CAVEAT EMPTOR VERSUS CAVEAT VENDITOR
By CHARLES T. LEVINESS*

Federal statutes and court decisions of the past decade have tightened the hold of government over business, both big and little. There is scarcely a trade or exchange, a barter or sale, that is not now affected by that big stick of federal control called regulation of interstate commerce. As parens patriae, Uncle Sam stands today as traffic cop in the channels of commerce, not only hustling on the traffic but filtering it through a maze of federal regulations to make it pure and sweet, clean and truthful.

The modern buyer need not be too wary. He may rely on newspaper advertisements and on labels describing his prospective purchase. A host of agencies protect him and are vigilant in his interest. These range from the strong arm of the Federal Trade Commission to state statutes and unofficial bodies such as Better Business Bureaus.

As a principle of legal relationship between buyer and seller, caveat emptor is today a pretty sick horse. It is not so much the buyer as it is the manufacturer and the merchant who must beware, on penalty of fine or imprisonment. The rise and the fall of this Latin phrase, which has attained the status of an ancient maxim, makes good copy. To begin with, it is not very ancient. It goes back only to about the time of Coke, and marks a new individuality of thought and custom current in his time and found in the frontier days of our own country.

Caveat emptor was always popular in America. It possessed a certain ruggedness that we as a young nation

liked to associate with ourselves. It was found in a few English decisions prior to the Revolutionary War. It was not a legal principle of the Middle Ages, nor is it found in the Roman Law, despite its Latin expression.

As a matter of fact, the Middle Ages treated the buyer with much the same deference he finds today in the phrase “the customer is always right”. In feudal times there was no freedom of trade at all. Society was based on a system of rigid controls, authority being divided between church and lords. This regimentation extended to and enveloped trade practices.

The main purpose of early trade control seems to have been to insure an open market, a fair price, an honest measure and a good quality, considerations which might be termed ideal in any age but always difficult of attainment. But if our best efforts today are not good enough to prevent some abuses, let our current administrators take heart from the experiences of their predecessors half a dozen centuries back.

The first legally recognized program of regulation of trade appears to have been the assizes of bread and of beer, in the reign of King John about 1256.1 As between the two, it appears that the brewers were more often haled into court than the bakers. The principal charge seems to have been the dispensing of bad beer or the use of scant measures.

But there were others who also got in trouble with the authorities. For instance, the early records show complaints that the men of Sprouston buy measly pigs and sell sausages and puddings unfit for human bodies; that one John Truckke bought a drowned cow and sold it in little pieces; that the cooks and pastry-makers of the town warm up pastries and meats on the second and third day; and that William Brok, butcher, sold meat of oxen and sheep, measly bad and putrid through age.2 The penalty usually was to make good the loss, but occasionally a

1 Selden Society, Select Pleas in Manorial and other Seignorial Courts (Maitland Edition, 1889).
2 Selden Society, Leet Jurisdiction in Norwich (Hudson Edition, 1892) 8, 10, 13, 47, 60, 71, 80.
flagrant violator or a repeater would be made to ride a rail through the town square.

Elaborate regulations were devised by our ancestors to control trade practices at fairs. Goods were to be sold only in shops which had frontage. No merchandise could be sold which was not publicly exhibited to all. Inspectors of weights and measures were appointed. The office of the alnager was established, and it was his duty to measure cloth. Canvas and woolen goods could not be sold in the same store because such a dual display might confuse the purchaser or tempt the merchant to pass off cotton for wool.\(^3\)

The ambulatory fair was succeeded in popularity by the market town or central place to which would-be purchasers might travel in order to obtain a wider selection. This practice developed along with transportation and, by the Fifteenth Century, London already had become the chief market town of the island. An elaborate body of law sprang up to regulate trade in the market towns, of which the keystone was the doctrine of the open market. Most any sale was good if made in "market overt". A sale made in open market carried a warranty of title which did not exist if the sale were made in the back of a store, in an alley, or in the purchaser's private home.\(^4\)

Salesmen were required to keep away from hotels and private houses unless sent for by a lord or baron. Sales could not be made by candlelight, in the dark part of a store, or after sunset. Even in taverns, there was a rule that travelers dropping in to quench their thirst must proceed first to the cellars to see that the beer they were to drink came from the proper casks.\(^5\)

While modern regulation of the ancient art of beer-drinking has not yet imposed such a requirement upon the thirsting wayfarer, at least one alcoholic beverage-

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\(^4\) Pease Market Overt in the City of London (1915) 31 L. Q. Rev. 270.

control board has a rule requiring each beer tap to be conspicuously labeled and requiring such tap to be connected directly with the beer keg containing the product advertised on the tap. Tavern-keepers found passing off ten cent beer for the fifteen cent variety advertised on the beer tap face suspension of licenses.\(^6\)

Manufacturers in the Fourteenth and Fifteenth Centuries also were subjected to regulation in the public interest. For instance, bakers were forbidden to make loaves false either as to the dough or the weight. Weavers could not set their threads too far apart or turn out cloth worse in the middle than at the sides. Skinners were prohibited from furbishing up worn furs otherwise than with the lines and collars of the old garments attached. Chandlers could not put resin in wax tapers. No tanner might use false leather disloyally tanned or curried. Potters were enjoined from making utensils which when put upon the fire would "come to nothing and melt." Coopers were forbidden to construct casks for ale and beer out of second-hand wood lest the savor of the liquor be spoiled. Casket-makers were forbidden to make their boxes of false and rotten wood covered over with linen cloth.\(^7\)

From the variety of rules governing open markets, it could be inferred that the science of salesmanship early reached a high peak. For instance, there was an ordinance forbidding merchants to set up red and black cloths or felts whereby the eyes of the buyers were deceived in the choice of a good cloth.\(^8\) Another outlawed night work for founders and other workers in metal because it gave opportunity to introduce false iron for tin and to gild false copper.\(^9\) In 1365 every manufacturer was required to adopt a seal so that his goods might be known and recognized afar. The baker had to put his mark upon his bread, the weaver upon his cloths.\(^10\)

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\(^6\) Rule 21, Rules and Regulations, Board of Liquor License Commissioners of Baltimore City (1941 Ed.).

\(^7\) Memorials of London, supra, n. 5, 118, 563.

\(^8\) Bland, Brown and Tawney, English Economic History (1920) 155.

\(^9\) Memorials of London, supra, n. 5, 226, 512.

\(^10\) Ibid, 358.
There was rigid price control during this period and the seller departed from the lawful rate at his peril. It seems that all the material and spiritual necessities of life were governed by standardized prices. O.P.A.A has not yet even dreamed of anything like this; let us hope it does not read this article. For in the old days almost every article of commerce, every service had its ceiling price. Even prayers had their price tag. The saying of a mass cost one farthing. The law provided, moreover, that if a half-penny were extended in payment for the mass and the proper change were not forthcoming, the worshiper was to have his prayer for nothing. But baptisms and marriages were not on the price chart. Presumably they brought what the traffic would bear.

The anxious solicitude of the law for the rights of customers was sometimes used as a cloak by craftsmen to keep outsiders from entering their trades, augmenting their numbers, and thus reducing the exploitable business of the community. For instance, if there were six plumbers in a town and another one attempted to move in, the six would try to exclude him on the theory that he was unskilled and should not be allowed to foist himself upon the unsuspecting townspeople. Machinery was prohibited in the mills, for the ostensible reason that work done by the hands of men insured a higher quality product. Today, we have in this State boards regulating the trade of plumbers, barbers, hairdressers, horseshoers and many others whose ostensible function is to examine candidates for the trade. The fact that few such candidates pass their examination is due, they will tell you, to a deep solicitude for the public welfare and not at all to a hope of keeping down their own numbers.

As more and more laws were passed to regulate trade, so more and more violations were noted. (There is a moral here but let us not pause to expound it). Punishment was in store for the felon who put a bushel of good oats at the mouth of the sack when the rest was of worse quality, a trick that one would think even the innocents

\[11 \text{Ibid, 463.}\]
of the Fourteenth Century would be on to. There are cases involving deceptive trade practices such as “selling false bow strings, barrels wanting in their true measure by two gallons, cups bound with silver gilt, false counters of gold, small bags filled with other merchandise than good powder ginger.” An indictment of an early faith-healer is noted. Because his charm for fever and ailments was a leaf of parchment wrapped up in cloth of gold, he was mounted on a horse and led through the city with trumpets and pipes, with a whetstone about his neck, and urinals hung about him fore and aft.\(^\text{12}\)

Abuses of trade regulations became so widespread in England that the people gradually revolted against the rules and decided that it might be better to let each customer shift for himself. The reason for the downfall of the elaborate system built up in the Fourteenth, Fifteenth and Sixteenth Centuries seems to have been primarily a complete breakdown in administrative energy and integrity, comparable somewhat to our experience with the Prohibition Amendment. By the Seventeenth Century, there was general complaint of intolerable abuse and fraud in the application of these regulations.

It was this popular frame of mind which developed the adage, “Let the buyer beware,” embalmed by the writers in the Latin *caveat emptor*. The first time that this phrase appeared in print seems to have been in 1534, and it related to horse trading. Wrote Fitzherbert in his Boke of Husbandrie: “If he be tame and have ben rydden upon, then caveat emptor.” The phrase was taken up by the text writers, popularized by Coke and Blackstone, and preached as gospel by early American appellate jurists.

The ideology of *caveat emptor* was popular with the common folk. It denoted to them that they could stand their own ground with the tricks of the merchants. They scorned the proffered aid of the jobholders appointed for their protection, since they found that many could not be trusted. They became sharp and suspicious traders themselves and demanded proof of the asseverations of

\(^{12}\) *Ibid*, 464, 466.
the merchants. They justified their new-found doctrine by the elemental formula of Christian marriages, that parties must accept each other for better or for worse. When a man took himself a wife, whether the price was a mug of beer or a lusty sum in gold, it was understood that he also took his chance upon latent defects in the chattel.\(^\text{13}\)

From horse-trading and the marriage mart, the doctrine of *caveat emptor* quickly spread to other fields. A case before King’s Bench, in the matter of one Chandelor, gave it prestige, if not definition and legal effect.\(^\text{14}\)

But the doctrine was more than a mere rule of trade. It became also a rule of personal conduct and of political thought. Let each man be strong and keen, capable of taking care of himself. With the advent of the Eighteenth Century the spirit of individualism was intense and there was a growing trend to laissez-faire. The great Blackstone, whose writings so influenced the circuit riders in young America, provided an out for the merchant “against defects that are plainly and obviously the object of one’s senses,” and attributed liability to the seller only for a “defect that cannot be discovered by sight and is a matter of skill or collateral proof.”\(^\text{15}\)

Statement of the doctrine of *caveat emptor*, as limited and qualified by the writers, was fairly simple. Its application was no such picnic. For instance, in 1778 a seller warranted that a mare was sound. He was held to be accountable to the purchaser because of the latent defect of windgals.\(^\text{16}\)

On the other hand, a man who bought two pictures by an obscure artist believing them to be works of a master was thrown out of court, it being held that the name of the painter set down in the catalog represented no more than the opinion of the dealer.\(^\text{17}\)

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17 Jendwine v. Slade, 2 Esp. 572 (1797).
In this country the doctrine of *caveat emptor* achieved its real triumph during the Nineteenth Century. The growth of the railroad, the Westward Ho' movement, and the emergence of our infant industrial system influenced the courts to extol individualism in business, as in private life.

_Caveat emptor_ not only was a sound legal precept, it was the patriotic thing. How could a man shift for himself on the frontier unless he could survive in the marts of commerce? As one jurist said in 1804: "The doctrine of _caveat emptor_ is best calculated to excite that caution and attention which all prudent men ought to observe in making their contracts."\(^8\)

Throughout the Nineteenth Century the maxim was firmly entrenched as controlling in American jurisprudence. A statement of the United States Supreme Court, rendered just after the Civil War, was typical of the period. It held _caveat emptor_ to be of such universal acceptance that "such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life."\(^9\)

But this hardy doctrine clashed with the developing ideas of a planned and ordered society. One writer of the maxim's decline draws the conclusion that "A refined _caveat emptor_ still means that purchase is a game of chance."\(^20\) Soon after the turn of the century a movement arose to take the gamble out of shopping. This trend is still upon us.

The proponents of clean advertising and honest labeling followed the lead of most other reform groups of the period and proceeded on two fronts, the state legislatures and the federal congress. The fight in the states resulted in the passage of false advertising statutes in 42 states. The campaign in Congress labored and brought forth the Federal Trade Commission.

\(^8\) Seixas and Seixas v. Woods, 2 Caine R. 48, 54 (N. Y., 1804)
\(^20\) Hamilton, _The Ancient Maxim Caveat Emptor_ (1931) 40 Y. L. J. 1133, 1187.
The battle in the states deserves passing comment. The movement for a model state statute against false advertising was launched in 1911 by Printers' Ink, a trade journal. At the outset it recognized the enforcement problem and said: "We are against any law unless, at the same time, it is made somebody's business to watch out for infractions of the law, to collect the evidence, and see that the case is pressed."\(^2\)

Thereupon interested volunteer organizations sprang forward to push the bill and enforce the finished product, if and when. Among these was the National Vigilance Committee of the Associated Advertising Clubs; and later came the Better Business Bureaus, which have given the statute strength, virility and vigorous prosecution. Shorn of extra verbiage, the Printers' Ink model statute states that "Any person who, with intent to sell, disseminates an advertisement which contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor."

The statute did not require proof of *scienter*, it will be noted. When the solons of the Maryland General Assembly were confronted with this bill, and also with the pressure which accompanied it, their reaction was characteristic: they compromised. The Maryland statute, passed in 1914, requires proof of guilty knowledge. It is hard to prove that an advertiser knew his statements were false. Thus our law is said to lack teeth. Efforts have been made in subsequent sessions to provide the necessary molars, without success thus far.

Twenty-four states have adopted the model statute; eighteen, including Maryland, have a weakened form of the model requiring proof of knowledge of the falsity of the advertisement or other such safeguards of the advertiser. Six states have no such law.\(^2\)\(^2\)

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\(^{21}\) 135 Printers' Ink, 100 (Apr. 22, 1926). Also see issue of May 31, 1940.

\(^{22}\) In 1911 Printers' Ink launched its campaign for state statutes against false advertising. It produced a model statute, written by Harry D. Nims of the New York City Bar, which is here quoted:

"Any person, firm, corporation or association who, with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with
None of the state statutes has been conspicuously successful in cleaning up advertising, due to lack of enforcement machinery, uninterested prosecutors, and other factors.

intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this State, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor."

Thereafter an attempt was made to have it enacted in every State Legislature. The fight was waged by advertising groups throughout the nation, participated in by the Associated Advertising Clubs of the World and later by the Better Business Bureaus.

As a part of the movement to secure clean advertising and appropriate legislation, the Associated Advertising Clubs at their Boston convention in 1911 adopted the "Truth in Advertising" motto and two years later at the Baltimore convention drew up their "Declaration of Principles" which today guides and controls the policies of all Better Business Bureaus. The clubs lined up actively behind the model statute.

It will be noted that the statute makes mere publication of the untrue statement a violation of law. No scienter is required, or proof that the advertiser knew, or should have known, or might by reasonably diligent investigation have discovered, that the misstatement is not "the truth, the whole truth and nothing but the truth." Therein lies the strength and effectiveness of the statute, from the prosecutor's viewpoint; and therein lies the antipathy to it on the part of many advertisers who ask how they are supposed to be omniscient about all phases of all goods they are called upon to advertise and sell.

Despite these objections to the model act, the pressure put behind it caused enactment in toto, or substantially so, in the District of Columbia and twenty-five states, as follows: Alabama, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Virginia, Washington, Wisconsin and Wyoming.

Seventeen other states to which the model statute was presented amended versions of it, the amendments consisting chiefly of the addition of safeguards designed to protect the unwitting advertiser from being punished for misstatements inadvertently made. The difficulty of proof under the amended or limited statutes is obvious. How can it be determined whether the advertiser was honestly mistaken, or whether he was trying a little light and fancy chiseling? Most of the states which have passed limited versions of the model have added the word "knowingly", thus forcing the prosecutor to prove knowledge of the misstatement. Printers' Ink has always fought such attempts to scuttle the act. It calls the word "knowingly" the "joker" in the pack and states that it "seriously weakens the model statute." See Printers' Ink, May 31, 1940.

The seventeen states which have such a limited act are as follows: Arizona, California, Connecticut, Florida, Maryland, Montana, Massachusetts, North Carolina, New Hampshire, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont and West Virginia.

Six states have neither model statute nor bastardized version thereof, as follows: Arkansas, Delaware, Georgia, Maine, Mississippi, New Mexico.

But in Delaware the City of Wilmington has a local ordinance modeled on the Printers' Ink statute.
tors. Their role has been in the local field only, as an adjunct to the work of the Federal Trade Commission, whose work we shall now consider.

It is said that ninety-three per cent. of our population is protected by these acts. For able articles on the subject see (1926) 36 Y. L. J. 1155; and (1931) 31 Col. L. R. 527.

**The Maryland Statutes.** In this State there are two statutes, both being modifications of the Printers' Ink model. In 1914 the Legislature, confronted with the model bill, added the words "wilfully and knowingly" before the words "makes or disseminates" any false statement. Md. Laws 1914, Ch. 410, Md. Code (1939) Art. 27, Sec. 208.

Six years later, when another attempt was made to secure the model statute, the Legislature adopted the exact wording of the act but added the saving clause that the untrue statement must be known to be false or one which "by the exercise of reasonable care should be known by such person to be untrue." Md. Laws 1920, Ch. 704, Md. Code (1939) Art. 27, Sec. 209 (1939 Edition). The 1914 Act was not repealed.

So now we have both of them, neither of which is entirely effective. Prosecutions are generally under the later statute.

The City of Baltimore also has a "Seconds Law," an ordinance regulating the advertisement and sale of second-hand, rejected, "seconds," "irregular," blemished or defective merchandise. Ordinance No. 30, City of Baltimore, July 21, 1931.

Because of the practical difficulties of proof, the advertising statute has not been frequently invoked in Baltimore and there is no record that it has ever been proceeded under in the counties of Maryland. The State's Attorney's office in Baltimore refers to it as "the Better Business Bureau statute" and all of the cases instituted in Baltimore have been on information furnished by the local Bureau.

Indeed, that was the idea when the model statute was drafted. Many Bureaus were organized for the express purpose of establishing "truth in advertising" and enforcing this act. However, in at least two states, paid official investigators enforce the act. In 1926 Wisconsin hired two special officers for this purpose. See Printers' Ink, April 22, 1926. In Minnesota the law is enforced by deputies of the Department of Agriculture, Dairy and Food.

Prosecutions in Maryland and their results follow:

**Criminal Court of Baltimore.** Indictment No. 1054, 1927. A department store was brought to court for falsely advertising fire sale when the evidence showed the goods being sold were never in the building at the time of the fire. The verdict of guilty was given but the case was adjusted in cooperation with counsel for the Better Business Bureau on agreement that sufficient correction be offered in the newspapers repudiating the advertising.

Indictment Nos. 4479 to 4488, 1927. This concern was charged with selling seconds and blemished merchandise and failing to qualify advertising under the city ordinance. When the case came up the company demurred to the indictment because of faulty titling of the ordinance and the demurrer was sustained. At the request of the Better Business Bureau the City Council re-titled the ordinance as it stands today.

Indictments Nos. 1515 and 1516, November, 1931. Judge O'Dunne fined the proprietor of a photographic studio $100 for false advertising in connection with photographic coupons sold to the public.

Indictment No. 1633, 1933. Two persons were indicted for false advertising in connection with certificates for free permanent waves. Records show that a detainer was placed on one of them in another city, but the case was not tried.

Indictment No. 1686, June, 1933. Defendant was indicted and tried before Judge Stanton for advertising in the classified sections of the Baltimore Sun for teachers to enroll for better positions with his organization, which, through the evidence submitted, did not exist. He was sentenced
Undeniably the Commission first saw the light of day in Congress as a trust-busting measure. Its usefulness in regulating interstate advertising and deceptive trade practices was, at best, a second thought. Judges who in later years pointed out this fact have been criticized by the law review writers but their logic is based on the simple history of the statute. The origin of the commission was the result of a popular reaction against the

to six months, but it was suspended on agreement that he would leave the State.

Indictment No. 650, February, 1934. The proprietor of a cut-rate store advertised Virginia Dare wine and sold a product known as White Doe wine made by the Virginia Dare Extract Company. On plea of his attorney that he thought he was within his rights in selling it as a Virginia Dare wine in view of the fact that the makers were the Virginia Dare Extract Co., he obtained a not guilty verdict.

Indictment No. 1231, April, 1936. The defendant was found guilty and paid a fine of $100.

Indictment No. 2009, 1936. Defendant was charged with advertising by misnaming the material content of dresses and advertising merchandise that was sub-standard and blemished without so declaring in the advertising. This case was set for trial December 16, 1936, but was settled by counsel and the case was stetted on agreement.

Indictment No. 3569, 1936. A theatre was charged that, after advertising that Major Bowes and Jack Benny's amateurs were to appear on the stage, the evidence showed that those who did appear were never with Bowes. The defendant pleaded guilty and was fined $25 and costs by Judge Albert S. J. Owens.

**Police Magistrates’ Cases.**

Magistrate Kanft (1929). Advertising sign in window misleading as to price of merchandise, large 25¢ sign—small “on the dollar.” Ordered removal within two hours.

October, 1931, N. W. Police Court. Classified ad for sale of furniture, alleged to be her household equipment. Proved she was substituting factory shipments. Held for court, $500 ball. Adjusted before magistrate and dismissed at request of the Better Business Bureau.

Held for grand jury on $500 ball. Adjusted before further action. Eastern District (1935).

Continuation of “Last day—going out of business” signs. Ordered to remove signs by court. Central District (1935).

Going out of business. Charges were that stock had been bought and was being sold by purchaser, so was already “Out of business.” Court ordered signs removed. Central District, 1936.

Classified mover’s ad, “3 rooms $4.00, 6 rooms $7.00.” Continued to charge other prices. Magistrate Fine, N. W. District, ordered him to change advertising copy (1936).

No case involving these statutes has been before the Maryland Court of Appeals.

For a listing of the State statutes, a cross-section summary of the prosecutions under each reported by local Better Business Bureaus, and all court constructions of such statutes, see pamphlet entitled “The Law of False Advertising,” by the writer of this article, printed in July, 1942, by The Daily Record Co., Baltimore, and distributed privately by The Better Business Bureau of Baltimore.


growing power of the large and expanding business institutions in this country which became known, in the parlance of the stump speakers, as monopolies.

As far back as 1890, the Sherman Anti-trust Act\(^2\) had been enacted by Congress to put down a wave of combinations in the railroad and other industrial realms. Enforcement of the Sherman Act, viewed in retrospect, must be branded as a complete failure. Combinations of corporations continued to be formed. Indeed, there was much to be said in the public interest for the development of large railroad lines under single control, rather than the series of jerkwater lines which the policy of the Sherman Act seemed to encourage. However, the people, as opposed to the "interests", saw in the growth of these combinations a real or potential threat to their liberties. Small business saw itself frozen out by big business. The politicians lent a friendly ear to this clamor. In 1903, Roosevelt I, who was something of a liberal in his own right, established a Bureau of Corporations which he attached to the Department of Commerce and Labor. The apparent object of this new Bureau was to investigate the organization and conduct of corporations and combinations engaged in interstate commerce, except common carriers, and to report its findings to the President, who in turn would make recommendations to Congress. It was thought that the publicity resulting from these governmental investigations of business would discourage the forming of combinations in restraint of trade. This device fell far short of its announced purpose.

In 1911, in the famous Standard Oil case\(^3\) the Supreme Court applied what it called a "rule of reason" to large corporate combinations, although upholding a dissolution of the oil group. This decision so frightened the trust-busting fraternity that a well-organized campaign was launched. "Little business" and consumer elements joined hands. Both the Democratic and Republican parties, in their campaigns of 1912, adopted planks in their platforms

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3 Standard Oil Co. v. United States, 221 U. S. 1 (1910).
calling for reform legislation and opposing the extending tentacles of corporate interests.

The Democratic candidate that year, Governor Wilson of New Jersey, was himself an old hand at championing the rights of the little fellow against the encroachments of monopolistic interests. Back in 1898, when a professor at Princeton, he had published a textbook called "The State". This had discussed the capitalistic system under a democracy and the part that free trade and open competition should play under our form of government. Thus he was able in the 1912 campaign to elucidate his doctrines without benefit of ghost writers.27

Upon election, President Wilson met the issue with two measures: (1) a strengthening of the anti-trust laws which became known as the Clayton Act,28 intended to supplement the Sherman Act by declaring certain specific practices illegal and (2) creation of the Federal Trade Commission with the dual mission of investigating combinations in restraint of trade and of blocking, in the language of the Act, "unfair methods of competition in commerce." In addition, the Federal Trade Commission was given the power to administer the Sherman Act, designed to break up combinations in restraint of trade.29

There is nothing in the background or origin of the Commission to indicate that its sponsors expected it to have any special control over advertising. Its birth-marks were all those of anti-trust and monopoly. Yet almost from its inception the Commission has devoted its major efforts to the advertising field.

Certainly the need was there, if not the specific authority. Patent medicine advertising was the curse of the day. It is doubtful that people were killed, or even made worse, by drinking the stuff. But a campaign developed and gathered momentum. A United States Senator declared of patent medicine vendors: "They are the people who for the sake of a few dirty dollars are willing to imperil

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the comfort, the wealth and the lives of millions of people who cannot protect themselves.” It was pointed out that the very words “patent medicine” were fraudulent because of thousands of remedies not more than half a dozen were actually patented.

The Commission jumped whole-hog into cleaning up patent-medicine advertising, as well as other fields. Strangely, most all of its complaints originated, not with its own staff or with the public, but with competitors. It has been estimated that from the beginning up to the present time, practically ninety-five per cent of all complaints lodged with the Commission have been initiated by one competitor against another.

Misleading and deceptive advertising has consumed the time and energies of the Commission almost to the complete exclusion of its original assignment of trust-busting, as well as its other activities. This is not a recent trend but has been chronic from the first. Although charged with the administration of anti-trust legislation under the Sherman and Clayton Acts and with the administration of the Miller-Tydings, Robinson-Patman and Webb-Pomerene Acts, sixty-five per cent of its complaints during one typical year dealt with deceptive advertising. Of a total of 370 complaints issued, 241 charged misleading advertis-

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31 “In the field of medicine, human credulity learns little from experience”, wrote Dr. Cramp. “In the purchase of any kind of merchandise, except that sold for the alleged alleviation or cure of disease, the buyer has a chance of learning eventually whether or not he has been swindled. In the purchase of an automobile, a piano, or a suit of clothes, time will prove whether it was a good or a bad bargain; nature, through its agencies of wear and tear, makes clear whether one has been cheated. But when we go into the market to buy medicament or medical service, we are at sea, for here we have nature not as an assistant to aid our judgment but as an opponent to confuse it. In from 80 per cent. to 85 per cent. of all cases of human ailments, it is probable that the individual will get well whether he does something for his indisposition or does nothing for it. The healing power of nature—via medicatrix naturae—fortunately for biologic perpetuity, works that way. The seller of medicaments, then, obviously starts with at least an eighty per cent. chance in his favor. The pills and panaceas of today are colloquially, but incorrectly, called ‘patent medicines’; Incorrectly, because among the thousands of remedies offered to the public for the self-treatment of disease there are probably not half a dozen that are really patented.” Nostrums and Quackery and Pseudo-Medicine, by Arthur J. Cramp, 3rd Ed., Intro. p. VII; 103 F. (2) 538 (1939).
32 (1940) 8 Geo. Wash. L. R. 249, 262.
The reasons for the Commission's heavy list to the advertising side appear to have been two-fold: (1) a personal or political desire on the part of the early commissioners to clean up this field, impelled by public clamor in the patent medicine and other groups and (2) friendly court decisions. It will be recalled that the original Act gave the Commission jurisdiction only over "unfair methods of competition in commerce." It was not until 1938, with the adoption of the Wheeler-Lea Act, that Congress added the words "and unfair or deceptive acts or practices in commerce." Thus for the first twenty-three years of its life the Commission, in cracking down on phoney advertisements, was under the statutory compulsion of showing that some competitor was being injured thereby.

The courts were lenient with the Commission in the great majority of cases and read broadly into or around this statutory language. The first real court test of the powers of the Commission came in 1919 in the Sears Roebuck case and resulted in a victory for the Commission's exercise of its powers. Holding that the Commission represented the government as parens patriae, it ruled that it was not necessary for the commissioners to prove that any competitor had been damaged or that any purchaser had been deceived. They are to "exercise their common sense as informed by their knowledge of the general idea of unfair trade at common law," the Court said, adding "and thus to stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers."

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34 Supra, n. 29.
35 Sears Roebuck and Company v. Federal Trade Commission, 258 F. 307 (C. C. A. 7th, 1919). Another early case which gave the Commission a good start in its campaign was Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483 (1922). There the Supreme Court, speaking through Mr. Justice Brandeis, upheld the Commission in its efforts to prevent the company from falsely advertising as "gray wool", "natural worsted" and "Australian wool" underwear which contained but a small percentage of wool, in some cases as little as ten per cent. He said: "The fact that
This decision looked like the green light to the Commission and it acted accordingly. Following the mandate of the Court it strove to break up deceptive advertising wherever it reared its ugly head, regardless of whether or not it injured competitors. But ten years later, in the *Raladam* case, it ran amok when it tackled Marmola, “a scientific and safe remedy for obesity”, according to the ads. Because it is the leading case on the authority of the Commission and caused amendatory legislation in Congress to enlarge the Commission’s powers, a brief resumé of this case is made.

The Commission contended that the Raladam Company’s advertising of Marmola tablets to reduce weight was “false, fraudulent and injurious to the public.” A cease and desist order was issued. Upon a petition to review the order in the Sixth Circuit Court of Appeals it was held that the Commission had overstepped the bounds and should limit its activities to matters having a fair relationship to enforcement of general anti-trust and anti-monopoly policy. Judge Denison, who wrote the lower court opinion, made some tart comments on the self-medicating habits of the American people and took occasion to toss a few remarks at the personal habits of his colleagues on the federal bench.\(^6\)

Misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practise.”

This practise now is controlled by the wool-labeling act of 1940 which requires all articles containing any wool to be properly labeled. 54 Stat. 1128-33; U. S. C. A., Title 15, Secs. 68-68j (Oct. 14, 1940, effective July 14, 1941).

\(^6\) *Raladam Co. v. Federal Trade Commission*, 42 F. (2d) 430 (C. C. A. 6th, 1930). The Court said, at pages 430-434:

“... The so-called patent medicine habit has a traditional hold upon the masses of the American people. The medical profession has always contended that auto-diagnosis, drug store purchases, and self-medication are dangerous to the public health, and ought to be suppressed or minimized.

... For many years, and particularly of recent years, vast numbers of persons have desired to reduce their weight. Whether there was accumulation of fatty tissue beyond the normal standard for that person—a real obesity,—or whether there was a mere desire to be more slender, the tendency went to such an extent as to become a craze or a fad. Every one knew that a diminution of food intake—diet—or an increase of muscular effort—exercise—would tend to bring reduction. These things were prescribed and controlled by
Applying the theory that only those false advertisements could be banned which injured competitors, the court dived into Marmola's competitive field and came up with the finding that these competitors also indulged in the same lurid advertising and thus were hardly injured, were on the same "index expurgatorius" as Marmola, and in fact were as "relatively disreputable". "It cannot be seriously contended," Judge Denison concludes, "that the machinery of the Commission was intended to give governmental aid to the protection of this kind of trade and commerce."

Upon appeal, the Supreme Court upheld the lower court, and the Commission found itself limited to its original purpose of enforcing the Sherman Act, the Clayton Act and breaking up unfair trade practices which amount to a destruction of competition. Furthermore, the competition to be protected must be legitimate competition and not just another patent medicine. "Certainly", said Mr. Justice Sutherland, "it is hard to see why Congress would set itself to the task of devising means and creating administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another."


"There is no dispute, so far as I am aware, concerning the desirability of forbidding false and misleading advertising. The issue in the Raladam case was simply whether Congress had already given the Commission the power to intervene in the interest of the public where misrepresentation and deception are rife in an entire industry, or whether any legislation is necessary to accomplish this end. It will not be denied that some governmental agency should possess such powers, and that there is none at present better equipped than the Commission."
The loophole found in the Commission's practise by the Supreme Court in the *Raladam* case was adequately plugged by the Wheeler-Lea Amendment of 1938, already referred to. Now the Commission may and does tackle any false, deceptive or misleading advertisement or trade practise, wherever found, without reference to whether a competitor is damaged. There is no doubt now as to the scope of its powers, provided there is an interstate aspect to the case. Whether it will exercise these great powers wisely and in the public interest lies in the lap of the future. Its past record is temperate and constructive. Its present spokesmen are conciliatory. Its chief examiner explained in Baltimore in 1941:

"I wish to assure you at this juncture that the Commission, in taking corrective action in cases involving false and misleading advertising, is not in any sense attempting to exercise the power of censorship, and that it emphatically does not desire any such power. Neither is the Commission arbitrarily attempting to impose its views or desires on the advertiser, as this would constitute a bureaucratic interference with business, repugnant indeed to salutary and free competition, and wholly undesirable alike to the public and to business."

Some of its recent cases involve such questions as the value of aspirin content in "Aspirub" when applied dermally, the question whether there was misrepresentation, or only normal "puffing," in the advertisement of a prostate gland activating device, the reducing value of girth-control salts; the refurbishment of domestic perfumes with French labels; the passing off of American-made soaps as

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38 Supra, n. 29.
"English Tub," and the practice of "giving" valuable encyclopedias to prominent men, in exchange for the use of their names, if only they pay the ten-year service charges on the books.\footnote{Federal Trade Commission v. Bradley, 31 F. (2d) 569 (C. C. A. 2nd, 1929).}

Illustrating how far the Commission's jurisdiction now extends, the Third Circuit Court of Appeals in 1939 upheld a banning of the words "original" and "exclusively" used by the Belmont Laboratories in connection with ads for soap and ointment. It had been claimed for this product, a concoction known as Mazon, that it afforded quick and permanent elimination of eczema and that it was the original treatment of its kind for a variety of skin diseases, including athlete's foot and barber's itch. One ad read: "No other treatment for permanent cure has ever been discovered. Some of the best known skin specialists in the City of Philadelphia are using it exclusively and praise it highly."

Judge William Clark of Trenton, whose opinions are uniformly colorful, made good use of the material here afforded. In connection with the use of the word "original" he had this to say:

"Here 'original' appears to be used in the two senses of 'novel' and 'not otherwise obtainable'. Strictly speaking, therefore, it has no bearing on efficacy and so no relation to false hopes. But it has, it seems to us, a harmful connotation appropriate to each sense. The implication of newness is well recognized. In law what is old may be good, but in science progress is prized. One has a vision of thousands of doctors and druggists working in thousands of hospitals and laboratories and emerging with—Mazon."\footnote{Belmont Laboratories v. Federal Trade Commission, 103 F. (2d) 538, 541 (C. C. A. 3rd, 1939).}

Another recent case from the same circuit concerned Pep Boys, Inc. This corporation had obtained a trademark on the name "Remington" to be used upon its particular
brand of radios. The Court upheld the Commission's order prohibiting the use of this name on radios on the grounds that the name had a long-established, distinct and special connotation in the public mind in connection with typewriters (Remington Rand, Inc.) and ammunition (Remington Arms). The Court said:

"The test is whether the natural and probable result of the use by petitioner of the name 'Remington' makes the average purchaser unwittingly, under ordinary conditions, purchase that which he did not intend to buy. A deliberate effort to deceive is not necessary nor must the Commission find actual deception. . . ."47

This decision, if followed, may have a far-reaching effect. The beleaguered advertiser now must not only be truthful; he also must make sure that neither his trade name nor his ad deceives anyone, even unwittingly.

Before concluding, passing mention might be made of other federal agencies which check advertising and other trade practices. One is the Post Office Department whose postal regulations provide that criminal prosecution may be brought for using the mails to defraud. There is in the regulations a requirement of proof of intent to defraud. This has not been a popular statute with the clean advertising group because of the difficulties of proof, the necessity of proceeding in criminal law, and the fact that the statute seems to emphasize the purity of the mails over the protection of the consumer.

In the food and drug field, there is an elaborate set-up for the control of false advertising through the Federal Pure Food and Drug Act of 1906,48 together with its more recent amendments. This is the Act which grew out of Upton Sinclair's "The Jungle" and which not only regulates the advertising and sale of food and drugs but now, by an amendment which redefines the simple term "drugs", regulates a great many other things such as, for example,
diathermic devices, obesity regulators and the whole lush and lucrative field known as the cosmetics industry.  

As to the cantankerous subject of alcoholic beverages, the federal government closely patrols liquor and beer advertising. During one year, it disapproved 9,000 applications for label approval, out of the total of more than 90,000 acted upon, or ten per cent. More than 2,800 proposed advertisements were reviewed and many were disapproved. Typical of the ads disapproved were these: "America's Fastest Selling Applejack"; "Drink it tonight and you will feel like a million tomorrow"; and various illustrations, such as religious objects, women, children and athletes, which subjects are termed "socially objectionable."  

All this governmental paternalism is a far cry from the lusty days of the horse-trader when caveat emptor was in full flower. Today it is not the buyer but the seller who must watch his step, lest he run afoul of the State advertising statutes or the long, strong arm of the Federal Trade Commission and the other federal agencies. That some sort of regulation of advertisers is necessary in modern times is considered now beyond debate. This was indicated by the best-seller of a decade ago, the book called "One Hundred Million Guinea Pigs", which exposed hundreds of deceptive trade practises and rang the bell of consumer-consciousness throughout the nation.  

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51 Federal Alcohol Administration, Annual Report to Congress (1940), pages 7, 13, 16, 17, 18; (1940) 53 H. L. R. 828, 834.  
52 Kallet and Schlink, One Hundred Million Guinea Pigs (1932).  
53 One law review writer on the subject concludes his article with these words: "A marked consumer consciousness characterizes recent federal activity, both legislative and administrative. But the mere suppression of outright falsehood is not the ultimate solution, unless it is to be accompanied by a reasonable standard of truth. Confronted with a bewildering variety of products and the skillful advocacy of the advertiser, the modern purchaser needs information for intelligent buying. . . . Representation of the consumer interest in the Federal Government is still in a gestational stage. A possible solution lies in the centralization of control over advertising in one articulate and independent agency, dedicated to the consumer welfare and serving also as the nucleus for consumer education. Such an agency might more effectively extirpate the evils of dishonest advertising by uniting business, government and consumer in a con-
Today there are well-organized consumer groups, disinterested and energetic, whose purpose is to check and double-check the many representations made for certain advertised products. Their particular ward and beneficiary is the housewife, who performs the lion's share of public buying.

Leading among these unofficial agencies are the Better Business Bureaus found in nearly every large city, which are maintained and financed by local business interests—a sort of self-regulation and self-policing of the trade. They are doing under great difficulty a work of increasing importance.

What effect will war-time economies have upon this question?

In all lines of trade, the problem of the merchant today is not to sell his goods but to get the goods to sell. There is little incentive for the vendor to overstate his case or even to advertise at all, except to keep his trade name before the public. Thus far there has been little diminution in advertising copy but the immediate future of advertising is, to say the least, uncertain.

This writer ventures the opinion, however, that the work of advertising's policemen, both official and unofficial, will be even more important during the war years than heretofore. Merchants cut off from their "leaders" by war products priorities must of necessity turn to other lines. They must sell the public, accustomed to the best, a rather poor substitute; or they must sell the public something entirely different from what it wants or has been used to. If radios are unavailable, how about phonograph records, for instance? And if refrigerators are "frozen" how about the old-fashioned ice box?

This task of diverting the consumer into the purchase and use of ersatz materials and substitute products will call for all the ingenuity that the advertising profession
certed drive for the protection of the welfare of 130,000,000 persons weary of being guinea pigs." (1940) 53 Harv. L. R. 828, 841-2.

For other articles, see National Government and False Advertising (1933) 19 Iowa L. R. 28; Consumer's Protection Under the Federal Pure Food and Drugs Act (1932) 32 Col. L. R. 720; and notes in (1933) 31 Mich. L. R. 804; (1936) 22 Va. L. R. 812; (1939) 39 Col. L. R. 259.
can muster. Naturally, there will be some exaggeration, misstatement and deception, new in character because descriptive of a new or hitherto unadvertised product.

The task of the policing agencies, therefore, not only will continue unabated but will be fraught with many new and perplexing problems. Eternal vigilance not only is the price of freedom but also is the price of maintaining fair trade practices in the difficult years of adjustment just ahead. The advertiser must be on his toes no less tomorrow than today or yesterday. For the policy of these, our modern times, expressed in custom and fortified in statute, is "Let the seller beware".