

## CHAPTER FIVE

### Step Right Up

#### *Advertising and Your Rights*

AN ADVERTISEMENT IS NOT OFTEN THE BASIS OF A CONTRACT. We learned that a contract can only be formed when there is offer, acceptance, and consideration. Store advertisements are not usually offers. The law, perhaps somewhat artificially, classifies them as *invitations to bargain*. But there are exceptions to this.

Suppose a store advertises that it will give a free gift or a special discount to "the first one hundred customers" or to a person who has made some other special effort. If so, the store has made an offer. You can accept it by making the special effort successfully, which constitutes consideration. This could be the making of a contract. In fact, a major department store got into hot water a few years ago by carelessly advertising, "Be among the first 1,000 shoppers at our store tomorrow to win a \$1,000 shopping spree." The wording suggested to some people that all 1,000 would win -- a million-dollar proposition for the store.

### FALSE ADVERTISING

**False or deceptive advertising** has legal implications beyond contract law. False or deceptive advertising is a kind of deceptive act or practice forbidden under federal law and in most states, notably under the consumer fraud laws (discussed in chapter 15).

In false or deceptive advertising, the merchant's intent isn't important. The overall impression conveyed is what counts. False or deceptive advertising may mislead a consumer about a product's place of origin, nature or quality, or maker. The product can be property, services, or even credit (federal and some state laws regulate credit ads so you can shop for credit). An example of creating a misleading impression about a product's place of origin is putting French labels on sweaters made in Arkansas.

Similarly, promising first-quality socks and delivering irregulars or seconds is creating a misleading impression about an item's nature or quality. Claiming a cheap -- or even an expensive -- counterfeit watch is a Rolex is creating a misleading impression as to its maker. That particular kind of **palming off** is also a violation of federal trademark law, which is a special type of unfair competition law (see sidebar). As for services, false advertising might lead you into thinking that someone has qualifications (such as being a master carpenter) that he or she actually does not have.

## TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION

Unfair competition law is meant to prevent merchants from engaging in practices that deceive the public about the origin or quality of goods. One way this is done is by the enforcement of **trademark** rights. A trademark is an authenticating symbol or mark that assures the consumer that a commodity or good comes from a certain source -- i.e., a brand. The best-known trademarks are worth millions of dollars. For example, if just anyone could put **ACoca-Cola@** on a soft drink (and in years past many tried), people would never know what they were buying. But, because of that company's vigorous enforcement of its trademark rights, when you buy a Coke, you know you're getting a Coke. That benefits Coca-Cola, and it benefits consumers. Similarly, a **service mark** is a symbol meant to convey the source of services, as opposed to goods, and is protected by the trademark laws as well. A **trade name** is the name under which a merchant does business.

Trademarks that are **registered** with the federal government are often designated with a **®** symbol, while the **™** mark usually indicates that the merchant claims **common-law** trademark rights, but has not met the legal requirements needed to secure federal registration. Registration of a trademark enhances its owners ability to prevent infringement.

Illegal use of a trademark is called **infringement**. Willful infringers are subject to serious court action, and possibly criminal penalties, for violation of protected trademarks. Because trademark infringement is a fraud on the public, and because companies have a strong incentive to protect the value of their trademarks, it is one of the most-litigated areas of unfair trade practices.

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To avoid state and federal strictures against false or deceptive advertising, advertisements must be accurate about material aspects of the product or service that is offered. **Material,** means that a representation, statement, or depiction in the ad would likely affect a consumer's purchase or use of the advertised product or service . In other words, it is important to your decision to purchase. If an advertisement led you to expect green spark plugs and you got gray ones, the ad probably did not materially

mislead you. The standard would be what would be material to a reasonable consumer. Most of us would say the color of spark plugs doesn't really matter, no matter how serious an interior designer a car buff is.

That doesn't mean you get to stop thinking for yourself. There may be nothing wrong with an advertisement that features a dress that looks better on a fashion model than on a normal person. That's why we have fashion models. (There might be a problem if something special was done to make the *dress* look better than it really does.) And it's also ok for an advertiser to claim that it makes the best tasting fried chicken on the market. This kind of claim is "puffing"--that is, exaggerated sales talk without the talk. Consumers need to regard such claims with skepticism.

But it might be deceptive advertising to portray a toy in a way that suggests performance far beyond reality. And if the sparkplug ad said the plugs would last 50,000 miles and they failed early on, the advertisement was probably misleading. If you are not satisfied, complain to the company, report the matter to the state or local consumer protection office or contact the National Advertising Division of the Council of Better Business Bureaus or an industry self-regulating body.

### **Bait and Switch**

The *bait* is an advertisement luring you with the promise of an unbeatable deal, say on an appliance or car. The *switch* happens at the dealership, when the salesperson tells you that the advertised model isn't available or is "not for you." Invariably, it's a more expensive model that *is* for you. The salesperson has "switched" you from the one you thought you wanted to buy.

**Bait and switch** is illegal in most states and under federal law if the advertised model was never available in reasonable quantities. Stores are not necessarily bound by *honest* mistakes in newspaper ads, such as misprints, or if disparagement of the advertised product is used to discourage you in favor of another model. You probably have the right under state law to see the model that appeared in the newspaper ad. If the store is **fresh out of them** and refuses to offer you a raincheck, it also may be guilty of false advertising. You're allowed to be persuaded, but keep up your guard, and don't let someone talk you into buying a model you can't afford. If insisting on your rights gets you nowhere, keep the ad, get the salesman's name (and that of anyone else you spoke to) and let the merchant know that you'll be contacting the state (and, if there is one, local) consumer affairs authority or attorney general. And then *do it!* If a **misprint**

claim sounds fishy, the local consumer protection authorities may know if this store has a history of such sloppiness.

### **PRICE TAGS AND WINDOW SIGNS**

You get to the store and find an incredible bargain -- a dress you know is worth at least \$100, marked \$10. You take it to the register, where the salesperson does a double-take -- there's been a mistake, he or she says apologetically.

Though certain stores would sell you the dress for \$10, the general rule under state law is that you're not entitled to get the dress for \$10 where there's every indication that an honest mistake was made. After all, what have you lost, besides the chance at a windfall? Disappointment by itself is not consideration.

On the other hand, what if the same dress were displayed in the store window with a prominent sign reading, **FINAL CLEARANCE -- \$10!!**? Here state law might well give you the right to insist on the advertised price (watching out again for the bait and switch). Though the FTC might consider both displays and price tags as ads, the states may consider a store-window display more like a public advertisement than a price tag is, since its intent is to induce you to do something you wouldn't have done -- go into the store.

Keep in mind that there are advertising watch dogs out there--your local Better Business Bureau, the state attorney general's office, and the Federal Trade Commission. The FTC routinely monitors advertising for false, deceptive, and unfair claims. Once the FTC required a mouthwash manufacturer to stop claiming its product prevented colds, when there was no evidence that it did. Besides having to stop making the claims, the advertiser had to run counter-advertisements to educate the public that its previous ads were wrong.

In a similar vein, many cities and states have laws regulating **Going Out of Business** sales. Merchants who want to run one of these may need a license, since in past years there was a rash of decade-long **Going Out of Business** sales that deceived consumers into thinking they were getting unique opportunities. Now you can't run such a sale in these jurisdictions unless you're really going out of business.

But don't wait for the government to act before you apply a skeptical eye to advertising. Advertising is one of the great areas of modern media creativity, and is as old as free enterprise.

Your job is to use your head while appreciating the advertiser's craft. Remember to take advertiser's claims with a grain of salt, do your comparison shopping, and watch out for the bait and switch.

But if, despite all your care, you are victimized by false or deceptive advertising, you may be entitled to do more than complain to the authorities. Under the consumer fraud laws, you may be entitled to extra damages when you are victimized by deceptive trade practices. We will discuss this more in depth in [chapter 15](#).

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