

if he or she does not take affirmative action to cancel before the end of that period.

“Free trial” or “risk free trial” means an offer or agreement to provide merchandise to a consumer for a period of time without any terms or conditions.

“Home appliance” means any electrical, mechanical or thermal article produced or distributed for sale to a consumer for use in or around a permanent or temporary household or residence including, but not limited to, air conditioners, cameras, computers, dehumidifiers, dishwashers, dryers, electric blankets, electronic games, fans, freezers, motorized kitchen aids, ovens, radios, ranges, refrigerators, stereo equipment, televisions and washers.

“Merchandise” means any objects, wares, goods, commodities, services or anything offered directly or indirectly to the public for sale or rental at retail.

“Multi-tiered pricing” means a form of offer where the price of merchandise or the extent of a discount is contingent upon the consumer’s merchandise selections, such as the number of units purchased, the purchase of other merchandise pursuant to the terms of the advertiser’s offer, or the total dollar amount of the consumer’s order, for example, “Buy two cans of soda, get a third can at half price.”

“Percentage-off discount” means an offer to sell merchandise expressed in terms of a percentage reduction or range of percentage reductions in price, such as “10% off” or “25% to 50% off.”

“Point of display” means a location within a retail establishment where an item of merchandise is displayed for the purpose of selection by the consumer with the intention of purchase.

“Point of sale” means any location in a retail establishment where purchases of merchandise are totaled by a scanner and payment is made by a consumer.

“Point of sale discount” means a price reduction which, although it is advertised or posted at the point of display, is automatically applied to reduce the retail price of the merchandise at the time it is scanned for consumer purchase, or a price reduction manually entered through a cash reduction or similar device, then scanned for consumer purchase.

“Price advertisement” means any advertisement in which a specific dollar price is stated with regard to specific advertised merchandise.

“Price reduction advertisement” means an advertisement which in any way states or suggests directly or indirectly that merchandise is being offered or made available for sale at a price less than that at which it has been routinely sold or offered for sale in the past or at which it will be sold or offered for sale in the future. The following words and terms or their substantial equivalent, when used in any advertise-

ment except when used exclusively as part of the advertiser’s corporate, partnership or trade name, shall be deemed to indicate a price reduction advertisement: sale, discount, special savings, price cut, bargain, reduced, prices slashed, clearance, regularly, usually, cut rate, originally, formerly, warehouse or factory clearance, buy one get one free, at cost, below cost, wholesale.

“Rain check” means a written statement issued by an advertiser allowing the purchase of designated merchandise at a previously advertised price.

“Scanner” means an electronic system that employs a laser bar code reader to retrieve product identity, price and other information stored in computer memory.

“Targeted discount” means a price reduction on merchandise which reduction is restricted to customers designated by the advertiser, such as those who possess a card or other device bearing a scanner-readable code issued by the advertiser, a particular type of credit card, or some other device which, when read by the scanner, shall apply the discount at the time of purchase.

“Trade area” means that geographical area in which an advertiser solicits or makes a substantial number of sales.

Amended by R.1996, d.309, effective July 1, 1996 (operative August 15, 1996).

See: 28 N.J.R. 1186(a), 28 N.J.R. 3304(a).

Added “Factory outlet”, “Fictitious former price” and “Former price or price range”; deleted “Reference price”; and amended “Advertisement” and “Home appliance”.

Amended by R.1998 d.489, effective October 5, 1998.

See: 29 N.J.R. 3772(a), 30 N.J.R. 3657(b).

Rewrote the section.

Amended by R.2000 d.460, effective November 20, 2000.

See: 32 N.J.R. 3282(a), 32 N.J.R. 4126(a).

In the definition of “Advertisement”, amended the N.J.A.C. reference.

Amended by R.2012 d.016, effective January 17, 2012.

See: 43 N.J.R. 1130(a), 44 N.J.R. 166(b).

In definition “Advertisement”, deleted “, catalog” following “tag”, and inserted “catalog,”; and added definitions “Free-to-pay conversion” and “Free trial”.

Case Notes

Advertisements allegedly in violation of the Consumer Fraud Act, but not the subject of a specific regulation implementing the Act, are best left for a jury determination. *Leon v. Rite Aid Corporation*, 774 A.2d 674 (2001).

An advertisement violating regulations implementing the Consumer Fraud Act is per se a violation of the Act. *Leon v. Rite Aid Corporation*, 774 A.2d 674 (2001).

Held that a franchise or business opportunity venture is “merchandise” within intentment of the Consumer Fraud Act; failure of franchiser to provide franchisee with a rule disclosure statement was a per se unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation in violation of the Consumer Fraud Act. *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super 84, 510 A.2d 1197 (Law Div.1986).

13:45A-9.2 General advertising practices

(a) Without limiting the application of N.J.S.A. 56:8-1 et seq., the following practices shall be unlawful with respect to all advertisements:

1. The failure of an advertiser to maintain and offer for immediate purchase advertised merchandise in a quantity sufficient to meet reasonably anticipated consumer demand therefor. When an advertisement states a specific period of time during which merchandise will be available for sale, a sufficient quantity of such merchandise shall be made available to meet reasonably anticipated consumer demand during the stated period. When no stated period appears in the advertisement, a sufficient quantity of merchandise shall be made available to meet reasonably anticipated consumer demand during three consecutive business days commencing with the effective date of the advertisement. The requirement of this subsection shall not be applicable to merchandise which is advertised:

- i. On an in-store sign only with no corresponding out-of-store sign;
- ii. As being available in a specific quantity; or
- iii. As being available in a "limited supply," pursuant to a "closeout sale" or pursuant to a "clearance sale" if such offering meets the definition of a closeout sale; or if represented to be permanently reduced.

2. The failure of an advertiser to specifically designate within an advertisement which merchandise items possess special or limiting factors relating to price, quality, condition or availability. By way of illustration, and not by limitation, the following shall be deemed violative of this subparagraph:

- i. The failure to specifically designate which merchandise items are below cost, if any amount less than all advertised items are below cost, when a statement of below cost sales is set forth in an advertisement;
- ii. The failure to specifically designate which merchandise items, if any, are damaged or in any way less than first quality condition;
- iii. The failure to specifically designate merchandise as floor models, discontinued models or one of a kind, when applicable;
- iv. The failure to clearly designate or describe the retail outlets at which advertised merchandise will or will not be available. Such information need not be disclosed on any in-store advertisement.

3. The failure to conspicuously post notice of advertised merchandise, on the business premises to which the advertisement applies, in proximity to the advertised merchandise or at all entrances to the business premises. Such notice may consist of a copy of the advertisement or may take the form of a tag attached to the merchandise or any sign with such terms as "sale," "as advertised," "20% off."

4. In any price advertisement in which a home appliance is offered for sale, the failure of an advertiser to disclose the following information relating to the advertised merchandise: the manufacturer's name or the mer-

chandise trade name, the model or series number and such other information as may be necessary to clearly delineate the advertised item from other similar merchandise produced by the same manufacturer.

5. The use of any type, size, location, lighting, illustration, graphic depiction or color resulting in the obscuring of any material fact. Disclaimers permitted or required under this section, such as "terms and conditions apply" and "quantities limited," shall be set forth in at least 10-point type.

6. The use of the terms "Public Notice," "Public Sale" or words or terms of similar meaning in any advertisement offering merchandise for sale, where such sale is not required by court order or by operation of law, other than a sale conducted by an auctioneer on behalf of a non-business entity.

7. Describing the advertiser through the use of the terms "warehouse," "factory outlet," "discount," "bargain," "clearance," "liquidators," "unclaimed freight," or other words or terms of similar meaning, whether in the advertiser's corporate, partnership or trade name or otherwise, where such terms do not reflect a bona fide description of the advertiser being described.

8. Whenever an advertiser provides a raincheck for an advertised item which is not available for immediate purchase, the failure to:

- i. Honor or satisfy such raincheck within 60 days of issuance unless an extension of such time period is agreed to by the holder thereof or, if after a good faith effort an advertiser cannot procure for the holder of the raincheck the advertised merchandise within the 60-day period, failure to offer the holder of the raincheck a different item of merchandise of substantially the same kind, quality and price as the original advertised merchandise; and
- ii. Give written or telephonic notice to the holder thereof when the merchandise is available and hold such merchandise for not less than 10 days after giving such notice or to the end of the 60-day period for which the raincheck is valid, whichever is longer, for all merchandise with an advertised unit price greater than \$15.00;
- iii. Offer a raincheck to all customers who are unable, due to the unavailability thereof, to purchase the advertised merchandise during the period of time during which the merchandise has been advertised as available for sale; and
- iv. Conspicuously post its raincheck policy on a sign in at least one of the following locations:

- (1) Affixed to a cash register or location of the point of sale;
- (2) So situated as to be clearly visible to the buyer;

- (3) Posted at each store entrance used by the public;
- (4) At the location where the merchandise was offered for sale;
- (5) In an advertisement for merchandise; or
- (6) Printed on the receipt of sale.

9. The making of false or misleading representations of facts concerning the reasons for, existence or amounts of price reductions, the nature of an offering or the quantity of advertised merchandise available for sale.

10. The failure of an advertiser to substantiate through documents, records or other written proof any claim made regarding the safety, performance, availability, efficiency, quality or price of the advertised merchandise, nature of the offering or quantity of advertised merchandise available for sale. Such records shall be made available upon request for inspection by the Division or its designee at the advertiser's regular place of business or central office in New Jersey, or, at the advertiser's option, the Division's designated offices, for a period of 90 days following the effective date of the advertisement.

11. The use, directly or indirectly, of a comparison to a suggested retail price, inventory price, invoice price or similar terms that directly or indirectly compare or suggest the comparison between the cost of supply and the price at retail for the advertised merchandise.

12. Use of the term "cost," "wholesale" or other similar terms to describe an advertised price where such price is not equal to or less than the price per unit paid by the advertiser to the manufacturer or distributor of the merchandise. In the computation of the price per unit of the advertised merchandise, freight may be included if the advertiser pays for same and is not reimbursed therefore, but handling and all overhead or operating expenses shall be excluded.

13. The advertising of a free-to-pay conversion as a "risk free trial," or a "free trial," or as any other offer that requires the consumer to do nothing other than accept merchandise or a service without any obligation, unless the advertisement clearly states the length of the period the offer is without obligation or that terms and conditions apply.

Amended by R.1993 d.6, effective January 4, 1993.

See: 24 N.J.R. 684(a), 25 N.J.R. 192(a).

Added new (a)11.

Amended by R.1996 d.309, effective July 1, 1996 (operative August 15, 1996).

See: 28 N.J.R. 1186(a), 28 N.J.R. 3304(a).

In (a)1iii excluded merchandise represented to be permanently reduced, and added provision relating to use of the terms "cost" or "wholesale".

Amended by R.2007 d.337, effective November 5, 2007.

See: 39 N.J.R. 2586(a), 39 N.J.R. 4850(b).

Rewrote (a)8i through (a)8ii; in (a)8iii, substituted "; and" for the period at the end; and added (a)8iv.

Amended by R.2012 d.016, effective January 17, 2012.

See: 43 N.J.R. 1130(a), 44 N.J.R. 166(b).

In (a)5, inserted the last sentence; and added (a)13.

Case Notes

Penalty statute applied retroactively to misrepresentation of food on menu. *Division of Consumer Affairs v. Lubrano*, 94 N.J.A.R.2d (CMA) 93.

Respondent's motion to depose the Executive Director of the Office of Consumer Protection, in furtherance of defense that inspection processes were arbitrary and capricious, denied due to lack of good cause showing that information could not be otherwise obtained. *Div. of Consumer Affairs v. Acme Markets, Inc.*, 3 N.J.A.R. 210 (1981).

13:45A-9.3 Price reduction advertisements; merchandise advertised at a price of less than \$100.00

(a) An advertiser offering a price reduction on merchandise at a price of less than \$100.00 shall, in addition to complying with the provisions of N.J.A.C. 13:45A-9.2:

1. State with specificity in any price reduction advertisement the period of time during which the price reduction shall be applicable, unless that merchandise is advertised in the manner set forth in N.J.A.C. 13:45A-9.2(a) 1i through iii;

2. Ensure that the amount of the price reduction is sufficiently large that the consumer, if he or she knew what the former price was, would believe that a genuine bargain or saving was being offered; and

3. Comply with the provisions of N.J.A.C. 13:45A-9.4 if the advertisement makes reference to a former price or price range; however, this requirement shall not apply to merchandise discount offers made in accordance with N.J.A.C. 13:45A-9.8.

Amended by R.1993 d.6, effective January 4, 1993.

See: 24 N.J.R. 684(a), 25 N.J.R. 192(a).

Deleted (a)3iii; stylistic revisions.

Repeal and New Rule, R.1996, d.309, effective July 1, 1996 (operative August 15, 1996).

See: 28 N.J.R. 1186(a), 28 N.J.R. 3304(a).

Section was "Price reduction advertisements".

Amended by R.1998 d.489, effective October 5, 1998.

See: 29 N.J.R. 3772(a), 30 N.J.R. 3657(b).

Rewrote (a)3.

13:45A-9.4 Price reduction advertisements; items of merchandise specifically advertised at a price of more than \$100.00

(a) An advertiser offering an item of merchandise specifically advertised for sale at a price of \$100.00 or more shall, in addition to complying with the provisions of N.J.A.C. 13:45A-9.2:

1. State the selling price or price range;

2. State the former price or price range or the amount of the reduction in dollars;

3. State with specificity in any price reduction advertisement the period of time during which the price reduction shall be applicable, unless the merchandise is advertised in the manner set forth in N.J.A.C. 13:45A-9.2(a) 1i through iii;

4. Set forth the former price or price range or the amount of reduction in dollars in close proximity to the selling price or price range and the advertised item;

5. Set forth the basis upon which the former price or price range or the amount of reduction in dollars was established in close proximity to the former price or price range of the advertised item. In this regard, terms such as “comparable value,” “competitor’s price,” “our regular price,” or words of similar import shall be used to designate the basis for the former price; and

6. Set forth with specificity when in the remote past a former price of an item of merchandise was effective if it was not actively or openly offered for sale within the advertiser’s trade area in the regular course of business during at least 28 of the 90 days before the effective date of the advertisement. In this regard, when advertising a seasonal sale, such as Christmas dishes, pool supplies, outdoor furniture, etc., actual dates, specific holidays or terms such as “last season,” may be used to describe when the former price was used in the remote past.

(b) A former price or a selling price may be stated in terms of a price range when, and only when:

1. An advertiser operates more than one retail outlet at which advertised merchandise has been or will be available for purchase at different prices in the ordinary course of business. In such case, the price range shall be based upon the sales or offers of sale at the advertiser’s retail outlets; or

2. An advertiser advertises two or more items of comparable merchandise as available at reduced prices, in which case the price range shall be based upon former or usual selling prices of the advertised products.

i. The following examples would comply with this paragraph: “Regular price \$110 to \$125—On sale for \$100”; “Brand X 19” color TV—Regularly \$250 to \$300. Now \$150 to \$200.”

New Rule, R.1996 d.309, effective July 1, 1996 (operative August 15, 1996).

See: 28 N.J.R. 1186(a), 28 N.J.R. 3304(a).

Former N.J.A.C. 13:45A-9.4, “Application of regulation”, recodified to 13:45A-9.7.

13:45A-9.5 Price reduction advertisements; merchandise advertised as a savings of a percentage or a range of percentages

(a) An advertiser offering merchandise for sale at a savings of a percentage or a range of percentages (such as “save 20% or 20% to 50% off”) shall, in addition to complying with the provisions of N.J.A.C. 13:45A-9.2:

1. State the minimum percentage reduction as conspicuously (such as the same size print) as the maximum percentage reduction when applicable; and

2. Set forth the basis upon which the former price was established pursuant to N.J.A.C. 13:45A-9.6(b), in close proximity to the percentage reduction. In this regard, terms such as “competitor’s price” or “our regular price” or words of similar import shall be used to designate the basis for the former price.

(b) Percentage-off discounts made in accordance with N.J.A.C. 13:45A-9.8 shall be exempt from the requirements of (a) above.

New Rule, R.1996 d.309, effective July 1, 1996 (operative August 15, 1996).

See: 28 N.J.R. 1186(a), 28 N.J.R. 3304(a).

Amended by R.1998 d.489, effective October 5, 1998.

See: 29 N.J.R. 3772(a), 30 N.J.R. 3657(b).

Added a new (b).

13:45A-9.6 Pricing; prohibition on fictitious pricing and methods of substantiation

(a) An advertiser shall not use a fictitious former price. Use of a fictitious former price will be deemed to be a violation of the Consumer Fraud Act.

(b) A former price or price range or the amount of reduction shall be deemed fictitious if it can not be substantiated, based upon proof:

1. Of a substantial number of sales of the advertised merchandise, or comparable merchandise of like grade or quality made within the advertiser’s trade area in the regular course of business at any time within the most recent 60 days during which the advertised merchandise was available for sale prior to, or which were in fact made in the first 60 days during which the advertised merchandise was available for sale following the effective date of the advertisement;

2. That the advertised merchandise, or comparable merchandise of like grade or quality, was actively and openly offered for sale at that price within the advertiser’s trade area in the regular course of business during at least 28 days of the most recent 90 days before or after the effective date of the advertisement; or

3. That the price does not exceed the supplier’s cost plus the usual and customary mark-up used by the advertising merchant in the actual sale of the advertised merchandise or comparable merchandise of like grade or quality in the recent regular course of business.

(c) If the former price specifically references a time in the remote past during which it was offered, it shall be deemed fictitious unless substantiated pursuant to either (b)1 or 3 above.

(d) The following examples of fictitious pricing are provided for illustration only and are not intended to limit the