Merchant and Consumer Protection the New York Approach to the Regulation of Deceptive Trade Practices

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In 1959 a Special Committee of the Antitrust Section of the New York State Bar Association issued a report on the New York law of unfair trade practices. After an exhaustive analysis of the New York statutes and decisions, the Special Committee recommended enactment of a statute empowering the Attorney General or any district attorney to enjoin the commission of "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." The Committee expressly refused to endorse a coordinate private remedy, and the proposed statute declared that it neither enlarged...
nor diminished the rights of parties to private litigation. Professor Milton Handler, the Chairman of the Special Committee, stated that the Committee had found the New York common law of deceptive trade practices in ferment and had opted to let that ferment take its course rather than run the risk of engaging in unwarranted legislative intervention. Nevertheless, he recommended that the Bar Association re-examine the common law remedies for deceptive trade practices in about a decade to see if the time was then ripe for statutory codification or change.\(^5\)

The decade to which Professor Handler referred is almost over. This article examines the developments in New York law during that period in order to ascertain whether there is now an observable need for legislation providing private remedies for deceptive trade practices. This inquiry is of more than parochial interest. In the years since Professor Handler’s committee concluded its deliberations, the National Conference of Commissioners on Uniform State Laws and the American Bar Association House of Delegates have recommended that all states enact the Uniform Deceptive Trade Practices Act.\(^6\) The new Uniform Act provides a private injunctive remedy for deceptive trade practices which complements the public injunctive remedy proposed by the Special Committee in 1959.\(^7\) Although the Uniform Act has already been enacted in seven states,\(^8\) its adoption in New York would

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\(^4\) Id. at 95a.

\(^5\) Handler, Proposals for Changing the Law of New York on Unfair Competition and False Advertising, 1959 CCH ANTITRUST SYMPOSIUM 173, 176. The Special Committee also noted that the Federal Trade Commission Act, 15 U.S.C. §§ 40-58 (1964), from which its proposed statute was derived, contained no private remedy so that it would be difficult to predict the consequences of appending a private remedy to the proposed statute. SPECIAL COMM. REPORT 11.

\(^6\) NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1964 HANDBOOK 131-32 [hereinafter cited as HANDBOOK]; 89 A.B.A. REP. 405 (1964). The Commissioners have revised § 3(b) of the act, which deals with allowance of costs and attorneys’ fees, in response to a resolution by the ABA Section of Patent, Trademark, and Copyright Law. ABA SECTION OF PATENT, TRADEMARK, AND COPYRIGHT LAW, 1965 PROCEEDINGS 54-56, 64-66; 1966 HANDBOOK 90; 91 A.B.A. REP. 357 (1966). The current version of the act, which is officially known as the Revised Uniform Deceptive Trade Practices Act, appears in 1966 HANDBOOK 298-315 [hereinafter the current version of the act will be cited as UNIFORM ACT]. The original form of the act can be found in 9A UNIFORM LAWS ANN. (Supp. 1967) and S. OPPENHEIM, UNFAIR TRADE PRACTICES, app. E (2d ed. 1965).

\(^7\) UNIFORM ACT § 3(a).

\(^8\) CONN. GEN. STAT. ANN. §§ 42-115(c)-(f) (Supp. 1966); DEL. CODE ANN. tit: 6, §§ 2531-37 (Supp. 1966); FLA. STAT. ANN. §§ 817.69-.75 (Supp. 1968); GA. CODE ANN. §§ 1211 (Supp. 1966); IDAHO CODE ANN. §§ 48-601 to 48-606 (Supp. 1967); ILL. ANN. STAT. ch. 121 (Smith-Hurd Supp. 1967); OKLA. STAT. ANN. tit. 78, §§ 51-55 (Supp. 1907). The Oklahoma enactment contains several deviations from the recommended version of the act. Merrill, Oklahoma and the National Conference of Commissioners on Uniform State
undoubtedly increase the tempo of state enactments. Following adoption of the Uniform Commercial Code in New York, the President of the Uniform Commissioners observed:

[T]o those who are familiar with the difficulties and intricacies involved in adapting the provisions of the Code to the multitudinous commercial transactions of that great state, the magnitude of the achievement which this represents is apparent. It will no doubt supply the necessary incentive to many of the smaller states which heretofore have been hesitant, for, once the Code takes effect in New York, no state which has any pretentions at all in the world of commerce can be without it except at the risk of being completely out of step with the times.  

Thus far, the New York position on the Deceptive Trade Practices Act has not crystallized. The 1967 Report of the Committee on New York State Antitrust Law of the New York State Bar Association renewed the call of the 1959 Special Committee for a statute enabling the New York Attorney General to obtain injunctions against deceptive acts and practices, but declined to take a position on the Uniform Act. The Committee stated that “the question of whether New York should adopt all, or part, of the Uniform Act requires another study and report.”  

The following analysis may render further study unnecessary.

I

THE NATURE OF THE UNIFORM DECEPTIVE TRADE PRACTICES ACT

Section 2(a) of the Uniform Act contains both a general condemnation of deceptive commercial conduct and a series of specific subsections characterizing deceptive advertising, false disparagement, and trade symbol infringement as deceptive trade practices.  


10 1967 REPORT OF THE Comm. ON NEW YORK STATE ANTITRUST LAW, NEW YORK STATE BAR ASS’N 4-6, 11.

11 UNIFORM ACT § 2(a):
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;
(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
advertising consists of the dissemination of misleading factual statements concerning the product, service, or business of the disseminator. In Lower Main Street Merchants Association v. Paul Geller & Co., for instance, competitors were declared to be entitled to an injunction against a continuous "going out of business" sale by a retail men's clothing store. False disparagement involves the unprivileged publication of false, injurious statements about the product, service, or business of another. Thus, in Allen Manufacturing Co. v. Smith, the appellate division approved an injunction against the distribution of spurious United States Department of Agriculture documents that falsely indicated that the plaintiff's fly spray had been condemned by the government. Trade symbol infringement is the use of a commercial identification by one businessman that purchasers are likely to confuse with the commercial identification previously used by another. For example, in Standard Oil Co. of New York v. Standard Oil Co. of Maine, the long-established Standard Oil Company of New York was held entitled to enjoin the use of the name "Standard Oil Company" by a newly-

(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 misunderstanding.

Compare § 2(a)(12) with §§ 2(a)(1)-(11).

False disparagement is also known as injurious falsehood, slander of goods, and trade libel. Id. False statements that impugn the integrity or credit of a business also constitute actionable defamation. See Marlin Fire Arms Co. v. Shields, 171 N.Y. 384, 390, 64 N.E. 165, 164 (1902).
17 58 F.2d 677 (D. Me.), modified on other grounds, 45 F.2d 309 (1st Cir. 1930).
organized corporation that was engaged in the distribution of petroleum products in northern New England.

Sections 2(b)\textsuperscript{18} and 3(a)\textsuperscript{19} of the Uniform Act amplify section 2(a) with declarations that evidence of competition between the parties, actual confusion or misunderstanding, intent to deceive, and provable monetary damage are not inflexible prerequisites to relief. These sections do not preclude reference to such factors as evidence of probable damage, but make clear that other evidence of probable damage will suffice. A wholesaler with an exclusive sales agency for a trademarked beverage may, for example, be damaged by repeated, false assertions that the beverage is mislabeled, even though the retailer who makes the claims is honestly mistaken about their truth.\textsuperscript{20}

The Uniform Act authorizes injunctive relief against deceptive trade practices\textsuperscript{21} and preserves other state remedies not repealed in conjunction with the enactment of the Uniform Act.\textsuperscript{22} A court is also given discretion to award attorneys' fees to the prevailing party if a complainant has brought an action known to be groundless, or if a defendant has deliberately engaged in a deceptive trade practice.\textsuperscript{23}

\textsuperscript{18} Uniform Act \S 2(b) provides: "In order to prevail in an action under this Act, a complainant need not prove competition between the parties or actual confusion or misunderstanding."

\textsuperscript{19} Uniform Act \S 3(a) provides:

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....


\textsuperscript{22} Uniform Act \S 3(c). Section 2(c) coordinately provides: "This section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state."

\textsuperscript{23} Costs shall be allowed to the prevailing party unless the court otherwise directs. The court [in its discretion] may award attorneys' fees to the prevailing party if (1) the party complaining of a deceptive trade practice has brought an action which he knew to be groundless or (2) the party charged with a deceptive trade practice has willfully engaged in the trade practice knowing it to be deceptive.

Id. \S 3(b) (brackets in original). (The use of brackets in a Uniform Act indicates that the Uniform Commissioners do not believe that uniformity requires enactment of the bracketed language. 1966 Handbook 399).

With a 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, the original version of the Uniform Act authorized a court to award attorneys' fees to the prevailing party "in exceptional cases." E.g., 9A Uniform Laws Ann. (Supp. 1967, at 17). In states
II

REGULATION OF DECEPTIVE TRADE PRACTICES IN NEW YORK

The New York approach to the regulation of deceptive trade practices can be best evaluated by tracing the relationship between the public and private sanctions for deceptive commercial conduct. The major New York statutes affording public and private remedies for deceptive advertising, false disparagement, and trade symbol infringement will be surveyed, and an assessment will be made of the current state of New York common law. This analysis will emphasize those public and private remedies that are comparable to the injunctive remedy of the Uniform Act. Thus, the consumer damage and rescission remedies supplied by actions for breach of warranty and deceit will not be discussed. Finally, a judgment will be made concerning the significance of enactment of the Uniform Act in New York.

A. Statutes with Public Remedies

1. Deceptive Advertising

Most of the New York statutes that provide public remedies for deceptive trade practices proscribe deceptive advertising, i.e., deceptive representations made in connection with the marketing of goods or services. Although these statutes are numerous, the statute authorizing the Attorney General to seek injunctions against deceptive practices, proposed by the Special Committee in 1959, is not among them. This bill has failed of legislative enactment despite its repeated introduction at the instance of the Attorney General. Nevertheless, the New York

where the original Uniform Act has been enacted, the "uniform interpretation" clause in § 5 should lead judges to interpret original § 3(b) in light of the 1966 amendment until conforming amendments are made. For example, a strike suit under the Uniform Act would constitute an "exceptional circumstance" justifying the award of attorneys' fees to the defendant under the original wording of § 3(b). The 1966 amendment expressly singles out this situation as an instance in which attorneys' fees can be awarded.

24 New York has many specific statutes relevant to deceptive trade practices. For example, N.Y. GEN. BUS. LAW § 206(c) (McKinney 1968), makes it a misdemeanor for a person to divert or to attempt to divert a person from a hotel, boarding house, rooming house, or lodging house to another lodging by means of a false statement or representation made for purposes of gain. However, as Jack Greenberg, Executive Director of the Special Committee, observed, these laws have seldom been judicially construed and "cast little light on our problem, except to underscore the episodic manner in which the legislature has treated the problem." Special Comm. Report 14a.


26 See, e.g., Bloomquist v. Farson, 222 N.Y. 375, 118 N.E. 855 (1918).

Attorney General has obtained several other legislative grants of authority with respect to deceptive trade practices, and he maintains one of the most active state consumer protection programs in the country.28

a. Civil Remedies. The most useful weapons in the Attorney General's statutory arsenal are sections 63(12) and (15) of the Executive Law.29 Section 63(12) permits the Attorney General to seek, on five days' notice, an order enjoining "persistent fraud or illegality in the carrying on, conducting or transaction of business." "Fraud" is defined to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions."30 The leading case under section 63(12) is Lefkowitz v. ITM, Inc.,31 which involved the sale of household appliances through the use of an "endless chain" referral commission plan. Consumers agreed to pay exorbitant prices for these items on the representation that their earnings from referral commissions would be correspondingly high. Consumers were assured that six to seven purchases would result from each ten names referred. They were also guaranteed at least three hundred dollars if they referred the defendants to at least twenty persons who made appointments to discuss the plan. The court found that the plan involved a series of fraudulent representations to consumers and constituted an illegal lottery as well. In reality, the number of purchases resulting from referrals was not assured and was far lower than the defendants claimed. Moreover, if a customer was very far down the chain of referrals, he had a very slim chance of referring new prospects to the defendant. Few customers earned enough commissions to pay for the overpriced items they had bought in the belief that the purchase price would not come out of their own pockets. The court enjoined the use of this sales technique.

In another recent case under section 63(12), the Attorney General succeeded in enjoining a more subtle selling pattern. In People v. Compact Associates,32 the defendant vacuum cleaner distributors used door-to-door salesmen. In order to gain permission for a demonstration,

30 Id. § 63(12).
the salesmen paid prospective buyers five dollars and gave them a "Bond of Friendship," a document symbolizing friendly intentions. The defendants' salesmen were found to have regularly followed this come-on with misrepresentations. A consumer was told, for example, that no sale was contemplated but that a vacuum cleaner would be left with him if he signed a receipt. The "receipt" was invariably an installment sale contract. The court enjoined not only the outright lying, but also use of the Bond of Friendship and the payment for a demonstration, on the ground that the latter "created an atmosphere conducive to fraud."33

The Compact Associates court seemed to consider that the number of instances of probable consumer deception that could be shown by the Attorney General was critical to establishing "persistent fraud."34 Indeed, the dissent argued that only isolated acts of fraud had been demonstrated.35 A "numbers game" of this sort, which is invited by the "persistent fraud" requirement, makes section 63(12) unduly expensive and difficult to enforce. It should be sufficient for the Attorney General to prove that continuous use of a sales technique is likely to deceive consumers.36

Section 63(12) of the Executive Law interlocks with several other statutory powers of the Attorney General. The section itself authorizes him to issue subpoenas to ferret out persistent fraud. A recent amendment to the Civil Practice Law makes clear that these subpoenas can be issued administratively without a court order.37 Moreover, section 63(15) authorizes the Attorney General to accept assurances of discontinuance in lieu of seeking an injunction under section 63(12).38 The Attorney General may condition acceptance of such assurances on the defendant's payment of up to two thousand dollars of the cost of investigation.39 Other conditions have also been imposed, such as the

33 Id. at 131, 254 N.Y.S.2d at 267.
34 Id. at 131, 254 N.Y.S.2d at 267-68.
35 Id. at 136-37, 254 N.Y.S.2d at 270-73.
38 N.Y. EXEC. LAW § 63(15) (McKinney Supp. 1967). The Attorney General can also accept assurances of discontinuance under other statutes. Id.
deposit of funds in escrow for distribution to aggrieved consumers. Subsequent disregard of an assurance of discontinuance is prima facie evidence of violation of section 63(12).

Section 63(12) is also tied into the Attorney General’s power to prohibit wayward corporations from doing business in New York. This power is derived from the Business Corporation Law with respect to corporations conducted for profit and from the General Corporation Law with respect to nonprofit corporations. These statutes permit the Attorney General to seek judicial dissolution of domestic corporations and to enjoin foreign corporations from doing intrastate business if they have operated in a “persistently fraudulent or illegal manner.” In appropriate cases, receivers can be appointed to safeguard the assets of corporate offenders. The Attorney General has made repeated use of these broad powers, and the landmark case of People v. Abbott Maintenance Corp. has confirmed that sustained deceptive advertising is a basis for corporate dissolution.

The Attorney General’s civil powers to stop persistent deceptive advertising are not strikingly different from his civil powers to deal

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40 Mindell, supra note 28, at 622 & n.116-17.
with the specialized problems of deceptive issuance and distribution of securities and deceptive charitable solicitations. The most significant disparity in approach is that certain issuers and distributors of securities, charitable organizations, professional fundraisers, and professional solicitors must file specified information with state officials in order to carry on business lawfully. The basic civil remedies for deceptive marketing of securities and charitable solicitation are injunctive relief against the deceptive practices and, in certain cases, the prohibition of continued business in New York. Nevertheless, there are some important differences between these remedies and the remedies generally available to the Attorney General. With respect to deceptive practices in the marketing of securities, for example, a temporary receiver can be appointed who will only hold title to the property acquired as a result of the deceptive practices. Also, violation of an injunction against the use of deceptive practices involving securities is both a crime and grounds for imposition of a civil penalty of three thousand dollars. Finally, the Attorney General can obtain an injunction more easily under the statutes dealing with the marketing of securities and charitable solicitations than under section 65(12) of the Executive Law. Evidence of actual deception is unnecessary, and, at least with respect to the marketing of securities, so is evidence of intention to deceive.

Two other statutes invest the Attorney General with power over deceptive advertising. Sections 350-350(e) of the General Business Law authorize him to recover a civil penalty of up to five hundred dollars for any advertisement that is misleading in a material respect. Finally, section 396 of the General Business Law allows the Attorney General to enjoin "bait advertising," which occurs when a seller seeks to attract customers by advertising at a low price an item he does not intend to...

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50  N.Y. GEN. BUS. LAW § 353(a) (McKinney 1968); see People v. Reinforced Paper Bottle Corp., 176 Misc. 464, 26 N.Y.S.2d 251 (Sup. Ct. 1941).
51  N.Y. GEN. BUS. LAW § 359(g)(1) (McKinney 1968).
54  N.Y. GEN. BUS. LAW §§ 350-350(e) (McKinney 1968). It is a complete defense in such a proceeding that an advertisement is subject to, and complies with, the Federal Trade Commission Act, 15 U.S.C. §§ 40-58 (1964). This is an emasculated version of the statute originally recommended by the Special Committee.
55  N.Y. GEN. BUS. LAW §§ 396(1),(3) (McKinney 1968).
sell in more than nominal amounts. A bait advertiser makes every effort to sell unadvertised, higher-priced merchandise to persons who respond to his advertisements. Section 396(3) specifically negates evidence of actual consumer deception as an element of enjoinable bait advertising.

b. Criminal Remedies. The Attorney General shares general responsibility for the policing of deceptive advertising with the district attorneys. Whereas the Attorney General’s remedies are primarily civil, the district attorneys utilize their customary criminal proceedings. Section 190.20 of the Penal Law declares false advertising to be a misdemeanor. The crime occurs when a person addresses an advertisement containing a false or misleading statement to a substantial number of persons with the intent of increasing the consumption of property or services. Absence of conscious or reckless falsity will preclude a conviction. Although there are a host of other criminal statutes condemning deceptive advertising, section 190.20 is clearly the most important. Its comprehensive terminology encompasses such disparate practices as bait advertising and advertisement of fictitious price cuts. Moreover, section 190.20 is the result of an evaluation of the effectiveness of criminal sanctions against deceptive advertising. Experience with the predecessor of section 190.20 indicated, for instance, that the courts would not rigorously enforce strict criminal liability for deceptive advertising. Consequently, section 190.20 makes actual or probable awareness of falsity a necessary element of the crime where the defendant has asserted his good faith.

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68 The Attorney General is also specifically empowered to initiate some criminal prosecutions. This is true, for example, with respect to deceptive practices in the marketing of securities, N.Y. Gen. Bus. Law § 358 (McKinney 1968), and deceptive charitable solicitations, N.Y. Soc. Welfare Law §§ 482-c(1), 482-i(1) (McKinney 1966).
69 N.Y. Penal Law § 190.20 (McKinney 1967).
70 E.g., N.Y. Educ. Law § 224(l) (McKinney 1933) (deceptive advertising concerning educational accreditation); N.Y. Gen. Bus Law §§ 117 (deceptive advertising by travel agents), 187(2) (employment agencies), 396(a) (savings and loan associations) (McKinney 1968).
73 Despite a Court of Appeals decision indicating that even innocent misrepresentation in connection with the sale of goods or services constituted a crime, People v. Richter’s Jewelers, Inc., 291 N.Y. 161, 165-66, 51 N.E.2d 690, 691 (1943), lower courts continued to require evidence of intentional misrepresentation in order to sustain a conviction. See People v. Fleming, 273 App. Div. 1014, 78 N.Y.S.2d 812 (2d Dept 1948) (per curiam). One prosecutor informed the Special Committee that conduct tantamount to larceny had to be established in order to obtain a conviction for false advertising. Special Comm. Report 6a n.19.
c. Administrative Remedies. In addition to the Attorney General and the district attorneys, several state administrative agencies have limited jurisdiction over deceptive advertising. The Insurance Law forbids unfair methods of competition and unfair or deceptive acts or practices in the insurance business.64 "Unfair methods of competition" are defined to include violation of several other statutes, including section 190.20 of the Penal Law.65 The Superintendent of Insurance has authority to issue cease and desist orders against unfair or deceptive acts and practices.66 Temporary injunctions can also be obtained if necessary.67 The Agriculture and Markets Law and the Education Law similarly authorize the Commissioner of Agriculture and Markets and the State Board of Pharmacy to prevent the use of false advertisements and mislabeling in conjunction with the sale to the public of food,68 drugs, devices, and cosmetics.69 Although violation of these latter statutes is a misdemeanor,70 administrative regulation is the primary means of enforcement. The administrators have authority to impose monetary penalties,71 to seize misbranded or deceptively advertised products,72 and to obtain injunctions against continuing violations.73

2. False Disparagement

In contrast to the melange of civil, criminal, and administrative public remedies for deceptive advertising, there are relatively few statutes explicitly providing a public remedy for false disparagement. One such statute is section 40-c of the Insurance Law, which makes it a misdemeanor willfully and knowingly to circulate derogatory false statements that concern or affect the financial condition of insurance com-

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64 N.Y. INS. LAW § 272 (McKinney 1966).
65 Id. § 273 (McKinney Supp. 1967).
66 Id. § 276 (McKinney 1966). A civil penalty of up to $5,000 can be imposed for violation of a cease and desist order. Id. § 280.
67 Id. § 278(2).
69 N.Y. EDUC. LAW §§ 6810(2)(a), 6821(2), 6823(1) (McKinney 1953).
70 N.Y. AGRIC. & MKTS. LAW § 41 (McKinney 1954); N.Y. EDUC. LAW § 6823(1) (McKinney 1953).
72 N.Y. AGRIC. & MKTS. LAW § 202-b (McKinney 1954); N.Y. EDUC. LAW § 6815 (McKinney 1953).
DECEPTIVE TRADE PRACTICES

Conduct violating this statute is also a deceptive practice within the administrative jurisdiction of the Superintendent of Insurance. However, a number of public remedies for deceptive advertising are broad enough to be applied to some forms of false disparagement. For example, a sales promotion scheme combining false disparagement of competing goods or services with promotion of one's own wares might also involve "persistent fraud" under section 63(12) of the Executive Law, "false advertising" within the meaning of the civil penalty law, and criminal "false advertising."

3. Trade Symbol Infringement

The principal explicitly public remedies for trade symbol infringement are criminal. Section 279-n of the General Business Law, for example, provides that it is a misdemeanor to make a false or counterfeit trademark, to deliberately affix a false or counterfeit trademark to an article of merchandise, and intentionally to affix the genuine trademark of another to merchandise without the other's consent. There is some overt administrative regulation of trade symbol infringement. The Education Law, for instance, declares that drugs and cosmetics bearing infringing trade symbols are "misbranded" and subject to regulation by the Board of Pharmacy. Trade symbol infringement may also violate statutes regulating deceptive advertising. One of the misrepresentations enjoined in *Lefkowitz v. ITM, Inc.*, a proceeding under section 63(12) of the Executive Law, was a false claim that the defendant Gilbert Industries was the famous toy manufacturer listed on the New York Stock Exchange.

Another indirect public control over trade symbol infringement is the authority of the Secretary of State with respect to deceptive corporate names. The Business Corporation Law, which applies to corporations operated for profit, and the General Corporation Law,

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75 Id. § 273.
77 "False advertising" means advertising, including labeling, which is misleading in a material respect . . . ." N.Y. GEN. BUS. LAW § 350(a) (McKinney 1965).
79 N.Y. GEN. BUS. LAW §§ 279-n(1)-n(2) (McKinney 1968).
80 N.Y. EDUC. LAW §§ 6808(2)(h)(4), 6810(2)(d)(2), 6821(2) (McKinney 1953). The "botting" acts dealing with improper use of refillable trademarked containers have particularly severe criminal penalties. E.g., N.Y. GEN. BUS. LAW §§ 275 to 279-i (McKinney 1968).
which applies to nonprofit corporations, forbid the incorporation of a domestic enterprise and the authorization of a foreign corporation to do business with a name that is deceptively similar to that of a corporation previously incorporated or authorized to do business in New York.\textsuperscript{82} The prohibitions of the Business Corporation Law are literally broader than those of the General Corporation Law, but there is not much difference in their practical application. \textit{Barber & Co. v. Department of State,}\textsuperscript{83} a Court of Appeals decision under the General Corporation Law, is the leading authority concerning the factors to be weighed by the Secretary of State in administering these statutes. Although the corporations were not competitors, the Secretary of State had found "The Barber Company, Inc." to be too similar to "Barber & Co., Inc." to permit the former's use. The Court of Appeals upheld this decision, stating:

\begin{quote}
While the two corporate names are not the self-same thing, both make pretty much the same appeal to eye and ear and neither suggests any specific commercial activity. Both corporations are to do business in the same locality. Though competition between them may presently be unlikely, neither the financial advantage of either nor the convenience of its customers was necessarily a conclusive factor. The duty of the Department of State was a duty to the public in the first instance.\textsuperscript{84}
\end{quote}

When the New York statutes providing public remedies for deceptive advertising and false disparagement are compared to the statutes providing public remedies for trade symbol infringement, it becomes apparent that deceptive advertising has been regarded as the more offensive deceptive trade practice in New York. More of the significant public-remedy statutes deal with deceptive advertising that with the other deceptive practices. Furthermore, these statutes and the reported cases decided under them, do not begin to suggest the incidence of deceptive advertising in New York. In 1965 the Attorney General's

\textsuperscript{82} N.Y. \textit{Bus. Corp. Law} \textsection 301(a)(2) (McKinney 1963); N.Y. \textit{Gen. Corp. Law} \textsection 9 (McKinney Supp. 1967). There are similar limitations on the names that can be adopted through amendment of a certificate of incorporation or an authorization to do business. N.Y. \textit{Bus. Corp. Law} \textsection\textsection 801(a) (McKinney 1963) 1508(a) (McKinney Supp. 1967); N.Y. \textit{Gen. Corp. Law} \textsection\textsection 40(3) (McKinney Supp. 1967), 215 (McKinney 1943). The Business Corporation Law also prohibits the filing of a name that is deceptively similar to a name that has been reserved under that statute. N.Y. \textit{Bus. Corp. Law} \textsection 301(a)(2) (McKinney 1963).

\textsuperscript{83} 277 N.Y. 55, 12 N.E.2d 790 (1938).

\textsuperscript{84} Id. at 62, 12 N.E.2d at 793. The \textit{Barber} rationale was followed under the Business Corporation Law in Jervis Corp. v. Secretary of State, 43 Misc. 2d 185, 250 N.Y.S.2d 544 (Sup. Ct. 1964).
Bureau of Consumer Frauds and Protection reported opening 9,492 files and claimed that its mediation and court action resulted in consumer returns of $1,213,482.56. In 1966 the figures were 14,678 files and $1,064,627. After analyzing similar data from an earlier period, the Special Committee stressed the imperative need to control deceptive advertising: "We have concentrated on false advertising because we are of the view that this constitutes the area in which the gravest derelictions occur."

B. Statutes with Private Remedies

1. Express Statutory Remedies

In contrast to the statutes providing public remedies, the New York statutes affording private remedies for deceptive trade practices relate almost exclusively to trade symbol infringement. Like most states, New York has a trade symbol registration statute, which permits registration of both non-infringing trademarks (trade symbols used to distinguish goods) and non-infringing service marks (trade symbols used to distinguish services), provided that common law rights have been acquired in the symbols. Registration is not required and does not confer substantive advantages over nonregistrants. The primary benefits of registration are evidentiary and remedial. A certificate of registration can, for instance, provide valuable evidence of trade symbol use. In *Dunkin' Donuts of America, Inc. v. Dunkin' Donuts, Inc.*, the court adverted to the existence of a New York trade symbol registration as an indication that the plaintiff's symbol deserved protection. The registration statute also authorizes a court to order destruction of infringing

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87 SPECIAL COMMITTEE REPORT 7.
88 N.Y. GEN. BUS. LAW §§ 360-368-c (McKinney 1963). There are also several trade symbol registration statutes of more limited scope. E.g., id. §§ 209-a to 209-g (McKinney 1963) (hotel-motel name registration). These specialized statutes have been interpreted in the same manner as the general trade symbol registration statute. See Thruway Motel v. Hellman Motel Corp., 11 Misc. 2d 418, 170 N.Y.S.2d 552 (Sup. Ct. 1958).
89 N.Y. GEN. BUS. LAW §§ 360-a(a-1), 361 (McKinney 1963). Common law rights are not recognized in descriptive symbols without evidence that the public associates the symbols with a particular user. Id. 361-c, see R. Dole, supra note 16, at 6-8. The New York registration statute provides that continuous use of a descriptive symbol for five years is evidence of "distinctive" use. N.Y. GEN. BUS. LAW. § 361-c(3) (McKinney 1968).
90 N.Y. GEN. BUS. LAW § 368-e (McKinney 1963).
matter, a remedy not necessarily available at common law. Nevertheless, the private remedies for infringement of a registered trade symbol are essentially the same as those for infringement of an unregistered trade symbol: an injunction, damages, and, in the discretion of the court, recovery of the profits derived from infringement.

On the other hand, section 133 of the General Business Law contains a truly distinctive remedy for trade symbol infringement. Section 133 deals with misleading indications of location and trade symbols that can mislead the public concerning the identity of a person or his connection with another person. If a respondent intended to deceive the public in this fashion, section 133 authorizes injunctive relief on five days' notice. Proof of actual public deception is unnecessary.

In *Julius Restaurant, Inc. v. Lombardi*, the Court of Appeals determined that section 133 authorized a special proceeding. Initiated by service of a notice of petition, a petition, and any supporting affidavits, a section 133 proceeding can be decided upon papers alone. In close cases, however, some judges hear the arguments of counsel and even the testimony of witnesses. The injunction that can be granted on five days' notice is a final order and not an injunction pendente lite.

The resemblance of a section 133 proceeding to summary judgment has not escaped the attention of the New York courts. One judge has commented: "[T]he proof by affidavit and absence of factual issue must be tantamount to that which would authorize a summary judg-

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93 N.Y. GEN. BUS. LAW § 368-c(l) (McKinney 1968); see Note, supra note 91, at 355.  
94 N.Y. GEN. BUS. LAW § 368-c (McKinney 1968).  
95 Id. § 133. See generally Alexander, A Summary Civil Remedy for Trade Name Infringement: The New York Experience, 53 TRADEMARK REP. 17 (1963). Violation of § 133 is also a misdemeanor, but the criminal significance of the statute is negligible.  
97 *Julius Restaurant* and the following cases discussed in connection with § 133 were decided under the predecessor to § 133, former Penal Law § 964, reprinted in 29 McKinney's CONSOLIDATED LAWS OF N.Y. ANN., app. at 468 (1967). Section 133 became effective September 1, 1967, and is substantially identical to former Penal Law § 964.  
98 N.Y. CIV. PRAC. LAW § 403(b) (McKinney 1963). The notice of petition must be served in the same manner as a summons. Id. § 403(c).  
100 *See In re* Precision Apparatus Co., 6 Misc. 2d 817, 165 N.Y.S.2d 853 (Sup. Ct. 1956).  
This is generally understood to mean that a petitioner must make out the elements of a section 133 violation, especially the respondent's intent to mislead the public, by clear and convincing evidence. However, if a petitioner's papers establish a prima facie case, the respondent must do more than traverse the petition. Insubstantial or incredible averments and bare denials of intentional misconduct are insufficient to defeat a section 133 proceeding.

Unlike a section 133 proceeding, a common law action for trade symbol infringement can be brought even if the defendant had no intention to mislead the public. This substantive distinction, reinforced by section 133's unique procedure, has led most New York courts to distinguish sharply between section 133 proceedings and plenary actions for trade symbol infringement. Matter of Dictograph Products Co. v. Brooklyn Auralfone Corp., for example, held that a section 133 proceeding could not be combined with a plenary action. As a matter of practice, the summary proceeding is brought first, and, if summary relief is denied due to a failure to establish intentional misconduct, a plenary action may be initiated.

A few judges, however, have repudiated the distinction between section 133 proceedings and plenary actions. In Wilma Gowns, Inc.

103 In re Industrial Plants Corp., 286 App. Div. 568, 571, 146 N.Y.S.2d 2, 6 (1st Dep't 1955).
108 Charles F. Ryan & Son v. Lancaster Homes, Inc., 19 App. Div. 2d 14, 240 N.Y.S.2d 183 (4th Dep't 1963), illustrates this procedural sequence. The case arose out of an endeavor by Ryan Homes, Inc., a Pennsylvania house builder, to enter the housing market in Rochester, New York. Charles F. Ryan & Son, local housing contractors, brought a § 133 proceeding to restrain use of the trade symbol "Ryan" in the Rochester area by the Pennsylvania firm. Although the petitioners prevailed in the trial court, the appellate division reversed and gave the petitioners the following advice:

In the absence of a clear demonstration that the appellants intended to trade upon and exploit the petitioners' reputation, the petitioners' claim for relief under section 964 of the Penal Law [the statutory predecessor of § 133] falls...

109 The petitioners' proper remedy is a plenary action in equity. Id. at 19, 240 N.Y.S.2d at 187-88. This turned out to be bad advice on the facts of the Ryan case. The complaint in the plenary action was subsequently dismissed on the merits. Charles F. Ryan & Son v. Lancaster Homes, Inc., 22 App. Div. 2d 186, 254 N.Y.S.2d 473 (4th Dep't 1964).
the papers filed by the parties indicated that the respondent's trade symbol would be confused with the petitioner's trade symbol but did not establish the respondent's intent to mislead the public. Faced with a good common law claim that did not justify summary relief in a section 133 proceeding, the trial judge granted an injunction in the interests of justice rather than require the petitioner to bring a plenary action.

Section 133 is violated by the intentional use of a trade symbol that is likely to mislead the public concerning one person's connection with another. The statute is thus broad enough to encompass the concept of confusion of sponsorship, which is a newer form of trade symbol infringement that involves a false implication of endorsement, approval, or certification of a product, service, or business by another business. In Automobile Club of New York, Inc. v. Karnell, the New York affiliate of the AAA successfully brought a section 133 proceeding against a tow truck operator who had displayed the AAA symbol on his tow truck without authorization.

New York's privacy statute also applies to some forms of confusion of sponsorship. The statute permits any person whose name, portrait, or picture is used for advertising or for purposes of trade without his written consent to sue for an injunction and damages. If the defendant's conduct is found to be intentional, the jury can also award exemplary damages. In Adrian v. Unterman, a well-known women's dress designer was held entitled under the privacy statute to enjoin unauthorized use of his personal name in connection with the sale of perfume. Nonetheless, the privacy statute reflects

110 No person, firm or corporation shall, with intent to deceive or mislead the public, assume, adopt or use as, or as part of, a corporate, assumed or trade name, for advertising purposes or for the purposes of trade, or for any other purpose, any name, designation or style, or any symbol or simulation thereof, or a part of any name, designation or style, or any symbol or simulation thereof, which may deceive or mislead the public . . . as to the connection of such person, firm or corporation with any other person, firm or corporation.

N.Y. GEN. BUS. LAW § 133 (McKinney 1968).


113 N.Y. CIV. RIGHTS LAW § 51 (McKinney 1948).
114 Id. § 51. The basic privacy statute makes this form of invasion of privacy a misdemeanor. Id. § 50.

concern for the preservation of human dignity,\textsuperscript{116} and its confusion-of-sponsorship overtones have been limited correspondingly. Unauthorized use of another's assumed business name\textsuperscript{117} or partnership name\textsuperscript{118} has been held not to violate the statute.

The New York trade symbol registration act contains an important provision that is applicable to both registered and unregistered trade symbols. Section 368-d states:

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.\textsuperscript{119}

This statute codifies the antidilution theory of trade symbol protection. Frank I. Schechter, the trade symbol specialist credited with popularizing the antidilution theory in this country, summarized his position as follows:

(1) ... [T]he value of the modern trademark lies in its selling power; (2) ... this selling power depends for its psychological hold upon the public, not merely upon the merit of the goods upon which it is used, but equally upon its own uniqueness and singularity; (3) ... such uniqueness or singularity is vitiated or impaired by its use upon either related or non-related goods; and (4) ... the degree of its protection depends in turn upon the extent to which, through the efforts or ingenuity of its owner, it is actually unique and different from other marks.

Our conclusion [is] that the preservation of the uniqueness of a trademark should constitute the only rational basis for its protection ... \textsuperscript{120}

Schechter's theory protects the "conditioned reflex produced by persuasive advertising,"\textsuperscript{121} and has been criticised incisively by Professor Ralph Brown. Professor Brown observes that trade symbols can perform at least five functions. They can simultaneously signify (1) the source of goods or services, (2) the reputation of that source, (3)...

\textsuperscript{116} See Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. Rev. 962, 985-91 (1964).
\textsuperscript{118} Rosenwasser v. Ogoglia, 172 App. Div. 107, 158 N.Y.S. 56 (2d Dep't 1916).
\textsuperscript{119} N.Y. GEN. BUS. LAW § 368-d (McKinney 1968).
\textsuperscript{120} Schechter, The Rational Basis of Trademark Protection, 40 HARV. L. Rev. 813, 831 (1927).
\textsuperscript{121} Deering, Trademarks on Non-Competitive Products, 36 ORE. L. Rev. 1, 25 (1956).
consumer satisfaction with prior goods or services bearing the same symbols, (4) a conditioned reflex induced by persuasive advertising, and (5) intrinsic symbol value. Brown argues that only the first three of these functions deserve legal protection because they alone serve significant consumer interests. He favors protecting trade symbol functions that inform consumers about the nature of goods or services, and withholding protection from trade symbol functions that are intimately linked with persuasive advertising. Brown thus rejects out of hand the antidilution theory of trade symbol protection.

The judicial response to the New York antidilution statute has been more in accord with the views of Professor Brown than with those of Mr. Schechter. Judges cannot altogether ignore the statute if it is applicable, but preservation of the uniqueness of a trade symbol seems, at most, to have become an additional interest to be weighed in determining whether trade symbol infringement exists. This result is actually invited by the antidilution statute, which states that "[l]ikelihood of . . . dilution . . . shall be a ground for injunctive relief . . . ." New York has granted relatively liberal protection to trade symbols for some time and the antidilution statute was enacted in 1954 at the urging of lawyers who believed that the Second Circuit was interpreting New York law too restrictively. The federal courts, however, have remained cool to the antidilution theory notwithstanding the New York statute. In 1962 Judge Bonsal dismissed a statutory dilution claim with the comment that "[t]he doctrine has been given little weight in the Second Circuit." Furthermore, the New York cases have begun to reflect the Second Circuit position. In a leading

122 Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L.J. 1165, 1184-1206 (1948). Brown restricted his analysis to trade symbols used to distinguish goods, but, as the above text indicates, the analysis is equally applicable to trade symbols used to distinguish services.

123 Id. at 1191-94.


125 N.Y. Gen. Bus. Law § 568-d (McKinney 1968) (emphasis added); Note, supra note 124, at 529. For text of the statute, see p. 767 supra.


DECEPTIVE TRADE PRACTICES

New York decision, *Cue Publishing Co. v. Colgate-Palmolive Co.*,¹²³⁹ the publisher of *Cue Magazine*, a New York metropolitan entertainment guide, sought to enjoin Colgate from marketing a stannous fluoride toothpaste called “Cue.” The case had some of the classic attributes of dilution. Although “cue” was a dictionary word, it did not suggest either an entertainment guide or a toothpaste. Furthermore, the plaintiff was the senior user of the term in New York and contended that the down-to-earth, cavity-fighting connotations of a toothpaste would muddy the image of sophistication that had been cultivated for its magazine.

Nonetheless, the trial judge dismissed the complaint, stressing that the defendant was in no way trying to cash in on the plaintiff’s reputation and that toothpaste was so unlike an entertainment guide that there could be no significant dilution.¹³⁰ The appellate division affirmed on the ground that, despite “some dilution,” it would be inequitable to grant relief after the plaintiff had slept on its rights while the defendant had spent considerable money developing and introducing “Cue” toothpaste.¹³¹

The *Cue* case has been influential. Two federal district courts have recently relied on it for the proposition that the antidilution statute is not violated without evidence that the public is apt to confuse the defendant with the plaintiff or that the defendant has an unfair intent.¹³² Because the antidilution statute expressly makes lack of competition and confusion between the parties irrelevant and does not refer to wrongful intent,¹³³ this interpretation, like that applied in *Cue* itself, manifests judicial distaste for strong antidilution protection. Several other decisions, however, have invoked the statute in order to justify relief where confusion of sponsorship was apparent.¹³⁴

In *James Burrough, Ltd. v. Ferrara*,¹³⁵ for example, the manufacturer of “Beefeater” gin, who had licensed several restaurants to use the

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¹²³ 45 Misc. 2d 161, 256 N.Y.S.2d 239 (Sup. Ct), aff’d per curiam, 23 App. Div. 2d 829, 259 N.Y.S.2d 377 (1st Dep’t 1969).

¹³⁰ Id. at 167-70, 256 N.Y.S.2d at 245-47.

¹³¹ 23 App. Div. 2d 829, 259 N.Y.S.2d 377 (1st Dep’t 1965) (per curiam).


¹³³ N.Y. GEN. BUS. LAW § 368-d (McKinney 1968); see p. 767 supra.


¹³⁵ 8 Misc. 2d 819, 169 N.Y.S.2d 93 (Sup. Ct. 1957) The court indicated, however, that defendant’s use of the name, “The Beefer,” was permissible.
"Beefeater" name, was held entitled to enjoin unauthorized use of the name "The Beefeater" by another restaurant.

The antidilution statute contains a discrete phrase declaring that conduct that results in a "likelihood of injury" to the business reputation of a trade symbol is also a ground for injunctive relief, notwithstanding the absence of competition or confusion between the parties. To some extent, this language constitutes a broad-gauged codification of a trade symbol user's interest in avoiding tarnishment of his trade symbol's reputation by a disreputable concurrent user. The provision, however, has other significant applications. In Wertheim v. Milliken, for example, a trade symbol user enjoined a third party from reselling the former's over-age, trademarked X-ray film as usable film, and, in Clairol, Inc. v. L. H. Martin Value Center, Inc., a trade symbol user enjoined a third party from offering the former's trademarked goods to the public without adequate instructions concerning their use. Both decisions could be considered deceptive advertising cases. Moreover, in Joseph E. Seagram & Sons Ltd. v. Restaurant Cherry Lane, Inc., a trade symbol user obtained an injunction restraining a restaurant owner from displaying signs that falsely asserted that the plaintiff's whiskey was mislabeled. Although the judge did not expressly rely on the statutory "injury to business reputation" count in the Seagram complaint, he did allude to it. Seagram therefore implies that the New York antidilution statute authorizes injunctive relief against false disparagement that brings a trade symbol into disrepute. This implication, however, has yet to be translated into solid precedent.

136 N.Y. GEN. BUS. LAW § 368-d (McKinney 1968); see p. 767 supra.
140 The Martin Value Center case grants harsh relief in requiring the defendant to supply the plaintiff's instructions to the defendant's customers. It should be sufficient to require disclosure that these instructions should be obtained and followed in the use of the product. See Clairol, Inc. v. Cody's Cosmetics, Inc. ——— Mass. ———, 231 N.E.2d 912, 918 (1967).
143 Symposium, "Honest" Truth or Unfair Competition?, 53 TRADEMARK REP. 225, 286 & n.89 (1963) (remarks of Werner Janssen, Jr.).
2. Implied Private Remedies

In addition to the numerous statutes creating express private remedies for trade symbol infringement, some statutes providing public remedies for infringement have been considered by the New York courts to permit judicial implication of equivalent private actions. The leading case is *Lanvin Parfums, Inc. v. LeDans, Ltd.*, which arose under what is now section 279-n(6) of the General Business Law. This statute states that a person who

[k]nowingly sells, offers or exposes for sale, any goods which are represented in any manner, by word or deed, to be the manufacture, packing, bottling, boxing or product of any person, firm or corporation, other than himself, unless such goods are contained in the original package, box or bottle and under the labels, marks or names placed thereon by the manufacturer who is entitled to use such marks, names, brands or trade-marks . . . is guilty of a misdemeanor.

The plaintiff in *Lanvin* was an importer of French perfumes and perfume extracts who either sold his French products in their original packages or rebottled them as toilet waters and sold them under his own trade symbols. The defendants purchased the plaintiff’s products, rebottled them in smaller bottles than those used by the plaintiff, and undercut the plaintiff’s prices on resale. Because the defendants’ labels allegedly proclaimed that the products were the plaintiff’s perfumes and toilet waters, but the goods were not in the plaintiff’s original containers, the Court of Appeals concluded that the complainant stated a violation of section 279-n(6). The use of the plaintiff’s trade symbol in the commission of this crime was then held to entitle the plaintiff to enjoin the defendants’ conduct regardless of whether anyone was actually misled.

*Lanvin* constitutes a square holding that a private action can be implied from section 279-n(6) of the General Business Law. In *Presstonettes, Inc. v. Coty*, Mr. Justice Holmes committed the United States Supreme Court to the proposition that it is not trade symbol infringement for a rebottler to disclose the source of his products as long as he also prominently discloses the fact of rebottling. The *Presstonettes* decision has been so influential that it might well have been considered to represent New York law in *Lanvin* in the absence of

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145 N.Y. GEN. BUS. LAW § 279-n(6) (McKinney 1968).
146 264 U.S. 359 (1924).
the criminal statute. Several recent cases have followed *Lanvin* and allowed a trade symbol user to enjoin subsequent vendors from altering the packaging of his trademarked goods in a manner that would transgress section 279-n(6).

Another Court of Appeals decision imposes private liability for violation of a public remedy statute dealing with deceptive advertising. Section 188 of the Agriculture and Markets Law forbids the delivery of fewer goods than the seller represented to sell. In *Abounader v. Strohmeyer & Arpe Co.*, a grocer sought to recover damages from a vendor of olive oil for the penalties and counsel fees incurred because the defendant's containers did not contain as much olive oil as they were represented to hold. The Court of Appeals concluded that section 188 and several related provisions of the predecessor of the Agriculture and Markets Law impliedly imposed strict liability, regardless of privity, on sellers who mislabeled the quantity of the food they sold and sustained the sufficiency of the grocer's complaint. Perhaps because of its strict liability theory, the *Abounader* principle has not been applied to the general public remedy statutes that condemn deceptive advertising that is beyond the ambit of the Agriculture and Markets Law, or even to the general provisions of the Agriculture and Markets Law that forbid deceptive advertising.

*Abounader* constitutes a limited judicial effort to make private as well as public remedies available for deceptive advertising. Still another Court of Appeals decision, *Electrolux Corp. v. Val-Worth, Inc.*, takes the same approach concerning bait advertising that is intertwined with false disparagement. The defendants' sales technique in *Electrolux* began with television advertisements for rebuilt Electrolux vacuum cleaners at attractive prices. On the pretext of explaining the offer, salesmen would gain entrance to potential customers' homes and


148 E.g., *Clairol, Inc. v. L.H. Martin Value Center, Inc.*, 40 Misc. 2d 875, 244 N.Y.S.2d 210 (Sup. Ct. 1963) (alternative holding).

149 N.Y. AGRIC. & MKTS. LAW § 188 (McKinney 1954). The principal statutory sanctions for violation of § 188 are conviction of a misdemeanor, id. § 41, administrative imposition of a monetary penalty, id. § 39, and an injunction. Id. § 38.


152 E.g., N.Y. AGRIC. & MKTS. LAW § 202-a (McKinney 1954).

then proceed to sell new, more expensive machines produced by other manufacturers through false disparagement of the rebuilt Electrolux vacuum cleaners. The Court of Appeals held that Electrolux, the manufacturer of the "bait," was entitled to enjoin the defendants' scheme and to recover damages for any losses it had suffered. Chief Judge Conway justified this conclusion by reference to two public remedy statutes that could have been invoked against the defendants: the criminal false advertising statute,\textsuperscript{154} and section 396 of the General Business Law, which allows the Attorney General to initiate proceedings to enjoin bait advertising.\textsuperscript{155} According to Judge Conway, these statutes were important because, "if defendants' methods are deceitful and run contrary to accepted business ethics, the public policy of the State is relevant, though perhaps not decisive, in evaluating a claim of unfair competition."\textsuperscript{156}

Judge Conway's statement helps to bring the \textit{Lanvin}, \textit{Abounader}, and \textit{Electrolux} cases into perspective. The Court of Appeals has not regarded the administrative powers of the Commissioner of Agriculture and Markets, the ability of the Attorney General to obtain an injunction, or the ability of district attorneys to bring criminal proceedings as precluding a private remedy for deceptive trade practices. Instead, public remedy statutes have been treated as some evidence of the need for a corresponding private remedy. Nonetheless, the Court has proceeded with circumspection and has only implied private remedies from a few public remedy statutes of limited scope. The upshot is that only trade symbol infringement is adequately treated by private remedy statutes in New York. There are virtually no express statutory private remedies for deceptive advertising or false disparagement, and the few private remedies that have been implied from public remedy statutes have a narrow range.

The trade symbol orientation of New York's private remedy statutes contrasts with the deceptive advertising emphasis of its public remedy statutes. In view of the incidence of deceptive advertising in New York,\textsuperscript{157} an effective private remedy against deceptive advertising is needed. Although the incidence of false disparagement in New York is not as well documented as that of deceptive advertising, its probable frequency\textsuperscript{158} and the paucity of legislation dealing with false dis-

\textsuperscript{154} The predecessor of N.Y. PENAL LAW § 190.20 (McKinney 1967).
\textsuperscript{155} N.Y. GEN. BUS. LAW §§ 396(1), (3) (McKinney 1968).
\textsuperscript{157} See pp. 754-60 \textit{supra}.
\textsuperscript{158} See Symposium, \textit{supra} note 143, at 273-303.
paragement suggest an equivalent need for an effective private remedy. The various public remedies that can be applied to deceptive advertising and false disparagement do not materially alter the situation. Largely for budgetary reasons, state officials typically initiate formal proceedings only against deceptive conduct that materially affects the public or is outrageously flagrant.\textsuperscript{159} Although public officials also engage in informal mediation of consumer complaints,\textsuperscript{160} emphasis on this kind of activity can fritter away valuable resources that could more profitably be committed to bringing legal proceedings against major offenders.\textsuperscript{161} In any event, the number of offenders is so large that private as well as public remedies should be brought to bear against deceptive advertising and false disparagement. Professor Starrs has suggested that the "courts could take judicial notice of the present inability of the FTC, consumer fraud bureaus and offices of the attorneys general of the various states to cope with the ever-pyramiding evidence of fraud in more and more industries."\textsuperscript{162}

C. \textit{Common Law Principles}

The New York common law principles concerning deceptive advertising, false disparagement, and trade symbol infringement leave much to be desired. Like the statutes containing express private remedies, these principles deal most adequately with trade symbol infringement.

1. \textit{Deceptive Advertising}

New York adheres to the traditional common law view that deceptive advertising is not ordinarily actionable unless the plaintiff has a monopoly over the subject of the defendant's deceptive advertising\textsuperscript{163} or the deceptive advertising involves misuse of a geographical term and the truthful users of the term confine the relief sought to an improved form of the term.\textsuperscript{159-161} The courts have also held that a plaintiff who is not a competitor is not entitled to an injunction or recovery for damages.\textsuperscript{162}


\textsuperscript{160} \textit{E.g.}, N.Y.S. DEP'T OF LAW, 1966 ANN. REP. 12-13.


\textsuperscript{162} \textit{National Institute for Education in Law and Poverty}, \textit{Handbook on Consumer Law} \S\ 74:1, at 5 (1st ed. 1968).

The stunted growth of this tort in New York, as in most states, is primarily attributable to the difficulty of devising a concept of standing to sue that will right the most serious wrongs, yet preclude vexatious litigation. So many persons can be at least colorably injured by deceptive advertising that it is difficult to know who should be allowed to sue and who should not. The common law response to this situation is to deny standing to most persons.

2. False Disparagement

Evidence of special damage is a prerequisite to the recovery of damages for false disparagement in New York. In Drug Research Corp. v. Curtis Publishing Co., the court of Appeals stated:

Giving the pleading its most favorable construction, namely, that it states a libel on the product, it nonetheless must be dismissed for failure to allege special damages. . . . "special damage must be fully and accurately stated. If the special damage was a loss of customers . . . the persons who ceased to be customers, or who refused to purchase, must be named . . . . If they are not named, no cause of action is stated." 168

The extent to which special damage is also a prerequisite to equitable relief is less clear. At first blush, it might seem that special damage should not be required in order to obtain equitable relief for false disparagement. The ability to prove special damage is, after all, evidence that a complainant's remedy at law is adequate. By the same token, an inability to prove the losses that were caused by conduct having a definite capacity to injure is evidence that a complainant's remedy at law is inadequate and that equitable relief is in order. Nevertheless, the New York law governing equitable relief against false disparagement bears out Holmes's dictum that the life of the law has been experience rather than logic. 170

In the celebrated case of Marlin Fire Arms Co. v. Shields, a

166 See Dole, supra note 12, at 662-69.
168 Id. at 440-41, 166 N.E.2d at 322, 199 N.Y.S.2d at 37. (footnotes omitted)
169 Marlin Fire Arms Co. v. Shields, 68 App. Div. 88, 74 N.Y.S. 84 (1st Dep't), rev'd.
171 171 N.Y. 384, 64 N.E. 163 (1902).
firearms manufacturer sued to enjoin the publisher of a sportsmen's magazine from printing sham letters-to-the-editor that discredited the plaintiff's rifles. The trial court sustained a demurrer to the complaint, but was reversed by the appellate division.\textsuperscript{172} The Court of Appeals reinstated the demurrer on the alternative ground that the alleged falsity and perversity of the defendant's conduct was immaterial in the absence of an allegation of special damage. The Court declared: "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."\textsuperscript{173}

Although the Court also alluded to the shibboleth that "equity will not enjoin a libel!" and to free speech considerations,\textsuperscript{174} this aspect of \textit{Marlin} has become passé. In the 1959 case of \textit{Electrolux Corp. v. Val-Worth, Inc.},\textsuperscript{175} the Court of Appeals approved an injunction against a bait advertising scheme that was predicated upon false disparagement of the bait. New York has thus accepted the modern view which acknowledges equitable jurisdiction with respect to false disparagement and considers that free speech issues are relevant only to the grant or denial of relief in particular instances.\textsuperscript{176}

The vitality of the special damage requirement of \textit{Marlin} is less obvious. In \textit{Electrolux} the Court of Appeals dismissed the appellate division's concern with the absence of proof of specific loss of trade\textsuperscript{177} with the comment that "respondents' acts of unfair competition are to be distinguished from disinterested acts of trade libel."\textsuperscript{178} To understand this distinction it must be borne in mind that \textit{Electrolux} involved a suit between businessmen, a vacuum-cleaner manufacturer and a vacuum-cleaner reconditioner and retailer, and that the wrongful conduct consisted of the defendants' use of the reconditioned machines in a bait advertising scheme.\textsuperscript{179} The other two cases cited by

\begin{itemize}
\item \textsuperscript{172} \textit{Marlin Fire Arms Co. v. Shields}, 68 App. Div. 88, 74 N.Y.S. 84 (1st Dep't 1902).
\item \textsuperscript{173} \textit{Id.} at 399-96, 64 N.E. at 165-67.
\item \textsuperscript{174} \textit{Id.} at 399-96, 64 N.E. 165 (1902).
\item \textsuperscript{175} \textit{Id.} at 399-96, 64 N.E. 165 (1902).
\item \textsuperscript{177} \textit{Electrolux Corp. v. Val-Worth, Inc.}, 5 App. Div. 2d 216, 220, 170 N.Y.S.2d 738, 742 (1st Dep't 1958).
\item \textsuperscript{178} \textit{Electrolux Corp. v. Val-Worth, Inc.}, 6 N.Y.2d 556, 571, 161 N.E.2d 197, 205, 190 N.Y.S.2d 977, 989 (1959).
\item \textsuperscript{179} Because the plaintiff had supplied the defendants with used Electrolux vacuum cleaners for a considerable period of time, the Court of Appeals concluded that the plain-
the Court of Appeals as depicting the kind of "interested trade libel" that had no special damage requirement also involved businessmen. \textit{Bourjois, Inc. v. Park Drug Co.} was a suit by a face-powder manufacturer against a retail drug chain. \textit{Allen Manufacturing Co. v. Smith} was a suit between rival manufacturers of cattle fly-spray. On the other hand, of the three cases mentioned by the Court of Appeals as illustrating situations in which proof of special damage was necessary, two were suits against communications media, a newspaper and a magazine, and the third was a suit against a private individual. Thus, \textit{Electrolux} apparently dispenses with special damage as a predicate to equitable relief for false disparagement only if both parties are businessmen who deal in commodities or services rather than ideas. In other words, the Court of Appeals has seemingly retained \textit{Marlin}'s special damage requirement in situations where the grant of relief is most likely to raise free speech issues.

Use of a special damage requirement as a tacit buffer for the first amendment is unwise. \textit{Electrolux} indicates that a special damage requirement exists in every noncommercial false disparagement case regardless of whether the first amendment actually is a bar to equitable relief. \textit{Marlin}, for instance, was one of the Court of Appeals' examples of the "disinterested trade libel," which requires evidence of special damage. Yet, the complaint in \textit{Marlin} alleged that the defendant magazine publisher was disparaging the plaintiff's rifles through false and unfounded comments contained in fake letters-to-the-editor. \textit{Marlin} was decided in 1902, long before \textit{New York Times Co. v. Sullivan}, but the allegations in \textit{Marlin} could satisfy the \textit{New York Times} test for the "actual malice" that is constitutionally sufficient to render public speech actionable. If the firearm manufacturer's evi-

did not have the burden of proof on special damage, the complaint would have described the defendant as making false and malicious comments, and the plaintiff would have not been estopped to complain of the defendants' reconditioning activities. \textit{Id.} at 564-65, 161 N.E.2d at 201, 190 N.Y.S.2d at 983-84.

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\item \textsuperscript{180} 82 F.2d 468 (8th Cir. 1936).
\item \textsuperscript{181} 224 App. Div. 187, 229 N.Y.S. 692 (4th Dep't 1928).
\item \textsuperscript{182} Reporters' Ass'n of America v. Sun Printing & Publishing Ass'n, 186 N.Y. 437, 79 N.E. 710 (1906); \textit{Marlin Fire Arms Co. v. Shields}, 171 N.Y. 384, 64 N.E. 163 (1902).
\item \textsuperscript{183} Tower v. Crosby, 214 App. Div. 592, 212 N.Y.S. 219 (4th Dep't 1923).
\item \textsuperscript{184} \textit{Cf. Valentine v. Chrestensen}, 316 U.S. 52 (1942); see \textbf{Developments in the Law—Competitive Torts, supra} note 176, at 902-05.
\item \textsuperscript{185} \textit{Marlin Fire Arms Co. v. Shields}, 171 N.Y. 384, 386-88, 64 N.E. 163-64 (1902).
\item \textsuperscript{186} 376 U.S. 254 (1964).
\item \textsuperscript{187} The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.
\end{itemize}

\textit{Id.} at 279-80.
dence supported his allegations, a trier of fact could have found that the magazine publisher knew that his charges were false.\footnote{The Supreme Court has not decided whether a jury trial is constitutionally necessary in cases to which the \textit{New York Times} test applies. See, e.g., \textit{Time, Inc. v. Hill}, 385 U.S. 574 (1967). But the absence of such a constitutional requirement with respect to obscenity suggests it is not. See \textit{Freedman v. Maryland}, 380 U.S. 51 (1965); \textit{Kingsley Books, Inc. v. Brown}, 354 U.S. 436, 443 (1957); cf. \textit{id.} at 447-48 (Brennan, J., dissenting).} His bogus letters were so specific in their criticisms of \textit{Marlin} rifles that the author-publisher seemed knowledgeable about guns and in a position to know whether or not his comments were true.

Thus far the Supreme Court has applied the \textit{New York Times} test to defamation of public officials,\footnote{\textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964).} defamation of public figures,\footnote{\textit{Time, Inc. v. Hill}, 385 U.S. 74 (1967).} and invasions of privacy involving matters of public interest.\footnote{\textit{Curtis Publishing Co. v. Butts}, 388 U.S. 130 (1967).} Although that Court has not yet extended the test to false disparagement involving matters of public interest,\footnote{Some lower courts have endorsed application of the \textit{New York Times} test in situations in which an action for false disparagement could lie. All Diet Foods Distrib., Inc. v. \textit{Time, Inc.}, 36 U.S.L.W. 2294 (N.Y. Sup. Ct. Jan. 2, 1968) (operator of a health-food retail store restaurant sued a magazine that published an article dealing with food fads and frauds); United Medical Labs., Inc. v. Columbia Broadcasting Sys., Inc., 258 F. Supp. 735, 743-44 (D. Ore. 1966) (dictum) (mail-order laboratory sued television and radio network following a series of reports concerning the unreliability of mail-order laboratories in general).} the probability that the alleged facts in \textit{Marlin} could justify imposition of liability under the \textit{New York Times} test—the most stringent constitutional limitation on tort liability apt to be applied to false disparagement\footnote{In \textit{Curtis Publishing Co. v. Butts}, 388 U.S. 130 (1967), Mr. Justice Harlan gained three additional votes for his view that the \textit{New York Times} test should be moderated where public officials are not involved. Mr. Justice Harlan expressed his preferred test as follows: [A] "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. \textit{Id.} at 155.}—underscores the inexpediency of imposing a special damage prerequisite to equitable relief from all "disinterested trade libel."\footnote{Even if the \textit{New York Times} test is satisfied, an injunction against false disparagement should only forbid a repetition of the specific statements that have been found to be deliberately or recklessly false. Otherwise, the injunction may constitute an unconstitutional prior restraint on speech. See \textit{Near v. Minnesota}, 283 U.S. 697 (1931); \textit{Developments in the Law—Injunctions}, 78 HARV. L. REV. 994, 1008-12 (1965).}

The deficiencies of the \textit{Electrolux} approach are compounded by the absence of a sharp distinction between "interested" and "disin-
terested" trade libel. Marlin was, for example, cited in Electrolux as involving "disinterested trade libel;" yet, the Marlin complaint alleged that the publisher's reason for writing the bogus letters-to-the-editor was to pressure the firearms manufacturer into resuming his advertisements in the publisher's magazine. Thus, the defendant magazine publisher had an economic self-interest in publishing the challenged letters that was distinct from a communication medium's normal interest in disseminating matters-significant to its audience. Perhaps because Marlin is such a poor example of "disinterested trade libel," some New York courts have not acknowledged that Electrolux discarded the special damage requirement for equitable relief where the parties are ordinary businessmen. In Payrolls and Tabulating, Inc. v. Sperry Rand Corp., for example, the Appellate Division, First Department, relied on Marlin in dismissing a complaint that sought an injunction against false disparagement by a businessman. The First Department echoed the Marlin opinion when it stated:

[W]here the aid of equity is sought a mere allegation of the inadequacy of legal remedy or difficulty in ascertaining the measure of damage will not warrant its intervention, nor change an action at law into one in equity.

3. Trade Symbol Infringement

Unlike deceptive advertising and false disparagement, trade symbol infringement is a well recognized common law tort in New York and there are no artificial doctrinal barriers to equitable relief. Two noteworthy common law decisions that granted equitable relief when likelihood of confusion of sponsorship existed are Tiffany & Co. v. Tiffany Productions, Inc., in which the famous jeweler enjoined use of "Tiffany" by a motion picture producer, and Cornell University v. Messing Bakeries, in which Cornell University enjoined a baker from utilizing an overly prominent display of the University's name on a pennant, banner, scroll, or the like in conjunction with the sale of a special formula bread that had been developed at Cornell.

The maturity of the New York common law principles dealing

197 Id. at 598, 257 N.Y.S.2d at 887; cf. Marlin Fire Arms Co. v. Shields, 171 N.Y. 384, 390-91, 64 N.E. 163, 164-65 (1902).
with trade symbol infringement reinforces the legislative emphasis on private remedies for such torts. On the other hand, the legislature's neglect of statutory private remedies for deceptive advertising and false disparagement is not adequately compensated for by common law principles. Deceptive advertising is not generally actionable, and injunctive relief for false disparagement remains hobbled by an unnecessary special damage requirement as a result of the Court of Appeals' timidity and imprecision in Electrolux.

4. The Prima Facie Tort

The Special Committee's hopes for evolution of the nominate torts of deceptive advertising and false disparagement have not been fulfilled. Furthermore, despite its recognition in New York, the potentially far-reaching prima facie tort concept has not been used to compensate for the deficiencies of these nominate torts.

In an oft-cited dictum, Lord Bowen described the prima facie tort as follows: "[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse." As articulated by Lord Bowen, the prima facie tort is a general principle of liability for intentional conduct that causes actual damage. The theoretical sweep of the prima facie tort must be reconciled with the existence of the specific intentional (nominate) torts, like deceptive advertising and false disparagement, which have gradually been recognized at common law. Reconciliation has been achieved in New York by cutting the prima facie tort principle down to manageable size.

There is a long-standing New York rule that prima facie tort liability should be imposed only if the defendant's "sole" and "unmixed" intent was to injure the plaintiff. Several Court of Appeals decisions have been viewed as inconsistent with this rule, but the inconsistency arises from imprecise classification of these cases as prima facie torts.

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204 Note, Abstaining from Willful Injury—The Prima Facie Tort Doctrine, 10 SYRACUSE L. REV. 53, 57-59 (1958).
DECEPTIVE TRADE PRACTICES

facie tort cases.\(^{205}\) Admittedly, such imprecision has on occasion been fostered by the Court of Appeals. In *Advance Music Corp. v. American Tobacco Co.*,\(^{206}\) for example, the court analyzed a straightforward false disparagement case in prima facie tort terms.\(^{207}\)

A number of New York lower court decisions also require special damage for a prima facie tort action to lie.\(^{208}\) Until recently, the Court of Appeals has been content to specify that only "temporal damage," which is not necessarily special damage,\(^{209}\) is recoverable in prima facie tort actions.\(^{210}\) *Morrison v. National Broadcasting Co.*,\(^{211}\) however, may be a turning point. *Morrison* involved a suit against the producers of a rigged television quiz show by a young academic who had appeared on the show. He claimed that his reputation had been injured following disclosure of the rigging. The trial court denied a dilatory motion to dismiss a claim sounding in defamation, but indicated that the statute of limitations had run.\(^{212}\) The Appellate Division, First Department, modified this judgment by applying the prima facie tort theory of liability without the customary sole-intent-to-injure and special damage elements. The complaint was upheld on the general principle that "[t]he intentional use of wrongful means and the intentional exposure of another to the known, unreasonable risk of harm, which results in such harm, provides classic basis for remedy."\(^{213}\) The short statute of limitations for defamation was held inapplicable to this general principle of liability.

The First Department's effort to liberate the prima facie tort


\(^{206}\) 296 N.Y. 79, 70 N.E.2d 401 (1946).

\(^{207}\) Compare id. with *Restatement (Second) of Torts* § 623A & pp. 9-10 (Tent. Draft No. 13, 1967). The possibility that *Advance Music* moderated the special damage requirement with respect to false disparagement has been foreclosed by *Drug Research Corp. v. Curtis Publishing Co.*, 7 N.Y.2d 455, 166 N.E.2d 319, 199 N.Y.S.2d 33 (1960).

\(^{208}\) E.g., Brandt v. Winchell, 286 App. Div. 249, 141 N.Y.S.2d 674 (1st Dep't 1955) (per curiam), aff'd on other grounds, 3 N.Y.2d 628, 635, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958); Note, supra note 204, at 63-64.

\(^{209}\) *Special Comm. Report* 38a-39a.


from the sole-intent-to-injure and special damage requirements was aborted by the Court of Appeals. *Morrison* was reversed on the ground that the special statute of limitations for defamation actions could not be avoided by recasting a claim to fit a new noncategory of intentional wrong.\(^{214}\) In dictum the Court also noted that the plaintiff's complaint inadequately alleged special damage.\(^{215}\) This delphic comment may mean that special damage was necessary because the claim involved libel by extrinsic fact.\(^{216}\) On the other hand, this statement may constitute an overt declaration by the Court of Appeals that special damage is necessary in prima facie tort actions.\(^{217}\)

The holding of the Court of Appeals in *Morrison*, that a prima facie tort claim based on defamation should be treated as an ordinary claim for defamation, supports the position of some lower courts that a prima facie tort cannot exist if the facts give rise to a traditional nominate tort.\(^{218}\) This view fosters intelligible pleading and offering of proof, and permits discriminating application of the various tort statutes of limitations;\(^{219}\) yet it also tends to confine the prima facie tort to the role of providing a basis for hitherto unrecognized categories of tort liability.\(^{220}\) *Morrison*, therefore, could mean that the recognition of deceptive advertising and false disparagement as nominate torts in New York precludes the use of facts relevant to these nominate torts in a prima facie tort action.\(^{221}\) In any event, the sole-intent-to-injure and special damage elements of the New York prima


\(^{215}\) *Id.* at 458, 227 N.E.2d at 574, 280 N.Y.S.2d at 643-44.


\(^{217}\) *See also* *Rager v. McCloskey*, 305 N.Y. 75, 80-81, 111 N.E.2d 214, 217-18 (1955) (cited on this point by the Court of Appeals in *Morrison*). This would negate the contrary implication in *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946).


DECEPTIVE TRADE PRACTICES

facie tort doctrine all but render the tort useless as a supplement to the nominate torts of deceptive advertising and false disparagement.222

III

The Case for Adoption of the Uniform Act in New York

The case for enactment of the Uniform Deceptive Trade Practices Act in New York is succinct. The New York legislature has passed countless statutes condemning deceptive advertising and has appropriated considerable monies to finance the public regulation of deceptive advertising. Yet, the gap in the New York common law with respect to the actionability of deceptive advertising remains unfilled. Adoption of the Uniform Act would compensate for the deficiencies of the common law and enlist the self-financing private injunctive suit in the struggle against deceptive advertising. "There is no real reason to require the [expenditure of] . . . public money to proceed against trade liars if private competitors [and others] are willing to take on the job."223

The Uniform Act also flatly repudiates the necessity of establishing special damage in order to obtain an injunction against false disparagement by businessmen.224 In Electrolux Corp. v. Val-Worth, Inc.,225 the Court of Appeals seemed to favor this approach, but failed to write an opinion that unequivocally signaled the demise of the special damage requirement in a commercial context.226 Enactment of the Uniform Act will achieve this objective without the delay involved in waiting for an appropriate case to reach the Court of Appeals.

The provisions of the Uniform Act dealing with trade symbol

224 Uniform Act § 2(a)(8) declares false disparagement to be a deceptive trade practice, and § 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, loss of profits, or intent to deceive is not required. . . .
The act only applies to deceptive practices committed in the course of a "business, vocation, or occupation." Id. § 2(a). Publishers, broadcasters, printers, and other persons engaged in the dissemination of information are exempt from the act as long as they do not knowingly disseminate deceptive material. Id. § 4(a)(2).
226 See pp. 776-78 & notes 173-93 supra.
infringement are not significant additions to New York law. New York has a highly developed law of trade symbol infringement, which includes both statutory and common law recognition that conduct creating a likelihood of confusion of sponsorship is actionable. Nevertheless, *en bloc* New York enactment of the Uniform Act is desirable.\textsuperscript{227} Like all uniform acts, the Deceptive Trade Practices Act has a "uniformity of interpretation" clause, which declares that the "Act shall be construed to effectuate its general purpose to make uniform the law of those states which enact it."\textsuperscript{228} This clause makes decisions interpreting a uniform act highly persuasive in other jurisdictions that have adopted the same act, and would give maximum stature to New York decisions applying the Deceptive Trade Practices Act. The result might well be a more perceptive general application of the trade symbol provisions of the Uniform Act than would otherwise be the case. This result, like enactment of the Deceptive Trade Practices Act itself, would be in accord with New York's frequent role as a leader in legal reform.\textsuperscript{1967 \textit{REPORT OF THE Comm. on NEW YORK STATE ANTITRUST LAW, NEW YORK STATE BAR Ass'n 11} (footnote). \textsuperscript{228} \textit{UNIFORM ACT § 5}.}