

such a requirement cannot be implied. The court did not discuss this argument in very great detail and it is not clear whether such a discussion might not elicit a more definite congressional intent one way or the other.

It would seem that in discussing federal "strike" suit prevention the court should have discussed Rule 23 of the Federal Rules of Civil Procedure. This rule prohibits the settlement of derivative suits without the permission of the court, thereby apparently eliminating the cause of "strike" suits. The decision of the court on these particular facts seems to be correct. However, if the court were going to preface the decision with a policy discussion, it might have given a more complete treatment by including a discussion of Rule 23. If Rule 23 can be interpreted to prevent the "strike" suit, then federal security for expenses requirements must be justified on other grounds or they should be eliminated. Security for expenses legislation has had a long and controversial history in both state and federal courts. Perhaps the utilization of Rule 23 could satisfy both sides. It would, on the one hand, prevent the "strike" suit and, on the other hand, would relieve the minority shareholder of the security for expenses burden.

Of course, the elimination of security for expenses requirements from federal laws is a legislative rather than a judicial function. However, if Federal Rule 23 does eliminate the need for security for expenses perhaps the courts could aid Congress by pointing this out. If in judicial discussion of this problem the courts showed agreement on the impact of Rule 23 on security for expenses requirements, then the legislature would be better able to act. The courts cannot disregard existing laws but they can show that certain provisions have become unnecessary due to subsequent enactments thereby giving the legislature cause to reexamine their original position.

JAMES M. QUINN

Fair Trade Laws—Non-Signer Clauses—Constitutionality.—*Hudson Distribs., Inc. v. Upjohn Co.*; *Hudson Distribs., Inc. v. Eli Lilly & Co.*¹—The plaintiff is the operator of retail stores which sell pharmaceutical products. The defendants are the manufacturers of pharmaceuticals which they distribute to retailers either directly or through wholesalers. The defendants independently entered into a number of written contracts with retail stores in Ohio for the purpose of determining the retail price of their commodities, and served notice of these contracts on the plaintiff. The plaintiff purchased the defendants' trade-marked products in interstate commerce from a third party, with notice of the established retail price in Ohio. He then proceeded to sell these articles at prices below those fixed by the defendants. The defendants individually sought to enjoin the plaintiff from selling their products for less than the established prices. In so doing, they claimed the protection of the Ohio Fair Trade Act, which makes the purchase of a trade-marked or trade named commodity for resale, with knowledge of the existence of fair trade contract prices, an implied contract to comply with these prices, even

¹ 176 N.E.2d 236, Trade Reg. Rep. (1961 Trade Cas.) ¶ 70,065 (Ohio Ct. App. 1961).

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though the purchaser was not a signer of such a contract.² The plaintiff then sought a declaratory judgment, against each of the defendants, that the fair trade act was invalid and unconstitutional. Although heard separately, the court considered these cases together because they involved the same questions. In the Court of Common Pleas of Ohio, Cuyahoga County, the fair trade act was declared to be an unconstitutional delegation of legislative power to private persons.³ The Court of Appeals of Ohio, Cuyahoga County, reversed. HELD: The fair trade act is not an unconstitutional delegation of legislative power to private persons. The statute merely prescribes the conduct which is to constitute an implied contract, and such private contracts are not legislative in character.

In most states, fair trade acts are found constitutional where a manufacturer is allowed to enforce his resale price maintenance contracts only against the signers of such contracts.⁴ However, in nearly every state such acts also declare that the terms of a fair trade agreement between the manufacturer and any given retailer are binding on all other retailers who have notice of such agreements, regardless of whether they have consented to be bound.⁵ These "non-signer" clauses have been held unconstitutional by a majority of courts.⁶ Such decisions declare that "non-signer" clauses

² Ohio Rev. Code Ann. §§ 1333.27-1333.34 (Baldwin 1961). Section 1333.28(I) defines a contract for the purposes of the act as follows:

"Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

³ Hudson Distribs., Inc. v. Upjohn Co.; Hudson Distribs., Inc. v. Eli Lilly and Co., Trade Reg. Rep. (1960 Trade Cas.) ¶ 69,778 (Ohio Ct. of C.P. 1960).

⁴ Of the 46 states which have enacted fair trade acts, only Montana, Nebraska, and Utah have declared them entirely unconstitutional. Skaggs Drug Center Inc. v. Union Carbide & Carbon Corp., Trade Reg. Rep. (1961 Trade Cas.) ¶ 69,930 (Mont. Sup. Ct. 1961); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956).

⁵ Whoever knowingly and wilfully advertises, offers for sale, or sells any commodity at less than the minimum price stipulated in any contract entered into under Section 1333.06 of the Revised Code, whether such person advertising, offering for sale, or selling such commodity is or is not a party to such contract, is engaging in unfair competition and unfair trade practices and is liable to any person damaged thereby.

Ohio Rev. Code Ann. § 1333.07 (Baldwin 1961). This section was declared unconstitutional in Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958).

⁶ Twenty-one states have held their non-signer clauses unconstitutional. These are: Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, Utah, Washington, and West Virginia. In seventeen states such pro-

either deprive the retailer of the right to set his own prices without due process of law,⁷ or involve an unlawful delegation of legislative power to private persons.⁸

In 1958 the Ohio Supreme Court struck down the 1936 Ohio Fair Trade Act for both of the preceding reasons.⁹ In drafting the new fair trade act a great deal of reliance was placed on the Virginia Fair Trade Act of 1959, which provides that a non-signer who accepts goods with notice of the manufacturer's fair trade price is deemed to have contracted not to sell them below that price.¹⁰ The Virginia Supreme Court found this provision constitutional in the case of *Standard Drug Co. v. General Elec. Co.*¹¹ There the manufacturer sold flashbulbs to a retailer with notice of the fair trade price. The retailer, however, never agreed to comply with such prices, and later sold them at a lower figure. The court held that a contract had been made, and that the new act was not subject to the constitutional objections of non-signer provisions because it only allowed "voluntary" contractual restrictions on minimum resale price.¹²

visions have been held valid. These are: Arizona, California, Connecticut, Mississippi, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Tennessee, Virginia, and Wisconsin. See Trade Reg. Rep. ¶ 6021. See generally, R. K. Bates, *The Constitutionality of State Fair Trade Acts*, 32 Ind. L. J. 127 (1957).

⁷ *Union Carbide & Carbon Corp. v. White River Distribs.*, 224 Ark. 558, 275 S.W. 2d 455 (1955); *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (1956); *Miles Labs., Inc. v. Eckerd*, 73 So.2d 680 (Fla. 1954); *Cox v. General Elec. Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955); *General Elec. Co. v. American Buyer's Coop., Inc.*, 316 S.W.2d 354 (Ky. 1958); *Shakespeare Corp. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952); *General Elec. Co. v. J. L. Brandeis & Sons*, 159 Neb. 736, 68 N.W.2d 620 (1955); *Skaggs Drug Center v. General Elec. Co.*, 63 N.M. 215, 315 P.2d 967 (1957); *Union Carbide & Carbon Corp. v. Bargain Fair*, 167 Ohio St. 182, 147 N.E.2d 481 (1958); *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956); *Rogers-Kent, Inc. v. General Elec. Co.*, 231 S.C. 636, 99 S.E.2d 665 (1957).

⁸ *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 301 P.2d 455 (1955); *Bissel Carpet Sweeper Co. v. Shane Co.*, 237 Ind. 188, 143 N.E.2d 415 (1957); *Quality Oil Co. v. E. I. DuPont de Nemours & Co.*, 182 Kan. 488, 322 P.2d 731 (1958); *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts.*, 231 La. 51, 90 So.2d 243 (1956); *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 257 Minn. 562, 102 N.W.2d 528 (1960); *General Elec. Co. v. J. L. Brandeis & Sons*, 159 Neb. 736, 68 N.W.2d 620 (1955); *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956).

⁹ *Union Carbide & Carbon Corp. v. Bargain Fair*, 167 Ohio St. 182, 147 N.E.2d 481 (1958).

¹⁰ Va. Code Ann. §§ 59-8.1 to 59-8.9 (Supp. 1960). § 59-8.2 provides:

The following terms as used in this chapter are defined as follows: . . .

(10) "Contract" means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or container thereof.

The acceptance of a commodity for resale, after notice imparted by mail or attached to the commodity or container thereof, shall be prima facie evidence of actual notice of the terms of the contract. Acceptance for resale with actual notice shall be deemed to be assent to the terms of the contract.

¹¹ 202 Va. 367, 117 S.E.2d 289 (1960).

¹² It appears that not only does the present Virginia act clearly meet the conditions required by *Old Dearborn* for constitutional validity (state and federal), but by elimination of the "non-signer" provision and substitution of the provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional.

117 S.E.2d 289, 295 (1960).

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Two lower courts passed on the 1959 Ohio Fair Trade Act prior to the present case, and both found it unconstitutional.¹³ In *Bulova Watch Co. v. Ontario Store of Columbus, Ohio*,¹⁴ it was decided that the 1959 act was an attempt to retain the compulsion of the "non-signer" clause while avoiding its unconstitutionality by legislative redefinition of its terms as creating a "voluntary contract". Since there was no requirement of mutual assent, the conduct which was deemed to create a contract could not have created a contract at common law. The statute therefore attempted to bind retailers who had not actually contracted with the manufacturer, and, by so doing, had the same effect as a "non-signer" clause.¹⁵ The dissenting opinion in the present case follows *Bulova Watch*.¹⁶ But the majority opinion disregarded these previous Ohio decisions and found the 1959 fair trade act constitutional because it was within the power of the legislature to define the terms of an implied contract, and because such private contracts do not involve a delegation of legislative power.¹⁷ In so doing the Court of Appeals relied heavily on the Virginia case of *Standard Drug v. General Elec. Co.*¹⁸ However, in *Standard Drug* there was a direct offer to sell on stipulated conditions made by the manufacturer to the retailer, and an acceptance of the merchandise by the retailer without protest as to the conditions. Such was a sufficient inferential acceptance of the conditions to satisfy the common

¹³ *Bulova Watch Co. v. Ontario Store of Columbus, Ohio*, 176 N.E.2d 527 (Ohio Ct. of C.P. 1961); *Helena Rubenstein, Inc. v. Cincinnati Vitamin & Cosmetic Distrib. Co.*, 167 N.E.2d 687 (Ohio Ct. of C.P. 1960). In *Helena Rubenstein* a manufacturer sought to enjoin a retailer from selling its products for less than the established price. The retailer had received notice of these prices in accordance with the terms of the Ohio Fair Trade Act. The court held that the fair trade act was unconstitutional. "In construing the present sections, this court is of the opinion that the legislature has not only failed in attempting to correct the decision in the case of *Union Carbide and Carbon v. Bargain Fair* in 1958, but has imposed additional restrictions upon the individual property owners which are likewise unlawful and unconstitutional." 167 N.E.2d 687, 688.

¹⁴ 176 N.E.2d 527 (Ohio Ct. of C.P. 1961).

¹⁵ At first blush at least, it would seem to be a rather strange legal doctrine which would say that if one "knowingly and wilfully" sold at less than certain minimum prices in violation of a specific interdiction of statutory law, such would nevertheless be legal, but if one did exactly the same thing where the law said he had agreed to do so (without any regard to true intent), such would be illegal.

¹⁶ *Id.* at 531.

¹⁷ Judge Hurd also stated:

The great vice in the 1959 Act (as in the 1936 Act) is the delegation of legislative power to private persons without any proper formula, standard or control whatsoever. Thus those who have the most to gain are granted the greatest delegation of legislative power, and private persons are permitted unlimited license to fix and set prices at will. Thus the major effect is to permit private persons, if they so determine, to increase and maintain high prices, particularly of drugs and vitamins. In the ordinary course of events this will lead to monopoly and make it difficult for persons of ordinary means to purchase regularly those aids to health and well being so necessary under modern conditions. In this respect the interests of the consuming public are totally ignored, and the retailer is prevented from conducting his business as he sees fit.

¹⁸ *Supra* note 1, at 252.

¹⁷ *Supra* note 1.

¹⁸ *Supra* note 11.

law requirement of mutual assent. This rationale does not apply in *Hudson Distributors* because there the goods were purchased from a third party. Thus, there was no basis for finding the common law requirement of mutual assent.

The "non-signer" clause of the 1936 Ohio Fair Trade Act stated that where the manufacturer entered into resale price maintenance agreements with some retailers in the jurisdiction, all other retailers were bound, whether they consented or not.¹⁹ The 1959 fair trade act provides that a non-signer who accepts goods with notice of the manufacturer's established price is deemed to have contracted not to sell them below this price.²⁰ Since retailers who have not dealt directly with the manufacturer cannot be said to have entered into a common law contract or agreement with him, they are in effect being bound by the prices set by the manufacturer without their consent. As previously noted, legislation having this effect was declared unconstitutional in Ohio when the "non-signer" provision of the 1936 act was held invalid.

In *Hudson Distributors* the court may appear to have found a method of reversing the present trend of declaring unconstitutional fair trade acts which bind non-signers. However, it is likely that many courts will look to the effect of the statute rather than to its wording, and come to the conclusion that such provisions are subject to the same objections as "non-signer" clauses.

HENRY S. HEALY

Foreign Corporations—Nationalization—Act of State Doctrine and Executive Action.—*Banco Nacional de Cuba v. Sabbatino*.¹—Farr, Whitlock and Co., hereinafter referred to as Farr-Whitlock, contracted to purchase sugar from a wholly owned Cuban corporate subsidiary of Campania Azucarera Vertientes—Camaguey, a Cuban corporation controlled by United States' interests, hereinafter referred to as C.A.V. The sugar was to be loaded on vessels of Farr-Whitlock's choice at a designated port and Farr-Whitlock was to make payment in New York upon presentation of the necessary shipping documents. Loading commenced on August 6, 1960, and was finished by one p.m. on August 9, 1960. On August 6, 1960, the Cuban government nationalized the property of C.A.V. pursuant to a law which allowed the nationalization of Cuban enterprises in which United States persons, physical and corporate, held a majority interest. The law declared that this procedure was necessary because of aggressive acts by the United States, to wit: the reduction of the Cuban sugar quota. Farr-Whitlock, in order to obtain the necessary consent of the Cuban government for the departure of the vessel, entered into a contract with plaintiff's assignor, a corporation wholly owned by the Cuban government, purporting to sell the sugar on board the vessels to Farr-Whitlock. This contract con-

¹⁹ Supra note 5.

²⁰ Supra note 2.

¹ 193 F. Supp. 375 (S.D.N.Y. 1961).