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# 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.*

James A. Gorrell and Herbert R. Brown\*

In two recent cases,<sup>1</sup> the Ohio Supreme Court considered the constitutional validity and the effect of the provisions of the new Ohio Fair Trade Act.<sup>2</sup> The court followed the decision of the Virginia Supreme Court in *Standard Drug Co. v. General Elec. Co.*,<sup>3</sup> which upheld the constitutionality of a somewhat similar law enacted by the Virginia legislature a year earlier than the Ohio General Assembly's action on the new Ohio Fair Trade Act. Because the Ohio Supreme Court recognized the Virginia holding, considerable comment has resulted among lawyers and businessmen interested in the "new-type" fair trade theory embodied in the Ohio and Virginia laws.

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Fair trade legislation has been the center of both economic and legal controversy for several decades. In particular, the wisdom as well as the constitutional validity of the concept upon which such legislation is predicated has been questioned.<sup>4</sup> In Ohio, the legal problem is further complicated by the fact

\* The authors of this article cannot lay claim to being particularly unbiased in this matter. They were involved in the drafting of the original legislation when it was introduced into the Ohio General Assembly and have been involved in defending its constitutionality in most of the litigation arising out of that legislation since it was passed. Therefore, the reader is warned that they are committed to the fair trade principle, and despite all attempts to attain some objectivity, this bias exists and perhaps will become apparent to the reader of this article.

1. *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.*)

2. OHIO REV. CODE §§ 1333.27-34.

3. 202 Va. 367, 117 S.E.2d 289 (1960), *cert. denied*, 368 U.S. 4 (1961).

4. The basis upon which the supreme court affirmed the validity of the Ohio Fair Trade Act in the *Hudson* case was stated in the opinion of Judge Griffith as follows:

A. The new legislation is justified by section 2, article XII of the Ohio Constitution, which permits the General Assembly to pass laws regulating the sale and conveyance of personal property.

B. The operation of the act is restricted to items in free and open competition.

C. The new act is based upon a contractual relationship, the consideration for which is the use of a manufacturer's trademark or tradename, in which the court recognized the existence of property rights.

D. There is no compulsion upon a retailer to handle trademarked goods and, therefore,

that the recent supreme court decision which found the Fair Trade Act constitutional in Ohio carried the affirmative votes of only three out of the seven supreme court justices. Under the peculiar provisions of the Ohio Constitution,<sup>5</sup> however, this vote was sufficient to sustain the validity of the act because the Court of Appeals for Cuyahoga County had held the provisions of the Fair Trade Act constitutional in a two-to-one decision.<sup>6</sup> Accordingly, the Ohio Supreme Court was governed by the constitutional provision which states:

No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of a court of appeals declaring a law unconstitutional and void.<sup>7</sup>

A proper understanding of the new Ohio Fair Trade Act requires consideration of the history and purposes behind its enactment, study of the developments which have taken place subsequent to the recent supreme court decision, and an appreciation of the concept behind the "fair-trade" movement in the United States.

State fair trade laws and the "quality stabilization act" (as the proposed federal legislation now before Congress is called) are concerned basically with establishing the validity of resale price maintenance contracts between manufacturers and their distributors. Fundamentally, the questions raised by this legislation are economic in nature and involve competing economic interests. On the one hand, the manufacturer seeks to protect his channels of distribution and preserve the property rights which he has established in the good will of his trade names and trademarks. On the other hand, the distributor who buys a product will claim a right to the unrestricted use of the product. Supposedly, the public is interested in paying the lowest possible prices on the products they purchase.

At common law, both in this country and in England, resale price maintenance contracts generally were held valid and reasonable.<sup>8</sup> Then,

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the operation of the act upon any retailer comes about by virtue of the retailer's voluntary choice.

E. Conditions and contractual burdens imposed through legislation are not new and have ample precedence in the judicial decisions of this state.

F. The economic arguments with respect to whether or not price-cutting by retail dealers is injurious to the general welfare and detrimental to the small merchant is a matter of legislative consideration which was resolved by the Ohio General Assembly.

5. OHIO CONST. art. IV, § 2.

6. See *Hudson Distribs., Inc. v. Upjohn Co.*, 117 Ohio App. 207 (1961). The case arose in Cuyahoga County, Ohio.

7. OHIO CONST. art. IV, § 2.

8. *Gragan v. Chafee*, 156 Cal. 611, 105 Pac. 745 (1909); *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S.W. 427 (1901); *Garst v. Charles*, 187 Mass. 144, 72 N.E. 839 (1905); *Garst v. Harris*, 177 Mass. 72, 58 N.E. 174 (1900); *Walsh v. Dwight*, 40 App. Div. 513, 58 N.Y.S.

in the 1911 case of *Dr. Miles Medical Co. v. Park*,<sup>9</sup> the United States Supreme Court held that such resale price maintenance contracts were invalid under the Sherman Antitrust Act.<sup>10</sup> Following this decision, a period of approximately twenty years passed during which price-cutting went untrammelled throughout the United States. But certain factors convinced many state legislatures that such unrestrained competition was neither a blessing for the consumer nor for the manufacturer. Affected were certain manufacturers' trademarks, trade names, and their channels of distribution. Furthermore, the unchecked price-cutting adversely affected the small merchant. This was particularly true when the Great Depression occurred. California made the first real effort to re-establish the protection of the much-abused manufacturer's trademark and good will by passing California Statute chapter 278, section 1, the first of the state fair trade laws. This act, of course, applied only to *intrastate* commerce because of the effect of the *Dr. Miles* case and its interpretation of the application of the Sherman Act to interstate commerce.

As a reaction to the *Dr. Miles* case, the United States Congress enacted the Miller-Tydings Amendment to the Sherman Act.<sup>11</sup> Supposedly, it was the legislative step necessary to permit enactment of state fair trade laws to protect the owners of trademarks and trade names, even though such laws affected interstate commerce. The subsequent federal McGuire Act<sup>12</sup> clarified the extent to which state fair trade legislation applied. It specifically authorized the application of state fair trade provisions to non-signers of fair trade contracts. As a result of this so-called "enabling legislation," state fair trade laws were exempted from the operation of the Sherman Act. Since that time not a single state fair trade law has been challenged successfully as a violation of any of the federal antitrust laws.

A total of forty-six of the fifty states have adopted fair trade statutes since the initial California fair trade act of 1931, now the California Business and Professional Code section 16902. Two states, Ohio, in the new Ohio Fair Trade Act, and Virginia, in its new fair trade law, rejected the old non-signer provision which was originally contained in the California act. Instead, the Ohio and Virginia legislatures have based their statutes on purely contractual principles. The purpose of this article is to re-examine fair trade, particularly the type of fair trade legislation embodied in the new Ohio act. The history of the new Ohio act and

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91 (1898). The English rule was the same. See *Elliman Sons & Co. v. Carrington & Son, Ltd.*, [1901] 2 Ch. D. 275. See generally CALLMANN, UNFAIR COMPETITION & TRADEMARKS § 22.2 (2d ed. 1950).

9. 220 U.S. 373 (1911).

10. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

11. *Ibid.*

12. 15 U.S.C. § 45(a)(1)-(5) (1958).

its subsequent judicial interpretation in the Ohio courts will be of extreme importance to this examination.

#### WHY FAIR TRADE?

The need for fair trade legislation grew out of the national distribution of consumer goods identified by the brand or trademark of the producer or distributor. Slightly more than a generation ago most consumer goods were sold in bulk. The country store, the neighborhood grocer, and the family pharmacist purchased, displayed, and sold commodities in bulk. It is easy for those of us who have reached middle age to recall the barrels of pickles, the flat cylinders of cheese, the tubs of loose candy, and the barrels of crackers from which bulk merchandise was sold. In purchasing goods from such containers, consumers relied upon the reputation and integrity of the storekeeper. They neither knew nor cared about the identity of the producer or manufacturer.

As the facilities for mass national communications developed, national advertising became prevalent. The producers of consumer goods developed techniques for the national distribution of their products. To identify certain goods with their producer, brands or trademarks were affixed to the packages and used in advertising. Instead of the cracker barrel and cylinder of cheese, these products were identified as "Nabisco" crackers, "Heinz" pickles, and "Kraft" cheese. Thus, the reputation of the producer for producing desirable goods was symbolized in the mind of the consumer by the trademark.

It is axiomatic that a good reputation is difficult to build but easy to destroy. The good reputation of a consumer goods manufacturer becomes a reservoir of good will with consumers. Such good will is created by producing desirable products, making them available to consumers, and publicizing them. The trademark which a producer uses to identify the source of the goods is the symbol of the producer's good will. A producer retains a proprietary interest in his good will or good reputation with consumers. This is his most valuable asset. The new Ohio Fair Trade Act simply affords a means of protecting this proprietary interest against damage or destruction by those seeking to use this interest for their own purposes, contrary to the conditions imposed thereon by the owner.

Basic to the theory of the new Ohio Fair Trade Act is the fact that in the sale of branded goods two distinct and identifiable proprietary interests exist: (1) the interest of the producer as the proprietor of his good will, and (2) the interest of the owner of the goods. The producer does not part with his proprietary interest in his good will when he sells the goods. It is a protectible interest. Recognition of this fundamental principle is the basis of all trademark law. As Mr. Justice Clifford said in *McLean v. Fleming*:

Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the goodwill of his trade, and in the labels or trademark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his label and trademark without his consent and authority.<sup>13</sup>

Mr. Justice Holmes recognized the continuing proprietary interest of the producer and the limitations on the interest of the retailer when he said: "Ownership of the goods does not carry the right to sell them with a specific mark."<sup>14</sup> It is clear that under our laws of trademarks and unfair competition any act of a retailer or competitor which damages a trademark or the good will it symbolizes constitutes grounds for recovery.<sup>15</sup> It often is said that price-cutters use the good will of consumer goods producers to their own advantage. They contribute nothing to the creation of the good will, and the reputation of the producer is used as "bait" to create the impression that everything is an equal bargain.

Price-cutting is one of the oldest devices used to create a monopoly.<sup>16</sup> Retailers must earn a reasonable profit to stay in business. When a competitor begins to cut prices, other retailers must also cut prices. The result is often twofold: either profit is lost and/or the sale of the good must be discontinued. Thus, a producer's market is confined to a few giant outlets which are willing to either absorb loss of profits or can dispose of one particular line of goods for promotional purposes. This usually is accomplished at an unrealistically low rate of profit. As time passes, a small number of outlets will assume control of the market and are then in a position to set their own rate of profit. In the final analysis, this cycle will work to the long-run detriment of the public. Furthermore, the producer of an item requiring widespread circulation is directly injured because he will not sell as many items through a few large outlets as he will through many small outlets.

#### EVOLUTION OF THE OHIO FAIR TRADE ACT

Fair trade legislation throughout the United States evolved during the early nineteen thirties. It was a response to the particularly predatory price-cutting practices prevalent during that period.<sup>17</sup> As a part of this

13. 96 U.S. 245, 252 (1877).

14. *Bourjois & Co. v. Katzel*, 260 U.S. 689, 692 (1923).

15. See, e.g., *Hugo Stein Cloak Co. v. S. B. Stein & Son*, 58 Ohio App. 377, 16 N.E.2d 609 (1937).

16. Compare *Standard Oil Co. v. United States*, 221 U.S. 1 (1910), with *United States v. American Tobacco Co.*, 221 U.S. 106 (1910).

17. 2 TRADE REG. REP. ¶ 6041 (1963) contains a tabulation and reference to the fair trade laws enacted in the various states and an up-to-date designation of whether the courts in those states have held the law constitutional, constitutional in part, or unconstitutional.

movement, Ohio enacted fair trade legislation in 1936. This law was applied throughout the state with little controversy until 1958. Then, in the case of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*,<sup>18</sup> the Ohio Supreme Court found the 1936 act unconstitutional insofar as it bound non-signers of fair trade contracts. The decision indicated that the "non-signer" clause of the 1936 act involved a delegation of legislative authority, abuse of the police power, and violation of the due process clause. Unfortunately, the court was silent with respect to the way in which these various constitutional evils arose. Accordingly, subsequent courts and the legislature were left without true guideposts as to what could and could not be done in enacting and enforcing constitutional fair trade legislation.

It must be understood at this point that to be effective, fair trade legislation must reach two classes of retailers: those who will sign agreements with the manufacturers of branded merchandise, and those who desire to deal in such manufacturer's merchandise and utilize the manufacturer's trademarks and trade names, but who have not signed and will not sign written fair trade agreements. It is this second objective of the law which has bothered the courts and created constitutional problems in the view of certain state tribunals. In all but five states,<sup>19</sup> the courts have refused to find unconstitutional those portions of the law which permit manufacturers and retailers to sign written fair trade contracts.<sup>20</sup>

Many courts, including the United States Supreme Court, have found that even the non-signer provisions of the various state fair trade laws do not violate any constitutional provision.<sup>21</sup> The United States Supreme Court's decision stands to this day as a model of the type of decision and reasoning which supports the validity of the "old-type" fair trade legislation, including the non-signer provision. In fact, until the Ohio and Michigan decisions on fair trade, all of the so-called "big-market" states and most of the courts generally considered by lawyers to be "strong" courts had found fair trade legislation to be valid even as to non-signers. These included courts in the states of California, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania.

Subsequent to the Ohio Supreme Court's ruling in the *Bargain Fair* case, the Ohio General Assembly was forced to determine (1) whether or not a need still existed for fair trade legislation, and (2) whether, as a practical matter, any effective similar legislation could be enacted in view

18. 167 Ohio St. 182, 147 N.E.2d 481 (1958).

19. The states are Alabama, Montana, Nebraska, Utah, and Wyoming. None of these jurisdictions, it will be noted, is a so-called "big market" state.

20. See the decision in Ohio in the *Bargain Fair* case, where the court invalidated the non-signer provisions of the 1936 Fair Trade Act, but cast no question upon the constitutional validity of the contract provisions of the act.

21. *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936).

of the *Bargain Fair* holding. Affirmative answers to both questions resulted in the enactment of the 1959 Fair Trade Act. Significant to the analysis of what the legislature did in enacting the 1959 Fair Trade Act are the following propositions which are directly attributable to an analysis of what the *Bargain Fair* decision held and, perhaps more important, what it did not hold.

*First*, the Ohio Supreme Court did *not* hold all fair trade legislation unlawful *per se*. The court's objection was limited to the non-signer provision of the 1936 act. It held that the non-signer provision permitted a manufacturer to arbitrarily establish a resale price which by legislative fiat became the legal resale price throughout the state. This was true whether or not the retailer had acquired the goods with knowledge of the price, had in any way indicated his assent expressly, or by act or word had agreed to the conditions attached to his use of the manufacturer's trademark in reselling the goods. The court thus concluded that the non-signer clause was an unauthorized delegation of legislative power to the manufacturer. This objection would vanish, however, if the retailer were given advance notice of a manufacturer's minimum prices and a choice in deciding whether he desired to utilize the trademarks and trade names of manufacturers who elected to take advantage of the Fair Trade Act.

*Second*, the court did *not* invalidate the provisions of the former act which permitted the manufacturer and retailer to stipulate minimum prices by agreement. Thus, the legislature reasoned that the court's objections to the prior Fair Trade Act (or at least to the non-signer provision) would be overcome if the act were made applicable to all parties on a voluntary or consensual basis, whether that basis was the result of the acts of the parties themselves or of express agreements between the parties.

*Third*, the court found that a property interest did in fact exist in a trademark, and then held that the attempted protection of that property interest through the "non-signer" clause device unfairly infringed on the seller's property interest in the trademarked commodity.

In enacting the 1959 Fair Trade Act, the legislature accepted a principle stated by the Supreme Court of the United States:

There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well.<sup>22</sup>

The Court recognized that

good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business — sometimes the

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22. *Id.* at 195.



most valuable contributing asset of the producer [manufacturer] or distributor [retailer] of commodities. And distinctive trademarks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well-settled that the proprietor of the good will "is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority."<sup>23</sup>

Furthermore, the legislature stated:

A Proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.<sup>24</sup>

The Court recognized the legislative fiat that the "ownership of the goods does not carry the right [by the retailer] to sell them with a specific mark."<sup>25</sup>

With these fundamentals of trademark law and economics before it and defined by it, the legislature attempted to find a way to protect trademarks, good will, and small business and to prevent the concentrated sale of branded commodities in a small number of large retail outlets.

In the *Bargain Fair* case, the Ohio Supreme Court did not question the right of a trademark owner to enter into contracts with distributors of the goods bearing his mark to establish minimum prices for the resale of such goods. And there was no suggestion that a statute permitting the exercise of such a right was in conflict with the Ohio Constitution.

Relying on fundamental principles of contract law, the legislature in the new Fair Trade Act defined a "contract" as "any agreement, written or verbal, or arising from the acts of parties."<sup>26</sup> The proprietor of branded commodities is authorized to establish minimum prices for their resale. Anyone who purchases goods with knowledge of the established resale price enters into a contract with the proprietor not to sell the goods for less than the established prices while using the proprietor's trademark. Therefore, by the employment of the elementary principles of offer and acceptance, the legislature has provided that a retailer enters into a contract with a proprietor when he purchases goods bearing the proprietor's trademark with knowledge that the proprietor has established resale prices for his goods. The proprietor thus establishes minimum resale prices as a condition for the use of his good will as an aid in the resale.

23. *Id.* at 194-95. (Citing *McLean v. Fleming*, 96 U.S. 245, 252 (1877).)

24. OHIO REV. CODE § 1333.31.

25. *Bourjois & Co. v. Katzel*, 260 U.S. 689, 692 (1923).

26. OHIO REV. CODE § 1333.28(I).

The issue may be further narrowed: Is a statute unconstitutional if the contracts it authorizes are based on the principle of offer and acceptance arising from the *acts* of the parties? The legislature believed to the contrary.

After thorough debate and full consideration of all data presented relating to both the economic and constitutional questions, the House Judiciary Committee reported the present fair trade bill without a single dissenting vote. This bill was passed by the House with only four negative votes. The bill was then referred to the Senate Judiciary Committee, where it was recommended for passage without a single dissenting vote. The Senate as a whole adopted the bill with only two negative votes.

Governor DiSalle, in accordance with his prerogative, vetoed the law on policy grounds. Nevertheless, the Democratically-controlled House of Representatives repassed the bill by a vote of thirty to three.

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 as follows:

- [1.] [T]o protect and preserve small business,
  - [2.] [T]o safeguard the good will of trademarks and trade names,
  - [3.] [T]o further wholesome competition [and] . . . prevent monopoly in the distribution of goods, and
  - [4.] [T]o promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.
- . . . .
- [5.] To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices . . . .

The legislative hearings from which the purposes embodied in the new Fair Trade Act were drawn included evidence from which the legislature drew the following conclusions:

1. Competition is not restrained by the new Fair Trade Act among producers of rival articles who will seek to make their prices as competitive as possible, but only among dealers selling the same article. That is, any limitation on competition relates only to *intra*-brand and not *inter*-brand competition. The Ohio Fair Trade Act operates only in instances where the product involved is in free and open competition with other commodities of the same general class in the same market area. In effect, the producer is seeking only to avoid competing with

himself. Another manufacturer is free to undersell the producer and thus give the public an open market. Prices will therefore be kept down by competition between manufacturers and by the freedom of the public to refrain from buying an article if it is too expensive.

2. The consumer is not affected any differently through retail price maintenance contracts than if the manufacturer sold to them directly through his own local chains, as is the case with many large concerns such as A & P, Sears, Woolworth, etc. These manufacturers themselves control their own system of distribution.

3. The stability of the manufacturer's marketing organization and system of distribution is lost when some retailers start price-cutting. Such practice threatens the reasonable profit of others, who then will refuse to handle the price-cut article. This results in lower distribution of the manufacturer's products, which deprives both the manufacturer and the public of the benefits of mass production.

4. Price-cutting on well-known products often deceives the public and lures customers into a store where they may be induced to buy unknown, unbranded articles at an unreasonably high price. In this instance, both the manufacturer of the standardized article and the general public are losers.

5. A controlled system of distribution and minimum retail price maintenance operate as combatants to inflation by deterring price increases in two ways:

(a) Price increases by unscrupulous retailers who could take such action if the prices on branded commodities were not standardized and generally well known are prevented;

(b) The manufacturer will be reluctant to raise his prices where he must do so generally and thus be subject to the competition of rival manufacturers.

6. The reputation of a trade name in which the manufacturer may have a substantial investment and which may be the manufacturer's most valuable asset will suffer if the product sold in connection with such a trade name is priced indiscriminately by various retailers and dumped on their bargain counters.

7. Price warfare among competing retailers selling a manufacturer's commodity will result in the strongest retail organization driving the smaller independent retailers out of the market. The evils of this tendency toward monopoly affect not only those eliminated but also the welfare of the public generally. For in the long run, monopolistic conditions do not result in lower prices. Every independent business which fails as a result of price warfare lessens the vigor of the overall economy.

8. Emphasis placed by competing retailers on selling the same product at a price below that of other retailers (even perhaps below cost) discourages the retailer from providing necessary services in connection with the sale of the products.<sup>27</sup>

The new contract concept embodied in the Ohio Fair Trade Act of 1959 was also the basis for similar legislation enacted in Virginia. The Virginia legislation was tested and found constitutional by the supreme court of that state.<sup>28</sup> As in Ohio, previous Virginia fair trade legislation had been held invalid. Virginia and Ohio, however, are the only states which have adopted a contract concept to replace the non-signer provision, although the non-signer provisions were the backbone of the predecessor fair trade laws in each of those states, as well as the fair trade legislation existing in other states throughout the country.

#### WHAT FAIR TRADE ACCOMPLISHES

In essence, the new Ohio Fair Trade Act provides that where trademarked products are in free and open competition with other commodities produced for sale at retail, the owner of the trademark or brand name applied to such commodities may condition the use of such trademark or brand name. This can be accomplished by requiring that any retailer who desires to acquire and sell such commodities at retail with the use of that trademark or brand name must sell said products for at least the minimum prices stipulated by the owner of the trademark or brand name. The retailer is *not* required to utilize a trademark owner's brand or name if he objects to such condition. In addition, no retailer can be bound by the provisions of the Ohio Fair Trade Act unless he has had notice of the conditions on the use of a given brand or name at the time he acquires the commodities. The legislature has expressed an intention that the Fair Trade Act will have no operative effect unless the merchandise in question is in free and open competition with other commodities of the same class.<sup>29</sup>

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27. A complete transcript of the legislative hearings was before the court of appeals and the Ohio Supreme Court in Brief for Appellee, p. 9, *Hudson Distribs., Inc. v. Upjohn Co.*, 174 Ohio St. 487, 190 N.E.2d 460 (1963).

28. *General Elec. Co. v. Standard Drug Co.*, 202 Va. 367, 117 S.E.2d 289 (1960), *cert. denied*, 368 U.S. 4 (1961).

29. This merely gives the owner of a trademark or trade name the same control over his system of distribution as is now exercised by certain large commercial establishments, such as oil companies, groceries, and department stores that control their own systems of distribution from the manufacturing through the retail level. Thus the law says that the Bulova Watch Company, for example, may preclude price-cutting competition between various retail outlets of Bulova watches, but there can be no abatement of the competition between Bulova watches, Elgin watches, Hamilton watches, etc.

THE LEGAL BASIS FOR THE CONCEPT  
EMBODIED IN THE NEW OHIO FAIR TRADE ACT

It is clear that, even under the supreme court's holding in the *Bargain Fair* case, a written contract between manufacturer and retailer designed to establish minimum resale prices for a manufacturer's trademarked commodities is valid. The legislature has now provided that a contract also may exist where the manufacturer or trademark owner gives *notice* of its minimum retail prices to the retailer. If such a retailer thereafter decides to acquire the manufacturer's commodities bearing his trademark and to use that trademark in the sale of such commodities, a contract will exist. The legislature found that the only difference between the "consent" and "in fact" situations is that in the former, a written contract between the parties exists, while in the latter, a contract arises by reason of the acts of the parties. The legislature further recognized that nothing new nor novel occurs in the establishment of a contract arising out of their acts between certain parties.

If a person owns a piece of property, for example an apple, he may enter into an agreement with another person to sell that apple for five cents. A binding contract arises and the purchaser is obligated to pay the seller five cents. The seller also may place a sign on his apple saying, "For Sale — 5 cents." If another person then comes along, reads the notice, and takes and eats the apple, he is equally obligated to pay the seller five cents. This result follows even if the apple eater says to himself while munching the apple, "I intend to pay only three cents." The principle is the same whether the property interest transferred is an apple, a house, an exclusive franchise or license, or a trademark or trade name.

The Ohio legislature in 1959 simply defined another way in which parties may enter into fair trade contracts. This method was in addition to written agreements, the validity of which were not questioned in the *Bargain Fair* case. However, out of an abundance of caution, the legislature went further. The discounter was given additional safeguards which ordinarily do not appear in a contractual relationship. The legislature provided that a retailer might escape from the contract if he later regretted his bargain, even though he had decided to acquire a commodity having a given brand name with full knowledge of the condition on its use of that brand name. To accomplish such rescission, the retailer can sell the commodity back to the manufacturer at the invoice price. In addition, the legislature has provided that if the retailer decides *not* to take advantage of the manufacturer's trade name to assist him in reselling the goods, he may sell the commodity *qua commodity*

at any price he chooses.<sup>30</sup> In the apple analogy, the purchaser does not have these privileges.

The problem which really has faced the courts and legislatures has been to determine the proper allocation of competing property rights and interests under the fair trade acts. Both the interest of the manufacturer in his trademark or trade name and the interest in the commodity itself must be considered. The Supreme Court of Ohio held, and some others have agreed, that the non-signer clause weighed in favor of the property rights of the trademark owners to the prejudice of certain property rights in the commodity itself to the extent that constitutional rights surrounding the latter were violated.

The new Ohio legislation, together with the new Virginia act, established a new concept in the area of retail price maintenance — an area of expanding economic significance as giant discount organizations loom ever larger in the market place.<sup>31</sup> To an increasing extent, these organizations threaten the economic survival of the independent merchant and distribution systems which need independent merchants as an integral part of their economy. The new concept strikes a balance between the competing proprietary interests. It still permits the owner of a trademark or trade name to set the price or conditions on the use of that mark or name, just as the owner of any other piece of property may state its price. However, it prevents the owner of a commodity from being arbitrarily forced to accept that price or those conditions by (1) giving him a choice through notice of the conditions *before* he becomes bound by them, and (2) allowing him to break the relationship with the trademark owner without economic loss, even after he has made such an election.

When the *Hudson Distributors* case and the new Ohio Fair Trade Act are analyzed on the basis of the property interest in a trademark or trade name, the constitutional arguments that plagued the old non-signer clause dissolve. The legislature had ample precedent for the imposition of a contractual relationship arising out of the acts of the parties as defined in the Fair Trade Act.<sup>32</sup> In Ohio, the General Assembly was

30. OHIO REV. CODE § 1333.33.

31. Hudson Distributors is a part of a large chain of retail and wholesale drugstores operating in Michigan and Ohio.

32. The commercial statutes of Ohio contain ample precedent which would justify the legislature's conferring of covenants, warranties, and contractual burdens by law in situations in which a transfer of personal property occurs. Indeed, such authority existed in Ohio's versions of the Uniform Sales Act, Conditional Sales Act, Mechanic's Lien Laws, Negotiable Instruments Law, Trust Receipts law, and Warehouse Receipts Act. These laws were replaced by the adoption of the Uniform Commercial Code on July 1, 1962. Nevertheless, the same principles under examination in this article have been carried forth and, it is submitted, still prevail.

Specifically, the burdens and obligations imposed upon transferors of personal property can be found in §§ 1302.27-30 of the Ohio Revised Code. These sections impose a warranty

aided by an express provision of the Ohio Constitution which it felt authorized passage of such legislation.<sup>33</sup>

### FAIR TRADE IN OHIO SUBSEQUENT TO THE 1959 ACT

Subsequent to the enactment of the new Fair Trade Act, injunctions were granted readily in suits brought by trade name owners in Franklin County, Montgomery County, and in isolated instances in other parts of

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of fitness for a specific purpose and of merchantability as an implied condition of the sale itself. This occurs without regard to whether such a condition is incorporated into the sales contract between the parties. Instead, the burdens imposed arise from the fact that a sale occurred, not because the parties voluntarily agreed to such terms.

Similarly, the transfer or assignment in bulk of a part or entire stock of merchandise also creates burdens and obligations *by statute*. See OHIO REV. CODE §§ 1306.01-.08.

Section 1311.09 of the Revised Code affords remedial rights to parties involved in material improvements contracts. The rights afforded extend not only to the contracting parties, but also to subcontractors, materialmen, laborers, and those who have no contractual relationship with the original parties. These provisions, in their previous form, were attacked on constitutional grounds in *Theatre Co. v. Hooper*, 123 Ohio St. 322, 175 N.E. 450 (1931). The court, however, rejected the attack and upheld the statute's validity.

The impositions of contractual burdens and obligations by reason of prescribed acts or conduct are most commonly found in the law of commercial transactions. Obviously, these well-known principles are essential to the preservation of practical commercial relationships. Still, such obligations are *not* limited to this particular area of law.

For example, the Ohio General Assembly defined a contractual relationship in a "non-commercial" area. See OHIO REV. CODE § 3319.11, which establishes a school teacher's contract based solely on the acts of the parties. This section and its predecessor caused considerable litigation, but the Supreme Court of Ohio upheld its provisions. See *Jacot v. Secrest*, 153 Ohio St. 553, 93 N.E.2d 1 (1950); *State ex rel. Foster v. Madison Township Bd. of Educ.*, 151 Ohio St. 413, 86 N.E.2d 598 (1949); *State ex rel. Rutherford v. Barberton Bd. of Educ.*, 148 Ohio St. 242, 74 N.E.2d 246 (1947).

33. The General Assembly, in § 1333.27(A) of the Revised Code, specifically pointed out that, *inter alia*, it was acting "in pursuance of the power specifically granted the General Assembly by the people in Section 2, Article XIII of the Ohio Constitution, to regulate the sale and conveyance of personal property."

If the Ohio Fair Trade Act purports to do anything other than protect the proprietary rights of the owner of a trademark or trade name from the abuse of those rights by others, it certainly does nothing beyond prescribing the manner in which persons may sell and convey their personal property. Moreover, an examination of the legal arguments against this law indicates that they amount to the complaint that this legislation seeks to interfere with what is claimed as a person's completely uninhibited and unrestricted constitutional right to sell and convey his personal property, irrespective of the effect upon or the rights of others.

Even if the statute did go as far as claimed, it is submitted that the General Assembly has the express constitutional right to impose restrictions of the kind which opponents of the new Fair Trade Act claim are imposed. In 1912, the Ohio Constitution of 1851 was amended to include article XIII, section 2, to which the General Assembly referred and 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."

The immediate motivation for this amendment was that the supreme court in *Miller v. Crawford*, 70 Ohio St. 207, 71 N.E. 631 (1904) and *Williams & Thomas Co. v. Preslo*, 84 Ohio St. 328, 95 N.E. 900 (1911) declared a bulk sales law passed by the legislature unconstitutional on the ground that such a law constituted an unwarranted restriction upon the rights of the individual to acquire and possess property and contained a forbidden discrimination in favor of a limited class of creditors. The constitution was then amended by the inclusion of article XIII, section 2, quoted above, and thereafter the General Assembly re-enacted another bulk sales law. Subsequently, the supreme court agreed that the purpose of

the state. Prior to the effective date of the new Fair Trade Act, Hudson Distributors, Inc., part of a giant interstate discounting drug chain, commenced a declaratory judgment action in the Common Pleas Court of Cuyahoga County to test whether the new Fair Trade Act had overcome the constitutional infirmities found by the supreme court in the 1936 act. The parties in that case, which ultimately became the test case decided by the supreme court, proceeded to build a large and complete record. This compilation contained the complete legislative hearings as well as a full panorama of economic and legal arguments pertaining to fair trade legislation.

While there were other lower court holdings with respect to the constitutionality of the new Fair Trade Act,<sup>34</sup> it generally was conceded that the cases in which the constitutionality of the new Fair Trade Act would be tested were the declaratory judgment actions commenced by Hudson Distributors, Inc. against The Upjohn Company and Eli Lilly & Co. in Cleveland. In those cases, the law initially was held unconstitutional in the Common Pleas Court of Cuyahoga County. On appeal, the decision was reversed and the constitutionality of the new act affirmed. The supreme court then accepted a motion to certify filed by Hudson Distributors, Inc. and received extensive briefs from all of the parties to that litigation. Briefs also were submitted by interested groups throughout the state who appeared before the court as *amicus curiae*. In its struggle to reach a decision, the court twice heard oral argument on the merits pertaining to the constitutional questions before it. The supreme court then affirmed the decision in the court of appeals below and thereby held that the new Fair Trade Act was constitutional. But it did not succeed in completely validating the new Ohio legislation because the opinion was by a minority of the seven-judge court.<sup>35</sup>

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this amendment was to amend the Bill of Rights and give the General Assembly power to regulate the sale and conveyance of personal property, *regardless of any other provision of the Bill of Rights which might otherwise invalidate legislation in this area*. Thereafter, the court upheld the constitutionality of the new bulk sales law in *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 123, 110 N.E. 648 (1915).

34. See Judge Gusweiler's opinion in *Helena Rubinstein, Inc. v. Cincinnati Vitamin & Cosmetic Distrib. Co.*, 167 N.E.2d 687 (Ohio C.P. 1960), holding the Fair Trade Act unconstitutional, and the opinions of Judge Leach and the Franklin County Court of Appeals in the case of *Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distrib. Inc.*, TRADE REG. REP. (1962 Trade Cas.) § 70360 (Ohio Ct. App. 1962), *appeal dismissed*, 174 Ohio St. 486 (1962). (Consolidated with *Corning Glassworks, Inc. v. Ontario Store of Columbus, Inc.*, among others.)

35. The Ohio constitutional provision requiring six votes to declare a law unconstitutional has been tested and found valid by the United States Supreme Court in *Ohio v. Akron Park Dist.*, 281 U.S. 74 (1929).

The history and purpose behind the Ohio constitutional limitations upon the supreme court in declaring the laws of this state unconstitutional are outlined in *Michaelson v. City of Cincinnati*, 27 Ohio N.P. (n.s.) 100 (C.P. 1928): "For a number of years prior to the adoption of the constitution in 1912, there was a great deal of discussion and some severe criticism of the right of courts to declare acts of legislative bodies unconstitutional and void. At one time this criticism went to the extent of advocating the recall of judicial decisions.



The controlling opinion of the supreme court was a well-reasoned, lengthy discussion of the principles involved. The "majority" opinion, however, unfortunately was limited to two paragraphs with no statement of the legal rationale or reasoning which led to their conclusion. It can be said that if the judges of the supreme court strike down a piece of legislation involving so much thought and effort by the General Assembly, at the least the court owes the General Assembly the courtesy of explicitly stating the reasons for their feeling that the legislature has gone astray on constitutional principles. The so-called "majority opinion" did not deign to do this.

#### DEVELOPMENTS SUBSEQUENT TO THE OHIO SUPREME COURT'S HOLDING\*\*

The first litigation subsequent to the supreme court's holding in the *Upjohn* case took place in the Common Pleas Court of Cuyahoga County. This involved a counterclaim filed by Eli Lilly & Co. in the declaratory judgment action commenced against that company by Hudson Distributors, Inc.<sup>36</sup> In that case, Judge Gerald Baynes of the Common Pleas Court of Madison County, sitting by designation in Cuyahoga County, found that the discounter was in violation of Eli Lilly's rights under the new Fair Trade Act. Accordingly, the court granted an injunction prohibiting the discounter from further violations of the Fair Trade Act.

The new Ohio Fair Trade Act, however, also provides under Section 1333.32(b)(3) of the Ohio Revised Code that any person suffering damage by reason of a violation of the Fair Trade Act is entitled to recover the costs of suit "including reasonable attorneys' fees." This provision becomes truly significant in light of Judge Baynes' decision. Obviously, a substantial amount of attorneys' fees was involved in the representation of Eli Lilly, for the case went through the Supreme Court of Ohio. Hudson Distributors thus found itself legally bound to pay an award of \$38,100 in attorneys' fees to Eli Lilly. Counsel throughout the State of Ohio would do well to bear this in mind when advising clients on the merits of contesting actions commenced under the new Fair Trade Act.

The ultimate future of the new Fair Trade Act in Ohio has not yet

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The constitutional convention in 1912 by Article 4, Section 2, which section was later ratified by the people of this state, placed a check upon the power of the courts of this state to declare acts unconstitutional and void. If this court was to follow the opinion of the majority of the judges rather than the judgment of the court, it would be doing by indirection that which the Constitution prohibits being directly done." See also *Board of Educ. v. Wellston*, 43 Ohio App. 552, 184 N.E. 28 (1932).

36. *Hudson Distrib. Co. v. Eli Lilly & Co.*, No. 730,118, Ohio C.P. Aug. 7, 1963 (Cuyahoga County declaratory judgment action).

\*\* See Addenda for current developments in the *Lilly* and *Upjohn* cases.

been settled in the courts. Presently, cases seeking relief under the Fair Trade Act are pending in the Federal District Court in Columbus, as well as in the Common Pleas Courts of Clark, Cuyahoga, Lucas, and Mahoning Counties. Perhaps the federal courts will be the key to the future course which fair trade enforcement will take in Ohio. Judge Carl F. Weinman of the United States District Court for the Southern District of Ohio (Western Division) granted a temporary injunction even prior to the supreme court's ruling in the *Upjohn* case. The discounter in that case took an appeal to the United States Sixth Circuit Court of Appeals, which affirmed Judge Weinman's holding.<sup>37</sup> Because the Ohio Supreme Court has now affirmed the constitutionality of the Fair Trade Act, and since the federal courts are bound to follow the substantive law of the state involved, it would seem clear that any manufacturer should be able to secure redress for a violation of his rights under the new Ohio Fair Trade Act in the federal courts. Of course, the requisite diversity of citizenship must exist between the manufacturer and the offending retailer.

An analysis of the Ohio Constitution and of case precedents leads to the conclusion that judicial respect for the provisions of article IV, section 2 of the Ohio Constitution requires similar enforcement of the Fair Trade Act by the various common pleas courts throughout the State of Ohio. There exists, however, the possibility that *any* case commenced in the state court may reach a court of appeals which may be tempted to disregard the constitutional provision and strike down the new Fair Trade Act. For the lower courts now will feel confident that such action would receive the favorable support of the four dissenting supreme court judges in the *Upjohn* case.

### CONCLUSION

As a result of the recent Ohio and Virginia decisions, it appears that the long and turbulent history of fair trade legislation in this country may be at another turning point. A basic concern to all courts considering the cases arising in this field has been one of fairness, both to the proprietary interest of the trademark owner and to the interest of the retailer in selling merchandise purchased by the retailer at a price of the retailer's own choosing. The new contract concept of the Ohio Fair Trade Act strikes a balance that apparently affords fair protection to both the manufacturer and the retailer. The manufacturer's proprietary interest can be protected if he complies fully with the provisions of the new Fair Trade Act. The retailer also is protected because he cannot be

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37. *Miles Labs., Inc. v. Dayton Vitamin & Cosmetic Distribs., Inc.*, 292 F.2d 59 (6th Cir. 1961).

required to impose any particular price for a commodity, unless his willingness to be bound by a contractual agreement is first indicated through his act of acquiring the commodity in question with notice of the conditions attendant to the use of the trademark affixed to that commodity.

While it is unfortunate that the Supreme Court of Ohio was not able to lay the matter completely at rest by a majority affirmance of the finding of the Cuyahoga County Court of Appeals, the opinion of the court in the *Upjohn* case joins with the *Standard Drug* case in Virginia in validating the laws in the only two states embodying the new contract concept as the basis for fair trade legislation. This new concept of fair trade legislation seems to be satisfactory and may well afford the solution that legislators in the other states are seeking to meet the problems presented by the ever expanding, predatory, price-cutting discounters that are flooding the American market scene.

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#### ADDENDA

Since preparation of this article,

on August 22, 1963, the Ohio Court of Common Pleas, Cuyahoga County, Cohen, Judge, vacated and set aside the decision rendered by Judge Baynes and assigned the cause for retrial on allegations by the attorney for the plaintiff, Hudson Distributors, Inc., that Judge Baynes had a direct interest in a non-discounting retail store located fifteen miles from Columbus Vitamin & Cosmetic Distributors, Inc., a sister corporation of Hudson Distributors, Inc.<sup>38</sup>

This commonpleas decision is now being appealed.

Furthermore, the United States Supreme Court has granted review of the appeals in *Hudson Distribs., Inc. v. Upjohn Co.*<sup>39</sup> and *Hudson Distribs., Inc. v. Eli Lilly & Co.*<sup>40</sup> The outcome of these appeals, of course, is open to conjecture.

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38. *Hudson Distribs., Inc. v. Eli Lilly & Co.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70871 (Ohio C.P. 1963). See text at note 36 *supra*.

39. 32 U.S.L. Week 3210 (U.S. Dec. 12, 1963) (No. 489).

40. *Id.* (No. 490).