appellate judge to sit on an issue where previously three (First, Sixth and Tenth) out of four appellate districts consisting of nine appellate judges had held the 1959 Fair Trade Act unconstitutional; one appellate district (Eighth) held the act constitutional.

<sup>51</sup> Judge Schneider of the Ohio Supreme Court disqualified himself in the *Ontario of Price Hill* case without stating the reason for his disqualification or giving notice of his decision to counsel for the defendant-appellee.

<sup>52</sup> *Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Ohio, Inc.*, 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967).

<sup>53</sup> Former Judge Gibson who voted with the majority in the *Hudson Distribs.* case was no longer a member of the court, nor was former Judge Griffith who wrote the minority opinion in the *Hudson Distribs.* case.

judges so ruling after the divided decision of the court in the *Hudson Distributors* case.<sup>54</sup> A motion for rehearing in *Ontario of Price Hill* was filed but denied.<sup>55</sup> Various other motions were filed with the Supreme Court of Ohio and the Court of Appeals of the First Appellate District to suspend execution of the mandate in accordance with Ohio Revised Code section 2505.39. All of the motions were denied without hearing, and the case has now been remanded to the Common Pleas Court of Hamilton County for trial on the merits. The action of the supreme court in its handling of the motion for rehearing and subsequent motions raises a serious cloud of doubt over its decision.

<sup>54</sup> The following is the alignment of judges in Ohio who ruled on the constitutionality of the 1959 Fair Trade Act prior to the decision in *Ontario of Price Hill*, 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967).

Courts	Judges Holding Act Unconstitutional	Judges Holding Act Constitutional
Ohio Supreme Court	4	3
Court of Appeals	9	3
Common Pleas	7	1*
	20	7

\* Common pleas judges in Cuyahoga County ruling on the constitutionality of the Act were not free to rule otherwise by reason of the application of art. IV, § 2 of the Ohio Constitution in the *Hudson Distribs.* case. See *Rubbermaid, Inc. v. Claber Distrib. Co.*, 5 Ohio Misc. 125, 211 N.E.2d 98 (C.P. 1964).

<sup>55</sup> Upon inquiry from counsel the court refused to disclose the names of the judges and how they voted on the motion for rehearing. If either former Judge Johnson or Judge Schneider participated in the rehearing serious questions affecting the rights of the litigants are raised. Since Judge Schneider disqualified himself from participating in the *Ontario of Price Hill* case can he subsequently participate in ruling on a motion for rehearing in the same case? It appears that he did so participate since Judge Neil Johnson could not legally participate in the motion for rehearing at a time he no longer held judicial office. The supreme court refused to disclose the name of the judges who participated in the motion for rehearing or how they voted on this motion or on the other motions filed by the defendant-appellee. The procedure in rehearings before the various supreme courts differ and can substantially affect the rights of litigants. See *Louisell & Degnan*, "Rehearing in American Appellate Courts," 44 Calif. L. Rev. 627 (1956). The question as to whether defendant-appellee has been deprived of equal protection or due process of law in violation of the U.S. Const. Amend. XIV, § 1 and deprived of its civil rights under the Civil Rights Act, 28 U.S.C. § 1343 (1964), is being preserved in defendant's answer filed in said case. *Ontario of Toledo* was certified to the Ohio Supreme Court under authority of Art. IV, § 6 of the Ohio Constitution. Such certification imposes an absolute duty on the court to review the lower court decision. See *McCarty v. Lingham*, 111 Ohio St. 551, 146 N.E. 64 (1924); *Flury v. Central Pub. House of Reformed Church*, 118 Ohio St. 154, 160 N.E. 679 (1928). Ohio Rev. Code Ann. § 2503.39 (Page 1962) requires the supreme court to hear orally or in writing arguments if requested and such a request was made by the defendant-appellee in *Ontario of Toledo* but ignored by the court.

Additional problems were raised by the Ohio Supreme Court's decision in *Olin Mathieson Chem. Corp. v. Ontario Store of Toledo, Ohio, Inc.* when it reversed the lower court without the benefit of briefs and oral argument as requested by counsel. Thus the decision in the *Ontario of Toledo* case was not made, as its mandate would indicate, in the manner prescribed by law.

Clearly the Ohio and federal constitutional questions surrounding the 1959 Ohio Fair Trade Act have not been resolved.<sup>56</sup> The next round will come in the trial on the merits of the various pending cases around the state.<sup>57</sup>

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<sup>56</sup> Aside from the limited constitutional questions raised by demurrer in *Ontario of Price Hill* and *Ontario of Toledo*, there are also constitutional questions which can only be raised upon a trial on the merits. The United States Supreme Court granted review of the appeals in *Hudson Distrib., Inc. v. Upjohn Co.*, 375 U.S. 938 (1963) and *Hudson Distrib., Inc. v. Eli Lilly & Co.*, 375 U.S. 939 (1963). The lower courts in these cases did not reach the federal questions and the Ohio constitutional questions were not considered by the United States Supreme Court, which noted that there were separate and unresolved issues pending in the Ohio courts. The Court referred to the implied contract theory of the new Ohio Fair Trade Act but noted it was not deciding whether such an implied contract could be applied "to prices set by notice alone and without any conventional or express contracts," holding merely that "on the facts of the present case we need not and do not consider whether a state statute so applied would involve 'contracts or agreements' in the sense in which those terms are used in the McGuire Act." *Hudson Distrib., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 393 (1964). See also *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 538, 539, 95 A.2d 391, 397 (1953) where there was a direct contractual relationship with the retailer and a valid offer from the wholesaler. The court held that the acceptance by the retailer of the trademark goods did not amount to acceptance of the offer to maintain resale prices since a contract does not come into existence unless there is a manifestation of mutual assent by the parties to the same terms. *Accord*, *Bulova Watch Co. v. Ontario Store of Columbus, Ohio, Inc.*, 18 Ohio Op. 2d 221, 225, 176 N.E.2d 527, 533 (C.P. 1961). Also left undecided by the United States Supreme Court in *Hudson Distrib., Inc. v. Eli Lilly & Co.*, *supra*, was the question of whether the Ohio statute may validly be used by other than the owner of trademark or trade name or to permit horizontal price-fixing agreements under Ohio Rev. Code Ann. § 1333.29(A) (Page 1962). Thus all "special questions which might be raised by the facts of the case or by particular features of the Ohio Act" are left for the initial decision by the trial court. *Hudson Distrib. Inc. v. Eli Lilly & Co.*, *supra* at 400 n.6. See also *Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Ohio, Inc.*, 9 Ohio St. 2d 67, 68, 223 N.E.2d 592, 593 (1967), where the majority opinion broadly states that the United States Supreme Court in *Hudson Distrib.*, "reaffirms propositions of law contained in *Old Dearborn* . . . and disposes of the argument that the act violates the federal constitution." Actually the Supreme Court did not even refer to *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936), and certainly did not dispose of any federal constitutional questions. It simply resolved one federal issue: the Ohio Act "comes within the provisions of the McGuire Act exempting certain resale price systems from the prohibitions of the Sherman Act." *Hudson Distrib.*, *supra* at 386-87. For elaboration on this point see Weston, "Resale Price Maintenance," 33 A.B.A. Antitrust L.J. 76 (1967).

<sup>57</sup> See text *infra* at notes 103-8.

## IV. ANALYSIS OF OHIO DECISIONS

Despite the numerous rulings on the constitutionality of the Ohio Fair Trade Act, there are only six decisions in which opinions, either majority or dissenting, have been written.<sup>58</sup> The decisions upholding the constitutionality of the 1959 Ohio Fair Trade Act have primarily relied upon two cases.<sup>59</sup> But *Bargain Fair* is not rejected, reversed, or uniformly distinguished. The minority in *Hudson Distributors* cite *Old Dearborn* as precedent for the proposition that if the retailer acquires the commodities with full knowledge of the then existing price restrictions the delegation of the legislative power to private individuals does not violate the Ohio Constitution. No mention was made of the factual distinctions between the Ohio cases and *Old Dearborn*.<sup>60</sup> Furthermore, no reference was made in any of the opinions upholding the constitutionality of the Ohio Supreme Court's rejection in *Bargain Fair* of the *Old Dearborn* rationale as applied to Ohio constitutional questions.<sup>61</sup> The Pennsylvania Supreme Court in *Burche Co. v. General Electric Co.*<sup>62</sup> originally upheld the constitutionality of the Pennsylvania Fair Trade Act by also relying largely on the *Old Dearborn* case.

<sup>58</sup> *Helena Rubenstein, Inc. v. Cincinnati Vitamin & Cosmetic Distrib. Co.*, 84 Ohio L. Abs. 143, 167 N.E.2d 687 (C.P. 1960); *Hudson Distrib., Inc. v. Upjohn Co.*, 1960 Trade Cas. ¶ 69,778 (Ohio C.P. 1960), *rev'd*, 117 Ohio App. 207, 176 N.E.2d 236 (1961); *Bulova Watch Co. v. Ontario Store of Columbus, Inc.*, 18 Ohio Op. 2d 221, 176 N.E.2d 527 (C.P. 1961); *Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Ohio, Inc.*, 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967).

<sup>59</sup> *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936); *Standard Drug Co. v. General Electric Co.*, 202 Va. 367, 117 S.E.2d 289 (1960), *appeal dismissed*, 368 U.S. 4 (1961).

<sup>60</sup> The record in *Old Dearborn* discloses that it involved a fair trade contract which was signed by the secretary-treasurer of the price-cutting defendant-wholesaler. The latter purchased the products directly from the producer or trademark owner. *Seagram-Distillers Corp. v. Old Dearborn Distrib. Co.*, 363 Ill. 610, 612, 2 N.E.2d 940, 941 (1936). The Supreme Court, while stating that it considered the defendant a nonsigner for the purposes of the case, nevertheless stated that defendant's

voluntary acquisition of the property with knowledge [of the fair trade contract] carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under . . . the law by which such acquisition was conditioned.

299 U.S. 183, 193-194 (1936).

The Supreme Court of the United States in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 390 (1951) rejected the advance consent theory of *Old Dearborn* and categorized nonsigners as "recalcitrants . . . dragged by the heels and compelled to submit to price fixing."

<sup>61</sup> *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 184, 147 N.E.2d 481, 482-83 (1958); *see* *Bulova Watch Co. v. Ontario Store of Columbus, Inc.*, 18 Ohio Op. 2d 221, 224, 176 N.E.2d 527, 531 (C.P. 1961).

<sup>62</sup> 382 Pa. 370, 115 A.2d 361 (1955).



In 1964, that court, after some proding from lower courts, concluded that its previous decision was in error in holding that the statute was not an unlawful delegation of legislative power.<sup>63</sup> By reason of the similarity between the Ohio and Virginia Fair Trade Acts<sup>64</sup> the courts upholding the constitutionality of the 1959 Ohio Fair Trade Act relied heavily upon a decision of the Virginia Supreme Court of Appeals.<sup>65</sup> The Virginia case, in turn, relied heavily upon *Old Dearborn*.<sup>66</sup> The *Standard Drug* case also failed to meet the question of whether the Virginia Fair Trade Law was a valid exercise of police power.<sup>67</sup> Since the Ohio decisions upholding the constitutionality of the Ohio Act relied greatly on the Virginia decision, it is probable that the courts of Ohio will refuse to apply the Ohio Fair Trade Act, as did the

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<sup>63</sup> *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 98, 99, 199 A.2d 266, 267, 268 (1964):

Old Dearborn, as a careful study will bear out, is not precedent for the proposition that the nonsigner clause in a state price fixing statute, delegating legislative power to private individuals, does not violate the state constitution. . . .

The vesting of a discretionary regulatory power over prices, rates or wages, in private persons violates the essential concept of a democratic society and is constitutionally invalid.

See *Eli Lilly & Co. v. Schwegmann Bros.*, 109 F. Supp. 269, 271-72 (E.D. La.), *aff'd*, 205 F.2d 788 (5th Cir.), *cert. denied*, 346 U.S. 856 (1953); Conant, "Resale Price Maintenance: Constitutionality of Nonsigner Clauses," 109 U. Pa. L. Rev. 539 (1961); Fulda, "Resale Price Maintenance," 21 U. Chi. L. Rev. 175, 208 (1954); Rahl, "The Case Against Fair Trade," 44 Ill. B.J. 754 (1956). *But see*, *Olin Mathieson Chem. Corp. v. Cohen*, 234 F. Supp. 80 (E.D. Pa. 1964), upholding the Pennsylvania Fair Trade Act insofar as it applied to contract signers, noting that the Pennsylvania Supreme Court decision in *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964), need not be applied to contract signers as well.

<sup>64</sup> Va. Code Ann. § 59-8.1 to 8.9 (Supp. 1966).

<sup>65</sup> *Standard Drug Co. v. General Electric Co.*, 202 Va. 367, 117 S.E.2d 289 (1960).

<sup>66</sup> The retailer dealt with and purchased the commodity directly from the manufacturer. *Standard Drug Co. v. General Electric Co.*, 202 Va. 367, 374, 117 S.E.2d 289, 295 (1960). The facts again were similar to the direct dealing in *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936). Further, the Virginia court concluded, because of direct dealings between the parties, no compulsion was practiced and this point was so argued by counsel for the manufacturer. See Brief of Appellee at 34, *Standard Drug Co. v. General Electric Co.*, 202 Va. 367, 117 S.E.2d 289 (1960).

<sup>67</sup> In failing to meet the question as to whether the act was a valid exercise of state police power, the court avoided the obvious conflict of the act with the case of *Young v. Commonwealth*, 101 Va. 853, 45 S.E. 327 (1903). *Accord*, Note, 47 Va. L. Rev. 626 (1961); Note, 45 Va. L. Rev. 153, 168-71 (1959). *Compare*, *Bulova Watch Co. v. Zale Jewelry Co.*, 371 P.2d 409 (Wyo. 1962), where the Wyoming Supreme Court unqualifiedly rejected the theory of the Virginia decision in *Standard Drug Co. v. General Electric Co.*, 202 Va. 367, 117 S.E.2d 289 (1960), and endorsed the reasoning of the Ohio Supreme Court in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958).

Virginia courts, when the sale is not direct between the manufacturer and retailer.<sup>68</sup>

Aside from the reliance upon *Old Dearborn* and *Standard Drug*, the decisions upholding the constitutionality of the 1959 Fair Trade Act substituted "terminology for reason."<sup>69</sup> In *Bargain Fair*, the Ohio Supreme Court unmistakably classified fair trade legislation as "arbitrary price-fixing," and concluded that the nonsigner provision of the 1936 Act "delegated legislative power and discretion to private persons."<sup>70</sup> The minority in the *Hudson Distributors* case attempts to avoid this issue by stating that fair trade "is not price fixing as commonly understood in the law."<sup>71</sup> This minority also concluded that the Ohio Fair Trade Act does not amount to legislative price fixing, but failed to answer whether the result of the Act is price fixing by private individuals. The Ohio legislature has authorized and empowered any private person to fix prices at the retail or wholesale levels,<sup>72</sup> and the prices so fixed become the law of the State. There is no requirement or standard established to fix the prices. This leaves to persons wholly outside the legislature the power to determine whether there

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<sup>68</sup> *Standard Drug v. General Electric Co.*, 202 Va. 367, 117 S.E.2d (1960) has been limited to *direct* sale of merchandise from the fair trader to the distributor or retailer. *Bulova Watch Co. v. Zale-Norfolk, Inc.*, No. 2570 (Ct. Law & Ch. Norfolk 1961), *appeal and writ of error refused*, 203 Va. lxxi (1962). The limited application of the Virginia statute was pointed out to the Ohio Supreme Court in *Ontario of Price Hill*. See Brief of Appellee at 34 and Appendix C, *Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Ohio, Inc.*, 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967). This issue was not considered in the Ohio Supreme Court opinion undoubtedly because the record on demurrer did not disclose whether the parties had any direct dealings. This issue is being raised in the trial on the merits. *Accord*, *Bulova Watch Co. v. Ontario Store of Columbus, Ohio, Inc.*, 18 Ohio Op. 2d 221, 176 N.E.2d 527 (C.P. 1961), which is the only Ohio case that considered the fact that the retailer did not acquire the commodities in question from the manufacturer, thus establishing that there was no common law contract or possibility of mutual assent. See *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 95 A.2d 391 (1953).

<sup>69</sup> Note, 77 Harv. L. Rev. 763, 765 (1964). In the determination of that which is considered due process, proper exercise of police power and permissible delegation of legislative authority, "personal preference, not reason, seems however to be controlling," and due process under the prevailing Ohio doctrine "is what the judges say it is; and it differs from judge to judge, from court to court." See Justice Douglas' dissent in *Hannah v. Larche*, 363 U.S. 420, 505-6 (1960).

<sup>70</sup> *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 186, 147 N.E.2d 481, 484 (1958).

<sup>71</sup> Note, 24 Ohio St. L.J. 665, 670 (1963), states that "In the face of this history [Miller-Tydings Act] the assertion that it is not price fixing as understood in the law is incomprehensible."

<sup>72</sup> Ohio Rev. Code Ann. § 1333.28(K) (Page 1962).

shall be a law at all; and, if there is to be a law, what the terms of that law will be, who will be bound by it, and for how long.<sup>73</sup>

The minority of judges who upheld the constitutionality of the Ohio Fair Trade Act further concluded that the 1959 Act cured the constitutional defects of the former Act by introducing the concept of notice.<sup>74</sup> Yet the records and briefs in *Bargain Fair* cogently demonstrate that the 1936 Act required the same notice or knowledge prior to acquisition of the commodity as is required by the 1959 Act.<sup>75</sup> The two Acts cannot be distinguished on the ground that the new one comes into effect only in cases where the retailer purchased the commodity in question with notice of the minimum resale prices, while the old one was applicable to articles purchased prior to the time the retailer had notice of the manufacturer's minimum resale price. In comparison with the prior act, this is a distinction in the new act without a difference.

Unfortunately the current Ohio Fair Trade Act offers no standards upon which judicial control may be premised. Without standards for guidance the constitutional guaranty of an impartial tribunal cannot be preserved. The proprietor is the sole judge under the statute as to what the price shall be, when it shall be effective, and to whom it shall apply. It has been long established that a man may not constitutionally be a judge in a case where he has a direct and personal interest,<sup>76</sup> yet

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<sup>73</sup> Cf. *Serrer v. Cigarette Service Co.*, 148 Ohio St. 519, 76 N.E.2d 91 (1947), which dealt with the Unfair Cigarette Sales Act, Ohio Rev. Code Ann. § 1333.11 to .211 (Page 1962), which legislation established minimum prices by certain formulas and standards. See *Hudson Distribs., Inc. v. Upjohn Co.*, 1960 Trade Cas. ¶ 69,778, 77,079 (Ohio C.P. 1960); Judge Hurd's dissent in the same case at 117 Ohio App. 207, 232, 176 N.E.2d 236, 252 (1961); *Helena Rubenstein, Inc. v. Cincinnati Vitamin & Cosmetic Distrib. Co.*, 12 Ohio Op. 2d 199, 167 N.E.2d 687 (C.P. 1960). For statutes dealing with sales below cost see 2 Trade Reg. Rep. ¶ 6571-81 (1966). Sales below cost statutes are much more effective in eliminating the alleged unscrupulous loss leaders but do not give the unilateral price fixing control certain large manufacturers seek through fair trade.

<sup>74</sup> See Pogue, "Hudson Fair Trade Case—The Need for Constitutional Amendment," 12 Cleve.-Mar. L. Rev. 513 (1963).

<sup>75</sup> Brief of Appellee at 6, 27, *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958) demonstrates conclusively that "contract by notice before acquisition of the goods" was an issue before the Ohio Supreme Court in 1958. In *Cluett, Peabody & Co. v. J. W. Mays, Inc.*, 5 App. Div. 2d 140, 170 N.Y.S.2d 255 (1958), the New York nonsigner provision, identical to that of the 1936 Ohio Act, was held not to offend the New York Constitution since the nonsigner provisions do not apply to retailers who acquire the commodities prior to receiving notice of the established price. See also *Miles Laboratories, Inc. v. Family Bargain Center, Inc.*, 18 Misc. 2d 792, 186 N.Y.S.2d 372 (Sup. Ct. 1959); cases collected at 2 Trade Reg. Rep. ¶ 6252 (1965). *Contra*, *Barron Motor, Inc. v. May's Drug Stores, Inc.*, 227 Iowa 1344, 291 N.W. 152 (1940).

<sup>76</sup> *Tumey v. Ohio*, 273 U.S. 510 (1927).

it is difficult to view the Ohio Act as being anything other than an open-end type of selective price control act which grants to a private party the arbitrary right to exercise an option to make a law operative on his own unilateral terms.<sup>77</sup>

The decisions upholding the constitutionality of the Ohio Fair Trade Act find some new proprietary interest in the trademark or trade name, although the interest is not defined.<sup>78</sup> The alleged justification is for "the continuing protection of the good will associated with his trademark or trade name."<sup>79</sup> It is an interest which is made to appear and disappear solely at the whim of the proprietor. In this regard, it is of no different quality from the proprietary interest in a trademark which was argued to the Ohio Supreme Court in *Bargain Fair* and rejected.<sup>80</sup> The minority decision in the *Hudson Distributors* case concedes that "the General Assembly has extended the original concept of the trademark . . ." by section 1333.31.<sup>81</sup> This statement appears to ignore that a trademark is not a thing which is in itself capable of ownership, but is only a means of identification.<sup>82</sup> The

<sup>77</sup> The General Assembly cannot delegate discretion as to what the law shall be. *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 347, 55 N.E.2d 629, 637 (1944); see *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); Ross, "Delegation of Power", 77 Am. Jur. Comp. L. 1, 17 (1958). Nor does the General Assembly have the final word on what constitutes due process under the Ohio and United States Constitutions. *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 457 (1962).

<sup>78</sup> Ohio Rev. Code Ann. § 1333.31 (Page 1962).

<sup>79</sup> *Id.*

<sup>80</sup> All of the briefs in *Bargain Fair* on behalf of Union Carbide argued that the property rights of the producer in his trademark and good will justified the delegation of price-fixing power to such a producer. Brief for the Ohio Fair Trade Committee as Amicus Curiae at 24, *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958), asserted that:

The trademark and good will remain the property of the producer . . . [Appellants] must merely deal with that good will on the terms set by the owner thereof, i.e., by observing the resale price provisions of the Fair Trade Contract.

A subdivision of the same brief was entitled, at 15:

1. The Purpose of the Fair Trade Act is to Protect the Property Right of the Manufacturer in his Trade Mark, and the Good Will and Distribution System Associated with It.

See also *Hudson Distribs., Inc. v. Upjohn Co.*, 1960 Trade Cas. ¶ 69,778, at 77076 (Ohio C.P. 1960); *Bulova Watch Co. v. Ontario Store of Columbus, Inc.*, 18 Ohio Op. 2d 221, 228, 176 N.E.2d 527, 535 (C.P. 1961).

<sup>81</sup> 174 Ohio St. 487, 489, 190 N.E.2d 460, 461 (1963).

<sup>82</sup> *Hoeb v. Bishop*, 10 Ohio Dec. Reprint 595 (Cincinnati Sup. Ct. 1889); Cf. *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 315-16 (N.D. Ohio 1949); *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (1956); *Rogers-Kent, Inc. v. General Elec. Co.*, 231 SC. 636, 647, 99 S.E.2d 665, 670 (1957); *Remington Arms Co. v. Skaggs*, 55 Wash. 2d 1, 10, 345 P.2d 1085, 1090 (1959); *Bulova Watch Co. v. Zale Jewelry Co.*, 371 P.2d 409, 420 (Wyo. 1962).

identification of source is not a proper subject of sale without a sale of the good will of a business. The minority in the *Hudson Distributors* case rationalizes that since all ownership of property arises as a matter of law, the law may impose reasonable conditions and incidents of ownership, analogizing these conditions and incidents to procedures for conveying land, transferring automobiles and making wills.<sup>83</sup> None of the fair trade cases involve allegations of misrepresentation, and full disclosure of the source and owner should give the "proprietor" of the trademark all the protection to which he is entitled.<sup>84</sup> Ohio Revised Code section 1333.33(D) ostensibly affords the retailer relief by the removal from the fair traded product of "all trace of the proprietor's identifying trade-mark or trade name." In reality, however, tampering with an engraved or embedded trade name could amount to true misrepresentation or could subject such retailer to violation of some other law. A patentee cannot control the transferability of his commodity after he has sold it,<sup>85</sup> nor can the owner of trademarks do what is forbidden to a patentee.<sup>86</sup> The Ohio legislature possesses the power to regulate trademarks.<sup>87</sup> Such power is procedural rather than substantive, and accordingly it is not within its competence to convey to vendors of branded merchandise a property right in the trademarks that the latter have appropriated for promoting the sale of such merchandise. The law recognizes no property right in trademarks separate and apart from the business and traffic in commodities to which said trademarks are affixed. The only remedy accorded under the law in the several states to vendors of branded merchandise

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<sup>83</sup> The procedures for transferring motor vehicles, Ohio Rev. Code Ann. § 4503.12 (Page 1965), is to assure proper collection by the state of its annual license tax. See Saviers v. Smith, 101 Ohio St. 132, 128 N.E. 269 (1920). The procedures relating to wills are primarily designed to protect against fraud, coercion or mistake as to the decedent. Comment, "An Analysis of The History and Present Status of American Wills Statutes," 28 Ohio St. L.J. 293, 303 (1967). Thus the comparison hardly seems appropriate in light of the conditions imposed by the Fair Trade Law for the purpose of price fixing by a producer who transfers his commodity without retaining any title to it.

<sup>84</sup> *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947); accord, *Industrial Rayon Corp. v. Dutchess Underwear Corp.*, 92 F.2d 33, 35 (2d Cir. 1937); 3 Callmann, "The Law of Unfair Competition and Trademarks", 991-1009 (2d ed. 1950).

<sup>85</sup> *United States v. Univis Lens Co.*, 316 U.S. 241, 250 (1942).

<sup>86</sup> *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944); *Handler*, "Trade Marks and Anti-trust Laws", 38 Trade Mark Rep. 387, 397-99 (1948).

<sup>87</sup> It has been held that the Lanham Act, 15 U.S.C. §§ 1051-1127 (1964), manifests the congressional intent "to occupy completely" the field of trademarks in interstate commerce. *Time, Inc. v. T.I.M.E., Inc.*, 123 F. Supp. 446, 452 (S.D. Cal. 1954); accord, *Diggins*, "Federal and State Regulation of Trade Marks", 14 Law & Contemp. Prob. 200 (1949). See *Diamond*, "The Proposed Federal Unfair Commercial Activities Act", 23 Ohio St. L.J. 110, 115 n. 33 (1963).

is the right to enjoin infringement.<sup>88</sup> Neither state nor federal trademark laws have heretofore afforded a remedy in the form of revocation of a right to use a trademark such as is afforded by the 1959 Ohio Fair Trade Act, but, on the contrary, have granted only the right to effect cancellation of an infringing trademark.<sup>89</sup>

Some courts seem to have lost sight of the fact that the owner of the property in the fair trade case is the retailer and not the proprietor of the trademark. It would appear essential to due process of law that such owner be given an opportunity to be heard on the terms of a contract to which he is not a party, but by which he can be bound at the will of a stranger. The 1959 Ohio Fair Trade Act affords the retailer no opportunity to question the terms or prices established by the statutorily imposed contract. No administrative or judicial tribunal is empowered to hear the retailer-owner, to consider whether his terms or prices are reasonable or to determine whether they would benefit the retailer's property or the consuming public whom he serves. Even if such procedural safeguards were afforded by the Act they would be useless without standards to permit adjudication of the rights of such retailer. The right of an owner of property to fix its resale price is assuredly a valuable property right to be protected.<sup>90</sup>

Every argument advanced in support of the new Act had previously been presented to the Ohio Supreme Court in *Bargain Fair* and rejected.<sup>91</sup> Through a "neat bit of circular reasoning" the minority in the *Hudson Distributors* case concluded that the legislative legerdemain had resulted in a "voluntary" contract.<sup>92</sup> The minority did not

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<sup>88</sup> The remedy afforded is to prevent deception by trademarks so similar to those utilized by a complaining vendor that the public is induced erroneously to purchase the products of sellers of competing merchandise under the mistaken notion that such products were fabricated or distributed by the complaining vendor.

<sup>89</sup> *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412-14 (1916); *Elgin Nat'l Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 672, 674, 677-78 (1901).

<sup>90</sup> *Union Carbide & Carbon Corp. v. White River Distribs., Inc.*, 224 Ark. 558, 561, 275 S.W.2d 455, 457 (1955); *Rogers-Kent, Inc. v. General Elec. Co.*, 231 S.C. 636, 645, 99 S.E.2d 665, 668 (1957); *McGraw Elec. Co. v. Lewis & Smith Drug Co., Inc.*, 159 Neb. 703, 717-18, 68 N.W.2d 608, 616, *modified*, 160 Neb. 319 (1955); *Cox v. General Elec. Co.*, 211 Ga. 286, 291-92, 85 S.E.2d 514, 519 (1955).

<sup>91</sup> In addition to notice, property rights, and price-fixing, which have already been discussed, reliance was placed on a part of Art. XIII, § 2 of the Ohio Constitution, adopted in 1912 to authorize bulk sale legislation, which reads:

Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual. This provision was also cited in support of the 1936 Fair Trade Law in *Bargain Fair* and rejected; *accord*, *Bulova Watch Co. v. Ontario Store of Columbus, Inc.*, 18 Ohio Op. 2d 221, 227, 176 N.E.2d 527, 534 (1961).

<sup>92</sup> In referring to the Virginia Fair Trade Statute one writer stated:

determine whether the 1959 Act was within the permissible scope of police power legislation but instead stated:

Whether such conditions and controls are within the police power as declared by the General Assembly must be determined by an examination of known economic conditions.<sup>93</sup>

The minority did not allude to any new economic conditions existing in 1959 that did not exist in 1958 when the unanimous Supreme Court of Ohio in *Bargain Fair* found that the same economic conditions did not bring the Fair Trade Act within the police power.

Unless the courts are entrusted with power of final decision upon the constitutionality of purported police legislation and the permissible scope of interference by such legislation with private rights, the legislature could effect a practical abrogation of constitutional guarantees of personal rights.<sup>94</sup> The Ohio Supreme Court had a unique opportunity in the *Ontario of Price Hill* case to attempt to clarify the unanswered questions and confusing logic of the minority decision in *Hudson Distributors*. Unfortunately the majority decision failed to do so and instead merely added additional confusion by stating:

This case concerns the constitutionality of the 1959 Ohio Fair Trade Act (§ 1333.27 *et seq.* Revised Code). It is a typical nonsigner fair-trade case, as were . . . *Bargain Fair* . . . and *Hudson Distributors* . . .<sup>95</sup>

Thus the Ohio Supreme Court does not distinguish between its most recent fair trade case and *Bargain Fair*, and yet comes to a directly opposite conclusion on constitutionality. The minority in *Hudson Distributors* at least attempted to distinguish *Bargain Fair* rather than analogize it, but the recent decision in *Ontario of Price Hill*, neither distinguishes nor overrules it. Instead the decision stated that nonsigner fair trade laws have been held constitutional by many of

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It was a 'voluntary' contract because the statute made it so. Of course the contract is about as consensual as a shotgun wedding or one of the new FTC 'consent orders.'

Weston, "Fair Trade, Alias 'Quality Stabilization': Status, Problems and Prospects," 22 A.B.A. Antitrust L. P. 76, 91-92 (1963).

<sup>93</sup> *Hudson Distrib., Inc. v. Upjohn Co.*, 174 Ohio St. 487, 494, 190 N.E.2d 460, 464 (1963). Compare Justice Douglas' dissent in *Hannah v. Larche*, 363 U.S. 420, 505, 506 (1960).

<sup>94</sup> See *State v. Boone*, 84 Ohio St. 346, 351, 95 N.E. 924, 925-26 (1911); *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 549, 38 N.E.2d 70, 74 (1941). Cf. *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949). The standards for determining whether legislation properly comes within the state police power were outlined in *City of Cincinnati v. Correll*, 141 Ohio St. 535, 539, 49 N.E.2d 412, 414 (1943).

<sup>95</sup> 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967).

the most respected state courts. This statement thus detracts from the respect to be accorded its own decisions with regard to stare decisis. This most recent decision of the Ohio Supreme Court ignores that a majority of the "most respected state courts" concurred with the unanimous 1958 supreme court decision in *Bargain Fair* which held that nonsigner fair trade laws are unconstitutional in violation of their respective state constitutions.<sup>96</sup> It further ignores that in 1963 a majority of that same court reaffirmed *Bargain Fair* and applied it to the 1959 Ohio Fair Trade Act in accordance with the vast majority of lower and intermediate courts. Thus three judges of the Ohio Supreme Court, and one temporarily appointed appellate judge, cast aside without apparent reason two previous decisions of that court—one a unanimous decision in *Bargain Fair* and the other a majority decision by the elected Supreme Court judges in *Hudson Distributors*. In 1928, the Ohio Supreme Court noted that the most important function of courts of last resort was to render uniform the conflicting decisions of inferior tribunals within the jurisdiction of such courts.<sup>97</sup> Can it not be said that equally important, if not of greater importance, is the duty to avoid conflicting decisions of the court of last resort by adhering to unanimous and majority decisions on the same questions when they are not found to be clearly erroneous?

Finally, the decision in *Ontario of Price Hill* considered the United States Supreme Court opinion in *Hudson Distributors*<sup>98</sup> as dispositive of all federal constitutional questions and as reaffirming the propositions of law in *Old Dearborn*. Neither conclusion is accurate.<sup>99</sup>

Thus the Supreme Court of Ohio has unfortunately cast a shadow over its previous decisions heretofore endorsed by the vast majority of lower Ohio courts and the highest courts of other states. The method and content of its decision and rulings are open to question. The court has failed to put to rest the status of fair trade in Ohio.

#### V. ISSUES REMAINING OUTSTANDING ON TRIAL ON THE MERITS

Prior to the decision in *Ontario of Price Hill*, only two cases in Ohio had been tried on their merits, both being from Cuyahoga County.

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<sup>96</sup> 2 Trade Reg. Rep. ¶ 6041 (1967).

<sup>97</sup> See *Board of Educ. v. City of Columbus*, 118 Ohio St. 295, 298, 160 N.E. 902, 903 (1928). See also *Butzman v. Whitbeck*, 42 Ohio St. 223, 232 (1884) where the Ohio Supreme Court noted that "stability of judicial decisions of a court of last resort upon all questions, especially upon questions of great public concern, is one of the safeguards of popular government." Cf. *State v. Sinks*, 42 Ohio St. 345, 356 (1884).

<sup>98</sup> 377 U.S. 386 (1963).

<sup>99</sup> See note 56 *supra*.



In the first case<sup>100</sup> the court considered the appellate decision in *Hudson Distributors*<sup>101</sup> to be binding on it as to the question of constitutionality of the 1959 Ohio Fair Trade Act. Interestingly, the defendant-retailer acknowledged in the *Rubbermaid* case that it had received the required notice in accordance with the statute and was selling below the stipulated minimum retail selling price. Thus the question of the sufficiency of notice was not before the court. Ohio Revised Code section 1333.29 was interpreted as prohibiting discriminatory minimum resale prices within the same level of distribution,<sup>102</sup> but no claim of such discrimination was made so this issue was also not raised. Furthermore, the court found that while the retailer sold Rubbermaid products at one-third off list price, the consumer demand for Rubbermaid products had not been impaired.<sup>103</sup> Thus we have a finding that selling below fair trade prices does not cheapen the product in the eyes of the consumer or impair the goodwill of the manufacturer. While there was an admitted violation of minimum resale prices, the court found that the plaintiff failed to diligently and fairly enforce its alleged fair trade agreements. A dominant retailer, other than the defendant, was found to have continued to violate the 1959 Fair Trade Act and its written contract with Rubbermaid's acquiescence.<sup>104</sup> The court had first con-

<sup>100</sup> *Rubbermaid Inc. v. Claber Distrib. Co. of Cleveland, Ohio, Inc.*, 3 Ohio Misc. 39, 205 N.E.2d 410 (C.P. 1965).

<sup>101</sup> 117 Ohio App. 207, 176 N.E.2d 236 (1961).

<sup>102</sup> 3 Ohio Misc. 39, 44, 205 N.E.2d 410, 415 (C.P. 1965).

<sup>103</sup> The minority in *Hudson Distribs.* concluded, without any evidence, that continued discount selling cheapens the product in the eyes of the consumer. Yet Judge Thomas in *Rubbermaid* in applying the act at the trial level, in light of conclusive evidence, demonstrated that the minority conclusion was erroneous and selling as much as one-third below list price does not cheapen the product. With a finding that the good will of the proprietor is not impaired and that there is no monopoly by the retailer, can any remedies under the Act be invoked when the declared purpose of the Act is to safeguard such good will? In light of the purpose clause it would appear that a bare violation of the Act is insufficient to entitle the enforcer to any relief.

<sup>104</sup> The lack of diligent enforcement was *Rubbermaid's* knowingly permitting the May Company to give double trading stamps on Rubbermaid products sold for cash. Ohio Rev. Code Ann. § 1333.32 (Page 1962) specifies that in determining whether a sale of a commodity is below the proprietor's stipulated minimum resale price "any concession made, whether by the giving of coupons or otherwise," shall be deducted from the price. The 1959 Act, as distinguished from the 1936 Act, for the first time permitted a limited 3% allowance in the form of trading stamps:

[T]he allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three percent of such stipulated minimum resale price . . . .

This provision of Ohio Rev. Code Ann. § 1333.32 (Page 1962) was added as an amendment to House Bill No. 318 in committee. "Hearings on H.B. 318 Before the House Judiciary Comm." 103d Gen. Assembly, 113-114 (1959). This amendment provided that

cluded that special or promotional sales conducted once or twice a year on approximately four items did not amount to an abandonment of its fair trade program. It would appear, however, that all special or promotional sales would not necessarily so qualify. Furthermore, the statute<sup>105</sup> was found to require that all retailers and wholesalers must be given direct and continuous written notice of all price changes. While all products need not be fair traded, if there is confusion between a fair traded item and a nonfair traded item this, according to the *Rubbermaid* case, shall constitute an abandonment of fair trade as to such items. In addition to unlawful discrimination at various levels of distribution there may also be unlawful discrimination by way of discounts and through demonstrator and advertising allowances favoring certain retailers and classes of retailers, any of which could prevent enforcement of fair trade. The court concluded that it did not have the power to require the proprietor to extend its pricing and allowance advantages to all retailers alike.<sup>106</sup> The court then conditioned the issuance of an injunction on the cessation of giving statutorily excessive trading stamps by the dominant retailer of Rubbermaid's products. The Court of Appeals for Cuyahoga County reversed the lower court<sup>107</sup> in a most questionable opinion because of its failure to even refer to the specific statutory limitation of three percent<sup>108</sup> and the legislative hearings surrounding its enactment.<sup>109</sup> Furthermore an application for an injunction is addressed to the sound discretion of the court and unless a decree granting or refusing the same constitutes a plain abuse of discretion, a reviewing court will not disturb such judgment. In reversing the trial court's exercise of discretion the appellate court made no finding of abuse of discretion. No recognition

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no retailer may advertise at less than the fixed minimum price but is permitted to give trading stamps having a value of not more than 3%. This amendment eliminated opposition to House Bill 318 by trading stamp companies.

<sup>105</sup> Ohio Rev. Code Ann. §§ 1333.28(J), 1333.29, 1333.30 (Page 1962).

<sup>106</sup> *But cf.* § 2 of Clayton Act, as amended, 15 U.S.C. §§ 13, 13a, 13b (1964). Under § 2(a) of the Clayton Act, it is unlawful for a seller to discriminate in price between different customers. Aside from the right of a state court to enforce the Clayton Act is the right to equitable relief if such discrimination is found. *See* *FTC v. Anheuser Busch, Inc.*, 363 U.S. 536 (1960). Sections 2(d) and 2(e) of the Clayton Act describe the terms and conditions under which advertising and promotional allowances and services may be given to customers. *See* *FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55 (1959); *Exquisite Form Brassiere, Inc. v. FTC*, 360 F.2d 492 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966).

<sup>107</sup> *Rubbermaid, Inc. v. Claber Distrib. Co. of Cleveland, Inc.*, No. 27,596 (Cuyahoga County Ct. App., decided May 24, 1967), *appeal pending*, Ohio Sup. Ct. No. 41,105 (filed July 3, 1967).

<sup>108</sup> Ohio Rev. Code Ann. § 1333.32(A) (Page 1962).

<sup>109</sup> *See* note 104 *supra*.

was given to the difference in statutory provisions among the other states and the cases interpreting these differences.<sup>110</sup> The appellate court cited a California case but ignored that the California Fair Trade Statute, unlike Ohio, had no specific limit or prohibition on trading stamps. Most statutes, including Ohio's, provide that the offering or making of any concessions, whether by the giving of coupons or otherwise, shall be deemed a violation of the fair trade price restrictions.<sup>111</sup> Under such a provision the issuance of trading stamps constitutes a price violation.<sup>112</sup> Some statutes, but not Ohio's, include the phrase "except to the extent authorized by the contract."<sup>113</sup> Thus Ohio is the only state that has a three percent leeway to an express prohibition against the giving of trading stamps. Nevertheless, the court of appeals in the *Rubbermaid* case ignored a conclusively established violation of Ohio Revised Code section 1333.32(A) countenanced by the fair trade manufacturer in direct violation of the statute as well as by its contract with the retailer.<sup>114</sup> The court inferred that since the alleged violator sells at 33½ per cent below the manufacturer's fair trade price, this constitutes a much greater violation than that of the May Company in giving trading stamps in excess of the statutory limitation. The court suggested that the solution is to allow the alleged violator to only discount the price to the extent that the manufacturer condones the violation by the dominant retailer.<sup>115</sup> In Ohio, whether the giving of trading stamps represents a reduction in the sales price or a cash discount would not appear to be the decisive issue.<sup>116</sup>

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<sup>110</sup> *Compare*, *Gillette Co. v. White Cross Discount Centers, Inc.*, 1962 Trade Cas. ¶ 70,481 (Pa. C.P.); *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 337 Mass. 221, 148 N.E.2d 861 (1958); *Dart Drug Corp. of Maryland v. Eli Lilly & Co.*, 216 Md. 20, 139 A.2d 272 (1958); *Palmer v. Angert*, 90 N.Y.S.2d 745, 275 App. Div. 965 (1949). For a collection of the reported cases on the issue of trading stamps under fair trade acts, see *Annot.* 22 A.L.R.2d 1212 (1952). See also *Jantzen, Inc. v. E. J. Korvette, Inc.*, 219 F. Supp. 604 (S.D.N.Y. 1963).

<sup>111</sup> *Compare*, Ohio Rev. Code Ann. § 1333.32 (Page 1962).

<sup>112</sup> 2 Trade Reg. Rep. ¶ 6300 (1965).

<sup>113</sup> *Id.* See 2 Trade Reg. Rep. ¶ 6047 (1967).

<sup>114</sup> In addition to the evidence of the open violation, *Rubbermaid*, in answer to an interrogatory on the subject of trading stamps given by the May Company in excess of 3%, stated that if this were true they would take steps "to adopt procedures that will insure that the terms of plaintiff's fair trade contracts are not breached." *Rubbermaid* had the right to terminate its contract with the May Company but apparently did not do so.

<sup>115</sup> *Compare*, *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 4 Ohio Misc. 73, 91, 209 N.E.2d 234, 246 (C.P. 1965), where the court stated that a manufacturer having fair trade contracts executed with retailers cannot acquiesce in the latter's open violations and expect to enforce the law merely against nonsigners.

<sup>116</sup> Ohio Rev. Code Ann. § 1333.32(A) (Page 1962) does not use the words "cash

Even more questionable was the reversal of the trial judge's denial of attorney fees allowable under Ohio Revised Code section 1333.32(B)(3). There was no finding of abuse of discretion on the part of the trial judge in denying attorney fees or an injunction, and it would seem that such a finding would be mandatory to reverse on these issues. The statute provides that "attorney fees *may* be recovered whether or not specific monetary damages are established,"<sup>117</sup> indicating that it is discretionary with the trial court. The Ohio statute is the only Fair Trade Act allowing attorney fees as well as damages.<sup>118</sup> The attorney fees are allowable only to the enforcer, but are allowed independent of a claim or proof of damages.<sup>119</sup> While the appellee raised the constitutionality of this provision, the appellate court did not discuss it. When the first award of attorney fees was made in a fair trade case,<sup>120</sup> the author of the bill stated:

Counsel throughout the State of Ohio would do well to bear this [award of 38,100 dollars in attorney fees] in mind when advising clients on the merits of contesting actions commenced under the new Fair Trade Act.<sup>121</sup>

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discount" and specifically requires, in determining a violation, that the value of any concession [trading stamps] given in connection with the sale must be deducted from the price at which the retailer sells the commodity. However, the statute permits trading stamps where the "amount or value of such allowance [trading stamps] does not exceed three percent of such stipulated minimum resale price." The value of the double stamps given by the May Company was established to be 4.34% and thus clearly violated Ohio Rev. Code Ann. § 1333.32(A) (Page 1962). *Compare*, Safeway Stores v. Oklahoma Retail Grocers Ass'n, 322 P.2d 179 (1957), *aff'd*, 360 U.S. 334 (1959), where an injunction was granted against giving double stamps in violation of Oklahoma's Unfair Sales Act.

<sup>117</sup> Ohio Rev. Code Ann. § 1333.32(B)(3) (Page 1962).

<sup>118</sup> 2 Trade Reg. Rep. ¶ 6368 (1965).

<sup>119</sup> Statutes providing for the taxation of attorney's fees have been held unconstitutional as class legislation, on the ground that they were taxable in favor of or against only one party to the action. *See, e.g.*, Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 41 N.E. 262 (1895); Rowland v. Baltimore & Ohio Ry. Co., 13 Ohio C.C.R. (n.s.) 221 (Ct. App. 1910). For collection of reported cases on validity of statutory provision for attorney fees, see Annots. 11 ALR 884 (1921); 90 ALR 530 (1934). *Cf.* Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150 (1897); Missouri Pacific Ry. Co. v. Tucker, 230 U.S. 340 (1913). On question of public policy *compare* Midwest Properties v. Renkel, 38 Ohio App. 503, 176 N.E. 665 (1930), *with* Byram Concretanks, Inc. v. Warren Concrete Products Co. of N.J., 374 F.2d 649 (3d Cir., 1967).

<sup>120</sup> Hudson Distribs., Inc. v. Eli Lilly & Co., 4 Ohio Misc. 73, 209 N.E.2d 234 (C.P. 1965). In the original retrial Judge Baynes sitting by designation in Cuyahoga County on August 7, 1963, found the retailer in violation of the Ohio Fair Trade Act, granted a permanent injunction, and awarded \$38,100 in attorney's fees to Eli Lilly. On August 22, 1963, the common pleas court vacated the decision rendered by Judge Baynes and assigned the case for retrial because of Judge Baynes' direct interest in a nondiscounting retail store located near the alleged violator's sister store. 1963 Trade Cas. ¶ 70,871 (Ohio C.P. 1963).

<sup>121</sup> *See* Gorrell & Brown, note 7 *supra*, at 99.

This comment reflects the serious policy consideration of allowing the award of attorney fees only to the enforcer of the Act. The necessary right of defending in good faith a fair trade action is threatened by the assessment of the plaintiff's attorneys' fees and other costs as a penalty for failure.

The second case in Ohio tried on its merits was *Hudson Distributors, Inc. v. Eli Lilly & Co.*<sup>122</sup> On retrial, Judge Lybarger set forth minimum criteria necessary to obtain fair trade enforcement in Ohio courts. Referring to the unfortunate disparity in interpretation of the broad Ohio Fair Trade Act and the "widespread, utter breakdown in observance of the Act in this state and county,"<sup>123</sup> the court determined that one seeking enforcement of fair trade in Ohio has

a greater duty of diligence in protecting price maintenance before coming into court than might be required in jurisdictions where the status of fair trade laws is clear-cut and non-observance is minimal.<sup>124</sup>

The court then established seven minimum prerequisites to fair trade enforcement in Ohio: (1) compliance with all statutory requirements; (2) endeavor to convince consumers of the alleged purpose of the Act and that it is in their interest to patronize those retailers who sell at fair-trade prices; (3) proof that one is justified in suing under the Act and has actually suffered damage to its good will, trade mark, trade names or brand names by the price cutting of the alleged violator; (4) the pursuance of vigorous, aggressive and unrelenting effort to discover those selling below fixed prices and to get them to abide by the law; (5) discontinuance of "business-as-usual" attitudes toward known violators; (6) enforcement of written contracts before pursuing nonsigners; and (7) bringing violators into court at the earliest opportunity.<sup>125</sup> Finding that Eli Lilly had failed to meet these minimum criteria, the court denied injunctive relief.

Other defenses that may be interposed in a fair trade enforcement action have yet to be considered in Ohio. The drastic relief of injunction should be granted only upon a clear showing that the applicant has strictly complied with the statute and is clearly entitled to relief thereunder. In addition to lack of enforcement or discriminatory enforcement, there are various ramifications of the defense of failure

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<sup>122</sup> 4 Ohio Misc. 73, 209 N.E.2d 234 (C.P. 1965); cf. *General Electric Co. v. R. H. Macy & Co., Inc.*, 103 N.Y.S.2d 440, 199 Misc. 87 (1951).

<sup>123</sup> *Hudson Distrib. Co. v. Eli Lilly Co.*, 4 Ohio Misc. 73, 84, 209 N.E.2d 234, 242 (C.P. 1965).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 84-93, 209 N.E.2d at 242-47.

to comply with the state act or the federal acts, if interstate commerce is involved.<sup>126</sup> As stated in *Duplex Printing Press Co. v. Deering*,

If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means.<sup>127</sup>

Strong-arm behavior against retailers daring to sell to consumers below fixed fair trade is neither authorized nor sanctioned by the state or federal acts. Yet boycotting, blacklisting, coercion, harrassment, and other concerted activities are engaged in to insure that price reductions on fair trade items are not made available to the public. There is no authority under any Act to permit manufacturers to engage in such reprehensible tactics under the guise of fair trade.<sup>128</sup> Equally con-

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<sup>126</sup> Consider the notice requirements of the Ohio Rev. Code Ann. §§ 1333.28(J), 1333.29 and 1333.30 (Page 1962). What must the notice contain to culminate a "contract" under the statute? It certainly must be accurately addressed to the correct corporate party and contain all the essentials of the statute. Can it merely threaten litigation? Indiscriminate notices threatening litigation and alleging violations of law can result in libel action and related suits by the innocent retailer or wholesaler. Must a copy of a proposed written contract be submitted? What if the retailer replies to the notice rejecting any alleged offer that might be contained in the offer or requests further information? Notice alone would seem ineffective to constitute a contract between the parties even under the Ohio statute, particularly where the offer is rejected in writing. See *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 95 A.2d 391 (1953); 1 Williston, *Contracts* § 319 (3d ed. 1957); 1 Corbin, *Contracts* § 355 (1963). The Ohio statute, as the Virginia statute, should only be applicable between a manufacturer and retailer who deal directly. What if there is no restriction or notice in force at the time of acquisition of the commodity but one is imposed by notice prior to resale? The notice is only binding as to products acquired after receipt of notice. See, e.g., *Charmley Drug Shop v. Guerlain*, 113 F.2d 247, 248 (3d Cir. 1940); *James Heddon's Sons v. Callender*, 29 F. Supp. 579, 580 (D. Minn. 1939); *Lentheric, Inc. v. Weissbard*, 122 N.J. Eq. 573, 195 A. 818 (1937). *Contra*, *Calvert Distillers Corp. v. Goldman*, 255 Wis. 69, 37 N.W.2d 859 (1949). *But cf.* *General Electric Co. v. American Buyers Cooperative, Inc.*, 1956 Trade Cas. ¶ 71,514 (Ky. Cir. Ct. 1956), where such application was held unconstitutional. Compare the proof necessary to show violations in *House of Seagrams, Inc. v. Mr. Booze, Inc.*, 1967 Trade Cas. ¶ 72,177 (N.Y. Sup. Ct. 1967).

<sup>127</sup> 254 U.S. 443, 465-6 (1921). See Statement of William H. Orrick, Jr., Assistant Attorney General, Antitrust Division, Department of Justice, on S. 774 [Quality Stabilization Bill], in "Hearings on S. 774, Before the Special Subcomm., Senate Comm. on Commerce," 88th Cong., 2d Sess. (1964), where he testified:

In the last twenty years, the Department of Justice has prosecuted case after case where State "fair trade" laws have been used to cloak illegal price fixing. These cases variously involved agreements among competing manufacturers, among competing wholesalers, among competing retailers and among manufacturers competing with others at different levels of distribution. . . .

<sup>128</sup> Ohio Rev. Code Ann. § 1333.32(B) (Page 1962) sets forth the only permissible remedies available against alleged violators. As stated in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956) the courts are not only bound by the limitations

demned but commonly employed is the fair trader's refusal to sell to a particular retailer or class of retailers.<sup>129</sup> Typical fair trade contracts require the retailer to stipulate that the manufacturers' products are in free and open competition with commodities of the same general class. This is an attempt by the fair trader to eliminate a preliminary requirement to qualify under the Act.<sup>130</sup> Delay in bringing actions

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marked by Congress, beyond which price fixing may not go, but also bound to construe such limitations strictly since resale price maintenance is a privilege restrictive of a free market. *See* *Sunbeam Corp. v. Richardson*, 243 F.2d 501, 503 (6th Cir. 1957). Such tactics were halted in *United States v. Hawaii Retail Druggists Ass'n*, 1963 Trade Cas. ¶ 70914 (Hawaii D.C. 1963). *See also*, *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. House of Seagram, Inc.*, 1965 Trade Cas. ¶ 71,517 (Fla. D.C.); Callmann, "Boycott and Price War: Violation of the Antitrust Laws or Unfair Competition?", 23 *Ohio St. L.J.* 128 (1962).

<sup>129</sup> *Lentheric, Inc. v. Weissbard*, 122 N.J. Eq. 573, 195 A. 818 (1937), followed in *Charmley Drug Shop v. Guerlain*, 113 F.2d 247 (3d Cir. 1940). Defense available only against manufacturer. *Burstein v. Charlene's Cut Rate*, 126 N.J. Eq. 560, 10 A.2d 646 (1940); *contra*, *Parker Pen Co. v. Charles Appliances Inc.*, 153 F. Supp. 69 (S.D.N.Y. 1957).

<sup>130</sup> *See* Ohio Rev. Code Ann. § 1333.29(A) (Page 1962). The phrase "in free and open competition" has been construed in a number of court decisions, involving a wide variety of products. *See, e.g.*, *Eastman Kodak Co. v. FTC*, 158 F.2d 592 (2d Cir. 1947), *cert. denied*, 330 U.S. 828 (1946); *Hutzler Bros. v. Remington-Putnam Book Co.*, 186 Md. 210, 46 A.2d 101 (1946) (copyrighted literature); *Eli Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939) (patented drugs); *Hoffmann-La Roche Inc. v. Weissbard*, 11 N.J. 541, 95 A.2d 398 (1953); *Columbia Records v. Goody*, 278 App. Div. 401, 105 N.Y.S.2d 659 (1951), (long-playing records); *Sunbeam Corp. v. Central Housekeeping Mart, Inc.*, 2 Ill. App. 2d 543, 120 N.E.2d 362 (1954) (electric household appliances); *Shulton, Inc. v. Consumer Value Stores, Inc.*, 1967 Trade Cas. ¶ 72,122 (Mass. Sup. Jud. Ct. 1967) (toiletries); *Revere Copper & Brass v. Economy Sales Co.*, 127 F. Supp. 739 (D.C. Conn. 1954) (copper-bottomed ware); *Glen Raven Knitting Mills v. Sanson Hosiery Mills*, 189 F.2d 845 (4th Cir. 1951) (silk hosiery); *Ronson Patents Corp. v. Sparklets Devices*, 112 F. Supp. 676 (E.D. Mo.), *aff'd*, 202 F.2d 87 (8th Cir. 1953), (butane lighters). Additional cases are collected at 2 Trade Reg. Rep. ¶ 6176 (1965); *compare*, *Rayless v. Lane Drug Co.*, 138 Ohio St. 401, 35 N.E.2d 447 (1941) where it was held that a fair trade contract which had a "horizontal" purpose designed to establish uniform prices or to effect a division of the markets "does not come within the spirit or letter of the Fair Trade Act" and is "illegal and void." The goods of a producer affected by such agreements are not considered to be in "free and open competition" with other goods. Certain patents or copyrights give a product a monopoly, *e.g.* a patent covering wiperblades for curved windshields and thus such products could not be in free and open competition with other goods usable for the same purpose. The uniqueness required for the patent or copyright militate against such competition. If the patent has been misused, goods covered thereby cannot be considered to be in free and open competition. *Cf.* *The Anderson Co. v. Trico Products*, 144 U.S.P.Q. 185 (W.D.N.Y. 1964). Any limitations on price competition by reason of size, market control or structure would appear to violate the free and open competition requirement. *Gulf Oil Corp. v. Mays*, 1960 Trade Cas. ¶ 69,821 (Sup. Ct. Pa. 1960).

against violators as well as indicating the lack of necessary diligence in enforcement, would appear to negate a claim of irreparable injury.<sup>131</sup> The fair trader who seeks equitable relief must satisfy the clean hands doctrine. Thus the conduct or activity of the fair trader is one of the factors that determines its right to enlist the equitable privileges afforded by the Fair Trade Act. Violation of the antitrust laws by unlawful restraints of trade or price fixing conspiracies or misuse of patents may be grounds for denying equitable relief under the Fair Trade Act.<sup>132</sup> Similarly the acquiescence in activities of the dealers or distributors could deny the manufacturer the right of enforcement.<sup>133</sup> Use of combination sales or packages may amount to abandonment of a fair trade plan,<sup>134</sup> as well as permitting or encouraging trade-in allowances with little or no resale value as means of allowing dealers to avoid the pricing system.<sup>135</sup> In Ohio it would appear that under the 1959 Fair Trade Act, and theories used to support its validity, the so-called "Eli Lilly defense"<sup>136</sup> should be applicable against an enforcer that did not first qualify to do business as required by state law.

The foregoing is not by any means all of the defenses that may be raised in a fair trade action, the applicability of which will depend upon the facts of each case in the absence of necessary statutory standards or guidelines.

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<sup>131</sup> 2 Trade Reg. Rep. ¶ 6324, 6358 (1965).

<sup>132</sup> *Schill v. Remington-Putnam Book Co.*, 182 Md. 153, 31 A.2d 467 (1943); *The Roberts Co.*, 4 Trade Reg. Rep. ¶ 27,905 (F.T.C. Dkt. 6943, 1960); *Texas Co. v. Di Gaetano*, 1962 Trade Cas. ¶ 70,207 (N.J. Super. Ct. App. Div. 1962); *contra*, *General Electric Co. v. S. Klein-in-the-Square, Inc.*, 121 N.Y.S.2d 37 (Sup. Ct. 1953); *compare*, *Di Gaetano v. Texas Co.*, 300 F.2d 895 (3d Cir., 1962); *Gillette Co. v. White Cross Discount Centers, Inc.*, 1962 Trade Cas. ¶ 70,481 (Pa. C.P. 1962).

<sup>133</sup> *Mead Johnson & Co. v. Sam's Wholesale Sundries, Inc.*, 1962 Trade Cas. ¶ 70,377 (N.Y. Sup. Ct. 1962). Knowledge of or acquiescence on the part of the enforcer may have to be shown. *Union Carbide & Carbon Corp. v. White River Distrib., Inc.*, 118 F. Supp. 541 (E.D. Ark. 1954).

<sup>134</sup> Ohio Rev. Code Ann. § 1333.32(A) (Page 1962) specifically provides that combination sales can be a violation of fair trade.

<sup>135</sup> Ohio Rev. Code Ann. § 1332.32(A) (Page 1962) limits trade-in allowances or credits to "the actual value thereof" whether control over trade-in allowances under fair trade is within the federal exemption has not been resolved. *See* Weston, "Resale Price Maintenance," 33 A.B.A. Antitrust L.J. 76, 82 (1967).

<sup>136</sup> *Eli Lilly & Company v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961). In Ohio the proprietor claims a continuing proprietary interest in its commodities by virtue of Ohio Rev. Code Ann. § 1333.31 (Page 1962). A contract created by notice solely pursuant to Ohio statute has to be a contract entered into in Ohio, to be performed and enforced in Ohio and necessarily governed by Ohio law. *See* *Bulova Watch Company, Inc. v. The Ontario Store of Columbus Ohio, Inc.*, 18 Ohio Op. 2d, 221, 176 N.E.2d 527 (C.P. 1961). *But see* *Champion Spark Plug Co. v. T. G. Stores, Inc.*, 356 F.2d 462 (4th Cir. 1966).



## VI. CONCLUSION

The question of whether fair trade in Ohio is fair or foul remains unanswered. The Ohio legislature, under pressure of the strong, fair trade lobby, is the only one that overrode a unanimous declaration of its highest court on the subject of fair trade. It is further unique in permitting the legislature to usurp the judicial function by alleged purpose clauses and findings of fact which are actually nothing more than "high sounding phrases."<sup>137</sup> With some help from Article IV, section 2 of the Ohio Constitution, fair trade has had an unusually chaotic effect on the sanctity of majority rule in Ohio. The Ohio Supreme Court unfortunately did not correct the situation though it was afforded several opportunities. Only by forthright and independent expressions from the lower courts in Ohio,<sup>138</sup> which lead to future reconsideration by our supreme court, can the unfortunate status of fair trade in Ohio be corrected. Hopefully the question can be reviewed again by the Ohio Supreme Court with no less than a six to one decision of the elected court ruling in a considered opinion upon the unanswered questions as to the validity of the Ohio Act. Meanwhile, if the trial courts follow the lead of Judge Lybarger<sup>139</sup> in establishing some criteria and standards relative to requirements of enforcement of fair trade in Ohio and applicability of various defenses, some semblance of reason can reign, pending final decision on the overriding constitutional questions which still must be resolved by the Supreme Courts of the United States and Ohio. Care must be exercised by the judiciary and the Attorney General of Ohio to assure that fair trade is not used for illegal price fixing arrangements, for refusals to deal and for boycotting. The Attorney General should be alerted to the use of fair trade by certain manufacturers to eliminate competitive pricing to state

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<sup>137</sup> *Helena Rubenstein, Inc. v. Cincinnati Vitamin & Cosmetic Distribs. Co.*, 12 Ohio Op. 2d 199, 200, 167 N.E.2d 687 (C.P. 1960).

<sup>138</sup> Judicial honesty dictates corrective action. This has been done in several states. For example, in Pennsylvania the lower and intermediate state courts expressed strong misgivings over the correctness of a prior supreme court decision on the constitutionality of the Pennsylvania Fair Trade Act which resulted in the Pennsylvania Supreme Court in *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964), reversing its 1955 holding of constitutionality. See also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932); *Commonwealth ex rel. Margiotti v. Lawrence*, 326 Pa. 526, 530, 193 A. 46, 49 (1937). The latter three cases express the need for re-examination of questions involving important private rights where said decision has not been acquiesced in by the judiciary.

<sup>139</sup> *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 4 Ohio Misc. 73, 209 N.E.2d 234 (C.P. 1965).

agencies or projects.<sup>140</sup> Overriding all those questions is the unanswered applicability of the Ohio Fair Trade Act to situations where the enforcer and the alleged violator (nonsigner) have not had any direct dealings. This important question will be answered in the pending cases where the retailer has not purchased the commodity from the manufacturer and has not entered into a written fair trade contract.

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<sup>140</sup> The Ohio legislature has recently given the Attorney General the mechanics for pursuing actions to prevent noncompetitive pricing in Ohio by the passage on August 23, 1967 of Ohio House Bill 556.