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**Deceptive Reference To Manufacturer's List Price As
Unfair Trade Practice**

*Giant Food, Inc. v. FTC*¹

Petitioner, a Delaware corporation operating retail stores in the Washington, D.C. metropolitan area, including Maryland, sought review of a cease and desist order issued against it by the Federal Trade Commission. The order

¹ 322 F. 2d 977 (D.C. Cir. 1963).

was aimed at Giant's practice of comparing its prices to the "manufacturer's list price" in advertising small appliances, although in fact the manufacturer's list price was not the usual and customary retail price in the area. The FTC had held Giant's practice to be in violation of section 5 of the Federal Trade Commission Act² prohibiting "unfair or deceptive acts or practices in commerce". The petitioner contended that its form of advertising was legitimate for purposes of price comparison. The Court of Appeals, in affirming the FTC order, held that, although such reference to manufacturer's list prices was not unlawful per se, it would constitute a deceptive trade practice if it could reasonably be interpreted to be misleading to the public.

Under the broad prohibition of section 5 of the Federal Trade Commission Act,³ the FTC has concerned itself with a great variety of business practices. One group of these practices may be classified as misrepresentation, and involves misleading or deceptive conduct operating primarily to injure the consuming public.⁴ Usually competitors are affected by misrepresentation only indirectly, where they suffer a diversion of trade to a rival.⁵ The instant case, which is an example of such misleading or deceptive practice, deals with price advertising, a subject that has been under increasing scrutiny by the FTC⁶ because of the growing importance of that practice in the changing competitive conditions of modern business.

By the terms of the statute,⁷ the FTC has been given virtual carte blanche to determine what constitutes an unfair or deceptive trade practice, subject to the requirements of due process and sufficiency of evidence.⁸ To this

² Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1958).

³ 15 U.S.C. § 45(a) (1958). "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful."

⁴ 87 C.J.S. *Trademarks, Trade-Names, and Unfair Competition* § 228(b) (1954). "[I]t is not necessary to find actual deception or that any [specific] competitor has been damaged, and a cease and desist order is justified . . . on the assumption that deception necessarily tends to promote unfair competition." *Id.* at 645.

⁵ *Electro Thermal Co. v. Federal Trade Commissioner*, 91 F. 2d 477 (1937), *cert. denied*, 302 U.S. 748 (1937).

⁶ BNA Antitrust & Trade Reg. Rep. No. 130, at A-9 (Jan. 7, 1964).

⁷ 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1958). The statute itself nowhere gives any specific criteria as to what will constitute "unfair methods of competition" or "unfair or deceptive acts or practices". See also 2 Trade Reg. Rep. 7000 (1964) which notes that "the terms are not defined in the act" and the businessman seeking guidance must look to the rulings of the Commission and the courts to determine whether the practice has been ruled on and under what circumstances it might be unfair.

⁸ 15 U.S.C. § 45(b)(c) (1958). See also 16 C.F.R. § 3.14 (1960) (evidence); 16 C.F.R. § 3.16 (1960) (hearings); 87 C.J.S. *Trademarks, Trade-*

end, it has set up certain standards of its own — industry trade practice rules and/or Guides — to which it refers in deciding whether a practice is or is not unfair. These are used in conjunction with its previous findings and, in any given case, may be subject to such other guidelines as seem applicable.⁹

The FTC Guides on deceptive pricing, promulgated in 1958,¹⁰ were based on certain general principles of interpretation stated therein. These principles indicate the basic outlines of FTC policy regarding pricing: advertisements and representations generally are considered in their entirety, with an eye to the over-all impression they produce upon the public rather than what their literal meaning may be; and ambiguous representations are read so as to protect the trusting, and not just the sophisticated, customer, regardless of whether or not there was any deliberate attempt to mislead.

The 1958 Guides were recently revised and have been superseded by a new set, adopted December 20, 1963.¹¹ These revised Guides do not indicate any change in the fundamental principles outlined in the former Guides, but they do represent an attempt by the FTC to furnish the businessman with a more concrete practical aid in conforming his conduct to the desired standards of fairness in the field of price advertising.

Specifically, the 1963 Guides divide the types of pricing practices regulated into five classes,¹² each covered by one Guide clearly spelling out the requirements for the practices with which it deals.

Guide 1. *Former price comparisons.* These involve an offered reduction from the advertiser's own former price. The former price must be the actual bona fide price at

Names, and Unfair Competition § 222 stating that the general rules of evidence in criminal prosecution apply and that evidence must be sufficient to establish the particular offense charged beyond a reasonable doubt (1954). *Id.* § 230(c) noting the requirement of a fair and public hearing at a reasonable time and place with reasonable notice to interested parties.

⁹ Evidence of impressions of the general public and/or jury findings on similar or comparable fact situations may be presented at FTC hearings. (2 Trade Reg. Rep. ¶ 7521 (1964).) See also *James S. Kirk & Co. v. FTC*, 59 F. 2d 179, 183 (7th Cir. 1932), *cert. denied*, 287 U.S. 663 (1932) in which the judgment of the FTC was held to be subject to a contrary interpretation by the Bureau of Standards and the court said that it was "expedient for other departments of the government, including the judiciary, to accept such construction if for no other reason than that of consistency."

¹⁰ U.S. Federal Trade Commission, *Guides Against Deceptive Pricing* (1958).

¹¹ 2 Trade Reg. Rep. ¶ 7897, § 14.10 (1964).

¹² *Ibid.* It should be noted, however, that the Introduction to § 14.10 states that the Guides are not "intended to serve as comprehensive or precise statements of law" but as practical aids only.

which the article was offered to the public on a regular basis for a reasonably substantial period of time. It might be noted that this does not necessarily preclude a former price at which no sales were actually made. In such a case, however, the advertiser is put on guard that the price must be one at which the merchandise was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of business, and in good faith. In addition it must be clear to the public that the former price was an asking and not a selling price, if no sales were actually made at that price.

Any price comparison based on a fictitious former price is prohibited. Included in the prohibition are deliberately inflated mark-ups,¹³ prices at which the article was never offered at all, prices not used in the regular course of business, prices used in the remote rather than the recent past, prices not openly offered to the public, and prices not maintained for a reasonable time.

Advertisements not specifically mentioning the former price but containing some general term such as "sale" or "reduced to" must in fact offer something more than an insignificant or nominal saving, and it is the advertiser's responsibility to see that it does.¹⁴

Guide 2. *Retail price comparisons and comparable value comparisons.* This is a commonly used form of bargain advertising, representing that the advertiser is selling below the prices being charged in his area for a particular article or for one of like grade and quality. In such cases, the advertiser must be reasonably certain that the higher price to which he compares his own price does not appreciably exceed the price at which substantial sales of the article, or one essentially similar and obtainable in the area, are being made.¹⁵

¹³ For an example of this practice see *People v. Minjac Corp.*, 4 N.Y. 2d 320, 151 N.E. 2d 180 (1958) where toy manufacturer marked up his original price excessively, then advertised toys at "20%-40% Off" and sold them at prices either the same or in excess of the prevailing price in the community.

¹⁴ *People v. Minjac Corp.*, *supra* note 13.

¹⁵ The Guide (2 Trade Reg. Rep. § 14.10(a)(3) (1964)) gives as an example of such a misleading practice: Retailer advertises Brand X pens as having a "Retail Value \$15.00, My Price \$7.50" when in fact only a few small suburban outlets charge \$15 and all the larger outlets around the main shopping areas charge around \$7.50. See also *Niresk Industries, Inc. v. FTC*, 278 F. 2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960). This case involved a mail order business in kitchenware in which an electric fryer was advertised in *Life* magazine as having a regular value of \$39.95 while the advertiser offered it for from \$6.95-\$8.95. The actual retail value in the area was around \$12-\$20 and the advertiser's *regular* price was \$6.95-\$8.95.

Guide 3. *Advertising retail prices which have been established or suggested by manufacturers (or other non-retail distributors)*. The practice objected to in the instant case comes under this category and it is in this area that the FTC has made probably the most sweeping changes in the revised Guides.¹⁶ Involved here are advertised reductions from a manufacturer's list price or suggested retail price. To the extent that these "list" prices do not correspond to prices at which a substantial number of sales are made, the advertisements may mislead the consumer. The danger of deception arises on the one hand from the belief of the general public that a suggested retail or "list" price is the one at which an article is generally sold, and on the other hand from the widespread failure of retailers to observe such list prices because of the advent of broad-scale retail discounting.

This Guide encompasses *any* means employed for advertising such prices, including large-scale, mass media advertising, pre-ticketing, direct mail advertising and distribution of promotional material or price lists to be displayed to the public.¹⁷ Its standards would be applicable to the

¹⁶ 2 Trade Reg. Rep. ¶ 7897, § 14.10(c) (1964). The 1958 Guides, U.S. Federal Trade Commission, *Guides Against Deceptive Pricing* (1958), dealt with this type of pricing practice under the heading of "Saving Claims" and included under the same heading former price comparisons. Each of these has been treated in the new Guides as a separate category (Guides 1 and 3), the new format presumably indicating an added importance and need for reconsideration of these practices. The 1958 Guides not only considered both practices together but dealt with them in somewhat skeletal form. No claim "which represents or implies a reduction or saving from an established retail price, or from the advertiser's former price" was to be used unless:

- a) the statement applies to the specific article offered for sale (as opposed to similar or comparable merchandise);
- b) the saving is from "the usual and customary retail price . . . in the trade area, or areas, where the statement is made" (or, in the case of former prices, from the "advertiser's usual and customary retail price . . . in the recent, regular course of business"); and
- c) the statement "clearly shows whether the saving or reduction is from the usual and customary retail price . . . in the trade area" or from the advertiser's former price.

There is no discussion or indication of what sort of conduct, specifically, might reasonably be expected to meet these requirements.

The 1963 Guides undertake to give much more elaboration as to the variations of conduct covered and the reasoning likely to be applied in testing them. This is especially marked in Guide 3 (retail prices), with which we are primarily concerned here. This Guide does not limit itself to a flat, general prohibition, but indicates significant factors which will be considered — advertising mechanics and methods, the understanding of the consuming public, the influence of current retailing and advertising patterns, and the size and type of the particular advertiser. Most important, it sets out specific examples of the kind of practice likely to be disapproved by the FTC and the degree of honesty and good faith which will be required of the advertiser to prevent such disapproval.

¹⁷ 2 Trade Reg. Rep. ¶ 7897, § 14.10(c) (2) (1964).

national or regional manufacturer himself, a mail-order distributor, or a local retailer, either individually or in combination.¹⁸ Obviously, not all suggested prices are fictitious, and an advertiser should be safe in referring to them if they are prices at which substantial, as opposed to isolated or insignificant, sales are regularly made in his trade area. The Guide makes a significant distinction, however, between the "standard of care" required of the local retailer, in contrast to the large-scale regional or national manufacturer. The former is held to at least a general knowledge of prices actually charged in his trade area, whereas the latter is expected to make an honest estimate of actual retail value but is not required to make a detailed investigation of the prevailing price of his products throughout the entire trade area.¹⁹

Guide 4. *Bargain offers based upon the purchase of other merchandise.* Such offers may take many forms ("Free", "Buy one — get one free", "2-for-1 Sale", "Half-Price Sale", "1¢ Sale", "50% off")²⁰ but all purport to offer bargains in the form of additional merchandise to be given on condition the customer purchase a particular article at the price usually asked by the advertiser. Since these are "conditional" offers, all the terms and conditions must be made clear at the outset.²¹ Furthermore, the seller may not increase his regular price or decrease the quantity or quality of the article required to be bought.

Guide 5. *Miscellaneous price comparisons.* This covers other less common, though multitudinous, forms of bargain advertising, controlled by the general principles discussed heretofore. Included are various practices, some of which were listed in the 1958 Guides as separate classes, such as

¹⁸ 2 Trade Reg. Rep. ¶ 7897, § 14.10(c) (5) (1964).

¹⁹ 2 Trade Reg. Rep. ¶ 7897, § 14.10(c) (1964). The Guide gives a fairly explicit indication of what is expected in each case:

As to the retailer, he is safe in using the price if a number of principal retail outlets in the area are regularly selling the article at the manufacturer's suggested price. It would, however, be deceptive if the list were being followed only by small suburban stores, house to house canvassers, and credit houses accounting for an insubstantial volume of sales in the area.

The large-scale manufacturer will meet his burden if he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price, determined, for example, by a market survey) which does not appreciably exceed the highest price at which substantial sales are made in his trade area. For an illustration of the factors which may be involved in such a case, see *Rayex Corp. v. FTC*, 317 F. 2d 290 (2d Cir. 1963) where the FTC's order was set aside because there was no evidence of actual retail prices in any given sales area of New York City and no showing of actual recurrent and frequent sales within a given trade area at less than the pre-ticketed price.

²⁰ 2 Trade Reg. Rep. ¶ 7897, § 14.10(d) (1) (1964).

²¹ 2 Trade Reg. Rep. ¶ 7897, § 14.10(d) (3) (1964).

advertising a retail price as a "wholesale" price, "factory" prices, "seconds" or "irregulars", advance sales and "limited" offers.²² In all cases the advertisers must make sure that the bargain offer is genuine and truthful.²³

Comparison of the revised Guides with those issued in 1958 indicates the changing standards upon which the FTC is basing its determinations of deceptive pricing practices. The *Giant Food* case, although it was decided before the revised Guides were adopted, seems to be clearly within the new trend, and to foreshadow the change in emphasis which the Guides now clarify.²⁴

The revised Guides appear to give new importance to certain types of pricing practices which the FTC considers to be most prevalent in business activities today and hence most likely to require clear safeguards for the protection of the consuming public. Most notable in this regard is the detailed consideration given to former price comparisons (Guide 1) and, particularly, to advertising of retail prices established or suggested by manufacturers (Guide 3), both of which were dealt with together as one category under the 1958 Guides. The new Guides are considerably more specific and detailed in attempting to indicate the bounds of permissible conduct. They give examples not only of practices likely to be regarded with suspicion but also of circumstances which would operate to relieve the advertiser of culpability in such cases — for example: the geographic scope of his business, his good faith, and the reasonableness of factors (such as market surveys or knowl-

²² 2 Trade Reg. Rep. ¶ 7897, § 14.10(e) (1964). The 1958 Guides listed nine categories:

- I. Saving Claims
- II. Limitations on the use of saving claims
- III. Comparable and Similar Merchandise
- IV. "Special Sale", etc.
- V. "Two For One" Sales
- VI. "½ Price" — "1¢ Sale" Conditioned on Purchase of Additional Merchandise
- VII. Factory or Wholesale Prices
- VIII. "Pre-Ticketing"
- IX. Imperfect, Irregular, Seconds

Of these, Guides IV, VII, and IX have been grouped together in the new Guide 5.

²³ 2 Trade Reg. Rep. ¶ 7897, § 14.10(e) (1964).

²⁴ It should be noted that one of the FTC Commissioners, Everette MacIntyre, objected to the revised Guides on the ground that the changes made were too sweeping, and that the previous objective tests for deception are replaced with the subjective one of trying to read the businessman's mind. A brief discussion of his statement appears in BNA Antitrust & Trade Reg. Rep. No. 130, at A-10 (Jan. 7, 1964).

edge of local prices) upon which list prices and price comparisons are based. There is less emphasis on older or more obvious practices, such as the "two for one" and "½ price" sales, lumped together in the 4th Guide, and the "special" sales, factory or wholesale prices, and "irregular" or "imperfect" claims, combined in the 5th.

There is more emphasis and clarification in the areas where greater shading and more subtle misrepresentation are possible — those concerning the use of potentially ambiguous price comparisons in Guides 1 (advertiser's own former prices), 2 (area retail prices and comparable values), and 3 (manufacturer's suggested retail prices). There is throughout an effort to deal with such comparatively recent business phenomena as the retail discount house and the far-flung manufacturing-distributing empire in such a way as to provide both the honest merchant and the public with practical aids for their protection in advertising and buying.²⁵

As both the 1958 and the 1963 Guides point out in introductory material, departures from them are not unlawful per se.²⁶ The determining factor in any given case probably will still be whether the average buyer, the "non-expert", would be misled by the particular practice involved,²⁷ and *not* whether the representation is true or

²⁵ For a recent case decided under the new Guides (though initiated under the old ones) and giving some indication of changes that may be expected in their application, see *Majestic Electric Supply Co., Inc.*, 3 Trade Reg. Rep. ¶ 16,825 (1964). In 1962 respondent distributor of catalog merchandise was found by the hearing examiner to have engaged in deceptive price advertising in two respects: claiming to be a "wholesale" distributor although it dealt almost exclusively with the ultimate purchaser; and referring to a "retail" price which was in fact a manufacturer's suggested price higher than the usual and customary retail price in the area. The FTC, in a ruling released March 23, 1964, affirmed the examiner's finding in the more familiar area of "wholesale" price advertising (now covered in Guide 5), but reversed on the reference to "retail" price (Guide 3). In explaining the reversal, the FTC specifically referred to the new Guide 3 and pointed out that, contrary to the standards set forth there for large regional or national distributors, there had been no showing that respondent's advertised "retail" price appreciably exceeded the highest price at which substantial sales were made in the area in which its catalog was circulated.

²⁶ 2 Trade Reg. Rep. ¶ 7897, § 14.10 (Introduction) (1964).

²⁷ In *FTC v. Sterling Drug, Inc.*, 317 F. 2d 669, 674 (2d Cir. 1963) the court discusses this at some length: "The central purpose of the provisions of the Federal Trade Commission Act . . . is in effect to abolish the rule of *caveat emptor* . . . by a rule which gives to the consumer the right to rely upon representations of fact as the truth. . . . [P]roof of intention to deceive is not requisite . . . since the purpose of the statute is not to punish the wrongdoer but to protect the public."

Quoting *Aronberg v. FTC*, 132 F. 2d 165, 167 (7th Cir. 1942), the court said:

"[T]he buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the

false in fact²⁸ or specifically intended to deceive.²⁹ In the revised criteria, however, the FTC does seem to strike a different balance for the potentially "gray" areas to which it gives the greatest attention (Guides 1, 2 and 3). Here, especially in the claims involving manufacturer's list prices or suggested retail prices, the likelihood is that the good faith of an advertiser, if clearly ascertainable on the basis of the given standards, may outweigh the fact that the public or some part of it could be or has been misled to a small degree.

All bargain advertisements have in common the creation of an impression that the customer is being offered an opportunity to make purchases under unusually favorable conditions, and, to the extent that such is not the case, they have been and will continue to be found misleading and deceptive by the FTC. The *Giant Food* decision, involving as it does one of the types of price advertising given new emphasis in the revised Guides,³⁰ is indicative of the "evolving content" of a statute "designed by Congress as a flexible concept"³¹ and not confined to the usual common-law methods or tests of misrepresentation. The decision and the Guides together are parts of a mosaic of potentially infinite variety and variation covering virtually every aspect of the pricing field and subject to such changing regulatory outlines as may be dictated by current business practices.

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mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."

It then continues, "Unlike that abiding faith which the law has in the 'reasonable man', it has very little faith indeed in the intellectual acuity of the 'ordinary purchaser' who is the object of the advertising campaign."

See also 1 CALLMAN, *UNFAIR COMPETITION & TRADE-MARKS* § 19.2(a)(1), at 341 (2d ed. 1950): "The general public has been defined as 'that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases . . . too often are governed by appearances and general impressions'."

²⁸ For an elaboration of this, see *Kalwajtys v. FTC*, 237 F. 2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957): "A statement may be deceptive even if the constituent words may be literally or technically construed so as not to constitute a misrepresentation." See also *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188 (1948): "Advertisements as a whole may be completely misleading although every sentence separately considered is literally true."

²⁹ *Gimbel Bros., Inc. v. FTC*, 116 F. 2d 578, 579 (2d Cir. 1941): "Whether or not the advertiser knows the representations to be false, the deception of purchasers and diversion of trade is the same. . . . Hence a deliberate effort to deceive is not necessary to make out a case of 'using unfair methods of competition' within the prohibitions of the statute."

³⁰ Advertising retail prices which have been established or suggested by manufacturers (or other non-retail distributors). 2 Trade Reg. Rep. ¶ 7897, § 14.10(c) (1964).

³¹ 87 C.J.S. *Trademarks, Trade-Names, and Unfair Competition* § 228(a) (1954).