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Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.: What's in Store for Fair Trade in Pennsylvania

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OLIN MATHIESON CHEM. CORP. V. WHITE CROSS STORES, INC.: WHAT'S IN STORE FOR FAIR TRADE IN PENNSYLVANIA

In the recent case of *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.*,[1] the Pennsylvania Supreme Court struck down and declared unconstitutional the non-signer provision of the Fair Trade Act of Pennsylvania.[2] The plaintiff, Olin Mathieson Corporation, was a manufacturer of pharmaceuticals using the trade mark "Squibb." It entered into contracts with retailers who sold "Squibb" products. These contracts stipulated minimum prices at which the commodities could be resold. The defendant, White Cross Stores, was a discount house chain who had not signed price maintenance contracts with the plaintiff, although it knew the contracts were in existence. White Cross advertised and sold "Squibb" products at less than the minimum prices expressed in these contracts. Olin Mathieson sought an injunction to stop the defendant from retailing these products, claiming that the sales were in violation of section 2 of the Fair Trade Act.[3] This non-signer provision states:

> Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling *is, or is not a party to such contract,* is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity.[4]

The chancellor granted a permanent injunction.[5] On appeal the supreme court reversed and held that section 2 of the act was an unlawful delegation of legislative power and, therefore, unconstitutional.[6] This Note will discuss the future of fair trade in Pennsylvania; specifically, the means a manufacturer can choose to protect his trade-marked goods.

The Pennsylvania Unfair Sales Act appears to afford protection for the markets of trade-marked goods. But upon further examination this act will seem to be of little assistance to the manufacturer. Several states have substituted an implied contract clause in place of the typical non-signer provision in fair trade acts. The possibility that Pennsylvania will insert such a provision in subsequent fair trade legislation will be examined. The possibility of the creation of an administrative agency to establish minimum

1. 414 Pa. 95, 199 A.2d 266 (1964).
2. PA. STAT. ANN. tit. 73, § 8 (1960).
3. PA. STAT. ANN. tit. 73, § 8 (1960).
4. PA. STAT. ANN. tit. 73, § 8 (1960). (Emphasis added.)
5. 414 Pa. at 96, 199 A.2d at 266.
6. *Id.* at 100, 199 A.2d at 268.

resale prices will be investigated, and a conclusion reached as to whether, in the future, this tribunal could effectively protect a manufacturer's trade-marked goods.

Fair trade, a "euphemistic name,"[7] is the generally accepted term for the maintenance of standard retail prices for trade-marked goods.[8] Proponents of fair trade, sometimes referred to as fair traders, are comprised principally of manufacturers in the drug industry. Their goal is legislation designed to curb loss-leader[9] selling and predatory price manipulation. Fair traders argue that a manufacturer who succeeds in creating consumer demand for his product acquires good will for the name of the product.[10] If a price manipulator or discount house is allowed to lower the price of the manufacturer's product in order to attract customers, the consumer will be led to believe that the article is worth no more than is charged and that the manufacturer has been realizing an undeserved profit.[11] The value of this trade-marked product, and hence his good will, are appreciably debased.[12] The manufacturer now has the unhappy choice of either lowering his prices or cutting his quality.[13] The answer to this dilemma, according to its proponents, lies in fair trade legislation which would be:

> [F]air to the MANUFACTURER because: he establishes his retail prices at a level that helps him maintain and improve quality; he eliminates the danger of entire markets being destroyed by ruthless price cutters. . . .
> It is fair to the WHOLESALER because: he can maintain adequate inventories at more stable prices; he can have confidence in the quality of the product he sells. . . .
> It is fair to the RETAILER because: he can recommend the products because of their quality; predatory retailers cannot steal his business because of loss leaders causing him heavy inventory and operating losses. . . .
> It is fair to the CONSUMER because: quality is protected with products built up to a standard—not down to a price; long term average prices are lower. . . .[14]

This legislation would legalize fair trade contracts for the maintenance of resale prices. These contracts would bind notified distributors to their terms

7. See Herman, *Fair Trade: Origins, Purposes, and Competitive Effects*, 27 GEO. WASH. L. REV. 621 (1959).

8. See AMERICAN FAIR TRADE COUNCIL, INC., A PRACTICAL GUIDE TO FAIR TRADE LAWS (1948).

9. An article sold at a loss in order to draw customers. WEBSTER, NEW INTERNATIONAL DICTIONARY (3d ed. 1963).

10. AMERICAN FAIR TRADE COUNCIL, INC., *op. cit. supra* note 8, at 2.

11. *Id.* at 3.

12. *Ibid.*

13. *Ibid.*

14. *Id.* at 34.

even though they are not parties to the contracts. The non-signers would be bound where the commodities are identified by brand names or trade-marks[15] and are sold in free and open competition.[16] Goods which pass pursuant to a contract made by a manufacturer and one retailer are considered to be goods which are subject to section 2 of the Fair Trade Act.[17]

The history of fair trade legislation presents an interesting conflict between the legislature and judiciary. A great deal of legislation pertaining to resale price maintenance has been enacted in many jurisdictions. However, the judiciary has either strictly construed or declared unconstitutional important provisions of this legislation, resulting in further legislative attempts. A brief review of the history of past fair trade legislation will enable the *Olin Mathieson* case to be placed in the proper perspective.

In 1911, the United States Supreme Court, in *Dr. Miles Medical Co. v. Park & Sons Co.*,[18] held resale price maintenance contracts invalid. The Court stated that where a manufacturer attempts to control the price which the consumer must pay he eliminates all competition.[19] This was considered a restraint of trade and invalid both at common law and, as it affects interstate commerce, under the Sherman Antitrust Act.

First under the leadership of the American Fair Trade League and later the National Association of Retail Druggists, powerful lobbies were formed.[20] Ultimately they were successful in having state legislation passed, declaring price control by manufacturers not a restraint of trade.[21] In 1936, in *Old Dearborn Distrib. Co. v. Seagrams Distillers Corp.*,[22] the Supreme Court held that price maintenance contracts which conformed to state legislation were valid in all respects. The Court was impressed with the fact that "the sole purpose of the present law [was] to afford a legitimate remedy for an injury to the good will which [resulted] from the use of trade-marks, brands or names. . . ."[23] The Court felt that "where price standardization

15. See PA. STAT. ANN. tit. 73, § 12 (1960). This section states:
(a) The term "trade-mark" as used herein means any word, name, symbol or device, or any combination thereof, adopted and used by a person to identify goods produced, manufactured or sold by him, and to distinguish them from goods produced, manufactured or sold by others.
(e) For the purposes of this act, a trade-mark shall be deemed to be "adopted and used" in this Commonwealth when it is placed in any manner on the goods or their containers or on the tags or labels affixed thereto, and such goods are sold or otherwise distributed in this Commonwealth.
16. Herman, *op. cit. supra* note 7, at 621.
17. See Olin Mathieson Chem. Corp. v. L. & H. Stores, Inc., 392 Pa. 225, 139 A.2d 897 (1958).
18. 220 U.S. 373 (1911).
19. *Id.* at 400.
20. Herman, *op. cit. supra* note 7, at 625.
21. *Ibid.*
22. 299 U.S. 183 (1936).
23. *Id.* at 198.

[was] primarily effected to protect the good will created"[24] by the trademark, the contracts should be sustained.[25]

After the *Old Dearborn* decision the attention of the fair trade lobby was turned toward the Sherman Act which still banned resale price maintenance contracts in interstate commerce. In 1937, this obstacle was removed when an obliging Congress passed the Miller-Tydings Amendment[26] to section 1 of the Sherman Act, thereby allowing price maintenance contracts in interstate commerce. In 1951, the Supreme Court dealt with this amendment for the first time. In *Schwegman Bros. v. Calvert Distillers*,[27] the Court agreed that a contract *signed* by the retailer would be enforced.[28] However, the terms of the contract, particularly the minimum resale price, could not be enforced against a *non-signer*.[29]

Schwegman was a serious blow to proponents of fair trade. Lacking an effective non-signer provision, the effectiveness of fair trade legislation was greatly reduced. However, in 1952 Congress passed the McGuire Act,[30] the practical effect of which was to allow manufacturers to enforce minimum resale price maintenance contracts against non-signing retailers.[31]

The legislatures of forty-five states have in the past enacted laws governing resale price maintenance contracts.[32] The courts of twenty-three of these states have struck down fair trade legislation as violative of the respective state constitutions.[33]

One reason frequently given for declaring this legislation unconstitutional was that it was not within the police power granted to the state under the constitution.[34] This argument against fair trade was as follows: A person has a right to sell his own property at a price agreeable to him.[35] The legislature may take away this right only through its inherent police power,

24. *Id.* at 189.

25. The concern with which the Court viewed the loss of good will should be noted. Today the courts seem to exhibit less concern for the good will of the manufacturer.

26. 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1963).

27. 341 U.S. 384 (1951).

28. *Id.* at 387.

29. *Id.* at 395.

30. 66 Stat. 632 (1952), as amended, 15 U.S.C. § 45(a)(3) (1963).

31. Herman, *op. cit. supra* note 7, at 627.

32. *Id.* at 625.

33. Brief for Appellant, Exhibit 1, pp. 45-49, Olin Mathieson Chem. Corp. v. White Cross Stores, Inc., 414 Pa. 95, 199 A.2d 266 (1964). Listed therein are the following 22 states: Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, New Mexico, Oklahoma, Oregon, South Carolina, Utah, Washington, West Virginia and Wyoming. To this list Pennsylvania may now be added.

34. *E.g.*, Union Carbide & Carbon Co. v. White River Distrib., 224 Ark. 558, 275 S.W.2d 455 (1955).

35. *Id.* at 561, 275 S.W.2d at 455.

and then only to protect the public welfare.[36] Fair trade legislation does not protect the public welfare.[37]

Fair trade legislation has also been declared an unlawful delegation of legislative authority[38] by the following reasoning: Although the power to make laws rests with the legislature, a non-signer provision of a fair trade act sets prices which bind all retailers.[39] "The effect is that parties to such an agreement have the legislative power to fix the minimum resale price at which non-parties may sell."[40] No hearing is provided to safeguard the unwilling retailer or consumer.[41]

In spite of the above reasons, it is submitted that the real basis for invalidating fair trade legislation is a judicial distaste for the economic consequences of fair trade. In *Union Carbide & Carbon Corp. v. White River Distrib.*,[42] the Supreme Court of Arkansas made this abundantly clear.

> Full and free competition is the long recognized basis of our economy. We can think of no way in which the public welfare was being jeopardized under the system of free competition prior to [the enactment of fair trade legislation], and we can think of none that exists today. To the contrary, we believe it is generally recognized that the interest of the public is best served by the opportunity to buy commodities in a freely competitive market.[43]

Fair Trade In Pennsylvania

In 1935 the Pensylvania legislature enacted the Fair Trade Act. The act enumerates exceptions for certain types of business transactions[44] and excludes from its protection any horizontal price fixing.[45] However, it will

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36. *Ibid.*
37. *Id.* at 562, 275 S.W.2d at 458.
38. *E.g.*, Remington Arms Co. v. G.E.M., 257 Minn. 562, 102 N.W.2d 528 (1960).
39. *Id.* at 572, 102 N.W.2d at 534.
40. 1 Davis, Administrative Law Treatise § 2.14 (1958).
41. *Ibid.*
42. 224 Ark. 558, 275 S.W.2d 455 (1955).
43. *Id.* at 562-63, 275 S.W.2d at 458.
44. Pa. Stat. Ann. tit. 73, § 7 (1960). This section states:
Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:
(a) In closing out the various stock for the purposes of discontinuing delivering any such commodity.
(b) When the goods are damaged or deteriorated in quality, or removed from the fair trade schedule of the producer or owner of the trade-mark, brand or name, and notice is given to the public thereof.
(c) By any officer acting under orders of any court or in the execution of any writ or distress.
45. Pa. Stat. Ann. tit. 73, § 9 (1960). This section states: "This act shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale process. . . ."

be seen that the courts of the state disagreed with the fundamental policy of the act.

In *Bristol-Myers Co. v. Lit Bros., Inc.*,[46] the supreme court agreed that the purpose of the Fair Trade Act is "to prevent the cutting by any dealer, of the established price of any commodity identified by the trade mark, brand or name of the producer."[47] However, the court continued:

> While it is the purpose of the Fair Trade Act to prevent "cut throat competition," it is *not* the purpose of the act to prevent *all* business competition. Competition is still "the life of trade," and no public policy is sound which stifles the spirit of enterprise.[48]

Thus, only four years after its inception, the judiciary was evidencing concern over the basic economic principles of the Fair Trade Act.

Burche Co. v. General Elec. Co.,[49] was the first case in which the Pennsylvania Supreme Court passed directly on the Fair Trade Act. The plaintiff, a retailer, complained that the act was an unlawful delegation of authority. The court unanimously replied: "It must be conceded that generally such acts are held constitutional."[50] The court went on to say: "Nor is this act an unlawful delegation of legislative power. In fact, it is not a delegation of power at all."[51] The court did not enlarge on this statement but simply relied on *Old Dearborn*, wherein the United States Supreme Court held that there was no unlawful delegation, since the retailer was not obliged to purchase the goods but acquired them with knowledge of the existence of fair trade contracts.

> It is clear that [the non-signer] section does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit.[52]

However, it must be remembered that *Old Dearborn* accepted the philosophy of fair trade as a protection of the manufacturer's good will. It is submitted that the principal reason the Pennsylvania Supreme Court upheld fair trade legislation at this time was that the court also accepted the good will theory.

> The General Electric Company has expended large sums of money in promoting and advertising these commodities both in Penn-

46. 336 Pa. 81, 6 A.2d 843 (1939).
47. *Id.* at 85, 6 A.2d at 845.
48. *Id.* at 89, 6 A.2d at 847. (Emphasis added.)
49. 382 Pa. 370, 115 A.2d 361 (1955).
50. *Id.* at 373, 115 A.2d at 362.
51. *Id.* at 374, 115 A.2d at 363.
52. 299 U.S. at 192. (Emphasis added.)

> sylvania and throughout the United States. [It] thereby develop[ed] a valuable reputation and good will for such commodities and for the trade-mark under which they [were] produced and sold.[53]

Three years after the *Burche* case, a majority of the Pennsylvania Supreme Court held, in *Olin Mathieson Chem. Corp. v. L. & H. Stores, Inc.*,[54] that a fair trade contract between a manufacturer and retailers in the northern and western portions of the state would bind a non-signing retailer in the southeast portion. Justice Bell, dissenting, cogently pointed out that although the Fair Trade Act was passed to prohibit unfair competition, in this case there was no competition at all.[55] He felt the act should be limited to unfair competition in trade-marked goods in the same territory rather than condone the absurdity of having a contract in Erie bind all dealers in Philadelphia.[56]

Just prior to *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, two Pennsylvania Supreme Court justices indicated the court's mounting concern over the economic soundness of the Fair Trade Act. In *Shuman v. Bernie's Drug Concessions, Inc.*,[57] Justice Cohen admitted:

> [W]e cannot fail to observe increasing objections to the legality of non-signer provisions in particular and to the economic soundness of fair trade laws in general. Changing patterns of merchandising and distribution require a reappraisal of the underlying premises of fair trade legislation.[58]

And in *Mead Johnson & Co. v. Breggar*,[59] Justice Musmanno stated the court's sentiments:

> Price fixing is at its best a drastic curtailment of competitive free enterprise, one of the main pillars of support of the entire American economic structure. At its worst, it can become a strait jacket on initiative in business, resulting in monopoly manacling progress so as to serve a possible conspiratorial status quo.[60]

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53. 382 Pa. at 372, 115 A.2d at 362.
54. 392 Pa. 225, 139 A.2d 897 (1958).
55. *Id.* at 232, 139 A.2d at 901.
56. *Id.* at 233, 139 A.2d at 901.
57. 409 Pa. 539, 187 A.2d 660 (1963).
58. *Id.* at 545-46, 187 A.2d at 664.
59. 410 Pa. 408, 189 A.2d 866 (1963).
60. *Id.* at 414, 189 A.2d at 869. He further stated:
The very idea that a commercial entity may hold in one fettering price-fixing grasp all business men engaged in vending a certain product, just as a herdsman holds lassoed cattle on the plains, offends against the most elementary concept of a free and independent society. The Fair Trade Act is not only in derogation of the common law, it is in defiance of principles which the Federal government has on countless occasions enunciated in its anti-trust legislation and litigation. Hence, the Fair Trade Act must be construed strictly.
Id. at 415, 189 A.2d at 869.

Despite strong feelings to the contrary, the chancellor adjudicating *Olin Mathieson* decided in favor of the manufacturer by granting an injunction because of the supreme court's decision in *Burche*. In a 5-2 decision[61] the lower court was reversed and the non-signer provision was declared unconstitutional.

The Pennsylvania Unfair Sales Act

One means still available to a manufacturer to protect his trade-marked goods is the machinery of the second Pennsylvania Unfair Sales Act.[62] This act states:

> It is hereby declared that advertisement, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act with the intent of unfairly diverting trade from or otherwise injuring a competitor or with the result of deceiving any purchaser or prospective purchaser, substantially lessening competition, unreasonably restraining trade or tending to create a monopoly in any line of commerce is an unfair method of competition contrary to public policy and in contravention of the policy of this act.[63]

However, upon examination, this act will be seen to be of little value.

Several differences existed between the Fair Trade Act and the Unfair Sales Act.[64] The most important distinction is the difference in the elements necessary for a cause of action. Under the Fair Trade Act, any sale below the minimum price contained in the contract was actionable at the prerogative of the manufacturer. Under the Unfair Sales Act, the complaining party must show not only a sale made below cost, but also that this sale was made with intent to injure competition. This creates a more difficult problem of proof. Many sales below cost are the result of market conditions rather than predatory motives.[65]

Because of a vague and uncertain "cost" term, the first Pennsylvania Unfair Sales Act of 1937[66] was declared unconstitutional in *Commonwealth v. Zasloff*.[67] In the present, or second act, "cost" is elaborately defined. It means invoice or replacement cost less all discounts and allowances, plus any

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61. Of the two dissenters, Chief Justice Bell dissented, not because of any affinity for the act, but out of respect for the rule of stare decisis. Justice Jones, the remaining dissenter, felt the court's decision in *Burche* should control.

62. Pa. Stat. Ann. tit. 73, §§ 211-17 (1960).

63. Pa. Stat. Ann. tit. 73, § 213 (1960).

64. Hawkland, *The Pennsylvania Unfair Sales and Unfair Cigarette Sales Laws*, Pa. Stat. Ann. tit. 73, at 1 (1960).

65. *Id.* at 9.

66. Pa. Laws 1937, 2672.

67. 338 Pa. 457, 13 A.2d 67 (1940).

charges, and a markup of four per cent at retail and two per cent at wholesale.[68]

However, the fact that the legislature defined "cost" does not necessarily mean the Unfair Sales Act will now be acceptable to the judiciary. This legislation has economic consequences similar in effect to fair trade. The retailer is still denied the latitude of determining his own prices. Competition is, to this extent, restricted.[69]

Opinions, declaring state unfair sales acts unconstitutional in other jurisdictions, have contained strong dictum deploring the economic policy of these acts:[70]

> [T]he most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. . . .
> Although the "Fair Sales Act" might help a few selfish interests, it would be detrimental to the public as a whole.[71]

Although the court in *Olin Mathieson* was eager to point out that its inquiry was restricted to legal aspects and public policy would not be enunciated,[72] it is difficult to believe that the court was not influenced by the economics of fair trade. The court at least recognized that there were authorities who have denounced the economic philosophy of fair trade legislation.

> Many recent statistical studies by competent authority have concluded that, rather than being benefited by such [fair trade] laws, the consumer has actually been harmed, and that the whole scheme of fair trade acts is one for private, rather than public gain.[73]

It should be remembered that *Olin Mathieson* followed *Burche*, a unanimous decision, by only nine years. Some significant reason must be present in order for a court to so quickly overrule precedent. It should follow that the court's philosophy as to the economic justification of the Fair Trade Act will play a large role in determining whether the Unfair Sales Act is necessary.[74] It is submitted that the court will view the Unfair Sales Act as another impediment to competition and that this act, too, will fall. If so, this method of protection for trade-marked goods will be unavailable to a manufacturer in the future.

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68. PA. STAT. ANN. tit. 73, § 212 (1960).
69. See generally Note, 57 YALE L.J. 391 (1958).
70. See State v. Packard-Bamberger & Co., 16 N.J. Misc. 479, 2 A.2d 599 (Dist. Ct. 1938) (dictum), *cert. denied*, 123 N.J.L. 180, 8 A.2d 291 (Sup. Ct. 1939); People v. Victor, 287 Mich. 506, 283 N.W. 666 (1939).
71. State v. Packard-Bamberger & Co., *supra* note 70, at 483, 2 A.2d at 601.
72. 414 Pa. at 98, 199 A.2d at 267.
73. *Id.* at 97-98, 199 A.2d at 267.
74. Hawkland, *op. cit. supra* note 64, at 23.

POSSIBLE FUTURE LEGISLATION

Assuming that the manufacturer is deprived of both the Fair Trade Act and the Unfair Sales Act, it is possible that the legislature could come to his aid. It must be remembered that *Olin Mathieson* declared unconstitutional only section 2, the non-signer provision, of the Fair Trade Act. It is possible that the legislature could substitute a provision more acceptable to the judiciary in place of that which was stricken. If this provision accomplishes the same result and is upheld, the fair trader's problem is solved. Two state legislatures, Virginia[75] and Ohio,[76] appear to have succeeded using this approach. However, it is unlikely that this type of legislation will be accepted by the Pennsylvania Supreme Court.

Following constitutional objections to its original act,[77] the Virginia legislature omitted a non-signer provision when it re-enacted fair trade legislation in 1958.[78] However, the legislature still attempted to make the act applicable to non-signers.

> *"Contract"* means any agreement, written or verbal or actual notice imparted by mail or attached to the commodity or containers thereof.
>
> The acceptance of a commodity for resale, after notice imparted by mail or attached to the commodity or containers 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."[79]
>
> Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract is unfair competition and is actionable at the suit of any person damaged thereby.[80]

Thus, a retailer who accepts a commodity with actual notice of intention to fair trade at a certain price, is considered to have contracted with the manufacturer to sell the commodity at the fair trade price. By statute, the retailer is not a non-signer being forced to sell at a predetermined price but is, instead, a party to a contract. Ohio's act is quite similar to that of Virginia, but since Virginia has been the guide, a discussion of its act will suffice.

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75. VA. CODE ANN. §§ 59-8.1 to 8.9 (Supp. 1960).
76. OHIO REV. CODE ANN. §§ 1333.28-.30 (Supp. 1960).
77. Va. Acts 1936, ch. 321. The non-signer provision was added in 1938. Va. Acts 1938, ch. 413.
The act was declared invalid in Benrus Watch Co. v. Kirsch, 198 Va. 94, 92 S.E.2d 384 (1956).
78. VA. CODE ANN. §§ 59-8.1 to 8.9 (Supp. 1960).
79. VA. CODE ANN. § 59-8.2 (Supp. 1960).
80. VA. CODE ANN. § 59-8.7 (Supp. 1960).

In *Standard Drug Co. v. General Elec. Co.*,[81] the Supreme Court of Appeals of Virginia considered the contract provision for the first time. One argument the retailer advanced was that the act was an unlawful delegation of legislative power.[82] The court rejected this argument saying:

> The restriction imposed by the manufacturer or producer was agreed to by the retailer when, with full knowledge of the restriction, he required and accepted the flashbulbs. No compulsion is practiced and no retailer is bound except by his own agreement.[83]

In coming to this conclusion, the court admittedly relied on the *Old Dearborn* rationale that there is no delegation because the act does not compel persons to contract.[84]

It should be remembered that *Burche* also relied on this same argument. But *Olin Mathieson* overruled *Burche* on this specific point by declaring that:

> *Old Dearborn* . . . is not precedent for the proposition that the non-signer clause . . . does not violate the state constitution.[85] It is no answer to the above to say that the retailer and the buyer, having notice of the prices fixed, are under no obligation to sell or buy the particular commodity. Under the statute, both come under the coercive price control of private persons not directly in contract with them.[86]

This, then, is one difference between Virginia and Pennsylvania. The *Old Dearborn* argument supports new fair trade legislation in Virginia. But because of *Olin Mathieson* the Pennsylvania Supreme Court is likely to find that the substitution of a contract clause for a non-signer provision in any fair trade legislation is still an unlawful delegation.

It appears, however, that the real disagreement between Virginia and Pennsylvania on the fair trade issue, and the reason why a contract clause will not be accepted in Pennsylvania, is the difference in economic philosophy each state has concerning fair trade legislation. Virginia continues to attach significant weight to the basis of the *Old Dearborn* decision, *i.e.*, that the aim of fair trade is to protect the good will of the manufacturer.[87]

In *Eli Lilly & Co. v. Schwegman Bros. Giant Super Mkts.*,[88] a federal

81. 202 Va. 367, 117 S.E.2d 289 (1960).
82. *Id.* at 369, 117 S.E.2d at 291.
83. *Id.* at 376, 117 S.E.2d at 295.
84. *Ibid.* See also text accompanying note 52 *supra*.
85. 414 Pa. at 98, 199 A.2d at 267.
86. *Id.* at 100, 199 A.2d at 268.
87. 202 Va. at 277, 117 S.E.2d at 296.
88. 109 F. Supp. 269 (E.D. La. 1951), *aff'd*, 205 F.2d 788 (5th Cir.), *cert. denied*, 346 U.S. 856 (1953).

court felt the basis for the decision in *Old Dearborn* was in doubt and should be re-examined:

> Perhaps after twenty years of experience under fair trade acts, the Supreme Court may conclude that the real purpose of these acts is not to protect the good will of the manufacturer. . . . [I]t may well be found that the real purpose of fair trade legislation is to protect the retailer from competition with another retailer who, because of his efficient merchandising methods, is able to reduce his distributive costs and consequently his retail prices.[89]

In the *Burche* case, the Pennsylvania Supreme Court also relied on the good will argument.[90] However, in overruling *Burche,* the supreme court impliedly agreed with the chancellor's remark in *Olin Mathieson* concerning the protection of good will: *"The good will theory is pure, unadulterated nonsense, which the proponents of Fair Trade have foisted upon the Courts and public in order to clothe their selfish motives with an aura of respectability."*[91]

In its opinion written for the *Olin Mathieson* decision, the Pennsylvania Supreme Court indicated its awareness of the conflicting economic views regarding fair trade legislation.[92] However, the court restricted its inquiry to the legal aspects involved.[93] The non-signer provision was declared unconstitutional.[94] If the opinion had ended there, it could easily be concluded that fair trade legislation in any form is dead in Pennsylvania. With *Burche* disposed of and *Old Dearborn* effectively limited, the argument that the act was not an unlawful delegation was rejected. Add to this the court's apparent distaste for the economic consequences of fair trade legislation and that conclusion is inescapable. However, the opinion did not end there. Instead the court pointed out that although price regulatory powers could not be delegated to private individuals,[95] these powers, in a limited way, could be delegated to governmental agencies, "such as public service or utility commissions."[96] The court continued:

> Moreover, where price regulation is delegated to a governmental agency, constitutional procedures are mandatory. The agency's action is legislative in character and is subject to the same tests and standards as a legislative enactment. Once the basic law is established by statute, the legislature may delegate the agency to make

89. 109 F. Supp. at 271-72 (dictum).
90. 382 Pa. at 372, 115 A.2d at 362.
91. Record, vol. 1, p. 50, Olin Mathieson Chemical Corp. v. White Cross Stores, Inc., 414 Pa. 95, 199 A.2d 266 (1964). (Emphasis added.)
92. 414 Pa. at 97, 199 A.2d at 267.
93. *Id.* at 98, 199 A.2d at 267.
94. *Ibid.*
95. *Id.* at 99, 199 A.2d at 268.
96. *Id.* at 98, 199 A.2d at 268.

> detailed rules for the statute's operation. However these rules must conform to statutory standards, be adopted after hearing, may not be arbitrary, and are always subject to judicial review.[97]

What the court has stated here is not new. It is recognized that the legislature may delegate authority to administrative agencies provided certain standards are set out.[98] What is significant is that the court repeated the rules pertaining to these administrative standards in this particular case. It is submitted that this portion of the opinion may be interpreted as an invitation to the legislature to construct some board, bureau or commission to administer resale price maintenance.

CONCLUSION

The Pennsylvania Supreme Court has made it clear that the day is past when a manufacturer and one retailer can set a price on trade-marked goods which binds all other retailers throughout the state. In support of the conclusion that resale prices on trade-marked goods can be maintained by a governmental agency, one need only recall the pattern of fair trade legislation. The defeats and limitations confronting fair traders following judicial decisions in 1911,[99] 1936,[100] and 1951[101] were eventually overcome by the legislature.[102] *Olin Mathieson* must be regarded as another judicial defeat for fair trade. But the legislature could again overcome this decision by accepting the court's invitation. An administrative agency could afford protection for the manufacturer's trade-marked goods. It is predicted that the pattern of fair trade will hold true.

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97. *Id.* at 99, 199 A.2d at 268.
98. 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.11 (1958).
99. Dr. Miles Medical Co. v. Parke & Sons, Co., 220 U.S. 373 (1911).
100. Old Dearborn Distrib. Co. v. Seagrams Distillers Corp., 299 U.S. 183 (1936).
101. Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).
102. Miller-Tydings Amendment, 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1963); McGuire Act, 66 Stat. 632 (1952), as amended, 15 U.S.C. § 45(a)(3) (1963).