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CONSUMER RIGHTS AND ADVERTISING

§ 24. 1. Introduction

This consumer rights chapter describes your rights when responding to an advertisement. It contains the following sections:

§ 24. 2. Basic Rules Concerning Deceptive Advertising

§ 24. 3. Relevant Statutes

§ 24. 2. Basic Rules Concerning Deceptive Advertising

A. Deceptive Advertising

An advertisement is considered deceptive and a violation of the Maine Unfair Trade Practices Act (5 M.R.S.A. § 207) if:

- (1) It contains a misrepresentation,¹ omission or practice that is likely to mislead the consumer;²
- (2) The consumer is “acting reasonably under the circumstances”; and
- (3) The misrepresentation, omission or practice is “material,” that is “likely to affect the consumer’s conduct or decision with regard to a product or service.”³

¹ Even literally true statements can be deceptive. *See Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992) (cheese advertisement was technically true but nonetheless would mislead consumers). The Maine Supreme Judicial Court has found that it was deceptive for a real estate broker to use the phrase “For Sale By Owner.” *See Help-U-Sell, Inc. v. Maine Real Estate Commission*, 611 A.2d 981 (Me. 1992) (“While the First Amendment protects commercial speech, it does not protect speech that is misleading.”).

² Mere “puffery”—overenthusiastic salesmanship—is not so deceptive as to be illegal. *See Rodio v. Smith*, 587 A.2d 621, 624 (N.J.1992). In this case the court concluded that the slogan “You’re in good hands with Allstate” was puffery. Here is the Court’s reasoning:

Plaintiffs assert that the slogan was a false representation of fact that Allstate was looking out for plaintiffs’ best interest. An essential element of common law fraud is the misrepresentation of a material fact.... Similarly, the Consumer Fraud Act requires an “unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment...of any material fact.” Allstate’s slogan is not a statement of fact, and therefore cannot rise to the level of common law fraud... Nor is the slogan a deception, false promise, misrepresentation, or any other unlawful practice within the ambit of the Consumer Fraud Act. However persuasive, “You’re in good hands with Allstate” is nothing more than puffery.

But see State of Maine v. Frederic Weinschenk et al., No. CV-00-244 (Me. Super. Ct., Kenn. Cty., December 23, 2002) (builder’s misrepresentations of the quality of construction so deceptive as to violate the Maine Unfair Trade Practices Act) (currently on appeal to the Maine Supreme Judicial Court).

³ *See generally, Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d 1431 (9th Cir. 1986), *cert. denied*, 479 U.S. 838 (1986). *See also*, F.T.C. Enforcement Policy—Deceptive Acts and Practices, 5 CCH Trade Reg. Rep. ¶150, 455 (1983); *F.T.C. v. Pantion I Corp.*, 33 F.3d 1088 (9th Cir. 1994) (deceptive to represent a hair product as “effective” when its efficacy was due solely to a placebo effect).

Please Note: It is not necessary to prove that the advertiser *intended* to be deceptive.⁴ On the other hand, a simple mistake in the advertisement (e.g., the wrong price) is not usually considered a binding contract offer which the business must honor. If a consumer believes a deceptive ad has caused a loss of money, the consumer can bring an unfair trade practice action pursuant to 5 MRSA § 213. See Chapter 3 in this Guide.

Failure to state a “material fact” can be illegally deceptive. “Material” facts are those facts known to the seller that would significantly influence the consumer’s decision to buy or the price the consumer would be willing to pay.⁵

B. Advertiser Claims Must Be Provable

Advertisers must be able to *substantiate* claims made in ads. For example:

- (1) If an advertisement claims, “50% off our regular selling price,” then the advertiser must be able to show that the sale price is in fact 50% less than the regular price he has offered the item for a reasonably substantial period of time in the relatively recent past; or
- (2) If an advertisement claims, “Mouthwash X—The Cold Killer,” then the advertiser must be able to prove that Mouthwash X does in fact prevent the common cold.⁶
- (3) If an advertisement claims health benefits can be realized from a high-fiber, low cholesterol diet then the advertiser must have a “reasonable basis” for such claims but not absolute proof. In 1996, the F.T.C. entered into a Consent Order that prohibited Mrs. Field’s Cookies, Inc. from promoting a cookie line as “low fat” when in fact two of the cookies contained 5.5 grams of fat—an amount that exceeds the three or fewer grams of fat per serving that qualifies as “low fat” under Food and Drug Administration regulations.

C. Price Comparisons Must Be Fair

The advertisement cannot compare the sale price of an item to a former price unless the product was openly and actively offered for sale:

- (1) at the former price;
- (2) for a reasonably substantial period of time;
- (3) in the relatively recent past.

⁴ If misrepresentation is intentional and serious enough it can also be a Class D crime. The Deceptive Business Practices Act states that it is illegal when a seller intentionally: “makes or causes to be made a false statement of material fact in any advertisement addressed to the public.” See 17A MRSA § 901 (1) (G).

⁵ For example, the FTC found it to be a deceptive failure to state a “material fact” when an advertisement for hearing aids failed to reveal that many people would not be helped by the hearing aid in making sound discriminations in group situations. *Re: Mother Hearing Aid Distributors, Inc.*, 78 F.T.C. 709 (1971). See also the Federal Trade Commission Guide, Household Furniture Industry (16 C.F.R. § 250) which states in part:

Industry members should not sell, offer for sale, or distribute any industry product under any representation or circumstance, including failure to disclose material facts, that has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers with respect to its utility, construction, composition, durability, design, style, quality, quantity or number of items, model, origin, manufacture, price, grade, or in any other material respect.

Violations of this Guide may be an unfair trade practice.

⁶ See, e.g. *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977); *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994) (deceptive to claim hair loss product “effective” when its efficacy was due solely to a placebo effect).

The advertiser must not invite price comparisons with competitors unless the higher price is actually being charged by other retailers in the same trade area. The F.T.C.'s guideline in this area states that such price comparisons must be made in "good faith and not for the purpose of establishing a fictitious higher price."⁷

D. Sufficient Quantities Of Advertised Goods

An advertiser should have sufficient quantities of goods on hand to meet reasonably expected demand. If only limited quantities are available, then the advertisement must clearly state the fact. If the ad features a number of the items, those in short supply should be singled out. *Unless the advertisement specifically states that there are only a limited number of a particular item, then rain checks should be given if sufficient quantities were not on hand.*⁸

E. False Prices

Factory outlet stores may not advertise a price as "wholesale" when it is in fact a "retail price" or the same price charged by the large retail outlets in the outlet's sales area. In addition, a factory outlet may not represent that it is selling at "factory prices" unless it is selling at the prices paid by retail buyers purchasing *directly* from the manufacturer. Confusing statements about prices can also be illegal. Maine has entered into Consent Decrees with AT&T and MCI which included a court-ordered injunction against misrepresenting in their ads the costs of their long distance service.⁹

F. "Free" Items That Are Not Free

Advertiser should not offer a product as "free" in conjunction with the sale of another product unless the companion product is sold at no more than the price at which it is usually sold in substantial quantities. "Free" offers are sometimes a problem in the sale of cars. If the dealer bargains over the price of the car, then the value of the "free" offer (*e.g.*, a television or a free trip) can be recouped by the dealer by tougher bargaining over the price of the car. The net result could be that you would not have received anything for "free." You would pay for the cost of the TV or trip in the higher price of the car. The Federal Trade Commission has issued a Guide¹⁰ which describes four illegal practices in connection with "free" offers:

- (1) Failure to disclose conditions of "free" offer: it is unfair to represent that an article or service which is not an unconditional gift is "free" unless all the conditions to the receipt and retention of the "free" article or service are clearly and conspicuously set forth.
- (2) Price increase: it is unfair when, with respect to any article required to be purchased in order to obtain the "free" article or service, the offeror increases the ordinary and usual price of such article. A change in trade-in policy may have the same effect as a price increase. A change in markup would have the same effect as a price increase only if it increased the retail price to the consumer.

⁷ See *State ex rel. Woodward v. May Dept. Stores Co.*, 849 P.2d 802 (Colo. App. 1992) (promotional mark-up price deemed deceptive).

⁸ The Federal Trade Commission's Retail Food Store Advertising and Marketing Practices Rule (16 C.F.R. Part 424) states that if a food store does not disclose the limited availability of an advertised item and runs out of that item, then the store is excused if it offers customers one of three alternatives:

- A. A "rain check" that allows customers to buy the item later at the lower price;
- B. A substitute item of comparable value to the sale item; or
- C. Some kind of compensation that is at least equal in value to the advertised item.

A store is also excused if it can show that advertised items were ordered in adequate time for delivery and in quantities to meet reasonably anticipated demands.

⁹ *State of Maine v. AT & T Corporation*, CV-00-139 (Me. Super. Ct., Kenn. Cty., August 5, 2002).

¹⁰ 16 C.F.R. Part 251.

- (3) Quality reduction: it is unfair when, with respect to any article required to be purchased in order to obtain the “free article or service, the offeror reduces the quality of such article.
- (4) Quantity reduction: it is unfair when, with respect to any article required to be purchased in order to obtain the “free” article or service, the offeror reduces the quantity or size of such article.

G. “Zero” Interest Financing

Watch out for hidden-charges in “zero” interest financing offers that appear weekly in some stores’ newspaper and television ads. Here are some examples:

- (1) In many “zero-interest” programs, you do not have to pay interest for the first six months, or whatever period of time is advertised. However, if you do not pay off the full price of the purchase within that time period, you will then be charged interest on the entire purchase amount dating back to the purchase date, even if you have paid off most of the balance. Often, the interest rate charged by the store is 20 percent or more—higher than most bank credit cards.
- (2) In some no interest programs, your payment each month does include an interest charge. If you make all of your payments on time and pay off the entire purchase price by the agreed-upon date, the interest you have paid is credited back to you. If you miss a payment, pay late one month or do not pay off the whole balance by the end of the agreed- upon period, you don’t get your rebate.
- (3) Some stores offer “no-interest” financing but inflate the selling price to make up the difference.
- (4) “No-interest” financing offers can include minimum-purchase requirements or may apply only to specific brands.

H. Bait and Switch

“Bait and switch” is the advertising of a product that seems very desirable and then “switching” the eager customer to another product that usually costs more. Typically, the seller will disparage the advertised “bait” or will tell the customer it’s not available. The F.T.C. has gone to court numerous times to prevent such advertising¹¹ and has published a Guide that describes the different kinds of bait and switch ads that are unfair trade practices. *See* 16 C.F.R. Part 238.

I. Deceptive Disclaimers

A deceptive claim cannot be “cured” by a later, inconspicuous disclaimer. Under Maine law a clause is conspicuous “when it is so written that a reasonable person against whom it is to operate ought to have noticed it...” *See* 11M.R.S.A. § 1-201 (10). In other words, what an advertisement “gives” in regular size print cannot be later taken away in “mouse” print.

§ 24. 3. Relevant Statutes

A. Unfair Trade Practices Act: 5 M.R.S.A. §§ 206-214

This statute provides the Attorney General with basic authority to declare unlawful “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” The Legislature by using such broad and undefined phrases as “unfair” acts and

¹¹ *Tashof v. F.T.C.*, 437 F. 2d 707, 709 (D.C. Cir. 1970) (false advertising of “low priced” eyeglasses).

“deceptive” acts gave the Attorney General the broad authority indeed to protect consumers in Maine. Section 213 of this Act allows individual consumers to bring private lawsuits if they have been the victim of an unfair method of competition or an unfair deceptive trade practice. If their suit is successful, they can also be awarded damages or their money back and the cost of their attorney fees. Under the Maine Unfair Trade Practices Act it is *not* necessary to prove the advertiser intended to be deceptive. But an injured consumer seeking relief must show the deceptive ad caused a loss of money.

B. Uniform Deceptive Trade Practices Act: 10 M.R.S.A. §§ 1211-1216

This act prohibits persons from using deceptive trade practices such as advertising goods or services with intent not to sell them as advertised. It applies to newspapers if they know an advertisement is deceptive. Among the deceptive trade practices listed at 10 M.R.S.A. § 1212(1) are:

- (1) Passing off goods or services as those of another;
- (2) Using deceptive representations or designations of geographic origin in connection with goods or services;
- (3) Advertising goods or services with the intent not to sell them as advertised;
- (4) Making false or misleading statements of fact concerning the reasons for, existence of or amounts of, price reductions;
- (5) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

This statute allows a business to bring an action against a competitor who is using deceptive advertising to unfairly compete for customers.

C. Deceptive Business Practices: 17-A M.R.S.A. § 901

This statute describes business practices that are so deceptive as to be a class D crime. An example of such fraudulent practices would be when a person intentionally makes false statements in an advertisement or when a newspaper knowingly publishes an intentionally false advertisement. Among the acts specifically prohibited at 17-A M.R.S.A. § 901(1) are:

- (1) Offering for sale less than the represented quantity;
- (2) Selling “adulterated or mislabeled” goods;
- (3) Making false statement of material facts in advertisements;
- (4) Advertising goods as part of a scheme with the intent (1) not to sell or provide the advertised property or services at all, (2) at the price or quantity offered, or (3) in a quantity sufficient to meet reasonably expected demand.

D. Going Out Of Business Sales: 30-A M.R.S.A. §§ 3781-3784

Under these statutes, a “going-out-of-business” sale must be just that. For example, the merchant cannot purchase new stock just for the going out-of-business sale. Before a business can advertise a final sale it must obtain a “going-out-of-business sale” license from the municipality (30-A M.R.S.A. § 3781(1)).

E. Business Opportunities: 32 M.R.S.A. §§ 4691-4700-B

This statute regulates sellers of business franchises. A business franchise involves a new business plan that costs the purchaser at least \$250. A work-at-home opportunity could fall within the definition of a “business opportunity.” The seller of business franchises must be registered with the Securities Administrator (121 State House Station, Augusta, ME 04333 (207-624-8551)) and must make certain disclosures to any potential buyer. *See* 32 M.R.S.A. § 4693.

F. Credit Advertising: 9-A M.R.S.A. §§ 8-101-8-401

Federal and State Truth-In-Lending laws require full disclosure in credit advertising of the actual price consumers will be charged. The applicable state laws are:

- (1) Truth-In-Lending Disclosure Requirements (*e.g.*, the finance charge, annual interest percentage rate (9-A M.R.S.A. §§ 8-101-8-209);
- (2) Credit Card Restrictions (*e.g.*, limits on card holder liability) (9-A M.R.S.A. §§ 8-301-8-303); and
- (3) Fair Credit Billing Requirements (*e.g.*, how consumers can contest incorrect billing charges) (9-A M.R.S.A. §§ 8-401-8-404).

If you have a credit advertising complaint, you should contact the Office of Consumer Credit Regulation (207-624-8527 or 1-800-332-8529).

G. Attorney General Rules Governing The Sale Of New Cars

The Attorney General has issued Unfair Trade Practice Act Rules (5 M.R.S.A. § 207(2)) which describe deceptive advertising practices when selling cars. *See* § 8.13 (Rule 105.7, 105.8) in this Guide and 10 M.R.S.A. §1174 (4)(c), which prohibits dealers from using “any false or misleading advertisement”