REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

COMPARATIVE PRICE ADVERTISING

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 5

COMMONWEALTH OF VIRGINIA
RICHMOND
1993

Report of the Joint Subcommittee Studying Comparative Price Advertising

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Report of the Joint Subcommittee
Studying Comparative Price Advertising
To
The Governor and the
General Assembly of Virginia
Richmond, Virginia
July, 1992

TO: The Honorable L. Douglas Wilder, Governor,
and
the General Assembly of Virginia

INTRODUCTION

House Joint Resolution 184, 1990, patroned by Delegate S. Wallace Stieffen of Hampton, established a 10-member joint subcommittee to study Virginia's comparative price advertising statute (Appendix A). The membership of the joint subcommittee was appointed as follows: the Speaker of the House appointed Delegates Glenn B. McClanan, Kenneth R. Plum, and Frank D. Hargrove from the House Committee on Corporations, Insurance and Banking, and Delegate S. Wallace Stieffen from the membership at large of the House of Delegates. The Senate Committee on Privileges and Elections appointed Senators Elliot S. Schewel and Clive L. DuVal, II, from the Senate Committee on Commerce and Labor. The Governor appointed Dr. Blue Wooldridge (representing the consumer public), Mr. Robert E. Knowles (representing the retail industry), Dr. Valery Y.R. Bates-Brown (representing the media), and Mr. Thomas J. Gallagher (representing the Better Business Bureau). House Joint Resolution 337, 1991 continued this study during the 1991 interim (Appendix B).

Price advertising is an integral part of retail marketing. Consumers should be able to depend upon advertisements to do their "shopping around." The United States Supreme Court, in Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.[1] found that a market economy must have a "strong interest in the free flow of commercial information"[2] in order to support fair competition. The Court's recognition of free commercial speech rights is not, however, so broad as to restrict the regulation of false or deceptive commercial speech.

Comparative price advertising, in general, is the advertising by a retailer of a product's or service's price as that product's or service's (i) previous price, (ii) price as charged by another retailer, (iii) price as compared to that for similar

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[1]96 S. Ct. 1817 (1976).
[2]Id. at 1827.

goods, or (iv) price as established by a manufacturer's suggested retail list. Under Virginia law, price comparison advertising is allowed only when the comparison price is legitimately established by substantial sales made at that price within the same trade area, or the product or service was offered for sale at the previous price for at least 30 days during the preceding four-month period, or the advertisement contains the date on which sales were made at the former or comparison price. Virginia's statute (§ 18.2-219) carries a Class 1 misdemeanor penalty and, generally, applies to all sales to the public without regard to the type of merchandise or service. The one major exception to this rule, motor vehicle dealer advertising, is regulated under § 46.2-1581.

Virginia's comparative price advertising statute has changed very little in the last 20 years - a time during which the American marketplace has become a national and international exchange. Sumpter Priddy of the Virginia Retail Merchants' Association, which originally suggested the need for this study, testified before the subcommittee that the laws governing merchandising have been slow to recognize the realities of today's marketplace. While retailers are striving to prepare themselves for what economists are calling a new world economy, Virginia's statute, as written, does not reflect today's marketplace. Its unwieldy language alone negates its effectiveness. The purpose of and the need for this statute, however, remain the same - to preserve an atmosphere of fair competition within the retail marketplace and to protect consumers from false and misleading advertising.

1. Fair Competition

Deceptive advertising harms consumers by duping them into purchasing a product which does not perform as promised, costs more than it is actually worth, or is an item the consumer does not need or want. However, these are not the only consequences of deceptive advertising. Misleading consumers as to the price or value of a product disrupts the competitive balance of the marketplace, thus undermining a free market economy.

Consumers have been taught to expect a high level of competitive price marketing for most products. Marketers use price comparisons to inform consumers of the lowest price available. False price comparisons will eventually erode the validity of consumer purchasing patterns to the point where marketers can no longer depend on these patterns for future merchandise planning. Retailers in today's market are now scrambling to find innovative ways to hold "sales" because they have schooled consumers to avoid paying full price. Several retailers and consumer advocates testified that this very environment has crept into Virginia's economy, creating skeptical consumers and damaging the reputation of some retailers.

2. Consumer Protection

Price advertising represents an important source of information for consumers when that information is truthful, fair and can be substantiated. When price advertising is deceptive, consumers end up paying inflated prices if they have relied on a false ad instead of comparison shopping. Consumers

who are subjected to price advertising abuses soon lose confidence in sales promotions and retailers. Moreover, consumer protection advocates maintain, in a market where price comparison claims are not trustworthy, high price becomes the indicator of quality, thereby skewing price competition.

SUBCOMMITTEE DELIBERATIONS

During the course of its study, the joint subcommittee held several public hearings around the Commonwealth to give retailers and consumers an opportunity to comment on comparative price advertising in Virginia Not too surprisingly, both the business and consumer public expressed the need to revise the standards regulating comparison advertising. Consumers have become confused by price comparisons and retailers have been economically disadvantaged by competitors' misleading comparisons. Another major concern for retailers is the requirement that goods be offered for sale for a certain amount of time before a comparative price can be advertised. Retailers contend that they are cannot comparatively advertise a sale that results from overbuying, manufacturers close-outs, or poor judgment by the retailer.

Most retailers who testified before the joint subcommittee advocated greater flexibility in the laws regulating price advertising. They stressed that any changes in Virginia's statutes should comport with federal and other states' law on the subject, an especially important feature to Virginia's national retailers such as Best Products, J.C. Penney Co., and Sears Roebuck & Company. These companies advertise nationally and need to be assured that their advertising meets the standards of the laws of all 50 states and the federal government.

The difficulty in compliance with Virginia's statute also damages consumers. Consumers are highly susceptible to advertised bargains. If this were not so, retailers would not bother to comparatively advertise their sales. Several consumer advocates testified that the term "sale" has lost its original meaning. Comparative price advertising abuses have become so commonplace that many consumers have lost confidence in sales promotions. Consumers can no longer depend on advertising to help them compare items and prices. Abuses of comparative price advertising only serve to make consumers cynical and to stifle competitive marketing by businesses willing to provide genuine price comparisons.

The joint subcommittee received several recommendations from retailers and consumers to ban comparative price advertising. However, the subcommittee's staff concluded that such a ban is in direct conflict with the Federal Trade Commission's policy to encourage truthful comparative advertising and, further, that an absolute ban on comparative price advertising could not easily be sustained in light of the many constitutional problems with restricting free speech. Although it is in the state's best interest to restrict deceptive advertising, the state has other enforcement options available that do not involve an outright ban on free commercial speech (Appendix C).

Most retailers testifying before the joint subcommittee advocated the adoption of the Federal Trade Commission guidelines on comparison price advertising in

statute form. The FTC guidelines are common sense descriptions of intentional and unintentional deceptive price comparisons which retailers should avoid when advertising price comparisons. However, the FTC guidelines are not written in a statutory scheme, do not contain suggested penalties, and are, perhaps, too fundamental. They do not contain the more complicated regulatory methods needed to restrain deceptive comparison advertising. Most importantly, the guidelines simply do not define in concrete terms what is deceptive comparison price advertising.[3]

By the end of 1990, it became obvious to the joint subcommittee that the education process concerning these issues had used all the time allocated for this study. Consequently, the members proposed House Joint Resolution 337, 1991, which continued the study and allowed a much broader consideration of those Code provisions involved in regulating comparative price advertising (e.g., the Virginia Consumer Protection Act, § 59.1-196 et seq.).

STATUTORY AMENDMENT: HOUSE BILL 501 (1992)

The joint subcommittee's recommended statutory amendment repeals existing comparative price advertising standards under the criminal law and adopts the Comparison Price Advertising Act to be enforced under the Virginia Consumer Protection Act. Under this Act, the seller is required to substantiate, upon the request of certain enforcement entities, the basis for any comparison claim. The amendments establish four types of comparison price advertising: (i) comparison to former price, (ii) comparison to competitor's price, (iii) comparison to manufacturer's list price, and (iv) comparison to market value. These four types of comparison price advertising apply to all forms of advertising to the public including in-store or at-site advertising.

In order to compare a sale price to a former price, a seller must meet one of four criteria: (i) the former price is the price at or above which substantial sales were made, (ii) the former price is the price at which identical or comparable goods were offered for sale, in good faith, for a reasonably substantial period of time, (iii) the former price is based on the seller's cost plus the usual and customary retail markup for such goods or comparable goods, or (iv) the date on which either substantial sales or bona fide offers for sale were made at the former price is clearly and conspicuously advertised.

When comparing a price to a competitor's price, the seller must be able to substantiate that the comparison price is a price offered by another seller within the trade area as defined by the ad itself. The ad must include a statement that the comparison price is a competitor's price and not a former price charged by the seller.

Comparisons to "manufacturer's suggested retail price," "list price" or other similar terms must comply with 15 U.S.C. § 45 (a)(1) and the regulations of the Federal Trade Commission. Comparisons to "market value" must be based on offers for sale made by a reasonable number of sellers in the trade area.

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[3] 16 CFR § 233.1 et seq., *Guides Against Deceptive Advertising.*

CONCLUSION

Virginia's comparative price advertising statute has long been problematic for both retailers and consumers who view the law as unwieldy and unenforceable. Hence, the joint subcommittee strove to reach a balance in regulation which would protect consumers yet foster a healthy climate of competition. While the statute is not intended to overburden retail marketers, it is intended to recreate a level playing field for price comparisons.

No regulatory statute works unless it is enforced. Linking comparative price advertising regulation to the Consumer Protection Act and removing it from the criminal law should provide better enforcement tools for use against false price comparisons.

Respectfully submitted,

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Elliot S. Schewel, Vice-Chairman

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APPENDIX

A. HJR 184, 1990

B. HJR 337, 1991

C. Memorandum on Comparative Price Advertising Ban

D. Chapter 768, 1992

APPENDIX A

GENERAL ASSEMBLY OF VIRGINIA--1990 SESSION

HOUSE JOINT RESOLUTION NO. 184

Establishing a joint subcommittee to study the necessity and desirability of revising the Commonwealth's "comparative price advertising" statute.

Agreed to by the House of Delegates, March 9, 1990
Agreed to by the Senate, March 7, 1990

WHEREAS, Virginia's comparative price advertising statute was last amended in 1974 at a time when retail marketing practices and conditions were much different than they are today; and

WHEREAS, certain terms of the statute are ambiguous and indefinite, providing little guidance to the merchant desiring to comply with the law; and

WHEREAS, the advertising standards of the Virginia statute are not consistent with other, more modern business practice standards such as the Code of Advertising recently developed by the Better Business Bureau; and

WHEREAS, it is desirable that the subject of comparative price advertising in today's marketplace be studied to ensure that the Virginia laws on the subject are responsive to that marketplace; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study comparative price advertising in the Commonwealth and to study the need to revise Virginia's statutory law on the subject.

The joint subcommittee shall consist of ten members to be appointed as follows: three members from the House Corporations, Insurance and Banking Committee and one member at-large of the House of Delegates, to be appointed by the Speaker of the House; two members from the Senate Commerce and Labor Committee, to be appointed by the Senate Committee on Privileges and Elections; and the following members to be appointed by the Governor: one representative of the consumer public; one member from the retail industry; one member from the media; and one member from a Better Business Bureau in Virginia. The Department of Agriculture and Consumer Services shall provide assistance upon request of the joint subcommittee.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1991 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

The indirect costs of this study are estimated to be $10,650; the direct costs of this study shall not exceed $7,200.

APPENDIX B

GENERAL ASSEMBLY OF VIRGINIA--1991 SESSION

HOUSE JOINT RESOLUTION NO. 337

Continuing the Joint Subcommittee Studying Comparative Price Advertising.

Agreed to by the House of Delegates, February 4, 1991
Agreed to by the Senate, February 21, 1991

WHEREAS, the Joint Subcommittee Studying Comparative Price Advertising found that the terms of Virginia's criminal comparative price advertising statute were ambiguous and confusing to both retailers and consumers; and

WHEREAS, the joint subcommittee found further that the statute does not govern some deceptive forms of comparative price advertising in current use; and

WHEREAS, the joint subcommittee's work during 1990 was hampered by its restrictive charge under House Joint Resolution No. 184; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Subcommittee Studying Comparative Price Advertising be continued. The membership of the joint subcommittee shall remain the same. The joint subcommittee is continued to study the revision of the comparative price advertising statute and other related criminal statutes as well as the Virginia Consumer Protection Act as it relates to this issue. The Department of Agriculture and Consumer Services shall continue to provide assistance upon request of the joint subcommittee.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1992 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

The indirect costs of this study are estimated to be $10,650; the direct costs of this study shall not exceed $7,200.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of this study.

APPENDIX C

COMMONWEALTH OF VIRGINIA

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DIVISION OF LEGISLATIVE SERVICES

MEMORANDUM

TO: Joint Subcommittee Studying Comparative Price Advertising

FROM: Virginia A. Adkins, Staff Attorney

RE: Constitutionality of Banning Comparative Price Advertising

DATE: November 8, 1990

This memo examines the legality of banning comparative price advertising in Virginia. After a brief introduction of the development of comparative advertising and the application of federal law, the paper focuses on the constitutional barriers to its prohibition.

I. Background on Comparative Advertising

A. Self-Governance/Pre-1979 Period

Although comparative advertising has now become a highly popular form of advertising, on a national level, it was virtually unknown until 1971. Surprisingly, the major obstacles that held back comparative advertising came from the media and self-regulating bodies and not government regulation. Before 1971, two of the three national television networks refused to accept any advertising naming competitors, and national print publications similarly frowned upon advertising that used the names or trademarks of competitors. In 1971, the federal government abandoned its neutral stance and began to exert pressure on the three networks to soften their internal policies against naming competitors in commercials. The federal government's power to regulate advertisement is derived from the commerce clause and is invested in the Federal Trade Commission. Under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), the FTC is empowered to prevent persons, partnerships, or corporations from using unfair methods of competition and unfair or deceptive practices in commerce.

B. Emergence of Federal Regulation

1. FTC's Policy Statement

During the 1970's, FTC conducted several studies to determine whether comparative advertising would benefit consumers. The Commission determined that it would and concluded that comparative advertising would lead to greater sophistication of the public and more rational purchase decisions. FTC's strongly pro-comparative advertising position was eventually codified in 1979. [Sec. 5, 38 Stat. 719, as amended; 15 U.S.C. § 45 (44 Fed. Reg. 47328 & 47329, August 13, 1979)]. Basically, the Commission's policy statement discourages industry restrictions on truthful comparative claims. As defined by the Commission, comparative advertising is advertising that compares alternative brands on objectively measurable attributes or price. However, FTC's policy favoring comparative claims does not immunize them from scrutiny. Deceptive advertising cases that involve comparisons between competitors' products are subject to the same standards of proof and levels of substantiation as any other cases of allegedly deceptive trade practices.

2. FTC Guides on Deceptive Practices.

In addition to the FTC policy statement on comparative advertising, the Commission has also issued guides that govern the conduct in certain areas that have been found to be susceptible to misleading practices. A guide embodies the law of deception in the area and reflects the enforcement intentions of the Commission. The guides do not have the force of law, like a formal regulation, but instead simply set forth the steps that a practical businessman should take to avoid confrontations with the law. In Re Surry, Ltd., FTC 299, 322 (1965). In 1958, the Commission issued its first set of Guides Against Deceptive Pricing, which took a very hard line on both the manufacturer's list or prevailing area price and the retailers own price. A flurry of cases resulted, placing heavy burdens of the manufacturer to ascertain the usual and customary prices in the trading areas. The guides were revised in 1964 using more flexible language and significantly reducing the duties on the sellers. Further revisions were proposed in 1974, but have not been acted on by the Commission to date.

II. State Regulation of Comparative Advertising

A. Impact of FTC Rulings and Guides on State Regulation.

It is clear that Congress did not intend to bar states from stopping unfair business practices which might injure their own citizens. Indeed, the FTC Act which authorizes the Commission to proceed against unfair practices committed in interstate commerce implicitly encourages states to develop their own laws. Holiday Magic v. Warren, 357 F.2d Supp. 20 (1972), vacated on other grounds 497 F.2d 287 (7th Cir. 1973). Because of the flexibility of the federal legislation, many state consumer protection laws are patterned after the FTC Act and specify that their courts may be guided by FTC's interpretations of unfair and deceptive trade practices. Murphy v. McNamara, 36 Conn.Sup. 183, ___, 416. A.2d 170, 174 (1979). Nonetheless, these states

maintain their freedom to exceed FTC requirements in pursuit of better consumer protection for state residents. They contend that their regulations and case law may go beyond what has been prohibited by the FTC, so long as the state regulations or cases are not inconsistent with existing FTC case law. City of New York v. Toby's Electronics, Inc., 443 N.Y.S. 2d 561, 564 (1980).

The total ban of comparative price advertising, however, probably would be determined by the courts to be inconsistent with FTC regulations and case law which have concluded that comparative advertising itself does not impose any threat of deception. In fact, several decisions have ruled that certain price comparisons are not illegal per se under the Act:

- Use of Manufacturer's list price is not unlawful per se; rather it is unlawful only if it is not the usual and customary retail price in the trading area. Giant Food Inc. v. FTC., 322 F. 2d 977, 981 (1963).

- Preticketing is not illegal per se unless the product is not usually sold at retail at the preticketed price in the trading area where the representation is made. Helbros Watch Co. v. FTC, 310 F. 2d 808 (U.S. App. D.C., 1962), cert. denied, 372 U.S. 970 (1963).

Courts recognize that the FTC has built up an expertise which places it in a position to assess the nature of acts and practices to determine whether they have the capacity or tendency to deceive. Trans World Inc. v. FTC, 594 2d 212, 214 (9th Cir. 1979). Therefore, determinations made by the Commission on what constitutes deception have been given great deference by the courts. FTC v. Mary Paint Co., 382 U.S. 46, 48-49 (1965).

B. Constitutional Barrier Imposed by the First Amendment.

Until the mid-seventies, the Supreme Court had held that advertising, "mere commercial speech," was not entitled to First Amendment protection. However, recent Supreme Court decisions have made it clear that the First Amendment does apply to advertising. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1975). The court's rules, however, are still evolutionary. There are indications that there may be reasonable, time, place and manner restrictions placed on commercial advertising. Id. It is also clear that there is no First Amendment protection for misleading advertising or advertising of illegal products. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). Finally the Supreme Court's most recent commercial speech case, Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986), advertising of legal activity may be banned if the legislature has the power to ban that particular activity, e.g., smoking cigarettes, consumption of alcoholic beverages, and prostitution.

Arguably, the ban of comparative price advertising does not constitute a time, place or manner restriction because the regulation would single out speech of a particular content (comparatives) and seek to prevent their dissemination. The court in Virginia Pharmacy specifically rejected Virginia's time, place and manner defense of a statute that prohibited advertisement on prescription drug prices because it referred to content and left no open ample channels for communication of this information.

The fact that there have been many instances of deceptive comparative price advertising has not been used so far as a reason for keeping this type of commercial advertising out of the protection of the First Amendment. Arguably, certain parallels might be drawn between obscenity and comparative price advertisements. Just as obscenity defeats First Amendment protection, so might comparative methods in advertising price be thought to defeat First Amendment protection. In the absence of First Amendment protection, the standard becomes quite relaxed. In order to pass congressional muster, it would be necessary only that the state regulation responding to commercial deception be reasonably necessary to the prevention of future deception. U.S. v. Readers Digest Association, 662 F.2d 955, 965 (3rd Cir. 1981), cert. denied 455 U.S. 908 1982). However, the argument that all comparative price advertising is per se deceptive would be difficult to support in virtue of FTC's findings to the contrary and its evaluation that there is consumer value in comparatives. As stated previously, FTC decisions would be given great weight by the courts.

If comparative advertising is not per se deceptive and its ban is not a restriction of time, place or manner, the courts will apply the test developed in the Central Hudson. This four part test looks at:

1. Is the expression protected by the First Amendment?

2. Is the asserted governmental interest substantial?

If the answers to 1. and 2. are both affirmative, then,

3. Does the restraint directly advance the governmental interest asserted?

4. Is the restraint no more extensive than necessary to serve the interest determined under 3. above?

Under Central Hudson, if comparative price advertising is neither misleading nor related to an unlawful activity it will be afforded First Amendment protection and the burden shifts to Virginia to assert a substantial government interest in banning comparative price advertising. Virginia's interest in protecting its citizens from deception in commercial advertising could serve as this substantial governmental interest.

To pass the next part of the Central Hudson test, Virginia would need to show that the limitation (ban) is designed carefully to achieve the state's goal (preventing deception). Compliance with this requirement is measured by two criteria. First, the restriction must directly advance the state interest involved. Second, the government must show that its substantial interest could not be served as well by a more limited restriction on commercial speech. There is no dispute that a total ban on comparative prices would eliminate those cases involving deception. However, the last prong of the test presents problems because Virginia could as an alternative design an enforcement mechanism that would be less restrictive than the total ban. For instance, Virginia could require higher levels of substantiation for comparative claims.

C. Constitutional Barrier Imposed by the Interstate Commerce Clause

Article I, Section 8 of the Constitution provides in part that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Although advertising is not specifically mentioned in the Commerce Clause, it is widely accepted that Congress may regulate advertising pursuant to its power to regulate interstate commerce. The interstate nature of advertising can be found in either (i) the interstate dissemination of the advertisements, (ii) the interstate contracting for the advertisements, or (iii) the distribution of advertised goods across state lines. When a state regulation conflicts with federal legislation enacted under the Commerce Clause, the federal statute controls pursuant to the Supremacy Clause. As noted earlier, the FTC Act and regulations have not preempted this field and states may enhance their own consumer protection laws.

To what extent may the states enhance their consumer protection laws in the absence of federal preemption has not been squarely addressed by the Supreme Court. In deciding other commerce cases, the Court has given particular importance to the rationale of the commerce clause -- to create and foster the development of a common market among the states and eradicate trade barriers or obstacles to the free flow of commerce, interstate or foreign. Cooley v. Board of Wardens, 53 U.S. 299 (1851). When local legislation thwarts the operation of the common market of the United States the local laws place an impermissible burden on interstate commerce.

In general, the Court is more willing to sustain nondiscriminating state regulation that addresses health and safety concerns. Virginia's ban on comparative price advertising would be nondiscriminating because it does not favor its own retailers over out-of-state retailers. Each is treated equally under the prohibition. However, the competing national interest -- to have the free flow of truthful commercial information -- would probably outweigh Virginia's local interest -- to facilitate the enforcement against deceptive comparative advertising. The magnitude of this national interest is clearly evident from the number of FTC regulations and cases which have encouraged comparative price advertising.

III. Conclusion

A total ban on comparative price advertising is not recommended in virtue of the many constitutional problems and the fact that it directly conflicts with FTC's policy to encourage truthful comparative advertising.

1992 SESSION

VIRGINIA ACTS OF ASSEMBLY - CHAPTER 768

An Act to amend and reenact § 59.1-200 of the Code of Virginia, to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 17.7, consisting of sections numbered 59.1-207.40 through 59.1-207.44, and to repeal § 18.2-219 of the Code of Virginia, relating to comparison price advertising; penalties.

[H 501]

Approved APR 5 1992

Be it enacted by the General Assembly of Virginia:

1. That § 59.1-200 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 17.7, consisting of sections numbered 59.1-207.40 through 59.1-207.44, as follows:

§ 59.1-200. Prohibited practices.—The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

1. Misrepresenting goods or services as those of another;

2. Misrepresenting the source, sponsorship, approval, or certification of goods or services;

3. Misrepresenting the affiliation, connection or association of the supplier, or of the goods or services, with another;

4. Misrepresenting geographic origin in connection with goods or services;

5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits;

6. Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;

7. Advertising or offering for sale goods which are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or which are "seconds," irregulars, imperfects, or "not first class," without clearly and unequivocally indicating in the advertisement or offer for sale that the goods are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are "seconds," irregulars, imperfects or "not first class";

8. Advertising goods or services with intent not to sell them as advertised, or with intent not to sell at the price or upon the terms advertised.

In any action brought under this subdivision, the refusal by any person, or any employee, agent, or servant thereof, to sell any goods or services advertised or offered for sale at the price or upon the terms advertised or offered, shall be prima facie evidence of a violation of this subdivision. This paragraph shall not apply when it is clearly and conspicuously stated in the advertisement or offer by which such goods or services are advertised or offered for sale, that the supplier or offeror has a limited quantity or amount of such goods or services for sale, and the supplier or offeror at the time of such advertisement or offer did in fact have or reasonably expected to have at least such quantity or amount for sale;

9. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions ; ~~or making false or misleading price comparisons with the supplier's competitors, the supplier's former price, or the general market price~~ ;

10. Misrepresenting that repairs, alterations, modifications, or services have been performed or parts installed;

11. ~~Misrepresentation~~ *Misrepresenting* by the use of any written or documentary material which appears to be an invoice or bill for merchandise or services previously ordered;

12. Notwithstanding any other provision of law, using in any manner the words "wholesale," "wholesaler," "factory," or "manufacturer" in the supplier's name, or to describe the nature of the supplier's business, unless the supplier is actually engaged primarily in selling at wholesale or in manufacturing the goods or services advertised or offered for sale;

13. Using in any contract or lease any liquidated damage clause, penalty clause, or waiver of defense, or attempting to collect any liquidated damages or penalties ~~which~~ *under any* clause, waiver, damages, or penalties *which* are void or unenforceable under the laws of this Commonwealth, or under federal statutes or regulations;

14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction:

15. ~~Any violation~~ *Violating any provision* of §§ 3.1-796.78, 3.1-796.79, or § 3.1-796.82 , relating to the sale of certain animals by pet dealers which is described in such sections , is a violation of this chapter;

16. ~~Failure of a supplier~~ *Failing* to disclose all conditions, charges, or fees relating to the return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not less than twenty days after date of purchase, a cash refund or credit to the purchaser's credit card account for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase. In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any refund may be delayed for a period of ten banking days to allow for the check to clear. This subdivision does not apply to sale merchandise which is obviously distressed, out of date, post season, or otherwise reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser has requested the supplier to order merchandise of a specific or unusual size, color, or brand not ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in § 46.2-100;

17. If a supplier enters into a written agreement with a consumer to resolve a dispute which arises in connection with a consumer transaction, failing to adhere to the terms and conditions of such an agreement;

18. ~~Any violation~~ *Violating any provision* of the Virginia Health Spa Act, Chapter 24 (§ 59.1-294 et seq.) of this title;

19. ~~Any violation~~ *Violating any provision* of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et seq.) of this title;

20. ~~Any violation~~ *Violating any provision* of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et seq.) of this title;

21. ~~Any violation~~ *Violating any provision* of the Virginia Lease-Purchase Agreement Act, Chapter 17.4 (§ ~~59.1-207.15~~ *59.1-207.17* et seq.) of this title;

22. ~~Any violation~~ *Violating any provision* of the Prizes and Gifts Act, Chapter 31 (§ 59.1-415 et seq.) of this title;

23. ~~Any violation~~ *Violating any provision* of the Virginia Public Telephone Information Act, Chapter 32 (§ 59.1-424 et seq.) of this title;

24. ~~Any violation~~ *Violating any provision* of § 54.1-1505;

25. ~~Any violation~~ *Violating any provision* of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter 17.6 (§ 59.1-207.34 et seq.) of this title;

26. ~~Any violation~~ *Violating any provision* of § 3.1-949.1, relating to the pricing of merchandise;

27. ~~Any violation~~ *Violating any provision* of the Pay-Per-Call Services Act, Chapter 33 (§ 59.1-429 et seq.) of this title; ~~and~~

28. ~~Any violation~~ *Violating any provision* of the Extended Service Contract Act, Chapter 34 (§ 59.1-435 et seq.) of this title ~~.~~ *; and*

29. Violating any provision of the Comparison Price Advertising Act, Chapter 17.7 (§ 59.1-207.40 et seq.) of this title.

CHAPTER 17.7.

COMPARISON PRICE ADVERTISING ACT.

§ 59.1-207.40. Definitions.—In addition to the definitions listed in § 59.1-198, as used in this chapter, the following terms shall have the following meanings:

"Former price" or "comparison price" means the direct or indirect comparison in any advertisement whether or not expressed wholly or in part in dollars, cents, fractions, or percentages, and whether or not such price is actually stated in the advertisement.

"Substantial sales" means a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison price in the supplier's trade area.

§ 59.1-207.41. Advertising former price of goods or services.—No supplier shall in any manner knowingly advertise a former price of any goods or services unless:

1. Such former price is the price at or above which substantial sales were made in the recent regular course of business; or

2. Such former price was the price at which such goods or services or goods or services of substantially the same kind, quality, or quantity and with substantially the

same service were openly and actively offered for sale for a reasonably substantial period of time in the recent regular course of business honestly, in good faith and not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based; or

3. Such former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services or goods or services of substantially the same kind, quality, or quantity and with substantially the same service, in the recent regular course of business; or

4. The date on which substantial sales were made, or the goods or services were openly and actively offered for sale for a reasonably substantial period of time at the former price is advertised in a clear and conspicuous manner.

§ 59.1-207.42. Advertising comparison price of goods or services.—No supplier shall in any manner knowingly advertise a comparison price which is based on another supplier's price unless:

1. The supplier can substantiate that the comparison price is the price offered for sale by another supplier in the regular course of business for goods or services of substantially the same kind and quality, and with substantially the same service in the defined trade area;

2. The trade area to which the advertisement refers is clearly defined and disclosed; and

3. A clear and conspicuous disclosure is made in the advertisement that the price used as a basis of comparison is another supplier's price, and not the supplier's own price.

§ 59.1-207.43. Use of certain terms in advertising former or comparison prices.—A. No supplier shall advertise a former or comparison price in terms of "market value," "valued at" or words of similar import unless such price is the price at which the goods or services, or goods or services of substantially the same kind, quality or quantity, are offered for sale by a reasonable number of suppliers in the supplier's trade area.

B. A supplier may advertise a former or comparison price in terms of "manufacturer's suggested price," "suggested retail price," "list price," or words of similar import provided that, with regard to such advertising, the use of the former or comparison price complies with 15 U.S.C. § 45 (a) (1) and the regulations of the Federal Trade Commission adopted thereunder.

§ 59.1-207.44. Enforcement; penalties.—Any violation of this chapter shall constitute a prohibited practice under the provisions of § 59.1-200 and shall be subject to the enforcement provisions of Chapter 17 (§ 59.1-196 et seq.) of this title. It shall be the responsibility of any supplier who uses a comparison price to be able to substantiate the basis for any price comparisons made by the supplier. Upon the request of the Attorney General, any attorney for the Commonwealth, the attorney of any county, city, or town, or the Commissioner of the Virginia Department of Agriculture and Consumer Services, a supplier shall provide documentation to substantiate the basis for any comparison price utilized by the supplier in any advertisement governed by this Act. No provision of this chapter shall be construed to apply to any supplier whose advertising practices are governed by § 46.2-1581.

2. That § 18.2-219 of the Code of Virginia is repealed.