Uniform Deceptive Trade Practices Acts

PROCEEDINGS OF THE COMMITTEE OF THE WHOLE UNIFORM TRADE PRACTICES ACT NATIONAL CONFERENCE OF COMMISSIONERS n*

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New York, New York

Mr. Edwin L. Z'berg of California presiding; Mr. G. M. Fuller of Oklahoma presenting the Act.

CHAIRMAN Z'BERG: This is Tab 6, the Uniform Deceptive Trade Practices Act. There are several changes which need to be made. Commissioner Fuller will indicate those changes to you, and then you can write them into your draft. Commissioner!

MR. FULLER: Mr. Chairman, gentlemen:

If you will turn to Tab 6, the Act itself begins at page 4. Following line 2 we need to insert a new subparagraph (1). You'll have to squeeze this in. It's approximately two lines:
(1) "article" means a product, as distinguished from a trademark, label, or distinctive dress in packaging. At line 3, renumber sub (1) to subparagraph (2). At line 7, insert after the words "services or" the words "to indicate." At line 9 change subparagraph (2) to subparagraph (3). Turn to the next page. On page 5, line 15, change subparagraph (3) to subparagraph (4). At line 18 renumber (4) to (5). Lines 23--24----Strike subparagraph (5) as it now appears----strike it entirely, and strike the comment. Turn to page 6 and refer to Section 2 at line 4, toward the bottom. The next to last word, "likelihood"----strike it, the second one, next to the last word. Strike the second "likelihood." Page 7, line 7, strike the second "likelihood" there. That's the next to the last word. Page 8, toward the bottom, line 23, after the word "disparaging" put the word "the"; and the word "businesses"----strike the plural, and make that "business"; and insert after "business" the words "of another."

MR. JESTRAB: Where is that? What page?

MR. FULLER: Page 8, toward the bottom. After the word "disparaging" on line 23 add the word "the," and then on over in that line, the word "businesses'----make it singular----"business"----and after "business" and "of another." On page 9 at line 25, the first word, "offering"----strike that and put the word "advertising" in lieu of "offering"----the word "advertising."
On that same line, the word "without"----strike "out" and make it "with"; and after "intent" insert the word "not."
On line 26 strike the rest of that subsection, "or to supply reasonably expected public demand"----strike those words.
Then that subsection ends with the word "advertised," and place a semicolon there.
At this point, right after line 26, we need to add subparagraph (10). This is about three lines, so you will have to squeeze it in:
(10) advertising goods or services with intent not to supply reasonably expected public demand, unless the advertisement discloses a limitation of quantity; Then in your Comment following that strike the word "This" and make that "Subsections (9) and (10)"; and make

"deals" singular. At line 28 renumber subsection (10) to (11). At line 31, renumber (11) to (12). Page 10, line 37, the last word is "trading"; change that to "trade practices." Now, in Section 3 at line 2 the third word "injured"----change that to "damaged"; and further in the same line, the second "injured"----change it to "damaged." At line 6 strike the words "temporary as well as permanent." At line 8 place a period after "reasonable," strike the words "but the" and capitalize the "R" in "Relief." The sentence begins with "Relief." On page 12---- and I think this is the last one, gentlemen, at line 9, the third from the last word is "notice." Change to that "knowledge," and on line 10 strike the words "confusing or misleading," and in place thereof put the word "deceptive." Thank you very much.

Now, Mr. Chairman, we are ready to proceed with a reading of the proposed Act section by section. I will preface this by saying to you that we are very grateful to have our consultant here this morning.

Mr. Richard F. Dole has been with the Legislative Research Center of the Michigan Law School for the past two years and has devoted a great deal of time to working on this Act. We're certainly grateful to the Legislative Research Center and to Professor Pierce for some great work on drafting this Act.
Mr. Dole is now to become a professor of law at the University of Iowa Law School, and I think he can answer our questions this morning.

This is a third draft. The prior drafts presented at Monterey and last year at Chicago have gone through a number of revisions resulting in what you have in front of you. I do want to say that the Committee has had an opportunity-- and particularly our consultant----to coordinate with the American Bar Association's Unfair Competition Committee of the Patent Trademark Section very closely. We have done it throughout the past four or five years that I have had this Committee.

We have coordinated with the Reporter of the Restatement of Torts and with a number of lawyers and other bar association groups that are interested in this field of the law. Mr. Chairman, I think we will read this section by section.

CHAIRMAN Z'BERG: Is there anyone who didn't get any of those changes who might want to have it repeated?

MR. THEOBALD: Would you repeat the first one you gave?

MR. FULLER: Following line 2 on page 4----that's the first change. You are adding a new subparagraph (1), beginning: "article" means a product, as distinguished from a trademark, label, or distinctive dress in packaging.

CHAIRMAN Z'BERG: All right. If there are no objections, then, we will proceed to have the Act read section by section. Commissioner, would you start with the first?

MR. FULLER: By the way, we believe, after the number of drafts we have been through, that we are up for final consideration at this meeting of the Conference, or hope we are.
Section 1. [Definitions.] As used in this Act, unless the context otherwise requires:

(1) "article" means a product, as distinguished from a trademark, label, or distinctive dress in packaging.

(2) "certification mark" means a mark used in connection with the goods or services of a person other than the certifier to indicate geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of the goods or services or to indicate that the work or labor on the goods or services was performed by members of a union or other organization.
Mr. Chairman, I believe I will proceed through all these definitions. They are used only in one section of the Act that we will come to later:

(3) "collective mark" means (i) a mark used by members of a cooperative, association, or other collective group or organization, or (ii) a word, name, symbol, device, or any combination of the foregoing in any form or arrangement used to indicate membership in a cooperative, association, or other collective group or organization.

(4) "mark" means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement used to identify and distinguish goods or services.

In (5) the definition of person is taken from the Commercial Code, with a minor exception.

(5) "person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

(6) "service mark" means a mark used by a person to identify services and to distinguish them from the services of others.

(7) "trademark" means a mark used by a person to identify goods and to distinguish them from the goods of others.

(8) "trade name" means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement used by a person to identify his business, vocation, or occupation and distinguish it from the business, vocation, or occupation of others.

CHAIRMAN Z'BERG: Are there any questions, discussions, or comments relative to this first Section, or any of the definitions that have been read? [There were none.]
If not, then, we will continue with the next Section.

MR. FULLER: Mr. Chairman, in the next Section we enu--merate, or list, types of conduct that are deceptive trade practices.

MR. JESTRAB: Mr. Chairman, I have a question on subdivision (5). I note in the Comment at page 5 to subdivision (5) that the definition is substantially the same as the definition of "person" in the Uniform Commercial Code. Wherein does it differ?

CHAIRMAN Z'BERG: We will ask Mr. Dole if he will comment.

MR. DOLE: I believe the only variance is the specific reference to unincorporated associations, which I do not believe appeared in the Code. I do not believe they included unincorporated associations.

MR. JESTRAB: The reason I inquired is that there are other Acts that will be considered at this session of the Conference defining the word "person," and it would seem to me that it would be desirable if we could achieve some uniformity of definition in the Uniform Acts, and unless there is some particular reason for departing from the definition in the Uniform Commercial Code, I don't think we should do it.

MR. DOLE: The only reason for this addition was that, as I understand it, one of the principal problems as to who is a person relates to an unincorporated association. Are they a legal entity which can sue and can be sued?
I noted in the Code definition they did not explicitly include them, although they would be in the broad language at the end of the definition. This is not a substantial question, and we---- well, that is my reasoning, and perhaps the Committee would like to express their opinions.

MR. FULLER: I would like to say this, that I believe that's correct, that "unincorporated association" is not included in the definition of "person" in the Commercial Code, but we do need it here in deceptive trade practices. We have found examples where the unincorporated association should be protected.
That may not always be true when you are trying to define "person," but we think it is here.

CHAIRMAN Z'BERG: Is there any other discussion relative to the first Section? [There was none.]
If not, Commissioner, would you proceed.

MR. FULLER: I said that we are going to enumerate these types of conduct that are deceptive trade practices, and I believe that the continuity will be better if we go through all 12 of them, I believe it is. However, that's subject to your desire, and anyone that wants to---- I'll allow time here, and anyone who wants to interrupt on a particular subsection, please do so.

Section 2. [Deceptive Trade Practices.]

(a) The following types of conduct are deceptive trade practices:
(1) Passing off goods or services as those of another;
I will comment there that that is traditional language in unfair competition, and the Committee has used that as its first type of conduct.
(2) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
(3) Causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
(4) Using deceptive representations or designations of geographic origin in connection with goods or services;
(5) Representing 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) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
(7) Representing that goods or services are a particular standard, quality, or grade, or that goods are a particular style or model, if they are another;

(8) Disparaging the goods, services, or business of another by false or misleading representations of fact;
This deals with "bait advertising":
(9) Advertising goods or services with intent not to sell them as advertised;
(10) Advertising goods as services with intent not to supply reasonably expected public demand, unless the advertisement discloses a limitation of quantity;
(11) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
(12) Engaging in any other conduct which creates a likelihood of confusion or of misunderstanding.

Mr. Chairman, I think we should discuss those. I would like to say that I think when we have considered these 12 there is another subparagraph that the Committee and the Section have had under consideration that I want to give you the benefit of, that the Committee is not submitting, but, because it has been suggested to the Committee several times, we want to present additional wording; but I think if it meets with the approval of the Committee, we will consider what I have presented now and see if there are any questions or any improvements.

CHAIRMAN Z'BERG: Does anybody have any questions or discussion or comment?

MR. HELM: I wanted to ask----I think it's subsection (2)----as to whether or not this would affect the right of a manufacturer who chooses to get someone else to manufacture a particular article which it sells as its own and takes the full responsibility for the completeness of the product----whether or not this will prevent them from doing that and using this manufacturer's article manufactured by somebody else as one of its own manufacture.

CHAIRMAN Z'BERG: I will ask Mr. Dole to answer your question.

MR. DOLE: As I understand the question, it is whether subsection 2(a)(2) would pose any impediments to commercial arrangements whereby a seller arranges to have another party manufacture goods for his sale which he sells as his own.

MR. HELM: That's right.

MR. DOLE: Subsection 2(a)(2) has no effect whatsoever upon commercial arrangements of that nature. Its effect is upon the designations, the trademarks, the indications which the seller would place upon those goods.
In other words, assume that the manufacturer has a trademark for the particular goods he manufactures. Now, this seller with whom he has made this arrangement may or may not have a license to use this mark on the goods. If he does not, he has to use a different mark, and under subsection 2(a)(2) the manufacturer could prevent his using the manufacturer's mark without permission.
By the same token, if the seller had a distinctive trademark of his own, he could prevent the manufacturer from selling the same goods that he sold to the seller under the seller's mark without permission, but the underlying commercial arrangements are not effected whatsoever. This relates primarily to what is called the law of trade identification----what you are selling, not who manufactures it or how you get it.

MR. HELM: Thank you.

CHAIRMAN Z'BERG: Does somebody back here have a question?

MR. JESTRAB: I don't----at any rate, I'm not sure that I understand 2(a)(1). The problem is, if it is to prohibit a seller-- is that the idea, to prohibit a seller from passing off his goods as being the goods of another?

MR. FULLER: Yes, that's right. This is the passing off, palming off of goods, and giving the indication that they are the goods of another.

MR. JESTRAB: That bothers me a little bit, because it could very well make people responsible for the sale of goods in a situation where they don't have any control over it at all. For example, a grocer----all I would have to do is to direct your attention to these privity cases that we are having so much trouble with now, and what this does is to make it sort of a statutory tort, and I am wondering if you are not imposing liability where there would be no particular wish to impose liability under the language of the section, which would certainly cover, for example, a grocer who sells Green Giant peas, manufactured actually in Oklahoma.

He wouldn't have any idea. He would represent those peas as being from the State of Oklahoma or from the State of Minnesota----Green Giant peas. Actually, they were packaged and taken care of down in Oklahoma. They were not what they are represented to be.

Now, you have that kind of a situation. You will run into it in clothing and in many other cases, and it seems to me that you are going to have a great many claims made against people who have absolutely no control over this sort of thing. Your definition isn't specific enough.

I'll stop there and give the Committee a chance to explain that. I am looking for information. I don't have any firm ideas about it, but you have a problem there.

MR. FULLER: Well, the Committee will probably have a better example, but if you have the Jones Company making Green Giant peas, what this prevents is the Brown Company making some peas and passing them off as Green Giant peas, as their own.

This is a traditional common law action for passing off, or palming off your goods for the goods of another. You are deceiving. You are misrepresenting in that situation.

MR. JESTRAB: Well, that may be, Commissioner, what you intend to do, but that isn't what you have done. There isn't any common law rule that would give a grocer who has no knowledge----or that would give a customer of a grocer who has no knowledge of where the peas came from, other than the fact that they were sold to him as being Green Giant peas--

CHAIRMAN Z'BERG: May I ask Mr. Dole also to comment? He has been listening to your comments and might be able to help you.

MR. JESTRAB: Wait until I finish.
The fact that the grocer would have the right to interplead the manufacturer that sold them to him is very little comfort to him. He ought not to be in the litigation in the first place, and if you don't mean to include the grocer in that situation-- and I don't think you do----then I think you ought to make it clear in the subdivision, and the subdivision doesn't do it this way.

CHAIRMAN Z'BERG: Mr. Dole, would you respond.

MR. DOLE: Commissioner which section, actually, are you concerned with at the present time? Is it 2(a)(1)?

MR. JESTRAB: 2(a)(1).

MR. DOLE: And is it your impression that this has something to do with warranties?

MR. JESTRAB: No. That is not my impression.

MR. DOLE: I'm just trying to get clear. You mentioned this grocer. Are you concerned that a customer of the grocer-- a retail customer----would have a cause of action against him under this Act? MR. JESTRAB: That's if he passes off peas made in Oklahoma as being Green Giant peas, yes. That's what 2(a)(1) says.

MR. DOLE: Now, this customer has already bought the peas, is that correct?

MR. JESTRAB: That's correct.

MR. DOLE: And he is now aware of where they are actually from?

MR. JESTRAB: That's correct.

MR. DOLE: Now, the only remedy under this Act is an injunction. If he is already aware of the misrepresentation he may have bought one case of peas, but he isn't going to buy any more, and then he wouldn't need the injunction, would he?

MR. JESTRAB: Well, I don't know whether he is going to buy any more or not. I haven't any idea what his appetite is, or his family's appetite. [Laughter]

MR. DOLE: How can he claim he is likely to be damaged by the misrepresentation, when he knows the truth? He knows that the grocer misrepresented, and if he buys any more, isn't he assuming whatever risk is involved through the misrepresentation?

MR. JESTRAB: I don't know whether that would be true or not. I can't answer that question.

MR. DOLE: In other words, I'm suggesting--

MR. JESTRAB: [Continuing]... but I am saying to you that I don't think this does what you intend to have it do, it doesn't seem to me. Maybe it does.

MR. DOLE: I am suggesting to you on this score, with regard to the grocer, that a customer of the grocer would have no standing to sue under this Act once he was aware of the deception.

MR. JESTRAB: I don't think that's right. I don't think that that's true at all.

MR. DOLE: He can't get damages under this particular Act.

MR. JESTRAB: Well, you may have said that he can't get damages. I'm also not entirely sure about that either, but I don't want to get involved in that discussion now. What I want to know is: Isn't it a fact that you have not limited this----or that you are going to make a grocer or a middleman responsible for something, actually, over which he has no control? That's all I'm talking about.

MR. DOLE: I don't believe that is a fact.

MR. JESTRAB: Well, that's what it says. Isn't that true? That's what 2(a)(1) says, isn't it?

MR. DOLE: It says that passing off goods or services as those of another is actionable. Now, this is one of our oldest torts. It started in England around the eighteenth century, and is a traditional equitable subject matter.

MR. JESTRAB: Not in this kind of language. Maybe that's what is intended, but I would like to know: Do you know of another statute like this one----just one?

MR. DOLE: Now, if you will let me, I will answer that question specifically, and then I will go on to this language.

With regard to this entire statute as a whole in principle, there is presently being considered a federal statute that covers substantially the same conduct and provides substantially the same cause of action.
Now, with regard to this specific language, last year we did not have it in the bill. The reason was, it was such a fundamental element of law that we felt that it was adequately covered by subsections 2(a)(2) and (3), which specify actually the essence of passing off.

Then Commissioner Fuller and I held a meeting with some members from the Patent Section, and they said: We agree with you that this is substantially covered by sections 2(a)(2) and (3), but out of an abundance of caution, this is such a traditional principle, we would appreciate it if you would reiterate it as your first subsection.

MR. LADD: I have a question about that, because I am trying to pinpoint the issue, if I can, and I wonder if Commissioner Jestrab is troubled with this problem, or whether this is a relevant problem. I'm not just sure.

I imagine it would satisfy what Commissioner Jestrab has in mind if you would add the word "wittingly" in front of "passing off." That's your whole problem, isn't it?
[Mr. Jestrab nodded his head in the affirmative.]

MR. LADD: Now, would adding the word "wittingly" change the idea of what this Committee has in mind?

I don't know. I think it does; and, if not, I think there must be some explanation for it, and I would like to hear that discussed for my own information.

CHAIRMAN Z'BERG: Thank you, Commissioner. We will ask Mr. Dole to answer.

MR. DOLE: I take it, Dean Ladd, that by "wittingly" you mean "knowingly" or "intentionally"?

MR. LADD: Yes.

MR. DOLE: Now, actually, if you take a look at Section 3(a), you will see that this draft at present negatives the fact that an intent to deceive is required. This is, again, a very common aspect of this type of law. It has grown up principally in equity. Damages are, generally, only assessed under the common law, when they are allowed, when there is an intent to defraud; but as this body of law has developed, an intent to deceive has not been an element to the cause of action, although generally the defendants, of course, do have this intent.

MR. LADD: Then you would say that the purpose of this Act has nothing to do with compensation for damages, or anything of the kind, for past conduct? It would really relate prospectively rather than retrospectively, and whether this fellow knew it or not, if he was doing it, it ought to be subject to restraint; and that that would be the full measure, is that correct?

MR. DOLE: That is entirely correct, and very well stated. And, of course, once a suit were filed, he would be put on notice too.

MR. LADD: Then why, Mr. Jestrab, doesn't that really handle it? It seems to me that it might.

MR. JESTRAB: No, it doesn't. If that is what they mean, why don't they say so? That's the problem that I have with it.

After all, we are not going to have the professors down there to explain that to these people, and if that's what they mean, all I think is that they ought to say so, and that's fine.

MR. LADD: If it's just a question of control, rather than compensation, wouldn't Section 3 do that?

MR. JESTRAB: Well, there is another thing about it, and I'm not going to labor the point. I'm going to make this statement, and I'm going to let it drop; but I think that you are going to have a problem with the idea of who is doing the passing, and passing off what goods, and what's the liability; and in the second place, it's this assurance with which everybody says it doesn't give any rights in tort. That is a lot surer than I would be of what a court is going to do, and if there is a right in a statute of this kind----and even though a tort liability is expressly negatived, it seems to me that the possibility yet remains of a tort action and tort liability. They will call it common law, and then talk about the right under this statute.

And so I think that unless you are going to expose innocent people to some litigation, it ought to be clarified----and that's the end of my story.

CHAIRMAN Z'BERG: Thank you.

MR. RAIN: Mr. Chairman, I'm not sure that I have identified Commissioner Jestrab's objection. It may be that it's somewhat similar to the situation we face in the defamation case where the goods are handled by two or three persons-- maybe similar to the case of the magazine distributor being held liable where he has nothing to do with the content of the

defamatory material. But if that is the problem, would it be solved if you used something similar to the passing off of his goods or services as those of another?

That way you eliminate the middle man, the distributor, the one who is publicizing the thing, similar to the defamation type of case.

CHAIRMAN Z'BERG: I think Mr. Dole has a particular reference he wants to give relative to this.

MR. DOLE: Yes, I do. I have here the Restatement of Torts Second. I think the most important point I can make is that in this respect, with regard to passing off, we are not----I don't believe----changing the law of any state. We are merely putting it in words, and these are traditional words.
In the Historical Note to the Restatement of Torts Second it says:

This Chapter developed from the rule which imposes liability upon one who diverts custom from another to himself by falsely representing that the goods he is offering are the goods produced by another, a type of fraud commonly called passing off or palming off one's goods as those of another.

MR. RAIN: That's just the point. You don't have the "one's." You say "passing off one's goods as the goods of another." What is missing here is the "one's goods"----which I had reference to.

MR. DOLE: I understand your point. If you look at the Comment to passing off, you will see this Coca--Cola v. General Foods case cited.

MR. RAIN: Yes.

MR. DOLE: This involved a retailer who passed off, I believe----say, Pepsi Cola for Coca--Cola, and the Coca--Cola Company was able to ask him to stop. If a customer wanted to have Coca--Cola and asked for it, he at least should tell him he wasn't going to get it, before he served him Pepsi Cola.
This is the only liability that this Act would impose upon a retailer and it is already well established in much of our law.

MR. RAIN: I think what Mr. Jestrab's concern is----are you going to get the benefit of other cases of the Restatement where you pass a statute, unless the words themselves are going to express the exact meaning?

I'm not sure the other thing will be relevant to a construction of this statute, if it is adopted by the legislature.

MR. DOLE: I was trying to point out that some of the cases are in line with your wording. They don't limit it. When you say "his goods," you see, you are talking about a retailer. He doesn't manufacture any. So by "his" you mean a manufacturer's. A retailer could never be liable for palming or passing off; but as the law has developed, the manufacturer whose goods are not sold when something else has been substituted for his goods covertly by a retailer----this manufacturer has been able to get legal redress.

MR. RAIN: What you are saying is that the retailer doesn't pass off.

MR. DOLE: Yes, he does.

MR. RAIN: Well--

MR. DOLE: It's covert substitution. That might be the clearer way to say it.

MR. RAIN: I thought you just said that the retailer does not pass off when he sells at retail.

MR. DOLE: Oh, no. Take this Coca Cola case. A customer came into this store and said, "I want a Coke." Without saying a thing, the retailer sold him Pepsi Cola.

Now, it was held in this case that the manufacturer of Coca--Cola could enjoin the retailer from covert substitution, from passing off secretly other goods for the ones actually requested.

MR. RAIN: I see that case, but how about Mr. Jestrab's illustration of the retailer who is merely reselling prepackaged, precontained goods?

MR. DOLE: This is true for Coca--Cola. This is prebottled.

MR. RAIN: Yes, but was that served in a Coca Cola bottle?

MR. DOLE: Yes. Well, now, I don't recall that specifically. [Calls of "No! No!"]

MR. DOLE: It couldn't have been, could it?

MR. RAIN: I think Mr. Jestrab has reference to the case of Coca--Cola, or some manufacturer putting his product in someone else's carton or container, and the retail grocer, without any knowledge of it, sells it.

MR. DOLE: Oh, I believe--

MR. RAIN: That's his illustration. Now, is the retailer in that case passing off?

MR. DOLE: No, I do not believe so.

MR. RAIN: Well, it turns on what "passing off" means.

MR. DOLE: Well, if he is in utter good faith, if he is just handling the goods that someone sells to him, I believe the person who mislabels...

MR. RAIN: I think you may be right, but the question is: Does this say that, or not? That, I think, is the essence of this problem, the thing you are speculating about right now.

MR. DOLE: If they could enjoin the manufacturer, the retailer isn't going to be able to sell those goods until the manufacturer changes his label. This would have the same effect as enjoining the retailer, because he couldn't sell them.

MR. LADD: I want to try another approach to this thing that it seems to me may answer it. In the first place, if it's just selling some goods to another that has a different name, but it is packed with the same thing----if you are looking at it from the standpoint of damages, it would be purely a matter of the most nominal damages. We are thinking of the purchaser, of the people who are buying in a little different way, and not being deceived as to what they have.

Now, on the other hand, we are also thinking of the producer, and protecting the producer against the palming off as well as protecting just the purchaser from the palmed off item. Therefore the problem is really one of controls rather than a problem of damages, because the most that can be recovered in these cases would be very nominal damages, and that would give no basis of control.

On the other hand, assuming there were real damages----that there was a tack in the piece of pie made by a pie company, or something of that kind----or an automobile with a bad wheel, like the Buick v. MacPherson --that kind of thing----there you are getting into a totally different problem, and you are running into what we have in the Commercial Code under the law of sales, the sales and the implied warranties, and you would be working in this damage field.

This would not preclude, as I see it, anything of the damages, and from the standpoint of the sale of the Coke, it isn't hurting anyone. There's no mouse in that bottle of Coke, which gets into a different area of the law.

Therefore, this is simply a control protecting the public and also protecting the producer when another passes off his goods as that of his own.
It would seem to me that might solve it. I don't know.

CHAIRMAN Z'BERG: Yes. Thank you.

MR. SCHWARTZ: The issue raised by Mr. Jestrab is whether an innocent retailer who engages in a deceptive trade practice innocently is subject to the Act. I think the Act clearly covers him, and it should, and perhaps a better illustration would be that of a retailer who sells clothing supplied to him by a jobber who falsely puts on the label of Manufacturer A, when in fact it's from Manufacturer B.
Now, the retailer knows nothing about this. He's passing off. He is subject to the Act, and he should be. There's nothing unusual in that. We have the Wool Labeling Act. We have the Fur Labeling Act.
I have had it happen to my clients in the shoe business, where they are selling something which is subject to a design patent, and they have received notices, and they immediately stop, because the people who own that design patent, or the trademark under which the shoe is being sold, say: "Stop it or we'll enjoin you."

They are innocent, but they are enjoined, and I think they should be enjoined.

MR. JESTRAB: That's all I wanted to know.

MR. SELIGMAN: I am going to have to disagree, and question this idea of being able to sue somebody for something that was not done knowingly.

It appears to me that even though damages are not to be awarded, one of the big injuries to a business man is the unfavorable publicity to which you will expose him unnecessarily by letting him be sued and publicized as having engaged in a deceptive trade practice. It's totally unnecessary, because if a passing off is occurring, once it is called to his attention he must stop it, and it can be done simply by a letter, and then if he continues the practice, he is subject to this Act.

It appears to me that this philosophy of being able to sue him when he did something innocently is wrong, because it isn't the injunction that will hurt him; it's the publicity that will hurt him, and I think the word "willful" should be in here, in order that there be no doubt.

I think in Section 2----this is on page 6----line 2, the word "willful" would precede the word "conduct," so that it would qualify it, and you would still get all the benefits of this protection, and you wouldn't hurt innocent people or give business people a chance to damage a competitor by the very unfavorable publicity that could result.

CHAIRMAN Z'BERG: I think it's quite clear that the intention of the Section was not to limit it to willful types of action. Commissioner Fuller, would you like to respond?

MR. FULLER: We are going to come to that point in Section 3 on Remedies. We are ahead of ourselves here, but the Act does provide that intent to deceive is not required, and in protecting the manufacturer and the seller, they need to stop this kind of activity.

The words "passing off" and "palming off" are words of art. They have been interpreted many times by the courts. We are placing it in a statute here, but I think they do have meaning, and certainly it's the opinion of the Committee that this is wrong. Passing off or palming off your goods as the goods of another, or goods that you as a distributor are passing off-- it's wrong. If someone comes in and specifically asks for one thing, and you give him another thing, it's wrong; and the remedy has generally been given even where there was no intent to deceive, because the wrong was there anyway.

CHAIRMAN Z'BERG: Thank you.

MR. DANA: Mr. Chair--man, addressing myself to Section 2, I'm troubled by the fact that every one of the subdivisions begins with a verb or verb form----"passing off," "causing"---- and it doesn't say "a person who" or, better still, "a seller who."

I also note the introduction in 2(a), line 2, doesn't say:
The following types of conduct are deceptive trade practices when engaged in by a person selling goods and services:
So it seems to me that it would unwittingly catch things not desired. I'm not too worried about 2(a)(1), because when it says:
(1) Passing off goods or services as those of another;... by implication you get a "one" there, and that one person is a seller.
(2) Causing likelihood of confusion...
... that likelihood of confusion could be caused under this definition by a complete third party, an interfering volunteer, a stranger to the matter, who could say that Tiffany's jewelry is really manufactured by Cartier's, and he might not sell jewelry himself or have any motive of privity, but would say it just to cause trouble, and under this he would be liable.

(3) Causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another; Technically speaking, suppose a mere housewife announced that she was a partner of Bernard Baruch. Technically she is caught under (3).

[Section 2(a)](4) does state "in connection with goods or services," but [subsection] (3) doesn't say that.

And then you take (6) on page 8. It again begins with "representing"; it doesn't say "a person who" or "a seller who" or "a person trying to make a profit." If a man who bought a Cadillac said, "This Cadillac of mine is new," and it wasn't new, I would say that technically he engaged in an unfair trade practice.

Finally, (12) at the bottom of page 9:
Engaging in any other conduct which creates a likelihood of confusion or of misunderstanding.
That doesn't say a word about goods or services, or that the person is trying to make a profit. He could be just creating a misunderstanding about anything. Say, he wrote a misleading letter to the newspapers.

Unless it's taken care of, I think consideration should be given to beginning each of these subdivisions with "a person who" or "a seller who," or maybe better still, as I said, starting 2(a) by saying "When engaged in by another seller, with intent"----perhaps----"falsely or unwarrantedly to make a profit"----or something of that kind.

CHAIRMAN Z'BERG: Thank you. I'll ask Commissioner Fuller to respond.

MR. FULLER: In Section 3 the remedies start with "A person damaged or likely to be damaged," so if she represented her car as new, and it wasn't, and someone was damaged by that, it was certainly a deceptive thing; but you have to have the person come in who is damaged to have an action.
In Section 2 we are, more or less, defining conduct.

MR. DANA: I agree that the person who is damaged has been covered in 3, but you have gone to a lot of trouble to define "person," and you haven't got any person mentioned in Section 2, so the person damaged in Section 3 could sue. I'll admit that these are sort of interfering volunteers, but they are not sellers. They are not people out to make a profit.

MR. FULLER: If Bernard Baruch is damaged by this woman saying that she's his partner, and you say she's not, he has a cause of action.

MR. DANA: I'm not sure it ought to be covered by this particular Act, which deals with unfair trade practices, which deals with sellers----with traders. That's my point.

MR. DAVIS: In connection with subsection (6) I am somewhat disturbed about the word "deteriorated." Something can be new, and deteriorate solely from the passage of time, not because it has actually been damaged by use, or altered, or reconditioned.
I'm thinking about new steel pipe that is stacked out and begins to rust. Is that deteriorated within the meaning of this section?

MR. FULLER: Well, it might be.

CHAIRMAN Z'BERG: That's a good answer. [Laughter]

MR. DAVIS: Should that be a deceptive trade practice, where that is something that is bound to happen and does happen regularly and constantly in the trade in our part of the country?

MR. FULLER: We are not saying that. He is going to have to have a definite proof here with regard to his damages from it; but it ought to be enjoined if it is deteriorated to a significant point, so that it simply is not new.

In other words, would there be deception? It depends on your degree of deterioration. If it is deteriorated enough to make a difference as between something new and something less than new, then you might have an injunction.

Now, as to whether you are damaged or not, we are not dealing with that in this Act. I mean, whether you have monetary damages----we are not dealing with it in this Act.

MR. REHNQUIST: Subsection (10), as I understand it, now reads [in] the first part: Advertising goods or services with intent not to supply reasonably expected public demand... I take it the intent here is to set up a reasonable man's standard, and I wonder if the word "expected" shouldn't be changed to "expectable," so it is clear that it is not the expectation of the particular advertiser as a fact, but that the reasonable expectations that a reasonable person might deduce from the advertising.

CHAIRMAN Z'BERG: I understand this is acceptable.
Are there any other questions or discussion relative to these subsections?

MR. RAIN: Has your Committee considered the possibility that misrepresentations as to price----you have one as to price reductions, but I have in mind the case of misrepresenting the cost under warranties.
For example, "If this wears out, we'll give you a new one free." As I understand, the usual practice is that it is given free, but the cost of installation might be twice what it was with the other one.
Is this a case where you might consider adding the words "misrepresentation with respect to cost?" I just ask that as a question that you might consider.

That's one of the big baits in many establishments these days, the misrepresentation as to cost. It's the service. It's the other thing which is charged for, although we say the product is given away free under the warranty.

CHAIRMAN Z'BERG: I'll ask Commissioner Fuller to answer your question.

MR. FULLER: For the moment we are going to say we believe that would fall in the catch-all clause under subparagraph (12). [Laughter]

MR. DAVIS: Mr. Chairman, may I ask a question also along that same line?
I understand that a misrepresentation of a price reduction is condemned. Frequently you will see an advertisement that will say, "Price $4; $8 value." Is that kind of thing condemned by section (11)?

They do not say the price was ever $8 and reduced to $4, but they do say "$ 8 value."

CHAIRMAN Z'BERG: I understand that is not within the Act at the present time. It is not within (11). It might be within the catch--all. Mr. Dole says he would like to elucidate further.

MR. DOLE: Some of these things you have been bringing out illustrate the difficulty, or the problem, that you have in this type of legislation. You have to balance specificity with generality.
If you tried to specify everything, we could have a couple of hundred deceptive trade practices listed here, and we still could think of others, I'm sure. This is the reason why every piece of major proposed legislation in this field has relied upon some general language which gives guidance to the courts. The California statute, as indicated in the Prefatory Note, relies upon the similar general standard of likelihood of public deception.

What we have tried to do with the specific subsections that are mentioned is single out some of the most important deceptive trade practices that came to our attention, and to give guidance to the courts with respect to them. We have of necessity had to rely upon a relatively general provision at the end to catch some of the sorts of things that you gentlemen are mentioning.

MR. SCHWARTZ: Mr. Chairman, I'm not at all concerned about the first eleven subsections. I think they are proper, and they aim at deceptive trade practices which should be hit. However, I am terribly worried about catch--all (12), precisely because it is a catch--all. It's vague. It's indefinite, and God knows what's going to be caught in it.

Now, if all the Committee is trying to say, as we did in the Uniform Commercial Code, is that we are not attempting to limit the areas in which this law will develop, and we tell the courts that if they want to take other types of deceptive trade practices and bring them within the umbrella of the statute, fine----and you have such a hint in sub (c) on page 10.

It seems to me that if you put a comment under (c) saying that, in effect, the court is free to develop other types of trade practices, and the enumeration is not intended to be limiting, that is all that should be done at this point.

CHAIRMAN Z'BERG: I will ask Commissioner Braucher to comment.

MR. BRAUCHER: Mr. Chairman, Commissioner Schwartz has raised a point that has troubled me for sometime. I think those of us who do not have any great experience in the field of unfair competition are a little shocked at what has been going on for a long time.

For example, this business of enjoining somebody who didn't know that he was doing wrong----he knows now, and he can be enjoined. Well, apparently this is something that has been done, by the federal courts at least, for a long time, and the Lindsay bill, which has been pending for a long time with very responsible support, has the same provision we have that absence of knowledge or intent doesn't bar the relief.

Now, this catch--all provision, I think, is a thing which has troubled a number of people. If you just read it as what it says, without looking at the context of the rest of the Act, it's a pretty frightening thing.
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Well, I read it and I was amazed and startled, and so was everybody I talked to about it, and that's the way a lot of this is.

Well, I'd just like to point out that the Committee's formulation of this Act is, on the whole, conservative here. There are more radical formulations, and the Lindsay bill, for example, has the same trouble, only squared. In the Lindsay bill they have the same provision. They call it "unfair commercial activities," and then they define "unfair commercial activities" to include commission of an act or practice which violates reasonable standards of commercial ethics.

Well, try that one on for size for a minute! [Laughter] We don't have anything like that. Now, back to the specific points Mr. Schwartz made, it seems to me that catch--all clause ought to mean, in its context, other things like the eleven things that went before, and I don't know whether the Committee has yet come to a conclusion on this, but it was just suggested that we might put in the word "similar" to make it say that----"other similar conduct." Am I correct in thinking that the Committee----?

MR. FULLER: We'd like to suggest that ahead of the word "conduct" add the word "similar."

MR. BRAUCHER: Well, if you take the word "conduct" in that last catch--all clause, so called, and write in the word "similar" ahead of it, I think you make it mean what I thought it meant anyway, and maybe that takes a little of the trouble out.

Now, I would be reluctant to see the whole clause stricken, because, after all, without a statute this is the law. You have precedents, and things that are sort of like the precedents will be enjoined on the same principle that the former activities were enjoined. We simply cannot dream up all of the things that dishonest people will dream up.

The great safeguard, which has been referred to several times this morning, comes in Section 3. You have got to have a likeli--hood of damage before you can go for this injunction, and that is more of a safeguard than you think it is. This does not authorize a whole army of private attorneys general to roam around protecting people against unethical conduct. If it did, I'd be even more concerned about it than I am now, but I really think that part of this---- and I think I sympathize with the reaction that I get from the members of this body----comes from our lack of familiarity with what has already been done for a long time and that people seem to have learned to live with.

That, Mr. Chairman, is my piece of the morning.

MR. SCHNADER: Mr. Chairman I was very much impressed by Commissioner Dana's comment, and I would like the Committee to tell me why the following would not be a more desirable way of expressing Section 2:
A person engages in a deceptive trade practice who in the conduct of his business
(1) passes off goods or services as those of another;
... and then go right on down the line in that way.

CHAIRMAN Z'BERG: Would you repeat that language, please.

MR. SCHNADER:
A person engages in a deceptive trade practice who in the conduct of his business
(1) passes off goods or services as those of another;

(2) causes likelihood of confusion... and so on.

CHAIRMAN Z'BERG: Just a minute, while the Section confers. [Pause]

MR. FULLER: Not to delay you further, the fact of the matter is that the Committee is inclined to accept the suggestion, or language along that line. We in prior drafts have had something of that nature. As a matter of fact, just off the top of your head, Commissioner Schnader, what you suggested is a little better than what we have had before; so it is a matter here, in a few minutes, of checking these words and fitting it into these subsections. However, we are inclined to accept that suggestion, and then will try to present it here in a minute.

CHAIRMAN Z'BERG: I think we might as well go on while--

MR. BRAUCHER: Mr. Chairman, I think this is something we have been struggling with, and we have had previous drafts that talked about "in the course of a commercial enterprise," and the Bar Association Section said that was too restrictive.

The Lindsay bill uses the words "for purposes of profit," which accomplishes the same kind of thing that Mr. Dana and Mr. Schnader are trying to accomplish, but we didn't like that because again you get nonprofit unfair activities.

But as I understand it, the Section is prepared to accept this in the general idea. "... in the conduct of his business" is an idea we can accept. I hate to do this in this vague form, but it has burst on us as a new flash of insight, and we'd like to pray over it just a little before we accept it.

CHAIRMAN Z'BERG: There was one aspect of the deceptive trade practices which, as Commissioner Fuller earlier stated to you, the Section decided they would not include. However, it has been discussed a great deal, and was asked to be in, so some language has been prepared, and we would like to tell you about dilution.

MR. FULLER: Gentlemen, if you will again insert some language for consideration that I will read you----I think the only place I can find to put it is on page 13, if you don't have a pad in front of you. There is open space there.
This is for consideration. This would be a new subsection (4), and would involve renumbering. This is all in Section 2. This is another one of the types of conduct for consideration. This would be a new sub (4):
Conduct which is likely to dilute the distinctive quality of a trademark or trade name of another.
Now, this is known as the antidilution provision, or an antidilution statute, of which five states now have this language, or something similar to it, that has been proposed. It was recommended to your Committee by the Unfair Competition Committee of the ABA. That's the Patent Trademark Section's Committee on Unfair Competition; and they have officially recommended it to your Committee.
At the same time, members of the Committee----many of them----have expressed their opinion this should not be included, and we have had a good deal of dissension one way and the other on the point.

The Committee has not included it. The Committee has considered the possibility of it being a bracketed section or an alternate thing, but we did feel a duty to present it to the Conference in Committee of the Whole for further consideration.

Now, let me say just this further fundamental. Dilution of the trademark is covered under the Act to a certain extent. If there is likelihood of confusion, and some of the other types of conduct that have been mentioned, dilution can fall within the terms of the Act as drafted. Just dilution of a trade name or a trademark----that is probably not covered by the Act.

To give you an example, we had one gentleman commenting; he said he was opposed to including something like this because it would be so hard to render an opinion. He tried to render an opinion on infringement in connection with the name "NBC Building," and he had to consider dilution in connection with NBC for National Broadcasting Company, NBC for National Biscuit Company, NBC for National Bank of Commerce, and all of those trade names.

We'd like any comments from the floor.

MR. MERRILL: I suspect that what I am about to say reflects my total ignorance in this particular field, but I'm troubled by what would be comprehended within this term "dilution." I just don't get the concept.

CHAIRMAN Z'BERG: Let me ask Commissioner Fuller, then, to--

MR. MERRILL: Well, let me add one thing more, and then we'll get the answer.

CHAIRMAN Z'BERG: Go ahead.

MR. MERRILL: It seems to me that if we are going into this new section, after we get the explanation of what is meant we probably ought to ask the Committee or ask the Committee of the Whole, if it accepts the proposal, also to authorize the insertion of a definition of "dilution," because I don't think that dilution has a legal meaning at present.

CHAIRMAN Z'BERG: I think the point is that the Committee is not recommending it. However, it has been suggested quite strongly to the Committee, and there was a great deal of discussion, so that the Committee felt they had to advise all present of what it was that they discussed and what the possible language was.
So, Mr. Dole--

MR. DOLE: One of the interesting things about dilution is that it has never been definitively defined. [Laughter] I think that the most accepted definition is the gradual whittling away of the uniqueness of a trademark.

The idea is that if only one person can use a trademark, then he will be able to use it to impress the public more through his advertising. Whenever they hear the word, they will think of him. They will not think of a shoe shop down the street that has the same name that didn't return their shoes on time.
It's derived from a German term which I will not attempt to pronounce, but in a German case in 1924 a German court decided that well--known trademarks should be protected against

dilution of their selling power which could result in permitting others to use them on products unrelated to those sold by the original trademark user.

If another person uses a trademark on a good that is related to that sold by the original trademark user, the likelihood of confusion test gives protection. The idea is that dilution would give some extra protection, and there is controversy as to whether or not this extra protection is desirable.

CHAIRMAN Z'BERG: I might again point out that this section is not before you to be acted upon unless some member of the body wishes to move it and attempt to have it inserted. We are only advising you of what it is that was considered yesterday.

MR. SCHWARTZ: I'm glad it's merely tentative because I think it's worse than sub (12). [Laughter]
May I suggest----because I'm all for the underlying philosophy----that we should expand, with judicial standards, into the deceptive trade practices field, subject to the change made by Commissioner Schnader, if all we said at the beginning of Section 2(a) is: "Deceptive trade practices include the following," and then go down the line, (1) through (11). Then I think you have covered everything. You have told the court: Go ahead and do the other things that are like this.

CHAIRMAN Z'BERG: Thank you.

MR. REHNQUIST: Mr. Chairman, I would find it helpful to hear from either Commissioner Fuller of some other member of the Committee why the majority decided not to include dilution, whether it was on the merits they didn't believe in it or whether they didn't think it belonged in this Act, or something like that.

MR. FULLER: I can't help you very much, because my own position was somewhat neutral, and we tried to weigh the pros and cons. Certainly a pro is that it has been recommended by an ABA committee; and the same time it's apparent to the Committee that it has developed as a controversial matter; than in uniform laws, I think, generally we don't try to get into the most controversial areas----I mean, if it's something we have a choice on. So I'm neutral enough that I'm not going to give any pros and cons.

MR. BRAUCHER: I could add just a word on this, because I was present for the Section consideration of this.
We paid proper deference to the proposal strongly made by a responsible committee of the ABA Section. Several arguments were made. One was that it doesn't fit the title of this Act as we now have it, because dilution is beyond the area of deceptive trade practice, and so you are going beyond your proper scope.

The second thing was that there is controversy about this outside the Conference. I think Mr. Fuller just suggested that we are sometimes controversial, but this is one of the things in the Lindsay bill, and the language that is before you, or that has been suggested, follows somewhat the language of the Lindsay bill: To dilute the distinctive quality of a trademark or trade name of another. That's one of the principal things that have kept the Lindsay bill off the ground, I think.

Now, in addition to that, we had the problem of vagueness that Commissioner Merrill referred to. We weren't quite sure what it meant, and to the extent we got the message as to what it meant, we weren't sure that we really wanted to cover it.

So I think it was a combination. Nobody in the Section that I know of felt bitterly one way or the other. The principal problem was that there are about five states that now have antidilution statutes, and if you are thinking about trying to get it enacted, you have to have some recipe as to whether they repeal those statutes or not. I suppose Massachusetts, which has a dilution statute, would merely keep it, if they adopted this.

MR. BULLIVANT: To bring your suggestion to a head I would like to move that the language which the Committee has failed to include be included.

If I understand this draft correctly, certain types of dilution might be covered. If there is confusion as to source; for example, if a well--advertised trade name in financial circles were seized upon by a shoe business, and if the financier caused a trade survey to be made to show that a lot of people that the financier was engaging in the shoe business, he might have relief under this Act.

However, if a trade survey or a public opinion survey showed that members of the public were not in fact being deceived as to whether the financier was in the shoe business, there would be no relief under this Act. Is that not correct?

CHAIRMAN Z'BERG: As I understand it, that's substantially correct.

MR. BULLIVANT: It seems to me there is an element of fairness in protecting the institution which by fair and long advertising builds up a name which can gradually be pirated away. A fly--by--night institution will probably try to seize upon the good will that's involved, and it may be rather expensive to prove that there is actually confusion as to source, and a responsible institution may not feel called upon every time someone steals a part of its name in a rather unrelated activity to go to court and do something about it.

However, if it sits by for a number of years and lets several people pirate away a part of this intangible good will element, it soon finds itself with a trade name or a business name or an institution name which has become slowly but steadily degraded, and I think that type of degradation should be prohibited, and I feel, therefore, that the controversial language should be included.

MR. BRAUCHER: Mr. Chairman, in the Section when this matter was mooted, the proponents of this never went beyond suggesting that this should be a bracketed, optional addition, and I wonder if that is consistent with Mr. Bullivant's motion, or whether you want to put this in.
The problem is that I think we might defeat the Act in places where somebody rises up and opposes the dilution provision.

MR. BULLIVANT: I would be satisfied, as far as my motion is concerned, if it were inserted in the Act in brackets, so that it's left optional with the state as a matter of policy to go this far; but I think this option should be left to the state which wanted to go as far as I have suggested.

CHAIRMAN Z'BERG: Then the motion before us is that the language which has been read previously by Professor Fuller related to dilution be included as an optional section of the Act.

MR. VON HERZEN: I rise to ask a question of the Committee, whether the language that is proposed to be included, which appears to me to use the language that is largely covered by the Lanham Act----whether the Committee has considered whether or not relief is now available under the Lanham Act for the misuse of dilution of trademarks and trade names. This is Question No. 1.

No. 2 is whether the Committee would consider, if this has or has not been had under the Lanham Act----whether it is intended to broaden the Lanham Act and the remedies that are available under it.

And No. 3 is whether or not the word "dilution"... in the context that is used in that particular phraseology----really does not mean "diminish." It appears to me that it does, and if this is the true meaning of the term, then I think we should substitute the word "diminish" in place of "dilute."
The word "dilute" in my lexicon goes back to the area of prohibition, [laughter] and whether or not you had liquor available which was of the potency represented by the particular bootlegger that was involved.
I would like to have the Committee, if it is possible----maybe it isn't possible today----to tell me whether or not these things have been considered.

CHAIRMAN Z'BERG: Yes, I believe they have. Mr. Dole, would you answer the question?

MR. DOLE: As I understand it, there are three questions. The first one is the relationship of our test of trademark infringement, if you will, to the Lanham Act. I believe that our test of trademark infringement is fully...

MR. VON HERZEN: And trade name.

MR. DOLE: [Continuing]... as administered. The Lanham Act does not allow registration of trade names as such. However, if you use the same term as a trademark and as a trade name, you can register it and get trademark protection, although it is a trade name.
Furthermore, a local trade name can infringe a federally registered trademark. You cannot register a trademark, but if you use it----a trade name; but if you use it as a trade name, you can register it under the Lanham Act.

How does that satisfy the first question?

MR. VON HERZEN: Does this broaden it?

MR. DOLE: No. No, this is fully consistent with the law that has developed under the Lanham Act. There might be a question with regard to dilution, which is not recognized by the Lanham Act. There is some dictum in some federal district court cases saying that if you have registered a trademark under the Lanham Act, you may not be able to get dilution protection under state law.

MR. VON HERZEN: In effect, then, we are giving a state remedy where a federal remedy was heretofore perhaps exclusive. We are now giving it to the state, is that correct?

MR. DOLE: No. Actually, the state had the remedy first. State trademark protection goes way, way back. The first fed--eral statute was passed in 1870, and there have been two or three statutes, culminating with the Lanham Act. We are considering state protection as a supplement and complement to federal protection.

Now, I believe we have mentioned both of your first two questions: (1) The relationship of the Lanham Act; and (2) does it broaden the Lanham Act?
Now, the third question related to dilution. I believe that the following language would express----using your term "diminish"----the idea of dilution:
Conduct that diminishes the distinctive value or nature of a trademark, trade name...
... and so forth.

So I think that you are right. The word "diminish" is part of the idea. I think that from the point of view of the ABA Section, as far as I know, there is a body of law that has grown up around "dilution," so that those experienced in the field translate it into "diminish," if you will, and that there might be some hostility, or at least some question in their minds, as to whether or not another word, even though it means substantially the same thing, would be acceptable to them.
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CHAIRMAN Z'BERG: The motion we have before us is the motion on dilution. Unless there is anything specific someone wants to say relative to that...

MR. DULLY: I merely offer this as an instance to go into the general hopper, as to what was recorded a very short time ago in the State of Connecticut.
The language particularly enunciated so many times today about an honored institution being brought into jeopardy-- I should recite that the honorable Trustees of Yale University were very much disturbed, if not taken aback, when a motel some twelve miles away adopted the cognomen, or pseudonym, or whatever you care to call it, of the Yale Motel. The resulting legal process, one of injunctive proceedings instituted by the Trustees, did go to the infallible Supreme Court of the State of Connecticut, which held in effect there was no infringement on the sacred name of Yale----I suspect, no dilution----and, in fact, no diminution, if you will. [Laughter]

MR. EASTHAM: I was one of those in the Section. I should be up there, but I stayed down here because I wanted to talk on this subject.
I do not think the dilution section has any place in this Act. In the first place, it is, as far as I can tell from Mr. Dole's research, not an existing remedy in the common law. The thing does not exist in the common law, and a few states have passed statutes on it, but I gather that even under these statutes the statutes have been very strictly construed, and there has been very little come of it.
I think the reason for this is that unless there is confusion caused by the use of a trade name, the theory that some theorists come up with is that there is a dilution, or as the Germans put it, a Verwasserung [laughter]----which is a watering as far as I can translate it--

MR. VON HERZEN: Water in the beer. [Laughter]

MR. EASTHAM: [Continuing]... which gets back to prohibition.
I don't think this thing does actually exist when there is no confusion. If people had actually been confused and thought that the Yale Motel was run by Yale University, and if this could have been demonstrated, then perhaps it could have been stopped under this Act. If there is no confusion, I don't think that whatever minute watering there is of a trademark is something that should be stopped by the government. So I would urge the defeat of this motion.

CHAIRMAN Z'BERG: All right. The motion before us at the present time is that the language that was read by Commissioner Fuller----and I think you probably remember what the language was----be included as an optional provision in this Act.
[The motion was put to a voice vote and was lost.]

CHAIRMAN Z'BERG: We will now proceed with a reading of Section 3.

MR. FULLER: Page 10: Section 3. [Remedies]
(a) A person damaged or likely to be damaged by a deceptive trade practice of another may be granted an injunction restraining the continuance of the deceptive trade practice. Proof of monetary damage, loss of profits, or intent to deceive is not required. The court may grant relief according to the principles of equity and upon terms that the court considers reasonable. Relief granted for the copying of an article shall be limited to the prevention of confusion of source.

That's language that the Committee has added, as we see it, to cope with decisions this year in the Supreme Court of the United States, the case of Sears, Roebuck & Co. v. Stiffel Co., and the case of Compco Corp. v. Day Brite Lighting, Inc. They were decided this year, and they have obvious, but limited, implications for this Act.

In both cases the Seventh Circuit had affirmed a judgment awarding damages and an injunction under Illinois law for the copying of unpatentable articles in their entirety. The Supreme Court of the United States reversed both decisions, holding that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. In other words, the Constitution of the United States provides for patenting and copyright, and if it's not patented, it's in the public domain.

Now, at the same time, here's what the Supreme Court of the United States said with regard to what a state may do, and this is where we are trying to come in this Act. The Court emphasized and said----and I'm quoting:

Doubtless a state may in appropriate circumstances require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to source, just as it may protect businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods, so as to prevent others by imitating such markings from misleading purchasers as to source of the goods.

The Court also stressed that:
A copyist who abused his privilege to imitate an unpatented or uncopyrighted product or design could be required by state law to distinctively label his product...
and said----that was in the Compco case:

As we have stated in Sears, while the federal patent laws prohibit the copying and selling of unpatented articles, they do not stand in the way of state law, statutory or decisional, which requires those who make and sell articles to identify those products as their own.
With that background before you, you have the section on remedies.

MR. HAVIGHURST: Mr. President, referring to this last sentence which you have discussed, I notice that it limits the action to confusion. All the rest of the way through this Act you have used "confusion or misunderstanding." I don't know that one adds very much to the other, but was "misunderstanding" deliberately omitted there?

CHAIRMAN Z'BERG: Were you suggesting that perhaps it might be well to add the word "misunderstanding"?

MR. HAVIGHURST: I would at least like to know why it isn't there. If it was deliberately omitted, I would be glad to have the explanation for it. I don't see the explanation offhand.

MR. FULLER: The matter was discussed in the Committee, and we think now that we would accept those words, "or misunderstanding," following the word "confusion" in the last line of the section. Add "or misunderstanding."

MR. FRED T. HANSON: Some of the Commissioners have expressed concern that a party may be brought into court under this section who doesn't know that he has been doing anything wrong. I wondered if the Committee had considered providing, or requiring, notice to cease and desist from the practice as a condition precedent to the remedy under Section 3.

MR. FULLER: We haven't considered that. As a practical matter, I'm sure there would be some demand made in advance, unless somebody was a little trigger happy on suing, but we haven't considered requiring a notice, or this sort of thing.

MR. BRAUCHER: Mr. Chairman, I could add a word.
I don't think this has been discussed directly as such, but we did discuss the problem of the principles of equity which are tied in with this, and I think it would be standard practice to give this notice, and if the leaving out of any such requirement merely changes the laboring oar, so that if the defendant were to come in and say, "Well, I didn't know I was doing anything wrong, and I've stopped now that I've found out about it," I think you would find it would be very hard to get an injunction in most courts.

MR. HANSON: That doesn't quite meet the point that one of the Commissioners made.
You have got a suit started, and it's on the record. If a man has been sued, that's what one of the Commissioners here wanted to avoid, even the beginning of a suit. He wanted to avoid having him brought into court, so he has something to defend.
If he gets a notice first, then he can make a choice. If he chooses to desist, there will be no record of any suit having been brought against him.

MR. MUNTER: There is another aspect of this question of notice and suit, and it is this, that in the event an innocent violator is brought into court immediately and he agrees to desist thereafter, he is nevertheless subject to being assessed counsel fees for the plaintiff. The way I read the Act, counsel fees may be assessed in injunctive proceedings against the defendant even though he is absolutely innocent and didn't know that he had violated the Act.

That's another reason, in my opinion, why there should be some provision here for notice by a complaining body against the alleged violator----thirty days, sixty days, or ninety days.

CHAIRMAN Z'BERG: Mr. Dole, do you want to comment?

MR. DOLE: I wanted to direct my comments to your comment with respect to the attorneys' fees.
Now, it says on page 11 that the court in exceptional cases may award reasonable attorneys' fees to the prevailing party. If a good faith defendant is served with process, ceases the conduct upon receiving the process----ceases the practices that he determines he was not entitled to engage in----it seems to me that the defendant would become the prevailing party in this case, and that if the court refuses to award an injunction because he has ceased his conduct. So this is a real possibility, that the court could do this.

Secondly, the exceptional cases clause, which is taken from the Federal Patent Code, is intended to prevent courts just assessing attorneys' fees in every case. It takes an exceptional case, and generally under the Patent Code it requires fraudulent, malicious and willful conduct on the part of a defendant. This could be reviewed on appeal as a matter of law.
So there are two safeguards in this section that would relate to your comments.

CHAIRMAN Z'BERG: Any other comments or suggestions?

MR. SELIGMAN: I was very happy to get a little support on this question of intent, and I'd like to go over it a little bit further, because I think it's really important.
For instance, in our own profession we don't want some unintentional breach of our code to be the subject of a full blown unprofessional conduct proceeding, and apparently the business people in their organizational acts don't either.

On page 2 of the Prefatory Note I notice that you have stated:
The pertinent conduct condemned by the Business and Professions Code includes making statements in connection with the sale of goods or services which are known or should be known to be untrue or misleading, and advertising goods or services without intent to sell them as advertised...

Now, I don't know whether this is the way it appears in the statute in California, because later on I notice you state that there are California decisions stating that no intent was necessary, but take the example in our own profession. If in a firm it happens that retainers are accepted on both sides of a case where technically this is exceedingly improper, and before you have an opportunity to notify the clients that you can't handle it that way someone comes along and makes a full blown question of violation or ethics out of it----this can happen in a firm of attorneys where different ones are consulted, and naturally it can be taken care of very simply, and I think that if a merchant unknowingly sold peas that were grown in Oklahoma and he had intended to be selling those that were grown in Pennsyl--vania, this idea of notice to desist-- something of that nature should precede any kind of court proceeding; and I don't think legislatures are going to like this Act, even if unbeknownst to us, as Professor Braucher mentioned----those who aren't in this practice----things have been going on that we wouldn't even believe.

I don't see why we should lend a hand and pick up a stick and keep beating these business people by giving our blessing to it.

MR. JOINER: It can happen, as the Commissioner points out, in our own profession, of course, but it doesn't happen that way. It doesn't happen, because we find that people are reasonable people.
This statute is designed to correct an evil which we all have observed and which is in existence throughout this country, of deception in the sale of goods, and so forth, and to provide too many safeguards of the kind that are suggested will do two things. It will (1) tend to make the acquisition of evidence very difficult under certain circumstances----they will go under the table on certain things----and (2) there are a great many times when there is a need to move with great haste, and to provide a notice in advance of the beginning of an action, and then, thereafter, the acquisition of evidence of the violations, and so forth, would in a great many instances prevent the application of the Act.
I think it's far better to try to deal with that evil and rely upon what has been demonstrated to be the fairness of people, as shown, it seems to me, in our own profession in this connection----that this kind of action does not occur----and to not include such a notice in the statute.

CHAIRMAN Z'BERG: Thank you. if there are no additional comments on this section, we will continue.

MR. JOE SHOEMAKER: Mr. Chairman, I would concur with Commissioner Seligman, from New Mexico, that a notice provision would be very helpful in terms of getting this passed in a state legislature. As a legislator from Colorado, I think without a notice provision it would be very difficult to pass this statute the way it is.

CHAIRMAN Z'BERG: Thank you.

MR. BURDICK: I too would like to see some sort of notice provision, because I feel that you are creating a new remedy here, and a rather stringent one, against innocent sellers, as well as those who operate deliberately, and it's especially with regard to the innocent seller that I would require the element of notice, but in order to make it uniform you may have to have the requirement of notice for everybody.

However, I have another suggestion on Section 3, that instead of "a person damaged or likely to be damaged" by the practice, I would suggest using the term "affected," because in a given case at that point when he seeks relief, he may not be able to prove any damage. However, a continuation of the practice may well result in damage. So he could be a person affected by it, and still show no damage at the time.

CHAIRMAN Z'BERG: The change from the word "injured" to "damaged" was discussed at great length, and I think the desire was to try to limit the effect of the remedy.
I'll ask Commissioner Fuller if he might tell you why the language was changed from "injured" to "damaged," which might bear upon your suggestion of "affected."

MR. FULLER: Well, I'm not going to answer that last question. I can't remember. [Laughter]
I want to call your attention, though, to the second sentence, Commissioner Burdick. Proof of monetary damage is not required. We do feel that a person has to have some damage, in the sense that you have a prospective damage or a damage in the sense of an equity case in an injunctive proceeding, to bring an action here; and the change----I guess I can partially answer. The change from "injured" to "damaged" was in the minds of some of the members of the Committee a little stronger requirement.

If you say "affected," then you have a lighter requirement for someone who might come in, and the Committee felt that a person should show some damage to be able to be a plaintiff here.

MR. BURDICK: Then I am confused by your second sentence, because what other type of damage is there besides monetary damage?

MR. DOLE: Commissioner, the language "damaged or likely to be damaged" is taken from the Lanham Trademark Act. The idea is that there will be, as you suggested, often pecuniary damage that cannot be proved. I have a drop in sales, but I can't prove that this deceptive act caused it.
So we relied, as did the Lanham Act, on this "likely to be damaged" language to get the idea across that you are suggesting, but also to get across the idea that it is a pecuniary interest. This is related to the comments on commercial activities, use of deceptive conduct for profit.

MR. BURDICK: Why don't you say: "a person having a pecuniary interest likely to be affected by the deceptive trade practice"?

MR. DOLE: Then we would be worried about the fact that there might be too strict proof of pecuniary interest.

MR. BURDICK: I think you have a contradiction in terms the way it stands now, and I certainly would straighten that out.

MR. DOLE: Well, I have spoken. Let's let the Committee give their view.

MR. BURDICK: I would also like to develop that thought that before injunctive relief is to be granted, there should be some threatened continuance of the practice. That would be the normal rules of equity. However, the first sentence seems to suggest that he would be entitled to this injunction simply by a showing of the person having committed the deceptive trade practice, without necessarily any threat or continuation of it.

CHAIRMAN Z'BERG: Did you want somebody to comment on that?

MR. BURDICK: Yes, I would.

MR. WADE: I think the answer to the whole question about notice and the continuation relies upon sentence 3:
The court may grant relief according to the principles of equity and upon terms that the court considers reasonable.

Now, an equity court would normally require notice if there was some indication that the person was innocent and ready to quit. He wouldn't grant an injunction. If we put in a specific requirement that a notice must be had for thirty days or ninety days, then this is going to aid considerably the man who is intentionally doing wrong. It gives him the opportunity of going on for a long period of time.
Courts have dealt with this type of thing. A court of equity has dealt with it, and I don't believe that any court is going to deal unfairly with a defendant in that connection. I don't believe that any court is going to render a decree which will make it appear that an innocent defendant has been doing something wrong.

MR. BURDICK: Then I would suggest that all of the first sentence and the third sentence be combined, so that it would read something like this, that the court may enjoin the continuation of a deceptive trade practice, granting temporary as well as permanent relief, according to the principles of equity and upon terms that the court considers reasonable, etc.

MR. WADE: I think that's good.

MR. FULLER: We're inclined to accept the proposition of switching those sentences. In effect, you are saying: Let's bring the sentence on equitable principles...

MR. BURDICK: Into the first sentence.

MR. FULLER: Yes, and then go on and use the first sentence as it is now constructed.

MR. BURDICK: Well, essentially. I still favor the idea of notice, but that should be a separate provision somewhere.

MR. FULLER: I'm saying that we are going to try to reword it here to accomplish that matter of bringing the second sentence...

MR. BURDICK: The first and third together.

MR. JOINER: I have a question, Mr. Chairman.
Did Judge Burdick's language include the description of who it is that may initiate the action? I thought the language he gave eliminated that description.

CHAIRMAN Z'BERG: You suggested retaining the first sentence? You are not eliminating "a person likely to be damaged?"

MR. BURDICK: That phrase should be in there too.

MR. JOINER: I like his description better than your description. It means something to me.
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MR. FRED T. HANSON: Just in order to bring this before the house, I move that it be the sense of the Committee of the Whole that there be inserted in Section 3 a requirement for notice in advance of bringing the action under this section.
[The motion was seconded by Mr. Joe Shoemaker.]

CHAIRMAN Z'BERG: May I ask you whether in your requirement for notice you have to give notice if you can prove bad faith, or not? Would notice be required in all cases?

MR. HANSON: That would be acceptable, that notice is required only in those cases where bad faith is not proven.

CHAIRMAN Z'BERG: Have you altered the motion?

MR. HANSON: No. I'm going to withdraw my acceptance of that, because that still leaves you in a position where the man can be sued and brought into court. There is a difference

between not being sued at all and being sued and brought into court and being able to present a defense.

CHAIRMAN Z'BERG: Just so I understand it, your motion is that there be included a notice provision in all cases under Section 3?

MR. HANSON: Correct.

CHAIRMAN Z'BERG: Is there any discussion of the motion?

MR. WORLEY: Like Dean Wade, I would be quite content to trust the discretion of the chancellor to provide protection for an innocent defendant, but like others who have expressed concern as to the task of selling this legislation to legislators at the local level, I would think that the Act could be strengthened if there were inserted, either as a part of Section 3(b) or as an additional subsection, the following language:

Unless it shall be shown that a defendant willfully engaged in a deceptive trade practice neither costs nor attorneys' fees shall be assessed against him.
This would reassure the legislators that an innocent defendant could not be punished.
I make these remarks at this time because I think that if the Act were amended to include a notice provision, we would in large measure emasculate its wholesome purposes. I believe that if we want to give reassurance to those who are concerned about the status of innocent defendants, we ought to declare what we want the chancellor to do, although I would have trusted him without that declaration.

CHAIRMAN Z'BERG: Thank you. Any other discussion?

MR. REHNQUIST: I wish to speak in opposition to the notice requirement.
To me it is just utterly irreconcilable with the idea of temporary relief. Conceivably in the case of some sales or some trade practices a plaintiff is going to want a temporary restraining order or at least a temporary injunction, and the idea that he must have given notice thirty days beforehand would be just utterly contrary to the purpose of the Act.

I think, as Dean Wade said, the traditional equitable principles will protect the defendant. Let's not put a notice requirement in.

MR. SELIGMAN: On the question that Commissioner Burdick raised, it seems to me that the language in Section 3, line 2, "a person damaged..."

CHAIRMAN Z'BERG: Excuse me. We have a motion. Does your comment relate to the motion before us now, which is the notice provision?

MR. SELIGMAN: No, but let me speak to that.
It hasn't been demonstrated, to me at least, by the supporters of the lack of notice provision that there is any harmful effect to giving the notice. That is, you will achieve what you want if after receiving notice the person quits doing what you objected to. Then you have accomplished what you wanted to accomplish by an injunction, except you weren't able to hurt that person by dragging him into court and by making him hire an attorney.

We shouldn't be speaking against the desirability of going to an attorney, but when you sue that man----and perhaps he has a good defense----he still is going to have to spend, even to get it thrown out on a motion for dismissal, perhaps $400 or $1,000, just because we wouldn't give him a chance to drop whatever he was doing innocently.

I'm speaking now in behalf of the smaller merchants that we were talking about. In a large industry perhaps this makes no difference. They have house counsel and retained counsel anyway; but when you are thinking of the smaller business man that may be affected by this, just remember that when you talk about an injunction you are scaring him to death, and he's going to run to an attorney, and he's going to run to an attorney even though he didn't do anything that he knew of that was wrong in the first place.

MR. SCHWARTZ: I am opposed to the notice provision. A notice provision is a license to hunt during the period of the notice, and I see no reason why we should give the deliberate wrongdoer any period of time in which he is free to do what he wants.

As far as the innocent person, I find it hard to believe that any company worried about any act under the statute which might hurt it wouldn't send a notice. Of course they will send a notice. They don't want to hire lawyers and pay out money unless they have to.

Finally, I don't think the injunction would issue in any case where the court felt there was no deliberate attempt to violate the statute.

MR. NORTHAM: It seems to me that the Committee cannot take this motion even if it merely expresses the sense of the Committee of the Whole.

In the first place, in almost any statute we have a choice between, perhaps, virtuous goals. Here our drive is to stop bad practices. If the man is innocent, the court will take care of it. At the same time, it is conceivable that the question would not become moot. What if he does confess error, so to speak? "I didn't know what I was doing." The court should have complete authority to take care of any case, innocent or guilty.

MR. DULLY: I want to harken back to what the good legislative Commissioner from Colorado stated, that from a practical standpoint in selling this to a legislative body or to a judiciary or law committee, I daresay that any layman, No. 1, would absolutely insist on notice; and if that's true, and this Act is ever presented, in due course again, I suspect, you will have any sort of amendment relating to notice in any jurisdiction in which it is enacted.

I'm pleading from the realistic angle of this, and if what you are interested in is passage, it's all--important.

CHAIRMAN Z'BERG: I will ask Commissioner Fuller to again tell you what the position of the Committee was, before we call for the motion.

MR. FULLER: The Committee will just simply state that we would oppose the provision for notice, and we will refer again to the principles of equity that are mentioned in the article on remedies, and to a lot of practical difficulties about the time and manner of notice, and things like that here that could be difficult to deal with in this type of evil.

CHAIRMAN Z'BERG: All right. The motion before you is a notice provision requirement in Section 3.
[The motion was put to a voice vote and was lost.]

CHAIRMAN Z'BERG: We will go on, then, with a continuance of the reading of the sections.

MR. FULLER: I'm on 3(b) on page 11.
(b) The court in exceptional cases may award reasonable attorneys' fees to the prevailing party.
(c) The relief provided for in this section is in addition to and not in exclusion of remedies otherwise available against the same conduct pursuant to the common law or other statutes of this state.

MR. PENCE: With respect to Section (b), that section is unenforceable in our state, and I know it is unenforceable in some other state----how many I don't know----but being unenforceable even in a small number of states, I think the material ought to be bracketed, and I move that the section be bracketed.

CHAIRMAN Z'BERG: We will accept your suggestion, and so a motion won't be necessary.

MR. PENCE: Very well.

CHAIRMAN Z'BERG: All right. We will continue on, then, with Section 4.

MR. FULLER: Page 12:
SECTION 4. [Application.]
(a) This Act does not apply to:
(1) Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency;
(2) Publishers, broadcasters, printers, or other persons engaged in the dissemination of information or reproduction of printed or pictorial matter who publish, broadcast, or reproduce material without knowledge of its deceptive character; or
(3) Litigation or appeals pending on the date that this Act becomes effective.
(b) Subsections 2(a) (2) and (3) do not apply to the use by any person of any service mark, trademark, certification mark, collective mark, trade name, or other trade identification which was used and not abandoned prior to the effective date of this Act, if the use was in good faith and is otherwise lawful except for the provisions of this Act.

CHAIRMAN Z'BERG: Any questions or comments relative to Section 4?

MR. JOINER: Mr. Chairman, I wonder if subsection (a)(2) is necessary now, in the light of the change that is going to take place under Section 2(a) of the Act.
Section 2(a) as it is now drafted just defines certain types of conduct as deceptive trade practices, but, as I understand, you are going to redraft it to provide that certain methods of violating the Act are involved, including the use of the business, vocation, or occupation in some way, and because of the drafting principle involved, you had to have an exception then with regard to publishers, broadcasters, and printers.
Doesn't that make 4(a)(2) now unnecessary?

CHAIRMAN Z'BERG: We'll take that under consideration, your suggestion. [Conferring]. No, they are not going to take it under consideration. They are going to come to a conclusion right now. Mr. Dole would like to speak.

MR. DOLE: This type of clause is traditional in any type of legislation that effects the news media. You find it in the Lanham Act. You find it in the Federal Trade Commission Act. The point is that the media very often have no knowledge. They don't have a duty to scan ads submitted to them and to have their attorney determine legality, and this exemption is intended to make sure that the news media will not feel that there might be a danger of this sort even if, perhaps, because of the wording of Section 2 it might be a somewhat exaggerated fear.

MR. BRAUCHER: Mr. Chairman, we have made a change in 4(a) sub (3). Strike out the word "litigation" and substitute "actions." The Section is proposing to do that, unless some objection is made. [There was no objection.]

CHAIRMAN Z'BERG: All right, if there are no further questions, I believe the remainder of the sections are standard.

MR. PETERSON: Mr. Chairman, I just have one question about publishers, broadcasters, etc. Would that include the telephone company publishing a telephone directory?

CHAIRMAN Z'BERG: The question is: Would the telephone company in their yellow pages be covered by this?

MR. DOLE: By the exemption? Sure.

CHAIRMAN Z'BERG: The answer is "Yes."

MR. CHARLES S. HANSON: Mr. Chairman, to take off some of the sting of what has been said, I would move that the title of the Act be amended to read "Uniform Trade Practices Act."

CHAIRMAN Z'BERG: You have heard the motion. Is there any discussion? [There was none.]
[The motion was put to a vote and was carried.]
I believe we have now, then, finished our discussion of the Act, unless somebody else has any additional comments.

MR. VON HERZEN: Mr. Chairman, there was a gentleman from Tennessee that made a suggestion for an addition to 3 which I thought was in the nature of a motion. I don't know whether he made the motion or not, but if he did not, I will make it as a motion, but I can't remember the language he used.
He had a subdivision (b) that he wanted to add to Section 3 under "Remedies," particularly on costs and such.
I thought that was an excellent suggestion, and would make the Act much more acceptable to legislators.

CHAIRMAN Z'BERG: Would you yield to the Commissioner from Tennessee?

MR. VON HERZEN: I certainly will.

MR. WORLEY: My suggestion was aimed at the palatability of the Act, and I did not make a motion because there was then a motion pending.
The language suggested, either as an addendum to present subsection 3(b) or as a separate subsection, is as follows:
Unless it shall be shown that a defendant willfully engaged in a deceptive trade practice, neither costs nor attorneys' fees shall be awarded against him. I think this would be the ruling of the chancellor in any event, but it declares it for the legislators who will be considering the Act.

CHAIRMAN Z'BERG: Would you repeat your language again, please.

MR. WORLEY: Before I make it as a motion I would like the reaction of the Committee.

MR. WADE: There is one aspect of section (b) that has not been made clear, I think. Section (b) as it is now worded applies no matter whether the plaintiff or the defendant loses. In this particular phraseology it would apply to the case where the plaintiff wins.
You see, the thought was that if a plaintiff brings an action with no basis for it at all----it's a strike action, or something of that sort----then attorneys' fees might be awarded against him.

MR. WORLEY: In the light of Dean Wade's comment I think this ought to be a new subsection, and does not sleep well with section (b).

MR. BRAUCHER: The first sentence as we now have it in (b) would be:
The court in exceptional cases may award reasonable attorneys' fees to the prevailing party.Now, as I got your addition----and I just want to make sure it's right----it would go on with a new sentence:
Unless it shall be shown that a defendant willfully engaged in a deceptive trade practice, neither costs nor attorneys' fees shall be assessed against him.
That would simply not affect the plaintiff. The second sentence would be limited to an award against the defendant.

MR. WORLEY: I thought Dean Wade's point was that this might confuse the meaning of the first sentence, which is broader in thought than the second sentence, and I would think that my suggestion belongs in a separate subsection, if your first sentence is as broad as Dean Wade says it is, and I can see that it is, because the "prevailing party" could be either the plaintiff or the defendant.

MR. BRAUCHER: Well, the question of style as to how it is fitted in here is a little troublesome, because we are trying to get this proposed for a vote by states, and we don't like to leave open ends, but I think the difference between having it all part of (b) or having it a separate sub (c) is purely a stylistic matter.

MR. WORLEY: We will leave that with you. Is it necessary that I move the amendment?

MR. BRAUCHER: The Committee accepts the amendment, subject only to the question whether we have two subsections or one.

MR. HAVIGHURST: Mr. Chairman, I call your attention to the fact that that section is now in brackets, and I think possibly this should not be within the brackets.

CHAIRMAN Z'BERG: All right. Fine!

MR. BRAUCHER: Mr. Chairman, could I respond to that? I think this is plainly right as to costs, and if you separate it out, the "nor attorneys' fees" would have to be in brackets to fit with the other. This is again a stylistic matter, and I think you can leave that to the Committee.

MR. SELIGMAN: Reverting to the point that I brought up when we were discussing the motion, on page 10, Section 3, line 2, I understand that a suggestion has been made to redraft that, but I have been unable to determine whether the Committee accepted the point, which seemed to me to be well taken, that if you leave in the words "a person damaged," and that all has to be proved, that would hardly be a proper case for injunctive relief. If the person is likely to be damaged, then injunction would be a proper relief, but if there is no question of future damage, then this would not be a proper case for injunctive relief, and in your rewording of that section there shouldn't even appear to be a cause of action, if you simply prove that you are damaged and don't have to prove any more.
Commissioner Burdick brought that up, and I don't think you commented on that.

CHAIRMAN Z'BERG: I think Commissioner Burdick was speaking about the redrafting of the whole section after he spoke about the damage part, which was responded to by Mr. Dole; but, Mr. Braucher, did you want to speak to this?

MR. BRAUCHER: The Section accepted, as I understood it, Judge Burdick's suggestion that the first sentence and the third sentence should be consolidated, so that the principles of equity would come right in with the grant of the injunction, and I have language on that.
We did not accept the notion that you should leave out a description of who the plaintiff should be, which I understood he separately suggested.
Now, the language "a person damaged or likely to be damaged" is language we didn't make up. It comes out of the Lanham Act, and I think we would be reluctant to change that language. We would rely on the principles of equity to prevent the award of unnecessary injunctions where it had been shown that the deceptive trade practice had been discontinued and there was no likelihood of its being resumed.
This is the point that, I think, Commissioner Northam made earlier----that courts of equity have had this problem on a great many different varieties of things that are to be enjoined, and they don't have useless injunctions.

Now let me read the language as we now have it, of Section 3(a).
A person damaged or likely to be damaged by a deceptive trade practice of another may be granted an injunction restraining the continuance of the deceptive trade practice, in accordance with the principles of equity and upon terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding of source.

Now, that's what we have done in response to Commissioner Burdick's suggestion of consolidating the two sentences, but we have not done anything about changing the

designation of the plaintiff or the description of the person who can be a proper plaintiff, and if that is to be done, I think it should be moved.

CHAIRMAN Z'BERG: All right, thank you.
Well, if there are no further questions or discussion, as I say, I think the remaining sections are standard, and Commissioner Braucher, do you have a motion to make----or somebody?

MR. BRAUCHER: I must add one point, and subject to somebody in the Section disapproving it. Mr. Dole pointed out to me that part of Mr. Seligman's suggestion could be taken care of by deleting just the words "damaged or." Was that part of your suggestion, sir?

MR. SELIGMAN: That was my point.

MR. BRAUCHER: Well, subject to someone having a contrary view, I see no harm in that at all. It seems to me the critical thing here is "a person likely to be damaged." This is an injunction action, not a damage action, and the past damage only goes to the likelihood of future damage, so I think we would be prepared to change this to read: "a person likely to be damaged."

MR. BURDICK: I'd like to join in that recommendation. I think the injunction has some reference to future damage.

CHAIRMAN Z'BERG: Are we ready for a motion?

MR. BRAUCHER: Mr. Chairman, I move that the Committee of the Whole rise and report that it has had under consideration the Uniform Trade Practices Act, that it has considered it section by section, has made certain changes and amendments, and recommends that the Act, as so amended, be approved and be presented for a vote by the states for final adoption.

CHAIRMAN Z'BERG: You have heard the motion.

MR. HAVIGHURST: Mr. Chairman, is this debatable?
I didn't hear----maybe this was when I was out of the room, but Mr. Schnader's suggestion----I have never heard what the Committee did with that.

MR. BRAUCHER: We accepted it. I will read the language if you wish.
This is in the preamble to Section 2, and it now reads, as I understand it, in accordance with Mr. Schnader's suggestion:
(a) A person engages in a deceptive trade practice when in the conduct of his business he:
... and then you have to change all the subsections so that they read "passes," "causes," "represents," and so forth, rather than "passing," "causing," and "representing."

MR. JOINER: Mr. Chairman, it seems to me that if you are going to draft it that way you ought to use the same language that you used above, and not limit it to the course of business, but business, vocation, and occupation.
This is found in the definition of trade name in subsection (a) of Section 1. You don't just speak in terms of business; and I think it appears in some of the other definitions. I would suggest that you include "business, vocation, or occupation."

CHAIRMAN Z'BERG: Is that all right?

MR. BRAUCHER: I think we will accept that one.

MR. SELIGMAN: I don't know whether the Committee took into account that suggestion of Commissioner Jestrab-- I don't know whether he is here or not----but on page 5, line 20, he suggested that you consider dispensing with the words "unincorporated association," as being superfluous and not conforming to the language used in the Uniform Commercial Code, and it seems to me that he was correct; that the catch--all language at the end of this paragraph, "or any other legal or commercial entity" is sufficient. Is that still being considered?

CHAIRMAN Z'BERG: It is my understanding that the Committee did consider his suggestion, but felt this language was important.

MR. DANA: Mr. Chairman, just before the final vote may I suggest one change in subdivision (12) at the very bottom of page 9?
As I understand it, the Committee agreed to say "engaging in any other similar conduct"----to add the word "similar."
I feel with Professor Braucher that the forms of wickedness are infinite, and "similar conduct" really stultifies having a further thing. Suppose we move it along slightly----"which similarly creates a likelihood of confusion or of misunderstanding." The conduct could be different, but the similarity is in the deceiving of the customers, and so forth. I think that would broaden it.

CHAIRMAN Z'BERG: The Committee likes that. They will accept that. All right, then, if there is no further discussion, you have heard the motion. [The motion was put to a vote and was carried.]

FOOTNOTES:
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