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The Uniform Deceptive Trade Practices Act:
Another Step Toward a National Law
of Unfair Trade Practices

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Be it Resolved, That it is the sentiment of the Section that there should be uniformity in the law of unfair competition among the respective states and . . . that the National Conference of Commissioners on Uniform State Laws be urged by the American Bar Association to make a study to determine the feasibility of promulgating a Uniform Code of Unfair Competition and to draft such a code if they find it to be feasible and desirable.

The National Conference of Commissioners on Uniform State Laws accepted this invitation of the ABA Section of Patent, Trademark, and Copyright Law in 1959. In August 1964, after several years of discussion and numerous tentative drafts, both the National Conference and the ABA House of Delegates recommended the enactment of the Uniform Deceptive Trade Practices Act by “all the States.” As of June 1967, the act had been passed in six states. This article surveys the need for the

1. ABA PATENT, TRADEMARK AND COPYRIGHT SECTION, PROCEEDINGS 45 (1958) [hereinafter cited as ABA PROCEEDINGS].
2. The National Conference of Commissioners on Uniform State Laws is an organization of state officials which was formed in 1892 in order to promote uniformity in state laws. Commissioners are appointed by the governor or legislature of a state and serve without compensation. Francis, 1961 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 25 KY. S.B.J. 201 (1961); see generally Dunham, A History of the National Conference of Commissioners on Uniform State Laws, 30 LAW & CONTEMP. PROB. 233 (1965).
3. 1959 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 66-67.
4. 1964 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 131-32, 39 A.B.A. REP. 405 (1964). Following a resolution by the ABA Section of Patent, Trademark, and Copyright Law, the Commissioners have revised § 3(b) of the act dealing with allowance of costs and attorneys’ fees. 1965 ABA PROCEEDINGS 54-56, 64-66; 91 A.B.A. REP. 357 (1966). The official and current version of the act appears in 9 UNIFORM LAWS ANN. The original version of the act is set out in OPPENHEIM, UNFAIR TRADE PRACTICES APP. E (2d ed. 1965).
5. CONN. GEN. STAT. ANN. §§ 42-115(c) to -115(f) (Supp. 1966); DEL. CODE tit. 6, §§ 2531-37 (Supp. 1966); IDAHO CODE ANN. §§ 48-601 to -606 (Supp. 1965); ILL. REV. STAT. ch. 121½, §§ 311-17 (1965); KAN. GEN.
Deceptive Trade Practices Act and offers a prognosis concerning the effect of the Uniform Act on the law of unfair competition or unfair trade practices.  

I. THE NEED FOR UNIFORMITY WITH RESPECT TO UNFAIR TRADE PRACTICES LAW

Commentators have repeatedly asserted a need for nationwide uniformity with respect to unfair trade practices law. Indeed, the need for uniformity has become a slogan. The bill of particulars for uniformity encountered in the law reviews has become standardized into the following principal allegations:

(1) prior to Erie R.R. v. Tompkins, most unfair trade practices cases were brought in federal courts and decided without reference to state law;

(2) Erie deprived this "progressive and well-reasoned" body of federal decisions of precedential value;

(3) state law, which had atrophied while the federal courts applied general principles of law in unfair trade practice cases, is "archaic" and "variegated;"

(4) Erie has resulted in the importation into the federal courts of the conflict of laws problems posed in state courts by multistate unfair trade practices;


6. "Unfair competition" has been outmoded as a designation for this area of law because conduct by noncompetitors as well as competitors is often actionable. RESTATEMENT, TORTS, Introductory Note Ch. 35 at 536-37 (1938). Both "unfair competition" and "unfair trade practices" signify injurious commercial conduct which is actionable by private persons.


8. 304 U.S. 64 (1938). Erie, of course, held that a federal court in a diversity case had to apply the substantive law of the state in which the federal court was located.

9. Chafee, supra note 7, at 1299.


12. Kunin, supra note 10, at 733-34.
Though often overdramatized, these charges are substantially true.

Prior to *Erie*, the federal courts applied "general principles" in the resolution of unfair trade practices claims both where federal jurisdiction was based on the diverse citizenship of the parties, and where federal jurisdiction was based on the joinder of an unfair trade practices claim with a substantially identical claim under the federal patent, trademark, or copyright laws. Today, under *Erie*, state law must be applied in diversity cases. Perhaps, most importantly, many federal judges also feel constrained to apply state law in pendent jurisdiction cases. Congressional legislation in the decades following *Erie* has restricted the scope of diversity jurisdiction and increased the scope of pendent jurisdiction.

It is also true that unfair trade practices decisions are often few in number in states without large commercial centers.

14. *E.g.*, Ely-Norris Safe Co. v. Mosler Safe Co., 7 F.2d 603 (2d Cir. 1929), *rev'd on other grounds*, 273 U.S. 132 (1927) (diversity jurisdiction); *Vogue Co. v. Vogue Hat Co.*, 12 F.2d 991 (6th Cir.), *cert. denied*, 273 U.S. 706 (1926) (alternative holding) (pendent jurisdiction). The greater number of such pre-*Erie* federal cases involved diversity jurisdiction. The concept of pendent jurisdiction was initially rejected by several circuits and did not receive the imprimatur of the United States Supreme Court until 1933. *Hurn v. Oursler*, 289 U.S. 238 (1933). *Erie*, of course, was decided only five years later.
17. 28 U.S.C. § 1332(c) (1964) limits diversity jurisdiction by declaring that a corporation is a citizen of both the state where it has its principal place of business and the state of incorporation; whereas 28 U.S.C. § 1338(b) (1964) expands pendent jurisdiction to include any unfair trade practices claim which is joined with a substantial and related claim under the federal patent, trademark, or copyright laws. The current American Law Institute study of federal jurisdiction proposes further congressional inroads on diversity jurisdiction and further enhancement of pendent jurisdiction. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 47-56 (Official Draft, Pt. I 1965) (diversity jurisdiction); id. at § 1313 (Tent. Draft No. 3, 1965) (pendent jurisdiction).
18. *E.g.*, 20 *INDIANA LAW ENCYCLOPEDIA* 10-21 (West 1959) & (Supp. 1965); 18 *IOWA DIGEST* (West 1941) (Supp. 1966) (title: Trade Regula-
Yet, the undeveloped nature of state law has generally led state and federal judges to refer to the pre-\textit{Erie} federal common law in order to fill doctrinal gaps in the state law.\footnote{19} Judge Clark once observed from his perspective as a federal circuit judge that:

\begin{quote}
[T]he issue is really whether we shall apply our regurgitation of the state redistillation of federal precedents or go more directly and realistically to the sources themselves. Actually, so far as I can discover, we have never found any difference in ultimate result, and so quite often lump federal and New York law together . . . .\footnote{20}
\end{quote}

Thus, many of the federal decisions allegedly relegated to the scrapheap by \textit{Erie} remain vital sources of law today.

Moreover, the conflict-of-laws issues posed by multistate unfair trade practices have been minimized by practical considerations. Proponents of uniformity have contended that the traditional \textit{lex loci delicti} choice-of-law rule requires mechanical application by a forum applying state law\footnote{21} of the law of every state in which the plaintiff's interests have been adversely affected by an unfair trade practice.\footnote{22} However, Judge Wyzanski articulated the pragmatic reaction of the courts to this contention when he responded that judges had "the robust common

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\textit{E.g.}, \textit{Diamond, The Federal Unfair Commercial Activities Act}, 23 \textit{Omo Sr. L.J.} 110, 115-16 (1962), citing \textit{Ettore v. Philco Television Broadcasting Corp.}, 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956). \textit{Ettore} was a misappropriation-right of privacy case. See \textit{Prosser, Torts} § 112, at 839-42 (3d ed. 1964), which involved contacts in four states, including the forum. The proposed Restatement of Conflict of Laws (Second) repudiates the \textit{Ettore} approach whether \textit{Ettore} is regarded as essentially a privacy or a misappropriation case. Under a privacy analysis, the Restatement (Second) favors application of the law of the plaintiff's domicile if publication also occurred there as it did in \textit{Ettore}. \textit{Restatement (Second), Conflict of Laws} § 379(h) (Tent. Draft No. 9, 1964). With respect to a misappropriation analysis, the Restatement prefers reference to the law of the place where the defendant's misconduct was principally situated. \textit{Restatement (Second), Conflict of Laws} § 379, comment e (Tent. Draft No. 9, 1964).
sense to avoid writing opinions and entering decrees adapted with academic nicety to the vagaries of forty-eight states. Concern for the efficient administration of justice has impelled the courts to focus primarily on the law of a single jurisdiction in adjudicating the legality of multistate unfair trade practices.

This approach can be faulted as giving undue significance to the law of a single jurisdiction. However, the objection loses much of its force if, as the embryonic Restatement of Conflict of Laws (Second) provides, the jurisdiction whose law is applied is "the state which has the most significant relationship with the occurrence and with the parties . . . ."

A prime candidate for the state of most significant contacts is the location of the defendant's principal place of business germane to the unfair trade practices; for example, the state from which a defendant manufacturer sells goods bearing infringing trade symbols to retailers in other states. Where a defendant's tortious activity occurs with relative frequency in numerous states, the state of most significant contacts may well be the location of the plaintiff's principal place of business relevant to the unfair trade practices; for example, where a defendant manufacturer sells goods with infringing trade symbols from places of business in several different states, the state of most significant contacts will often be the location of the principal office of plaintiff's business that is concerned with the sale of the product whose trade symbol has been simulated.

The most serious issues raised by the standard case for uniformity concern the potential and actual existence of varying

25. 1A Moore, Federal Practice § 0.326 (2d ed. 1965).
27. See id. § 379, comment c; Note, Choice of Law in Multistate Unfair Competition, supra note 24, at 1318.
28. See Restatement (Second), Conflict of Laws §§ 379(e)(3), 379(f), 379(h), comment d (Tent. Draft No. 9, 1964); Note, Choice of Law in Multistate Unfair Competition, supra note 24, at 1318-21.
state conceptions of unfair trade practices law. The problem is largely potential with respect to torts like deceptive advertising and false disparagement; there are relatively few litigated cases because the stringent common law prerequisites for actionability are seldom met. On the other hand, with respect to frequently litigated torts like trade symbol infringement, there are actual variances in the scope of protection. Some states, for example, consider that competition between the parties and an intent to deceive are prerequisites of common law trade symbol infringement; whereas other states do not.

There is undeniable validity in the proposition that "in multi-state actions a complainant should be entitled to a single [optimum] legal standard [of actionability] ...." If anything, the proposition is too narrow. The citizens of the several states are also entitled to optimum standards of actionability with respect to unfair trade practices occurring in intrastate commerce. The critical endeavor, of course, is to delineate the optimum standards of actionability.

II. AN OVERVIEW OF UNFAIR TRADE PRACTICES LAW

Unfair trade practices law can be roughly subdivided into groupings of legal rules dealing with the following types of conduct: misuse of conventional business techniques; misappropriation of commercial intangibles; interference with contractual relations; and conduct misleading the consumer or deceptive trade practices. Most of these species of unfair trade practices would materially benefit from revision by uniform

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34. See Pattishall, The U.S.A. Courts and the Prevention of Unfair Competition, 53 TRADEMARK REP. 599 (1963); Developments in the Law—Competitive Torts, 77 HARV. L. REV. 888 (1964). Two other categories of unfair trade practices encountered in the literature are private actions implied from statutes providing public sanctions for commercial misconduct, and private actions expressly authorized by statute. These latter two categories, however, are nonsubstantive classifications which overlap the substantive classifications of unfair trade practices law.
legislation. The principal exception is the tort of intentional interference with contractual relations, which is recognized "virtually everywhere."\textsuperscript{35}

The regulation of improper uses of conventional business techniques, like price cutting and refusals to deal, has been increasingly subsumed under federal and state antitrust laws.\textsuperscript{36} This is a logical development. Given the traditional American respect for competition, the most palpable abuse of conventional business tactics is utilization of those tactics to subvert the competitive process. Thus, in \textit{United States v. Parke, Davis & Co.},\textsuperscript{37} the Supreme Court held that a drug manufacturer violated the Sherman Act by carrying out the avowed policy of refusing to deal with wholesalers who traded with price-cutting retailers that had been blacklisted by the manufacturer.

The misuse of conventional business methods is also the subject of a plethora of particularized legislation. The Federal Automobile Dealers' Day in Court Act, for example, forbids coercion of automobile dealers by automobile manufacturers through unjustified cancellation or nonrenewal of dealer franchises.\textsuperscript{38}

The sheer quantity of existing legislation dealing with misuse of conventional business techniques indicates that a primary objective of uniform legislation in this area should be to integrate and to simplify the rules-of-the-game currently established by state and federal legislation. The proposed Uniform Antitrust Act, for example, constitutes an effort to replace disparate state laws with a uniform statute that is congruent with existing federal legislation.\textsuperscript{39}

The actionability of misappropriation of commercial intangibles is a controversial and complex subject. The misappropriation theory of unfair trade practices emerged full-blown in \textit{International News Serv. v. Associated Press},\textsuperscript{40} in which a majority of the Supreme Court upheld an injunction against unauthorized reproduction of uncopyrighted AP news dispatches while the news was still fresh. Despite its lofty condemnation of

\begin{thebibliography}{9}
\bibitem{35} Prosser, \textit{Torts} § 123, at 954 (3d ed. 1964).
\bibitem{37} 362 U.S. 29 (1960).
\bibitem{40} 248 U.S. 215 (1918).
\end{thebibliography}
appropriation to one's own advantage of what "equitably belongs to a competitor," the misappropriation theory has never gained wholehearted judicial acceptance. Judge Wyzanski speculated as long ago as 1942 that the theory no longer had the support of a majority of the Supreme Court.

The decidedly mixed judicial reaction to the misappropriation theory is due to the theory's congenital vagueness. The typical formulation of the misappropriation theory provides few guidelines to courts, or to businessmen seeking to predict the legality of their conduct. In the International News Serv. case, the Supreme Court offered few indicia which distinguish actionable misappropriation from healthy competition:

[D]efendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown.

To the extent that it is expedient to sanction the creation of exclusive rights in commercial ideas, information, designs, and artistic creations, blanket legislative endorsement of the misappropriation theory is not the most desirable approach. Selective, specialized, and detailed legislative condemnation of "misappropriation" is less potentially restrictive of socially useful competition, if only because the precision of the legislative action will discourage the assertion of exclusive rights not intended to be validated by the legislature. The formulation of a Uniform Trade Secrets Act, which articulates the subjects of trade secret protection and the appropriate remedies for trade secret infringement, would, for example, constitute a profitable legislative approach to the misappropriation theory.

The epitome of a deceptive trade practice is conduct which is misleading to consumers and consequently injurious to other businessmen. Typical deceptive trade practices are trade symbol

44. See Developments in the Law—Competitive Torts, supra note 34, at 946-47.
infringement, deceptive advertising, and false disparagement.\textsuperscript{45} Trade symbol infringement consists of the use of commercial identification by one businessman which is likely to be confused by purchasers with the commercial identification previously used by another businessman. In \textit{Standard Oil Co. of New York v. Standard Oil Co. of Maine},\textsuperscript{46} the long-established Standard Oil Co. of New York was held to be entitled to enjoin the use of “Standard Oil Co.” by a newly-organized corporation engaged in the distribution of petroleum products in northern New England. Deceptive advertising consists of the dissemination of false factual statements concerning the product, service, or business of the disseminator. In \textit{Lower Main St. Merchants Ass’n v. Paul Geller & Co.},\textsuperscript{47} competitors were declared to be entitled to an injunction against a seemingly perpetual “going out of business sale” by a retail men’s clothing store. False disparagement consists of the unprivileged publication of false, injurious statements about the business, product, or service of another. Thus, \textit{Allen Mfg. Co. v. Smith}\textsuperscript{48} approved the issue of an injunction against the distribution of spurious United States Department of Agriculture documents which falsely indicated that plaintiff’s fly spray had been condemned by the government.

In contradistinction to the mixed judicial reaction to the misappropriation theory, the utility of general standards of actionability with respect to deceptive trade practices has been repeatedly recognized. A 1925 Second Circuit opinion by Learned Hand eloquently expounded this view. In \textit{Ely-Norris Safe Co. v. Mosler Safe Co.},\textsuperscript{49} Judge Hand commented in dictum:

\begin{quote}
[T]here is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today. . . . As we view it, the question is, as it always is in such cases, one of fact. While a competitor may, generally speaking, take away all the customers of another that he can, there are means which he must not use. One of these is deceit. . . . [W]e conceive that in the end the questions which arise are always two: Has the plaintiff in fact lost customers? And has he lost them by means
\end{quote}

\textsuperscript{45} The tort of false disparagement is also known as injurious falsehood and trade libel. Prosser, \textit{Injurious Falsehood: The Basis of Liability}, 59 COLUM. L. REV. 425 (1959).


\textsuperscript{49} 7 F.2d 603 (2d Cir. 1929), \textit{rev’d on other grounds}, 273 U.S. 132 (1927).
which the law forbids? The false use of the plaintiff's name is only an instance in which each element is clearly shown.50

Judge Hand's generalized condemnation of deceptive trade practices is readily understandable. Consumer demand influences the allocation of resources in a free-market economy. If consumer decisions are based on misinformation concerning the products or services available, or concerning the businesses which vend them, consumer demand may be deflected from efficient businesses with superior products to firms less entitled to command an allocation of society's limited capital.51 Moreover, deceptive trade practices adversely affect the individual interests of both honest businessmen and consumers misled into buying products or services which do not adequately fulfill their needs.52

Notwithstanding their deleterious consequences, the actionability of deceptive trade practices at common law is both non-uniform and imperfect. Trade symbol infringement is a generally recognized tort, but there are material variances and gaps in the scope of common law protection. Some states, for example, consider that competition between the parties or an intent to deceive is a prerequisite of relief, whereas others do not.53 Moreover, many states have not passed on the actionability of use of a trade symbol which falsely implies the existence of endorsement, approval, or certification of a product, service, or business by another business. This is a new concept of trade symbol infringement, which is known as confusion of sponsorship.54 In Consumers Union, Inc. v. Admiral Corp.,55 for instance, the publisher of Consumer Reports was granted a preliminary injunction against advertising which incorrectly indicated that defendant's 1960 air conditioners had been rated a "Best Buy" by Consumer Reports.

With all its imperfections, the common law tort of trade symbol infringement is infinitely more developed than the common law torts of deceptive advertising and false disparagement.


51. BAIN, INDUSTRIAL ORGANIZATION 538 (1959).


53. See notes 30-32 supra and accompanying text.


As recently as 1961 a California intermediate appellate court refused to acknowledge the actionability of deceptive advertising at common law.\(^6\) Furthermore, the narrow holding of the "liberal" Ely-Norris case was that deceptive advertising was not actionable without proof of special damage to the plaintiff, unless the plaintiff was the sole producer of goods with the features which the defendant falsely claimed for his own goods.\(^5\) The common law actionability of false disparagement, though more widely recognized, has been similarly restricted by a special damage prerequisite.\(^6\)

Common law regulation of deceptive trade practices is consequently a sometime affair. Trade symbol infringement is a generally recognized tort and is generally actionable, though there are actual variances in the scope of protection. On the other hand, false disparagement is widely recognized as a tort but is often not actionable; and deceptive advertising is not generally recognized as a tort and, even where it is tortious, is generally not actionable.

After evaluation of the current status of unfair trade practices law, the Commissioners on Uniform State Laws selected deceptive trade practices as a primary subject for uniform legislation. The lack of a nationwide optimum standard of actionability with respect to deceptive trade practices was deemed intolerable in view of their injuriousness to honest businessmen and consumers alike.\(^5\)

### III. AN OVERVIEW OF THE UNIFORM ACT

Section 2 is the substantive core of the Uniform Act. Section 2(a) provides:

A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

1. passes off goods or services as those of another;
2. causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

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\(^5\) See notes 49-50 supra and accompanying text. 
\(^5\) E.g., Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932); Comment, Trade Disparagement and the 'Special Damage' Quagmire, 18 U. Chi. L. Rev. 114 (1950).
\(^5\) The other aspects of unfair trade practices law in need of statutory revision were not neglected. Work was also begun on a Uniform Antitrust Act, and a Uniform Trade Secret Act was taken under consideration. However, neither of these other statutes has been officially promulgated by the National Conference.
(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
(4) uses deceptive representations or designations of geographic origin in connection with goods or services;
(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
(6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand;
(7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
(8) disparages the goods, services, or business of another by false or misleading representation of fact;
(9) advertises goods or services with intent not to sell them as advertised;
(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or
(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Section 2(a) highlights certain types of deceptive advertising, false disparagement, and trade symbol infringement as specific deceptive trade practices and at the same time carries forward the generalized condemnation of deceptive commercial conduct found in such pre-Erie federal cases as Judge Hand's Ely-Norris decision. Sections 2(b) and 3(a) amplify the reach of section 2(a) with declarations that evidence of competition between the parties, actual confusion or misunderstanding, intent to deceive, or actual monetary damage are not prerequisites to the grant of relief under the Uniform Act.

Sections 2(b) and 3(a) do not preclude reference to any of the enumerated factors as evidence that a plaintiff is likely to be damaged by a deceptive trade practice of another. Proof of monetary damage, loss of profits, or intent to deceive is not required.

60. UNIFORM DECEPTIVE TRADE PRACTICES ACT § 2(a) (1)-(12) [hereinafter cited as UNIFORM ACT].
61. See notes 49-50 supra and accompanying text.
62. "In order to prevail in an action under this Act, a complainant need not prove competition between the parties or actual confusion or misunderstanding." UNIFORM ACT § 2(b).

A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. . . .

UNIFORM ACT § 3(a).
be damaged by a defendant's conduct. These sections simply make clear that those factors are no more than evidence that the plaintiff is apt to be damaged and that other evidence of probable damage will also suffice. A wholesaler with an exclusive sales agency for a trademarked beverage may, for example, be damaged by repeated, false assertions by a retailer that the beverage distributed by the wholesaler is mislabeled, even though the retailer is honestly mistaken about the truth of his claims.\(^\text{63}\)

Section 2(c) relates the substantive provisions of the Uniform Act to other regulation of unfair trade practices. Section 2(c) states that the Uniform Act does not preempt the common-law actionability of unfair trade practices, and does not impliedly repeal state statutes dealing with unfair trade practices which are not expressly repealed in conjunction with the enactment of the Uniform Act.\(^\text{64}\)

The Uniform Act authorizes injunctive relief against deceptive trade practices\(^\text{65}\) and preserves whatever other state remedies exist for the same conduct.\(^\text{66}\) In addition, a court is given discretion to award attorneys' fees to the prevailing party if a plaintiff has brought an action which he knew to be groundless, or the party charged with a deceptive practice has willfully engaged in the conduct knowing it to be deceptive.\(^\text{67}\)

There are several reasons for the omission of a damage remedy from the Uniform Act. The ebb and flow of commerce involves so many variables that the damages or profits caused by a commercial tort are often difficult to prove.\(^\text{68}\) In situations

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\(^{64}\) Uniform Act § 2(c).

\(^{65}\) Uniform Act § 3(a).

\(^{66}\) Uniform Act § 3(c).

\(^{67}\) Uniform Act § 3(b). The original version of the Uniform Act authorized a court to award attorneys' fees to the prevailing party "in exceptional cases" with the caveat that attorneys' fees could be assessed against a defendant only if the court found that he had willfully engaged in a deceptive trade practice. E.g., Ill. Rev. Stat. ch. 121½, § 313 (1965). The "uniform interpretation" clause appended to the Uniform Act should lead judges to interpret original § 3(b) in light of the 1966 amendment until conforming amendments are made. Uniform Act § 5. A strike suit under the act, for example, would certainly qualify as an "exceptional case" meriting the award of attorneys' fees to the defendant under the original language of § 3(b), just as it does under the express language of the § 3(b) amendment.

where such proof is wholly lacking, the injunctive remedy authorized by the Uniform Act is the only practicable remedy. Thus, in Red Devil Tools v. Tip Top Brush Co., the court affirmed an injunction against trade symbol infringement but reversed an accompanying accounting for profits in lieu of compensatory damages because “there was no showing that any direct or indirect injury had been caused by defendants to plaintiff's business or good will."

A damage remedy would also have been hard to reconcile with the Uniform Act's dispensation with an intent to deceive as an element of a deceptive trade practice. It is questionable whether a judge would or should allow the recovery of approximate profits or damages unless the judge believes that a defendant's professed innocence is more apparent than real. Economic sanctions based on estimated damages or profits may be justifiably used to punish and to deter deliberate tort-feasors. An inadvertent tort-feasor should not be treated as cavalierly.

Moreover, damages are often recoverable at common law with respect to deliberate deceptive trade practices. This common law view is dovetailed with the Uniform Act by section 3(c), which declares that the injunctive remedy provided by the Act "is in addition to remedies otherwise available against the same conduct . . . ." To the extent that the Uniform Act creates liability where not even deliberate conduct was actionable at common law, section 3(c) also constitutes an invitation to the courts to use the Uniform Act as a premise for judicial reasoning in expanding the availability of economic sanctions.

70. Id. at 575, 224 A.2d at 339; accord, National Van Lines v. Dean, 237 F.2d 686 (9th Cir. 1956).
73. UNIFORM ACT § 3(c).
74. Cf. Wood v. Peffer, 55 Cal. App. 2d 116, 130 P.2d 220 (1942), in which the court indicated that defendant's profits could be recovered where warranted in an action under CAL. CIV. CODE § 3389, a statute analogous to the Uniform Act, which authorizes an injunctive, but not
Although there are several statutes which reflect aspects of the Uniform Act, a 1933 California statute\(^7\) and section 43(a) of the Federal Lanham Trademark Act of 1946\(^6\) constitute rough prototypes. Section 43(a) declares deceptive advertising and misleading trade identification of goods and services, a form of trade symbol infringement, actionable at the suit of any person "who believes that he is or is likely to be damaged ... ."\(^7\) Intention to deceive is not a prerequisite to relief.\(^7\) The Uniform Act, of course, also possesses these substantive attributes. Indeed, the Uniform Act has broader substantive coverage than section 43(a), which does not reach disparagement\(^7\) or misleading identification of businesses.\(^8\)

Section 43(a) does not contain remedial provisions, and the general remedial provisions of the Lanham Act are expressly confined to redressing infringement of rights in federally registered trade symbols.\(^8\) Nevertheless, where economic loss can be established to flow from a section 43(a) violation that does not involve registered trade symbol infringement, the courts have analogized the availability of both injunctive and damage remedies from the general remedial provisions of the Lanham Act.\(^9\)
California Civil Code Section 3369, the other principal forerunner of the Uniform Act, provides in pari materia:

2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.

3. As used in this section, unfair competition shall mean and include unlawful, unfair, or fraudulent business practice, and unfair, untrue, or misleading advertising and any act denounced by Business and Professions Code . . . Sections 17500 to 17535, inclusive. [The sections of the Business and Professions Code referred to deal exclusively with deceptive advertising.]83

Judicial interpretations of section 3369 parallel numerous aspects of the Uniform Act: likelihood of confusion of sponsorship is actionable;84 the statute does not contain a restrictive or exclusive definition of deceptive trade practices;85 competition between the parties is not an invariable condition of relief;86 a defendant need not be an intentional wrongdoer to be subject to an injunction;87 proof of actual monetary damage is not necessary to obtain an injunction;88 the statute provides exclusively for injunctive relief through damages or a defendant's profits may be recovered where otherwise permitted by law;89 finally, attorneys' fees have been allowed a successful plaintiff where a defendant's violation of the statute was deliberate.90

84. See Academy of Motion Picture Arts & Sciences v. Benson, 15 Cal. 2d 685, 104 P.2d 650 (1940).
90. National Van Lines v. Dean, 237 F.2d 688 (9th Cir. 1956). The federal courts of late have been allowing attorneys' fees as an element of damages in unfair trade practice cases. RESTATEMENT (SECOND), TORTS § 746A (Tent. Draft No. 8, 1963). The Supreme Court, however, has recently reacted to perfunctory allowance of substantial sums as attorneys' fees by holding that attorneys' fees cannot be awarded in actions under the Federal Trademark Act of 1946. Fleischman Distilling Corp. v. Maier Brewing Co., 35 U.S.L. WEEK 4393 (U.S. May 8, 1967). The question of the continued validity of National Van, which awarded attorneys' fees in an action under § 338, was expressly left open in Fleischman. 358 F.2d 165, 165 (9th Cir. 1966), aff'd on other grounds, 35 U.S.L. WEEK 4393 (U.S. May 8, 1967).
This sketch of section 43(a) and California Civil Code Section 3369 illustrates that most of the basic elements of the Uniform Act were derived from prior legislative and judicial experience. However, a marked distinction between the Uniform Act and its antecedents is the former's inclusion of an enumeration of specific deceptive trade practices with a general ban on deceptive trade practices.

This should prove to be a significant difference. Several commentators have deplored the relative desuetude of section 43(a) without taking note of the generality of section 43(a)'s terminology as a possible defect. The California Supreme Court has remarked in construing section 3369 that:

"The phrase "unfair competition" when carried beyond its traditional scope in equitable actions . . . does not have a fixed meaning in the absence of statutory definition. Courts of equity, therefore, are loath to enjoin conduct on that ground in the absence of specific authorization therefor."

IV. THE UNIFORM ACT IN THE CONTEXT OF EXISTING STATE LEGISLATION

Professor Handler has pinpointed at least seventeen different types of state legislation relevant to unfair trade practices. The following discussion will stress those statutes which are most apt to be confused with the Uniform Act.

The Uniform Act imposes few restraints on pricing practices and differs markedly from the various "fair trade acts," "unfair sales acts," and "unfair discrimination acts" which forbid certain types of price competition. "Fair trade acts" authorize sellers of trademarked merchandise to make contracts fixing the minimum or stipulated prices at which the mer-

91. E.g., Derenberg, supra note 76, at 1039-55; Weil, Protectibility of Trademark Values Against False Competitive Advertising, 44 CALIF. L. REV. 527 (1956).
93. Handler, Unfair Competition, 21 IOWA L. REV. 175, 229-36 (1936). The Uniform Act, it will be recalled, does not impliedly repeal state statutes dealing with unfair trade practices which are not expressly repealed in conjunction with enactment of the act. UNIFORM ACT § 2(c).
94. The precise titles of these statutes often differ from state to state so that they can be reliably identified only by their substantive provisions. Nevertheless, the titles mentioned are typical and illustrate the legislative ploy of invoking the epithet "unfair" to justify virtually every kind of statute regulating commercial activities. See Wilcox, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 6-7 (TNEC Monograph No. 21, 1940).
chandise can be resold by distributors and dealers.95 Selling below the prices set by fair trade contracts is usually declared to be "unfair competition" which is actionable by "any person damaged."96 "Unfair sales acts" prohibit sales below cost made with the intention of injuring competition or competitors,97 and "unfair discrimination acts" condemn sale of the same goods at different prices in various areas of a state in order to injure competition or to promote a monopoly.98 Violation of "unfair sales acts" and "unfair discrimination acts," which may be combined in an omnibus "unfair trade practices act," is often both a crime and actionable by "any person."99

The Uniform Act has little or no common ground with these state statutes constricting price competition. "Unfair sales acts," which interdict certain sales below cost, have been defended as precluding use of loss leaders to create a false impression that an advertised bargain is representative of a seller's prices;100 but, this is a disingenuous rationale. If the primary legislative concern is with deceptive trade practices, these can be forbidden without stifling price competition.101 The Uniform


100. See, e.g., Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 49 (1960). The Pennsylvania Unfair Sales Act, for instance, specifically forbids use of sales below cost "with the result of deceiving any purchaser or prospective purchaser . . . ." PA. STAT. ANN. tit. 73, § 213 (1960).

101. See LaRue, supra note 97, at 62-63. LaRue also dismisses the argument that a loss-leader operation deceives consumers as to the quality of goods and services offered by the discount operator. It is admittedly difficult to see how the mere use of loss leaders will mislead consumers as to the quality of goods or services. Moreover, if collateral
Act, for example, condemns false assertions of the existence of, or amounts of price cuts, and advertisement of loss leaders with an intent to switch all or most prospects to unadvertised, higher-priced items, but price cutting in and of itself is not made a specific deceptive trade practice. Thus, mere price cutting does not fall within the general language of section 2(a) (12), for that subsection follows section 2(a)'s enumeration of particular deceptive trade practices and only proscribes conduct "which similarly creates a likelihood of confusion or of misunderstanding." Moreover, because section 3(a) authorizes injunctions solely against "deceptive trade practices," an injunction under the act should not forbid the use or advertisement of price cuts in the absence of a deceptive scheme.

Most states have "weights, measures, and labeling acts," "food, drug, and cosmetic acts," and "insecticide, fungicide, and rodenticide acts" which are enforced by state administrative agencies. These statutes perform similar functions. "Weights, measures, and labeling acts" set general standards for the packaging and labeling of packaged articles; whereas "food, drug, and cosmetic acts" and "insecticide, fungicide, and rodenticide acts" require higher standards for the packaging and labeling of the limited classes of products within their purview. Any or all of these statutes may also set standards for advertising.

misrepresentations concerning the quality of a seller's goods or services are present in a particular case, these misrepresentations should be subject to suppression without affecting his pricing policies.

102. Uniform Act § 2(a) (11).

103. Uniform Act § 2(a) (9)-(10).

104. Uniform Act § 2(a) (12). (Emphasis added.) To the extent that there is any room for doubt as to the interpretation of § 2(a) (12) in this regard, the fact that price competition was generally nonactionable at common law, see, e.g., Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909), and the social interest in competition should further indicate to the courts that the legislature did not intend price cutting and loss-leaders to be within the general language of § 2(a) (12). Cf. Intern. Ass'n of Cleaning & Dye House Workers v. Landowitz, 20 Cal. 2d 418, 126 P.2d 609 (1942) (general statute condemning unfair competition construed not to forbid price cutting). The elaborate provisions of the statutes which overtly regulate price competition are additional evidence that the terse language of § 2(a) (12) was not meant to apply to the complex problem of price regulation.

105. Uniform Act § 3(a).


107. E.g., Del. Code Ann. tit. 6, § 5125 (Supp. 1966) (Delaware weights and measures statute prohibits price misrepresentation); N.M. Stat. Ann. § 54-1-3(e) (1953) (New Mexico food act bans false advertising of products within its ambit); Ind. Stat. Ann. § 15-2408(a) (1964) (Indiana herbicide statute condemns false or misleading advertising of...
Because of its obvious impact on interstate commercial transactions, this type of state legislation is subject to gradual displacement by new federal legal controls\(^{108}\) and to the prospect of eventual overall preemption.\(^{109}\)

The Uniform Act’s ban on deceptive trade practices may parallel the deceptive advertising jurisdiction of state agencies charged with administration of “weights, measures, and labeling acts,” “food, drug, and cosmetic acts,” and “insecticide, fungicide, and rodenticide acts,” as well as the jurisdiction of other state\(^{110}\) and federal\(^{111}\) agencies with similar powers. Moreover, inasmuch as product simulation—including simulation of labels and containers—is a well-established deceptive trade practice,\(^{112}\) there is also a potential for conflict between the Uniform Act and state and federal administrative regulation of packaging and labeling. However, friction is precluded on both counts by section 4(a)(1) of the Uniform Act, which states that the act does not apply to “conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency.”\(^{113}\)

Section 4(a)(1) does more than harmonize the Uniform Act with state and federal administrative regulation of deceptive trade practices.\(^{114}\) The exemption from actionability of only herbicides). On the state level, these statutes illustrate Professor Braucher’s observation that the job of controlling unfair trade practices is being increasingly delegated to administrative agencies. Braucher, American Administrative Activity in the Field of Unfair Competition, 15 Food Drug Cosm. L.J. 423 (1960).


110. E.g., Ala. Code tit. 28, ch. 3A (1958), which gives the state superintendent of insurance jurisdiction over unfair methods of competition and unfair or deceptive acts or practices in the insurance business.


113. Uniform Act § 4(a)(1). See also Uniform Act § 3(c) which states that relief under the act “is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.” Section 3(c) precludes an argument that the Uniform Act impliedly repeals the deceptive advertising jurisdiction of state administrative agencies. For a discussion of the limited extent to which the Uniform Act is preempted by federal law see Dole, Merchant and Consumer Pro-
conduct which complies with administrative standards suggests that a competent administrative standard with respect to impermissible deception can serve as evidence of what is "conduct which similarly creates a likelihood of confusion or of misunderstanding" under section 2(a) (12). Thus, a Federal Trade Commission determination that the use of bogus governmental forms in order to obtain information concerning debtors constituted unlawful deception under the Federal Trade Commission Act could induce a court to condemn similar conduct under section 2(a) (12), as long as the doctrine of primary jurisdiction did not require judicial deference to administrative evaluation of such conduct.

The doctrine of primary jurisdiction allocates priority of jurisdiction between courts and administrative agencies. Where the doctrine is applied, administrative action must precede judicial action. The application of the doctrine of primary jurisdiction to an administrative agency's jurisdiction over deceptive trade practices would accordingly preclude use of section 2(a) (12) as a surrogate for administrative regulation.

A determination that the label or advertising of an economic poison or a food, drug, or cosmetic is or is not deceptive can involve considerable expertise. Moreover, state and federal "insecticide, fungicide, and rodenticide" and "food, drug, and cosmetic" acts constitute intermeshed statutory schemes that require affirmative disclosures as well as avoidance of overt deception. Both circumstances suggest that the doctrine of primary jurisdiction should be applied to complex issues arising under these statutes. Nevertheless, the doctrine need not be invoked with respect to uncomplicated issues concerning the subjects regulated by these statutes, such as whether or not a medicine or an economic poison bears an infringing trade symbol or has a package-format which is confusingly similar to another manufacturer's package-format.

State "weights, measures, and labeling" laws typically con-
tain relatively clear-cut requirements which do not necessitate much sophistication to apply. There is, therefore, no need to invoke the doctrine of primary jurisdiction with respect to these statutes in the absence of a legislative command to do so.

The Federal Trade Commission and its few state counterparts are the administrative agencies whose deceptive trade practice jurisdiction most nearly coequals the entire Uniform Act. Application of the doctrine of primary jurisdiction with respect to these agencies would eviscerate the Uniform Act; but, there is slight prospect of this occurring. Section 5 of the Federal Trade Commission Act, for example, contains a terse prohibition on deceptive conduct which adversely affects the public.

There is no complex regulatory scheme dealing with a specialized subject matter and no administrative jurisdiction whatsoever over deceptive conduct which is primarily injurious to individual businessmen or consumers. The doctrine of primary jurisdiction is thus not only uncalled for with respect to the Federal Trade Commission Act; invocation of the doctrine would materially and unnecessarily abridge private legal controls over deceptive trade practices. Actions under the Uniform Act should be privileged to trespass on the statutory domain of the Federal Trade Commission and similar state agencies, and the courts should be able to use section 2(a)(12) in their already discernible assimilation of well-established FTC precedents into the law of deceptive trade practices.

Reference to the Uniform Act's relationship to the Federal Fair Packaging and Labeling Act of 1966 is in order before leaving the subject of the interplay between the Uniform Act and administrative regulation of packaging, labeling, and advertising. Effective July 1, 1967, the Fair Packaging and Labeling Act requires the Secretary of Health, Education, and Welfare and the Federal Trade Commission to promulgate regulations specifying information that must appear on the labels of "consumer commodities" in order to facilitate value comparisons by consumers. These authorities are given discretionary authority to

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121. Jaffee, supra note 117, at 1040-41.
promulgate additional regulations concerning characterization of the size of a package, representations that a sale is at other than the customary retail price, disclosure of product ingredients, and nonfunctional slack-fill of packages, if the regulations initially required by the statute prove inadequate.\textsuperscript{125} The Secretary of Commerce is also empowered to encourage voluntary industry product standardization where he finds "undue proliferation" in package quantities, weights, or measures.\textsuperscript{126}

The Fair Packaging and Labeling Act was often referred to as the "truth-in-packaging" bill during its slow progress through Congress.\textsuperscript{127} As this nickname implies, the legislation is primarily intended to create meaningful standards of product comparison where none exist, and not merely to curb representations which are deceptive in light of existing standards of product comparison. Thus, the Fair Packaging and Labeling Act bans use of terms like "giant" in connection with descriptions of net package contents where such terms "exaggerate the amount of the commodity contained in the package."\textsuperscript{128} On the other hand, section 2(a)(12) of the Uniform Act, like section 5 of the Federal Trade Commission Act, prescribes conduct which is deceptive in view of existing marketplace standards.\textsuperscript{129} Measured by this yardstick, a lack of meaningful trade standards with respect to a particular representation, for example, a beverage billed as a "giant quart," could lead to a conclusion that there is no "likelihood of confusion or of misunderstanding" arising from use of the term as long as the product contains more than thirty-two fluid ounces.\textsuperscript{130}

The same analysis applies to section 2(a)(5)'s...
ban on representations that goods have "quantities that they do not have."

It is just as well that the Uniform Act is not comparable to the Fair Packaging and Labeling Act of 1966. Section 12 of that Act expressly preempts

all laws of the States . . . [which] provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this Act which are less stringent than or require information different from the requirements of section 4 of this Act or regulations promulgated pursuant thereto.131

Note, however, that section 12 does not preempt state law which coincides with the packaging and labeling standards evolved under the Fair Packaging and Labeling Act. This permits application of those standards under section 2(a)(12) as tests for packaging and labeling practices which create "a likelihood of confusion or of misunderstanding" as soon as the Fair Packaging and Labeling Act standards have crystallized the commercial meaning of terms like "giant quart."

The final class of legislation to be compared with the Uniform Act is extant legislation dealing with trade symbol protection and deceptive advertising. Most states have trademark registration statutes which supplement common law trademark protection through provisions for evidentiary advantages and additional private remedies; for example, a court order requiring the destruction of all infringing material.132 The Uniform Act, like state trademark registration statutes, supplements common law protection of trademarks.133 However, unlike many state trademark registration statutes, the Uniform Act applies to misleading trade symbols used to distinguish services and businesses as well as to misleading trade symbols used to distinguish goods (trademarks).134 Moreover, also unlike the typical trademark

133. UNIFORM ACT §§ 2(a)(2), 2(a)(3), 2(b), 2(c).
134. UNIFORM ACT §§ 2(a)(2), 2(a)(3). In modern parlance, a trade symbol used to distinguish a business, e.g., Campbell Soup Co., is a trade name; a trade symbol used to distinguish services, e.g., "Fastest Press in Town" is a service mark; and a trade symbol used to distinguish goods, e.g., a "Whamo" baseball bat, is a trademark. Many state statutes limit the privilege of registration to trademarks—though an increasing number include service marks, e.g., N.Y. GEN. BUS. LAW §§ 360a-ii, 362 (Supp. 1966). Trade names are generally not registrable. See Dole, The Proposed Trade Names Registration Act, 56 TRADEMARK REP. 91-92 (1966).
registration statute, the Uniform Act modifies the substantive law applicable to use of misleading trade symbols by expressly condemning conduct which creates a likelihood of confusion as to sponsorship, approval, or certification, and by explicitly dispensing with proof of competition between the parties and intent to deceive as inflexible prerequisites of relief.

Most states have a general statute forbidding deceptive advertising as well as a number of specific statutes forbidding deceptive advertising of particular products. The older legislation is characterized by criminal sanctions and has seldom been enforced. More recently, state attorneys general and a few state administrative agencies have been given power to enjoin deceptive advertising, and, though less frequently, the authority to recover a civil penalty. These deceptive advertising statutes with public remedies may reach conduct covered by the Uniform Act, but do not duplicate the function of the Uniform Act.

The effectiveness of any public remedy for deceptive advertising is necessarily conditioned by the budget and personnel available to implement the remedy. Moreover, proceedings by state officials are usually confined to deceptive advertising which materially affects the public or is outrageously flagrant. Thus, there remains ample need for a correlative private action by persons apt to suffer pecuniary loss from garden-variety deceptive advertising. As a matter of fact, state officials should be


136. Uniform Act § 2(b).

137. Uniform Act § 3(a).


142. See, e.g., Note, Antitrust and Unfair Trade Practice Regulation in Utah, supra note 141, at 347-49.

grateful if an adversely affected businessman is willing to institute legal proceedings under the Uniform Act against deceptive advertising which does materially affect the public: "There is no real reason to require . . . [the expenditure of] public money to proceed against trade liars if private competitors are willing to take on the job."

Finally, there are a number of state statutes which provide private remedies for some of the deceptive advertising proscribed by the Uniform Act. This legislation does duplicate portions of the Uniform Act and should be repealed in conjunction with enactment of the Uniform Act unless it offers different remedies. The few state statutes which authorize a damage remedy for deceptive advertising or allow consumers to rescind sales of deceptively advertised goods, for example, should not be repealed. However, even California Civil Code Section 3369, one of the prototypes of the Uniform Act, should be amended so as to add the Uniform Act's specific deceptive trade practices to section 3369's present generalized condemnation of commercial deception.

The foregoing analysis indicates that there are few state statutes which are comparable to the Uniform Act. The act is neither substantively analogous to the bevy of state laws providing private remedies with respect to price competition, nor substantively identical with either trademark registration statutes or the few state statutes authorizing rescission and a damage recovery for limited types of deceptive advertising. Furthermore, because of the advantages of utilizing both public and private remedies with respect to deceptive conduct which does not require application of the doctrine of primary jurisdiction, state statutes providing public remedies for deceptive advertising, labeling, and packaging are complemented rather than duplicated by the Uniform Act. Indeed, both state and federal statutes providing public remedies for conduct which runs afoul of the Uniform Act are potential sources of standards which can be utilized in the application of section 2(a)(12)'s denunciation of "conduct which similarly creates a likelihood of confusion or of misunderstanding."

145. E.g., Ga. Code Ann. ch. 106-5 (Supp. 1966), which includes bait advertising, misrepresentations as to the true ownership of a business during a sale, false claims that a sale is at wholesale, and a general provision.
V. THE FORSEEABLE IMPACT OF THE UNIFORM ACT

The potential contributions of the Uniform Act to the law of unfair trade practices are threefold: a nationwide standard of actionability with respect to deceptive trade practices; an improved private remedy with respect to deceptive trade practices; and an increased incentive for the absorption of Federal Trade Commission precedents into the law of deceptive trade practices.

Although deceptive trade practices have been actionable in principle for some time, the bulk of the reported cases in which relief has been granted involve trade symbol infringement.\textsuperscript{147} Private actions for deceptive advertising and false disparagement have been hobbled with unrealistic prerequisites. Under the leading case of \textit{Ely-Norris Safe Co. v. Mosler Safe Co.},\textsuperscript{148} deceptive advertising is not actionable, in the absence of direct proof of special damage, unless the plaintiff's goods are the only goods on the market which contain the features which the defendant falsely claims for his own goods. Similarly, in some states false disparagement is not actionable unless the plaintiff can aver the names of specific customers whom he has lost because of the defendant's conduct.\textsuperscript{149} Even those "liberal" jurisdictions which permit an action for disparagement to be grounded upon a general loss of business following the publication of deprecating false statements require difficult-to-obtain evidence that the general loss of business was causally linked to the derogatory statements.\textsuperscript{150}

The stringent common law prerequisites to the recovery of damages caused by deceptive advertising and false disparagement are understandable safeguards against unwarranted imposition of damage liability, though, even with respect to damage liability, mechanical application of these prerequisites has resulted in summary dismissal of seemingly meritorious claims.\textsuperscript{151} What is not understandable is the invocation of these same common

\textsuperscript{147} See \textit{e.g.}, \textit{Florence Mfg. Cd. v. J.C. Dowd & Co.}, 178 Fed. 73 (2d Cir. 1910).

\textsuperscript{148} 7 F.2d 603 (2d Cir. 1925), \textit{rev'd on other grounds}, 273 U.S. 132 (1927).


law prerequisites where attempts are made to enjoin deceptive advertising and false disparagement. In the leading case of Marlin Firearms Co. v. Shields, the New York Court of Appeals dismissed an action to enjoin the publisher of a sportsmen’s magazine from printing spurious letters-to-the-editor discrediting plaintiff-manufacturer’s rifles on the alternative ground that the alleged falsity and perversity of the defendant’s conduct was immaterial in the absence of an averment of special damage. In a revealing comment, the court of appeals stated: “We need not stop to consider the reason for the rule [requiring special damage] for it has been too long and too firmly established to admit of questioning at this day.” Though Marlin’s uncompromising equation of the prerequisites for equitable and legal relief for false disparagement has been modified by subsequent New York decisions, Marlin retains disquieting vitality as a precedent today. Similar decisions exist with respect to the availability of equitable relief against deceptive advertising.

It is fatuous to make the availability of equitable relief against deceptive advertising and false disparagement depend on proof of special damage. If special damage can be readily proved, injunctive relief may well be unnecessary and unavailable because of the adequacy of the plaintiff’s remedy at law. In those situations in which special damage cannot be established, but it is nonetheless probable that the defendant’s conduct is inflicting harm on the plaintiff, an injunction is appropriate precisely because damage cannot be proved. Thus, in Carter v. Knapp Motor Co., the Supreme Court of Alabama affirmed an injunction against the prominent display of a Hudson automobile festooned with white elephants by a consumer who had demanded and been refused unwarranted free repairs by a local Hudson dealer. The court alluded to allegations that the dealer had received numerous inquiries concerning the merit of Hudson

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152. 171 N.Y. 384, 64 N.E. 163 (1902) (alternative holding). The court also invoked the hoary maxim that “equity will not enjoin a libel.” Modern judges have acknowledged the existence of equitable jurisdiction with respect to false disparagement and consider that the issue of undue restraint of speech is primarily relevant to the grant or denial of relief in particular cases. E.g., Krebiozen Research Foundation v. Beacon Press, Inc., 334 Mass. 88, 134 N.E.2d 1, cert. denied, 352 U.S. 848 (1956); Mayfair Farms, Inc. v. Socony Mobil Oil Co., 68 N.J. Super. 188, 195-96, 172 A.2d 26, 29-30 (1961).

153. 171 N.Y. at 391, 64 N.E. at 165 (1902).


156. 243 Ala. 600, 11 So. 2d 383 (1943).
automobiles following the display of the car and concluded:

Complainant's damages can not be measured—it is unable to lay its finger, perhaps, upon the loss of a single sale of a car or of a single customer. But the averments show many inquiries indicating some doubt in the minds of the public thus aroused, increasing as the unlawful conduct continues and as time goes on. . . . The inadequacy of the remedy at law sufficiently is made to appear.167

The Uniform Act assimilates the approach of Carter with respect to the enjoinability of deceptive advertising and false disparagement published by businessmen.168 Sections 2(a) (5)-(8) declare that false disparagement and certain common types of deceptive advertising are deceptive trade practices; and section 3(a) states:

A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, [or] loss of profits . . . is not required.159

The Uniform Act essentially permits the courts to utilize the same discretionary equitable relief in false disparagement and deceptive advertising cases which they have customarily exercised in trade symbol infringement cases. The other salient features of the standard of actionability posited by the act are dispensation with intent to deceive, competition between the parties, and evidence of actual confusion or misunderstanding as fixed conditions of relief.

The injunctive remedy of the Uniform Act makes it reasonable to have the substantive provisions of the Act reach unintentional as well as intentional conduct.160 There is ample precedent for such a dispensation with “intent to deceive” as an element of enjoinable trade symbol infringement161 and deceptive advertising.162 However, the actionability of good-faith, false disparagement apart from the Uniform Act is less clear.

The original Restatement of Torts recognized liability for disparagement even though an injurious false statement was uttered without knowledge of its falsity.163 Nevertheless, Dean

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157. Id. at 603, 11 So. 2d at 384–85.  
158. The Act is limited to deceptive practices committed in the course of a “business, vocation, or occupation.” Uniform Act § 2(a).  
159. Uniform Act § 3(a).  
163. Restatement, Torts § 625 (1938).
Prosser has steadfastly maintained that this position is based on a misjudgment as to the mainstream of authority, and in the draft Restatement of Torts (Second) he squarely repudiates it. Liability, we are now told, does not exist unless the publisher is motivated by ill will, knows that his statement is false, is unsure whether his statement is true, or intends to interfere with the interests of another in an unprivileged manner.

Prosser's mode of bringing the Restatement of Torts back into the mainstream of American law may be unexceptionable so far as substantial damage liability is concerned; but why, on principle if not authority, should the enjoinability of false statements be similarly circumscribed? If false statements are sufficiently injurious and their disseminator refuses to cease publication on demand, a businessman ought to be able to initiate proceedings for a court order to cease publication even though the defendant is merely negligent in failing to note the inaccuracy of his comments. The Restatement (Second) view does, of course, permit injunctive proceedings against an originally careless defendant who persists in repeating his false statements after convincing evidence of their falsity has been presented to him, but invariably requiring a plaintiff to put a defendant in bad faith before suit can unnecessarily delay redress for serious grievances. Indeed, one writer has advocated a negligence standard for damage as well as injunctive liability flowing from disparagement.

The Uniform Act's discarding of competition between the parties as an indispensable element of a deceptive trade practice is a response to the evolution of complex channels of distribution and national economic markets. It is a fact that a retailer's or a wholesaler's false disparagement of a product vended by competing retailers or wholesalers can cause a loss of sales to the

manufacturer of the disparaged product.\(^{167}\) It is a fact that the adoption of a trade symbol by a junior user in a local market can cause economic injury to the senior user of the trade symbol if the latter is subsequently forced to develop a new trade symbol in order to penetrate the local market.\(^{168}\) By dispensing with competition between the parties as a prerequisite to relief, the Uniform Act permits the courts to weigh the probability of economic damage to a plaintiff under modern economic conditions.

The Uniform Act's declaration that evidence of actual confusion or misunderstanding is not necessary to establish likelihood of confusion or misunderstanding is in one sense a mere reiteration of the proposition, which is apparent from the face of the statute, that evidence of a likelihood of confusion or misunderstanding can be sufficient to establish trade symbol infringement under sections 2(a)(2) and 2(a)(3), as well as a general, section 2(a)(12) deceptive trade practice.\(^{169}\) However, the principal purpose of this provision is to make clear that the testimony of consumers concerning their reactions to a defendant's marketing methods is not a predicate to establishing these deceptive trade practices. In appropriate cases, judges may infer from the nature of the defendant's conduct and from the market context within which it occurs that there is a probability of consumer confusion or misunderstanding. Thus, in *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*,\(^{170}\) the Second Circuit upheld a finding of fact, based largely on circumstantial evidence, that sufficient likelihood of confusion existed to constitute federal statutory trade symbol infringement. The plaintiff had registered "Maternally Yours" with respect to the retail sale of maternity wear; and the defendant had subsequently opened a competing business called "Your Maternity Shop." Judge Waterman commented:

> In this case the similarity of the names is not so marked as to itself create the probability that reasonably prudent consumers would be confused. But when the relatively circumscribed area of concurrent use (the New York metropolitan area), the narrow specialty market within that area to which the concurrent use was largely confined (retail maternity apparel shops), the close proximity of many of the stores, the novelty of plaintiff's trade-mark, and the seemingly studied imitation by defendant of plaintiff's signs, labels, boxes, advertising slogans,


\(^{170}\) 234 F.2d 538 (2d Cir. 1956).
and telephone listings, all are taken into account, the likelihood of confusion is adequately established.\textsuperscript{171}

As \textit{Maternally Yours} illustrates, consumer testimony is not necessary to establish federal statutory trade symbol infringement. The Federal Trade Commission likewise tends to utilize circumstantial evidence rather than consumer testimony in determining whether conduct is deceptive.\textsuperscript{172} The importance of consumer testimony is downplayed in these proceedings partially because of the difficulty and expense involved in obtaining such testimony.\textsuperscript{173} The effort involved in locating specific consumers who have been misled by an advertising campaign can be disproportionate to the significance of their testimony. Moreover, if consumer testimony concerning actual confusion or misunderstanding were critical to establishing the existence of likelihood of confusion or misunderstanding, there would be a vexing question as to how much consumer testimony was necessary in each particular case. If 1,000 persons in the market for shoes have observed defendant's trade symbol, how many of these persons would have to testify that they mistook defendant's shoes for plaintiff's in order to provide evidence of a significant amount of actual confusion or misunderstanding?\textsuperscript{174} A likelihood-of-confusion-or-misunderstanding test which does not require any consumer testimony avoids the opaque issue of how much consumer testimony is enough to establish a significant amount of actual confusion or misunderstanding, yet permits use of whatever consumer testimony is readily available to establish likelihood of confusion or misunderstanding. In \textit{Maternally Yours}, for example, the Second Circuit noted that the testimony of one consumer "bolstered" the conclusion, derived primarily from circumstantial evidence, that likelihood of confusion existed.\textsuperscript{175}

The foregoing discussion has adumbrated the nature of the improved private remedy provided by the Uniform Act. The Act sketches a number of specific deceptive trade practices which judges can find actionable and declares that the absence of competition, an intent to deceive on the part of the defendant, and provable damages caused by the deceptive trade practices are

\begin{itemize}
  \item \textsuperscript{171} Id. at 543.
  \item \textsuperscript{172} E.g., Charles of the Ritz Distrbs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944); Zenith Radio Corp. v. FTC, 143 F.2d 29 (7th Cir. 1944).
  \item \textsuperscript{173} See Miles Shoes, Inc. v. R. H. Macy & Co., 199 F.2d 602 (2d Cir. 1952), cert. denied, 345 U.S. 909 (1953).
  \item \textsuperscript{174} See \textsc{Vandenburgh, Trademark Law and Procedure} 105-07 (1959).
  \item \textsuperscript{175} 234 F.2d at 543 (2d Cir. 1956).
\end{itemize}
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not necessarily bars to equitable relief. The Act constitutes a legislative declaration that the courts shall no longer treat claims for equitable relief from deceptive trade practices any differently than other claims for equitable relief—that injunctive relief shall be potentially available wherever commercial conduct can reasonably be considered to be both deceptive and injurious. This is hardly a startling proposition. It is novel in the deceptive trade practices context primarily because the common law prerequisites of equitable relief were unnecessarily analogized from the prerequisites of a damage recovery.

Comprehension of the nature of the improved private remedy afforded by the Uniform Act also provides the key to understanding the substance of the uniformity which will be brought about by the Act. The Act details a number of specific deceptive trade practices and declares that these acts, plus other similar acts, can be found enjoinderable regardless of the absence of competition between the parties, intent to deceive on the part of the defendant, and provable damage to the plaintiff. However, whether an injunction will actually be issued in any case which a plaintiff attempts to fit within a statutory pigeonhole depends on the sound discretion of the trial judge. This is an inherently nonuniform aspect of any general statute invoking equity jurisdiction. As precedents accumulate, patterns will develop in the exercise of discretion, but the role of precedent in equity jurisprudence is characterized by the homely adage that every tub stands on its own bottom. This is why section 2(a)(12)'s invitation to the courts to recognize new deceptive trade practices is not out of place in the Uniform Act. Uniformity is an elusive concept where the legality of conduct depends upon the application of general standards to varied factual situations.

During congressional hearings on a proposed federal unfair trade practices statute, a witness testifying in favor of the bill cited several examples of “divergent results” in state courts as evidence of the necessity for uniform unfair trade practices legislation. One pair of these cases illustrates the ease with which differing exercises of discretion can be confused with lack of uniformity. In Electrolux Corp. v. Valworth, Inc., the New York Court of Appeals reinstated a permanent injunction against the use of advertised bargains in order to attract customers who

were then switched through false disparagement to the purchase of more expensive goods. On the other hand, despite the alleged existence of a similar scheme, the Appellate Division of the New Jersey Superior Court reversed the grant of a temporary injunction in *General Elec. Co. v. Gem Vacuum Stores, Inc.*

Defendant's affidavits in *General Elec.* contradicted plaintiff's assertion that false disparagement was used to effect the switching of customers, and a pertinent New Jersey statute had apparently not been complied with by the plaintiff. The diverse results in *Electrolux* and *General Elec.* did not, therefore, derive from a lack of uniformity in state law. The different types of injunctive relief sought by the respective plaintiffs and the different postures of the respective records on appeal justified the varying results.

If the *Electrolux* and *General Elec.* cases had arisen under the Uniform Act, the results might well have been the same. The Act enhances a judge's power to grant injunctive relief against deceptive trade practices, but does not require exercise of that power. Nevertheless, widespread enactment of the Uniform Act will create a basic uniformity in deceptive trade practices law which is woefully lacking today. Deceptive advertising and false disparagement, as well as trade symbol infringement, will be potentially enjoinable by any person "likely to be damaged," and there will be a uniform statutory definition of these torts which will provide a common standard of actionability.

At first blush, it might seem that section 2(a)(12)'s broad proscription of "any other conduct which similarly creates a likelihood of confusion or of misunderstanding" will undermine the uniformity that will be achieved through enactment of the Uniform Act. What, for example, will preclude differing state conceptions as to the substantive content of section 2(a)(12)? A partial rejoinder is that well-reasoned decisions under section 2(a)(12) in one state should be highly persuasive in other states where the Uniform Act has been enacted. Natural osmosis in this respect should be accelerated by the declaration in section 5 of the Uniform Act that "this Act shall be construed to effectuate its general purpose to make uniform the law of those states which

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179. N.J. STAT. ANN. §§ 56:4-1&2 (1964) authorizes a trade symbol user to sue persons who misrepresent the value or quality of his products in contravention of a prohibitory notice affixed to the products. The plaintiff in *General Elec.* did not allege that he had utilized the notice prescribed by the statute.
A more adequate response is that the Uniform Act was intended to achieve several objects. The goal of establishing uniform recognition of the actionability of deceptive trade practices is attained through the specification of a core of eleven deceptive trade practices in section 2(a), all of which section 3(a) makes potentially actionable by any person "likely to be damaged." On the other hand, section 2(a)(12) implements the broader purposes of facilitating further evolution of deceptive trade practices law and of orienting state unfair trade practices law toward suppression of deceptive trade practices. Furthermore, a uniform interpretation of section 2(a)(12) will be fostered if the courts utilize that section to assimilate Federal Trade Commission precedents into the law of deceptive trade practices.

The Federal Trade Commission has established an impressive array of precedents concerning deceptive trade practices which can be utilized in the application of section 2(a)(12). By way of illustration, the Commission has ruled that it is a violation of section 5 of the Federal Trade Commission Act for a businessman to complain to the Commission about a competitor and then to publicize the fact that a complaint has been lodged with the Commission before the Commission has decided whether to act on the complaint. This Federal Trade Commission precedent suggests that it should be considered a section 2(a)(12) deceptive trade practice for a party-plaintiff to publicize the initiation of proceedings under the Uniform Act before a determination of his claims on the merits—unless he has an extenuating reason for doing so. A plaintiff, for example, should be privileged to warn persons dealing in goods bearing what he believes to be infringing trade symbols that an action has been commenced under the Uniform Act against the user of the trade symbol and that that person's distributors and dealers are similarly subject to suit. On the other hand, a plaintiff should be considered to violate section 2(a)(12) where, merely having filed a complaint which invokes the Uniform Act, he gratuitously informs customers of the defendant who are not pursu-

180. UNIFORM ACT § 5.
ing similar conduct that the defendant is engaging in a deceptive trade practice.\textsuperscript{184}

Several caveats are necessary with respect to the use of Federal Trade Commission precedents in the interpretation of section 2(a)(12). The FTC asserts authority to suppress advertising which is misleading to "the gullible and credulous, as well as the cautious and knowledgeable."\textsuperscript{185} Thus, an FTC determination that a particular representation is deceptive should only be persuasive authority under section 2(a)(12) if the Commission has convincingly established that the representation is important and misleading to an appreciable number of consumers. In its zeal to protect the public, the Commission sometimes attacks representations that are not important to many consumers and that are misleading to even fewer. In \textit{Etablissements Rigaud, Inc.}\textsuperscript{186} for example, the Commission ordered an American corporation which imported French perfume essences and mixed them with alcohol in the United States to refrain from using virtually any French or other foreign term to designate, to describe, or to refer to its perfume without an accompanying English translation. The Second Circuit was moved to comment:

\begin{quote}
It is doubtless permissible to forbid the use of words which indicate a French origin and manufacture when strictissimi juris there is none, but we can see no reason for prescribing the use of all French words when designating the perfumes or for the rather fantastic requirement of the order that the price of retention must be an accompanying English translation.\textsuperscript{187}
\end{quote}

The \textit{Rigaud} case is an instance of FTC misapplication of the reasonable doctrine that consumer deception can result where a seller falsely represents that his goods come from a geographical area renowned for producing that type of goods. The doctrine itself is germane to the Uniform Act, only its misapplication should be rejected. However, there is another FTC doctrine concerning deception as to geographic origin which should be rejected \textit{in toto} under the Uniform Act.

The Commission presumes that the American public prefers domestic to foreign goods and that it is accordingly deceptive to

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\item \textsuperscript{184} Cf. Black & Yates, Inc. v. Mahogany Ass'n, Inc., 129 F.2d 227 (3d Cir. 1941), cert. denied, 317 U.S. 672 (1942).
\item \textsuperscript{185} Heinz W. Kirchner, No. 8538, 1963-1965 CCH FTC COMPLAINTS, ORDERS, AND STIPULATIONS \[ 16664, at 21539 (1963), aff'd on other grounds, 337 F.2d 751 (9th Cir. 1964); see generally Millstein, The Federal Trade Commission and False Advertising, 64 Colum. L. Rev. 439, 457-65 (1964).
\item \textsuperscript{186} 29 F.T.C. 1032 (1939), modified, 125 F.2d 590 (2d Cir. 1942). The Rigaud case is discussed in Alexander, Some Competitive Virtues in the False naming of Goods, 39 So. Cal. L. Rev. 1, 13-14 (1966).
\item \textsuperscript{187} 125 F.2d 590, 591 (2d Cir. 1942).
\end{itemize}
\end{footnotesize}
sell foreign goods in this country without affirmative disclosure of the country of origin. The Commission’s presumption is based on official notice that American consumers prefer domestic products and is concededly rebuttable:

The Commission is well aware, for example, that a man who prefers an American-made watch band or hand tool may not prefer American cigars, perfume, caviar or scotch. . . . But we are not barred from taking official notice of a general fact merely because it is not a universal fact.

The admittedly tentative nature of the Commission’s official notice of consumer preference for domestic goods means that this fact should not be a subject of judicial notice under the Uniform Act. Administrative agencies have an affirmative duty to formulate sound regulatory policy and accordingly make use of official notice to effectuate the policies of the statutes that they administer. On the other hand, courts function largely as arbiters of private disputes and typically confine judicial notice to matters of common knowledge and facts capable of accurate and ready demonstration. The deceptive nature of failure to disclose the foreign origin of goods should accordingly be a question of fact under the Uniform Act—with the burden of going forward with the evidence on the plaintiff.

VI. FEDERAL ENACTMENT OF THE UNIFORM ACT

Proponents of uniformity with respect to unfair trade practices law have espoused federal as well as uniform state legislation as the vehicle for achieving this goal. In general, even

188. Manco Watch Strap Co., 60 F.T.C. 495 (1962). Uniform Act § 2(a)(4), which proscribes use of deceptive representations or designations of geographic origin, is more pertinent to this particular FTC doctrine than § 2(a)(12) of the act. Nonetheless, the FTC decisions dealing with disclosure of foreign origin illustrate a type of FTC precedent which should not be read into the Uniform Act.


190. Official notice and judicial notice are devices by which administrative agencies and courts interject facts into administrative and judicial proceedings without formal evidence of those facts being introduced by the parties. Procedural fairness requires that parties adversely affected have an opportunity to controvert facts that are proposed to be established by official or judicial notice. See generally 2 Davis, Administrative Law § 15.14 (1958); McCormick, Evidence § 331 (1954).

191. 2 Davis, op. cit. supra note 190, §§ 15.05-.06.


193. E.g., Diamond, The Proposed Federal Unfair Commercial Activities Act, 23 Ohio St. L.J. 110 (1962) (federal legislation); Handler, Unfair Competition, 21 Iowa L. Rev. 175, 259-62 (1936) (federal and uniform state legislation); Rogers, Unfair Competition, 35 Trademark REP. 126 (1945) (uniform state legislation); Rogers, New Concepts of
the supporters of federal legislation have acknowledged the value of a continued state potential for innovation and have favored a nonpreemptive federal statute.\textsuperscript{104}

Though the sweep and relative simplicity of a federal enactment have an obvious appeal,\textsuperscript{105} the plain facts are that the Commissioners on Uniform State Laws have promulgated the Uniform Deceptive Trade Practices Act, which was enacted in five states in the space of one year;\textsuperscript{106} whereas the principal federal proposal to date has been introduced fruitlessly into four successive Congresses,\textsuperscript{107} and has received chilly and inconclusive hearings in the House.\textsuperscript{108} This raises the question whether it would be expedient for advocates of federal legislation to consider enactment of the Uniform Act on the federal level.\textsuperscript{109}

The issue is eminently timely. Despite a few calls for federal enactment of the Uniform Act,\textsuperscript{200} a major effort is underway to enact an amendment to section 43(a) of the Federal Lanham Trademark Act which encompasses far more than deceptive trade practices.\textsuperscript{201} A comparison of this new federal proposal with the Uniform Act is instructive.


\begin{itemize}
\item[194.] E.g., Diamond, supra note 193, at 118. A notable exception is Judge Henry J. Friendly who favors "a federal statute occupying the field of unfair competition in interstate commerce, which could then be copied by the states . . ." Friendly, Satisfaction, Yes—Complacency, No! 51 A.B.A.J. 715, 720 (1965).
\item[195.] Uniform state acts move more or less slowly across the country and have a disconcerting tendency to acquire nonuniform amendments. Peterson, The Legislative Mandate of Sears and Compco: A Plea for a Federal Law of Unfair Competition, 69 Dick. L. Rev. 347, 375 (1965).
\item[196.] Connecticut, Delaware, Idaho, Illinois, and Oklahoma, see note 5 supra. The Uniform Act was enacted in Kansas in 1967. Ibid.
\end{itemize}
The draft section 43(a) amendment provides in part:

Any person who shall engage in any act, trade practice, or course of conduct, in commerce, which—

(1) causes or is likely to cause confusion, mistake, or deception as to the affiliation, connection, or association of such person, or as to the origin, sponsorship, or approval of his goods, services, or vocational activities, or

(2) either by a false or misleading statement or by omission of material information, misrepresents his goods, services, vocational activities, or their geographic origin, or misrepresents or disparages another person's goods, services, vocational activities, or their geographic origin, or

(3) results or is likely to result in passing off the goods, services, or vocational activities which he offers as or for those of any other person, or

(4) results or is likely to result in the wrongful disclosure or misappropriation of a trade secret or other research or development or commercial information maintained in confidence by another, or

(5) results or is likely to result in misappropriation of quasi-property of another, not otherwise protected by Federal statute, or

(6) without being limited to or by the foregoing subsections (1) through (5), is otherwise contrary to commercial good faith or to normal and honest practices of the business or vocational activity in which he is engaged, shall be liable in a civil action for unfair competition.

Provided, That it shall not be necessary to prove competition between the parties, actual confusion, mistake, or deception, or intent to injure the business or vocational activity of any other person or the goodwill thereof.

Aside from the matter of remedies which will be discussed subsequently, the proposed section 43(a) amendment differs from the Uniform Act in the inclusion of misappropriation of commercial intangibles, trade secret infringement, and, arguably, truthful disparagement as specific substantive offenses. The proposed section 43(a) amendment also contains a catch-all provision condemning conduct which is contrary to "commercial good faith" or "normal and honest practices" which has no counterpart in the Uniform Act. These are major differences.

By declaring that it is actionable if a person either "misrepresents or disparages another person's goods, services, [or] vocational activities. . . " the proposed section 43(a) amendment implies that disparagement need not consist of misrepresentations, that truthful statements which cause a probability

of pecuniary harm can constitute actionable disparagement.\textsuperscript{204} The Uniform Act takes precisely the opposite tack and limits actionable disparagement to false or misleading representations of fact.\textsuperscript{205}

The desirability of widespread dissemination of true information concerning goods, services, and businesses is a corollary of the social interest in suppression of commercial deception. Rational economic decisions by consumers are as much a function of the presence of correct information as the absence of misleading information:

Consumer ignorance is ... [an] important cause of market imperfections. Faced with a vast selection of goods and imprisoned by prejudice, habit and emotion, it is next to impossible for the average consumer to buy intelligently. Family units are not sufficiently large and their requirements are too varied to allow a detailed investigation of all the goods purchased. Exhaustive laboratory tests are necessary to determine the relative merits of goods offered in the market place.\textsuperscript{206}

Advertising is an important potential source of truthful commercial information, but, unfortunately, a high proportion of advertising copy attempts to persuade the consumer to buy "Chipso" simply because it is "Chipso," rather than because of "Chipso's" objective merits. The efficacy of such persuasive advertising from the advertiser's point of view, and the urgent need for more truthful factual information concerning products, services, and businesses were recently underscored by the Assistant United States Attorney General in charge of the Antitrust Division. He observed that wider dissemination of comparative product information should be encouraged in order to counteract the anticompetitive consequences of massive advertising expenditures by large firms.\textsuperscript{207}

In this context, the proposed section 43(a) amendment's potential applicability to damaging, truthful product commentary

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\item \textsuperscript{204} It is possible to read the initial portion of \textsection 7(a) (2) of the proposed section 43(a) amendment, which refers to false or misleading statements and misleading omissions, as qualifying that section's reference to disparagement. However, this is not a necessary reading, and a brief prepared by advocates of the proposed amendment supports the interpretation discussed in the text of this article by treating misrepresentation and disparagement of another's goods as discrete torts. \textit{Brief In Support of Congressional Passage of Proposed Unfair Competition Amendment to Lanham Trademark Act of 1946, 57 Trademark Rep. 88, 100 (1967)}.
\item \textsuperscript{205} \textit{Uniform Act} \textsection 2(a) (8).
\item \textsuperscript{206} \textit{Hale \\& Hale, Market Power: Size and Shape Under the Sherman Act} 418 (1958).
\item \textsuperscript{207} \textit{BNA Antitrust \\& Trade Reg. Rep.} 256: X-1 (1966).
\end{thebibliography}
by professional product commentators, like Consumer Reports, is indefensible.\textsuperscript{208} Truthful product commentary by disinterested persons merits encouragement, not extinction. However, it has been forcefully contended that commentary concerning one's competitors should be subject to stricter legal controls.

Professor Wolff, relying primarily on the German approach to unfair trade practices, argued that competitors should be prohibited from describing their rivals or their rivals' wares to consumers "unless vital interests of the informant, or of the public, cannot be protected by other means."\textsuperscript{209} Wolff essentially reasoned that the intensity of a businessman's self-interest would lead him to abuse any privilege that he was given to comment on his competitors so that it was the better part of wisdom to severely restrict that privilege. Yet, even under Wolff's approach, it can be plausibly maintained today that the proliferation of new products, models, and brands has created such a need for comparative information that the vital interests of the public cannot be adequately protected without permitting businessmen to engage in truthful discussion of their fellows. For this very reason a recent commentator has predicted a breakdown of the German approach to truthful disparagement on which Wolff relied so heavily: "The limitations on advertising on a comparative basis may, at least to some extent, be abolished soon because such advertising may be able to provoke competition. . . ."\textsuperscript{210}

In addition to its seeming outlawry of truthful disparagement, the proposed section 43(a) amendment contains a blanket legislative endorsement of the misappropriation theory of unfair trade practices with few statutory clues as to what is and what is not tortious misappropriation.\textsuperscript{211} Consequently, the proposed amendment accentuates, rather than alleviates, the misappropriation theory's imprecise emphasis on exclusive rights, thereby enhancing the danger of misapplication of the theory at the expense of competition. In American Safety Table Co.

\textsuperscript{208} S. 1154, 90th Cong., 1st Sess. § 7(b) (1967) allows any person whose business is likely to be damaged by conduct forbidden by the proposed amendment to sue, whether the conduct is engaged in by a competitor or a noncompetitor such as Consumer Reports.

\textsuperscript{209} Wolff, Unfair Competition by Truthful Disparagement, 47 Yale L.J. 1304, 1332 (1938).


\textsuperscript{211} S. 1154, 90th Cong., 1st Sess. § 7(a) (5) (1967).
Judge Medina declared, "Nor are we, in view of the deliberate plan to poach unjustifiably on Amco's goodwill, disposed to debate in detail the probabilities of confusion. . . ." Despite the fact that the patents on plaintiff's machine had either expired or were considered invalid, Judge Medina thereupon endorsed an injunction requiring defendants to distinguish their machine from plaintiff's through significant physical alterations.

A result similar to that in American Safety Table cannot recur through the application of state law because the Supreme Court subsequently declared in the Sears and Compco cases that the federal patent laws preempt state law which forbids or penalizes the copying of unpatented or invalidly patented articles. However, Sears and Compco pose no obstacle to a replay of American Safety Table under the proposed section 43(a) amendment. Indeed, supporters of new federal legislation concerning unfair trade practices have pointed to the need for federal legislation which would nullify the effect of Sears and Compco. Enactment of the proposed section 43(a) amendment's generalized codification of the misappropriation theory could accordingly lead to anticompetitive judicial decrees at worst, and, at best, to a judicial reluctance to find misappropriation where no appreciable public deception would result from the denial of relief.

The proposed section 43(a) amendment's blanket endorsement of a federal action for trade secret infringement is subject to the same criticism as its blanket endorsement of the misappropriation theory. Trade secret infringement is currently defined by an intricate skein of common law principles which merit specific legislative surgery rather than wholesale endorsement.

213. 269 F.2d at 276.
214. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day–Brite Lighting, Inc., 376 U.S. 234 (1964). See Brown, Product Simulation, 64 Colum. L. Rev. 1216, 1222 & n.21 (1964). The Uniform Act deals with Sears and Compco through § 3(a), which provides: "Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source." "Article" is defined in § 1(1).
217. See Arnold, Trade Secrets, 9 Iowa 161-64 (Conference No. 1965);
The proposed amendment, for example, offers no answer whatsoever to the present lack of clear metes and bounds as to what is and what is not protectable as a trade secret. One writer has trenchantly observed that "trade secret law has not successfully regulated business conduct. Its fundamental weakness is its inherent uncertainty. The standard of conduct, developed on a case by case basis, only reflects each court's philosophy of commercial morality."  

The proposed section 43(a) amendment also fails to deal with aberrational judicial tendencies to grant unnecessary and anticompetitive relief on a trade secret theory. Under the so-called Shellmar rule, for example, a trade secret infringer can be perpetually enjoined from using a purloined trade secret even if the trade secret later becomes common knowledge and a standard competitive technique. The more procompetitive Conmar rule requires that an injunction against use of a trade secret be denied or dissolved within a reasonable time after the secret has become common knowledge. However, the proposed amendment does not acknowledge the existence of this conflict of authority, let alone attempt to resolve it.

The proposed section 43(a) amendment's prohibition of conduct contrary to "commercial good faith" and "normal and honest practices" involves still greater danger of anticompetitive misapplications. It is, of course, true that "good faith" has become an increasingly relevant datum insofar as the law is concerned. The Uniform Commercial Code, for example, declares that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." However, the Code's declaration that an assumed contractual duty entails a concomitant obligation to perform that duty in good faith is fundamentally different from the proposed amendment's declaration that every merchant has an imposed duty to act in good faith, regardless of his willingness to assume that duty.

The Code does not, for instance, impose a duty to perform in

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221. UNIFORM COMMERCIAL CODE § 1-203.
good faith a contract which constitutes an unreasonable restraint of trade. Contracts in unreasonable restraint of trade are unenforceable at common law,222 and section 1-103 of the Code provides that common law principles concerning the validity of contracts supplement the Code unless specifically displaced.223 On the other hand, the proposed section 43(a) amendment’s unqualified references to “commercial good faith” and “normal and honest practices” are broad enough to constitute a legislative declaration that deviations from anticompetitive as well as pro-competitive trade customs are actionable. A businessman’s disregard of his competitors’ preferences for avoiding truthful comparative product commentary,224 price comparisons,225 or price competition itself could, for example, be considered actionable under the proposed amendment where the nonconformist garnered a sale or two!

The nature of a contractual duty which has been assumed also provides a precise context in which to ascertain good and bad faith on the basis of trade custom, course of dealing, course of performance, and other objective factors relevant to that context; whereas the universal obligation to engage in good faith conduct imposed by the proposed section 43(a) amendment has less specific referents. A brief submitted in support of the proposed amendment suggests that actionable departures from “commercial good faith” and “normal and honest practices” need not even be tied to violation of trade customs and commercial understandings. The brief states: “Section 43(a)(6) is designed to be a general provision of the type that will allow the federal courts sufficient latitude to fashion and develop a uniform and effective body of federal law in the field of unfair commercial activities.”226 This would appear to be an invitation for the chancellor to use his foot wherever he deems it necessary.

The brief seeks to justify a sweeping condemnation of commercial bad faith through invocation of several questionable “precedents.”227 First and foremost, the brief relies on provisions condemning bad-faith competition in two multilateral trea-

223. UNIFORM COMMERCIAL CODE § 1-103.
224. See Wolff, Unfair Competition by Truthful Disparagement, 47 YALE L.J. 1304, 1317 (1938).
225. See id. at 1328.
227. Id. at 104-05.
ties to which the United States is a party: the Paris Convention for the Protection of Industrial Property and the Inter-American Trade-Mark Convention. The Supreme Court has held that the Inter-American Convention is self-executing, but both treaties indicate that their declarations concerning unfair trade practices are not self-executing after those declarations have been implemented by the domestic legislation of a signatory. In the United States, the implementing legislation with respect to both treaties is the Federal Lanham Trademark Act. Since present section 43(a), which the proposed federal statute seeks to amend, is part of the Lanham Act, it follows that the American domestic legislation implementing the Paris Convention and the Inter-American Convention has never adopted the comprehensive bad-faith conception of unfair trade practices which appears in those treaties. These treaty provisions, consequently, are not "precedents" for the proposed amendment to section 43(a) in the sense of providing empirical evidence that a tort consisting of the exhibition of commercial bad faith constitutes either a useful or a manageable concept of tort liability.

The other "precedents" are also inapposite. Section 5 of the Federal Trade Commission Act's proscription of "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" is not analogous to the proposed section 43(a) amendment because section 5 is administered by the Federal Trade Commission, a public agency constrained by Congress to proceed only in the public interest. The proposed section 43(a) amendment relates to a private right of action, and


230. See Convention of Paris, supra note 228, art. 10 (Ter); Inter-American Convention, supra note 228, art. 21-22.


233. Even if it is maintained that the Lanham Act improperly narrows the protection promised by the treaties, the fact remains that there has been no American experience with an operative rule of tort liability like that enunciated in the treaties.


it is open to question whether persons primarily concerned with private interests should be allowed as great a privilege to sue other businessmen as is vested in the Federal Trade Commission. As the Justice Department observed in connection with a forerunner of the proposed section 43(a) amendment:

The principal objection to this legislation is that it would create a potentially dangerous anti-competitive weapon. The breadth of the definition of "unfair commercial activities" would extend the private injunctive remedy into new areas in which the courts have been consistently reluctant to venture.236

Nor is California Civil Code Section 3369 a meaningful precedent. Section 3369 condemns "unlawful, unfair, or fraudulent business practices," but this is not the equivalent of explicitly condemning every departure from "commercial good faith" and "normal and honest practices." Section 3369 uses general language to describe the scope of a private right of action, yet section 3369 does not affirmatively compel the courts to set sail on the uncharted seas of commercial good and bad faith. As a consequence, the bulk of the cases adjudicated under section 3369 have involved deceptive trade practices. A lower California court fairly appraised the great majority of California cases interpreting section 3369 when it said: "What constitutes 'unfair competition' or 'unfair or fraudulent business practice' under any given set of circumstances is a question of fact . . . the essential test being whether the public is likely to be deceived . . . ."237

Aside from its ill-advised applicability to truthful disparagement, the essential substantive defect of the proposed section 43(a) amendment is the unparalleled generality of the codification of private remedies for misappropriation, trade secret infringement, and the all-encompassing tort of bad faith commercial practices. Although section 2(a)(12) of the Uniform Act, which declares actionable "any other conduct which similarly creates a likelihood of confusion or of misunderstanding," also constitutes a broad standard of illegality, section 2(a)(12) does not raise the same problems as the proposed section 43(a) amendment.

236. Hearings on H.R. 4651 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess. 7 (1964) (letter from Nicholas Katzenbach, then Deputy Attorney General).

Section 2(a)(12) utilizes the existence of probable consumer deception as the test of illegality. This standard not only permits an objective inquiry into the existence of a section 2(a)(12) violation; it focuses section 2(a)(12) on a type of commercial conduct which is generally harmful both to consumers and to other businessmen.\textsuperscript{238} In contrast, the triad of indefinite statutory torts created by the proposed section 43(a) amendment—misappropriation, trade secret infringement, and bad faith commercial conduct—involves alleged wrongs to businessmen which may in fact benefit consumers. The copying of an unpatented and uncopyrighted product by a competitor may, for example, appropriate the fruits of the first businessman's innovation; but it may also result in greater availability of the product to the public, and lower prices. In \textit{Sears, Roebuck & Co. v. Stiffel Co.}\textsuperscript{239} the Supreme Court noted that Sears' copying of Stiffel's pole lamps resulted in Sears' retail price approximating Stiffel's wholesale price.\textsuperscript{240}

The fact that consumers may benefit from conduct which is made actionable by the proposed section 43(a) amendment does not necessarily mean that that conduct should not be made actionable. The possibility of consumer benefit from such conduct does, however, suggest that the legislature should provide intelligible guidelines for the courts if this conduct is to be actionable.

The indefiniteness of the conduct which is condemned by the proposed section 43(a) amendment is particularly objectionable in view of the potential consequences of engaging in that conduct. The proposed amendment states that all of the remedies provided in the Lanham Act shall be available for violation of amended section 43(a).\textsuperscript{241} This means, for example, that inadvertent commercial bad faith could subject a businessman to an injunction,\textsuperscript{242} to forfeiture of his profits or such sum as the court finds just under the circumstances, to liability for plaintiff's damages, which may be trebled in the discretion of the court, to liability for court costs,\textsuperscript{243} and, if another aspect of the proposed amendment is enacted, to liability for

\textsuperscript{238} See text accompanying notes 49-52 supra.
\textsuperscript{239} 376 U.S. 225 (1964).
\textsuperscript{240} Id. at 226.
\textsuperscript{241} S. 1154, 90th Cong., 1st Sess. § 7(b) (1967).
plaintiff's attorneys' fees.\textsuperscript{244} The vagueness of the proposed section 43(a) amendment constitutes a hazardous trap for the unwary in view of the bristling array of proposed remedies.

Although section 43(a) could profitably be redrafted, the proposed amendment is not the answer. A more desirable approach would be to incorporate the substance of the Uniform Act into section 43(a) and to leave intact section 43(a)'s present ambivalent relationship to the arsenal of Lanham Act economic remedies where infringement of a registered trade symbol is not involved.\textsuperscript{245}

**CONCLUSION**

The Uniform Deceptive Trade Practices Act provides a long-awaited improvement in the private remedies for deceptive trade practices. Deceptive advertising, false disparagement, and trade symbol infringement which causes likelihood of confusion as to sponsorship, approval, or certification should be potentially enjoinable throughout the nation. However, the utility of a coordinate statutory damage remedy is more questionable in view of the difficulties of proof and the inexpediency of imposing liability for damages with respect to the inadvertent deceptive conduct reached by the Uniform Act. A damage remedy has consequently been omitted from the Uniform Act, although section 3(c) permits the courts to analogize a common-law claim for damages from the provisions of the act.

The Uniform Act contains a proposed nationwide standard for the actionability of deceptive trade practices, and provides an opportunity for increased absorption of Federal Trade Commission decisions dealing with significant commercial deception into the law of deceptive trade practices. The substantive and remedial provisions of the Uniform Act compare so favorably with the currently proposed amendment to section 43(a) of the Lanham Act that Congress would be well-advised to adopt the substance of the Uniform Act in lieu of the proposed amendment. Needless to say, this course of action would also achieve the congruency between the state and the federal statutory law of deceptive trade practices which is a *sine qua non* of a truly uniform law of deceptive trade practices.

\textsuperscript{244} S. 1154, 90th Cong., 1st Sess. § 5 (1967).
\textsuperscript{245} See notes 81-82 supra and accompanying text.