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HONESTY AND COMPETITION: SOME PROBLEMS IN THE PRICING OF GOODS

GEORGE J. ALEXANDER

Judging by the authority given the Federal Trade Commission, it would seem that the two most important goals of federal trade regulation are honesty and competition in trade. Apparently, little thought has been given to a possibility of conflict between the goals. Maximum effort is expended in combatting anticompetitive conduct and in interdicting deception. Quaere: May the enforcement of commercial “honesty” be anticompetitive?

I. THE HONEST STANDARD OF VALUATION

A threshold problem to the honest price representation of goods is a standard of valuation. Much advertising space is filled with assertions of the “worth” or “value” of the product. An advertiser may represent

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2. The provisions of § 11 of the Clayton Act, supra note 1, allow the Commission to forbid the types of anticompetitive conduct expressly prohibited by the other provisions of the act. The broader grant of power under § 5 of the Federal Trade Commission Act, supra note 1, allows: (1) interdiction of violations of the types of anticompetitive conduct prohibited by the language of the Sherman Act, 26 Stat. 269 (1890), as amended, 15 U.S.C. §§ 1-7 (1958), Eugene Dietzgen Co. v. FTC, 142 F.2d 321 (7th Cir. 1944); (2) prevention of violations of the policy announced by the Sherman Act whether or not the Sherman Act could be literally applied, FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); (3) and, apparently, violations of the “spirit” of the Clayton Act even though no literal violation of that act could be established, Grand Union Co. v. FTC, 353 F.2d 92 (2d Cir. 1965). As the bulk of the remaining cases demonstrates, § 5 of the Federal Trade Commission Act, supra note 1, is also a powerful antidistortion provision. See, e.g., Nircel Indus., Inc. v. FTC, 278 F.2d 337 (7th Cir.), cert. denied, 364 U.S. 883 (1960). The remaining statutory provisions, supra note 1, are related to specific grants of authority to interdict deceptive conduct.

3. A casual search of a recent magazine revealed: “the finest and your best buy on any basis of comparison”—“the best value on the market today”—“exceptional value”—“at 1/3 the price you’d expect to pay”—“remarkable value”—“if you’ve been to Southern Italy you’ve seen this work and know that our price is no higher than if you brought it home.” Advertisements in House Beautiful, March 1962.
that his wares—cost him a given amount, are sold by retailers for a named price, or "list" for a certain sum. Other methods of determining the monetary value appropriately attributable to the product are only limited by advertising imagination. The three mentioned, however, suffice to raise the problem. What valuations are honest?

An advertiser, whether he represents a retailer or not, would seem perfectly within the statutory honesty standard if he claimed that a certain product "cost" a given amount to produce or "cost" the retailer a certain price, assuming only that the "cost" was not falsified. Despite the fact that cost is a notoriously illusive concept, it is unlikely that an action would be commenced against a "cost" advertiser solely to dispute the method of his computations. On the other hand, no encouragement is given to this form of advertising over any other in the Federal Trade Commission's Guides.4

A manufacturer's assertion of a regular retail price is dealt with more strictly. While the regular retail price is no less a question of fact than the "cost" of an item, the information required for an honest factual claim is not as necessarily within the knowledge of the seller. Also, in this area, the Federal Trade Commission has been quite explicit in detailing the requirements of truthfulness. If the retail price in a trading area is depressed, an advertisement in that area of a sales price which represents the higher national price is deceptive.5 If the product is sold through "discount houses" as well as stores which command a higher price, using the latter price in advertising is equally deceptive.6 The only permissible declaration of retail price is a statement of the price currently charged by all, or at least substantially all, retailers in the trade area in which the assertion is made.7

The use of "suggested" retail prices or "list" prices, whether represented by lists, catalogues or tickets accompanying the goods, does not

4. "Guides" are determinations of the Federal Trade Commission concerning policy to be used by the Commission staff in evaluating specific practices. They are released to the general public in the interest of obtaining voluntary compliance. See, e.g., Guides Against Deceptive Pricing, adopted by the Federal Trade Commission October 2, 1958, 2 Trade Reg. Rep. ¶ 7897. In the Guides Against Deceptive Pricing, supra, there is no mention of cost advertising although specific suggestions are made concerning value advertising. See also note 18 infra and accompanying text.


7. The Commission's cease and desist order against the Baltimore Luggage Co. begins by requiring the respondent to cease and desist from: "" Representing, directly or by implication, by means of pre-ticketing or in any other manner, that any amount is the usual and regular retail price of the merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made."" Baltimore Luggage Co. v. FTC, 296 F.2d at 610.
avoid the area price problem. Since the Federal Trade Commission considers the suggested or list standard a representation of the current retail price, the lists, catalogues, and tickets must conform both to the uniformity requirement and to the territorial limitation. Furthermore, it would seem that price tickets which bear the manufacturer's name must properly indicate not only the retailer's intention, but also the area price.

One major exception exists, however, in new automobile sales. In that field, the manufacturer must list a suggested retail price for his cars, and the retailer must display the price suggested on the cars. Furthermore, there is no requirement interposed that the suggested price relate in any specific manner to the prevailing price in the market.

If dissatisfied with the latitude allowed within the above described modes of advertising, the manufacturer of a product might use another method of valuing his product. Assuming the valuation to be candid and the method of arriving at it to be described conspicuously, there seems to be no objection. If, however, the advertiser prominently asserts the result of his computations as the "value" of his product (and, presumably, also if he uses a synonym such as "worth"), the

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9. Ibid.
12. Ibid.; Baltimore Luggage Co. v. FTC, supra note 5.
14. Automobile Information Disclosure Act § 3, 72 Stat. 326 (1958), 15 U.S.C. § 1232 (1958) provides: "Every manufacturer of new automobiles distributed in commerce shall ... securely affix to the windshield, or side window of such automobile a label on which such manufacturer shall endorse clearly, distinctly and legibly true and correct entries disclosing the following information concerning such automobile ... (f) the following information: (1) the retail price of such automobile suggested by the manufacturer ..."
15. Section 4(c) of the Automobile Information Disclosure Act provides for the following penalties for failure to display the suggested price on the car: "Any person who willfully removes, alters, or renders illegible any label affixed to a new automobile pursuant to section 3 ... shall be fined not more than $1,000, or imprisoned not more than one year, or both." 72 Stat. 327 (1958), 15 U.S.C. § 1233(c) (1958).
17. While the precise issue does not appear to have been raised, it is clear that: "The important criterion [in determining whether an advertisement is deceptive] is the net impression which the advertisement is likely to make on the general populace." Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944). Literal truth is not a defense, P. Lorillard Co. v. FTC, 136 F.2d 52 (4th Cir. 1945), but if the general impression given by the valuation is supportable in fact, the Charles of the Ritz standard would seem to apply.
advertisement must meet the standards of assertions of the retail price, since the Federal Trade Commission finds value and present area selling price synonymous.  

Should the manufacturer desire to suggest a valuation for his product based on comparison with other products on the market, such comparison is open to him under standards identical to those required of retailers in comparing goods.

II. THE HONEST STANDARD OF PRICE COMPARISON

Price comparison, because it relates to an issue with which the consumer is supposed to be vitally concerned, is a very common form of retail advertising. If he is able to offer goods at a price which compares favorably with his own prior price or the price currently demanded by his competitors, a retailer undoubtedly is motivated to communicate this fact. To remain within the Trade Commission's standard of honesty, however, it is important to observe certain rules. In the first place, there is a vast vocabulary to avoid. Irrespective of the correctness of the assertion, it is deceptive to advertise—"Regularly," "Usually," "Formerly," "Originally," "Reduced," "Was ....... Now ........." "......... Percent off," "Save up to $...........," "You Save $...........," "$50 Dress—$35"—if the comparison runs to prices charged by others rather than the prices formerly charged by the advertising seller. Furthermore, if the comparison is to another's prices, the advertising dealer must ascertain that the prices ascribed to the other dealer are his prices in fact. Gullibility does not justify reference to an advertised price which is not actually charged.

18. Household Sewing Mach. Co., 52 F.T.C. 250 (1955); "Examples of phrases used in connection with prices which have been held to be representations of an article's usual and customary retail price are . . . 'Value'. . . .'" Guides Against Deceptive Pricing, supra note 4, at 12907.

19. See notes 20-33 infra and accompanying text.


21. Guides Against Deceptive Pricing, supra note 4, at 12907. See Bankers Sec. Corp. v. FTC, supra note 20, where the use of "Regular" and "Usual" to truthfully compare price to price charged by others was held to be deceptive. In Gimbel Bros., supra note 20, where the complaint was ordered dismissed by the hearing examiner when the Commission offered no proof that "Usually" and "Regularly" used to compare to the prices of others were understood by the public to mean comparison to respondent's own prior prices, the Commission reversed. But cf. People v. Minjac Corp., 4 N.Y.2d 320, 151 N.E.2d 180, 175 N.Y.S.2d 16 (1958) the use of "20% to 40% OFF" was held to be used deceptively to represent a comparison to defendant's own former prices. The impression created by the claim was that a reduction was offered over community prices. Hence, a criminal conviction was affirmed.

22. Niresk Indus., Inc. v. FTC, 278 F.2d 337 (7th Cir.), cert. denied, 364 U.S. 883
the manufacturer is also deceptive unless the list price corresponds to the price at which the product is being sold by his competitors.\footnote{23}

Having avoided the pitfalls, should the dealer still desire succinctly to compare his prices with those of others for the same or similar goods, the Trade Commission has provided for this contingency. He may advertise—"Dacron Suit $20.00—Comparable Suits $25.00"—if certain conditions required for honest comparisons are met: (1) it is clearly indicated that the comparison is not being made with former prices of the advertiser; (2) the compared product is "at least [most?] of like grade and quality in all material respects" as the advertised one; (3) the compared product is presently sold in the same trade area at the price indicated.\footnote{24} Presumably, if there is a sufficient and prominent explanation of what is meant by the comparison, the advertiser may make it despite his inability to comply with one of the three conditions.\footnote{25} It is not clear, however, how one might advertise briefly that the same product is presently being sold by a competitor. Comparable value would seem to indicate a lack of identity in the compared products. "Usually" and "Regularly" are pre-empted for other use.\footnote{26} "Usually sold elsewhere for $........" would seem unobjectionable, but this usage is not expressly sanctioned by the Guides.\footnote{27}

Irrespective of the meaning of the second condition to comparisons with similar goods, it is clear that it is deceptive to compare goods made of less expensive material or inferior design with those having greater consumer acceptance.\footnote{28} Whether any type of comparison is allowable between a "budget product" and a "deluxe model" of the same type is not clear. Also somewhat obscure, except in the more obvious cases, is the question of how inferiority is to be determined.\footnote{29}

(1960) stated that reliance on the manufacturer's assertion of value in a Life Magazine advertisement did not justify use of the mentioned price as the value of the product when the seller did not know of any retailers who normally quoted that price.

\footnote{23. George's Radio & Television Co., 3 Trade Reg. Rep. 7 15691 (FTC Orders) (Jan. 19, 1962).}

\footnote{24. Guides Against Deceptive Pricing, supra note 4, at 12903.}

\footnote{25. The Guides expressly allow a disclaimer only as to the last condition: "[S]aid similar and comparable merchandise is generally available for purchase at the comparative price in the same trade area, or areas, where the claim is made, or, if not so available, that fact is clearly disclosed." Guides Against Deceptive Pricing, supra note 4, at 12903. The other conditions are stated without consideration of alternatives. But see note 17 supra and accompanying text.}

\footnote{26. See note 22 supra and accompanying text.}

\footnote{27. The only suggestion made in the Guides is: "Dacron suit $20.00—Comparable suits $25.00." Guides Against Deceptive Pricing, supra note 4, at 12903.}

\footnote{28. Barsam Distrib., Inc. v. FTC, 263 F.2d 396 (2d Cir. 1959) (per curiam) (less expensive perfume); Michigan Bulb Co., 54 F.T.C. 1329 (1958) (inferior nursery stock); Market Tire Co., 53 F.T.C. 668 (1957) (used tires compared to price of new tires).}

\footnote{29. A problem arises because the Commission finds value and current selling price...
The retailer must exercise some caution in advertising a comparison between his present prices and those which he formerly charged. He certainly may not offer a product for a time at a price beyond what he expects to receive and then announce a reduction from his former price.\textsuperscript{30} He also may not compare his present price to any previous price other than the one that he was receiving at the time of the advertised reduction.\textsuperscript{31} An appropriate vocabulary for making the type of comparison here discussed is provided above.\textsuperscript{32} In this type of comparison as well as in the one previously discussed, the retailer must take care to show "clearly" whether he is claiming a reduction from his prior prices or from the prices that were customary in the trade area.\textsuperscript{33}

Finally, the retailer must beware of using the price of similar, though not identical, goods as a standard of valuation for his product. In the recent \textit{Mary Carter Paint Co.} case,\textsuperscript{34} a "buy one, get one free" advertisement was interdicted because the price of the "one" to be purchased had not been established at a time when the "other" was being given away. The Commission held that the hearing examiner was correct in ruling that proof of the area price of comparable quality paint was irrelevant. Thus, although the respondent offered to prove that the price charged accurately represented the usual area price of one can of paint, the Federal Trade Commission decided that the only means of establishing "customary retail price" was by proof of the prior price of the respondent's paint. Since the case turns on the "truth" of the assertion of value of the first can, the rule of the case could boil down to a simple formula: (1) it is improper to assert value as being that of nonidentical goods (at least where there is no accompanying explanation); (2) similar goods of like quality are nonidentical if they bear different brand names. If this formula is followed, it would seem that newly introduced goods would have no acceptable "value" and that the price of each brand of a synonymous. See note 18 supra and accompanying text. The very fact that the seller's product has been sold at a lower price for a period of time may be sufficient to suggest "inferiority" if the products are not identical. See, e.g., Chicago Invisible Contact Lens Serv., 52 F.T.C. 781 (1956) where the trial examiner found that the claimed "value" was false since there was no evidence to establish any sum due to wide variations in pricing in this field. Id. at 785.

\textsuperscript{30} Guides Against Deceptive Pricing, supra note 4, list the following prerequisites to comparisons to one's former selling prices: (1) the saving or reduction statement must apply to a specifically identified product and not to similar or comparable merchandise; (2) the indicated reduction must be a reduction from "the advertiser's usual and customary retail price of the article in the recent, regular course of business"; (3) the comparison must be clearly ascribed to former prices. Id. at 12907.

\textsuperscript{31} Ibid.; J. C. Winter & Co., 31 F.T.C. 824 (1940).

\textsuperscript{32} See note 21 supra and accompanying text.

\textsuperscript{33} Guides Against Deceptive Pricing, supra note 4, at 12907.

\textsuperscript{34} 3 Trade Reg. Rep. \S 15968 (FTC Orders) (June 28, 1962).
product, no matter how far it varied from the price of otherwise identical goods, would become its only "value." It would also seem to follow that a product being reduced to attract customers to a store or being sold in a "sale" of any substantial duration would lose "value" if it were not held to a higher "value" by other stores. On the other hand, it is possible that the case is merely an indication of a stricter policy on assertions of "free" merchandise.\(^{25}\)

### III. The Honest Representation of Offering Price

Even the retailer's indication of the price for which the goods are going to be sold is fraught with the possibility of misrepresentation under the Federal Trade Commission's standard. For the same reasons that price lists which over-price goods are held deceptive, the use of manufacturer-supplied tickets or other price markings which do not represent the price that will be demanded is held deceptive.\(^{36}\) In fact, any indication of price becomes deceptive when the price is not charged in a substantial number of transactions.\(^{37}\) An allied problem is faced in "giving goods away." The use of the word "free," while probably never literally true in a commercial setting, is not prohibited. Goods, which are not unconditionally given away gratis, must be conspicuously marked, however, to indicate the conditions which will activate the gift.\(^{38}\) In no event may the gift be financed by raising the price of a product which must be bought as a condition precedent to obtaining the "free" item\(^ {39}\) or by lowering the quality, quantity or size of a tied purchase.\(^ {40}\)

As previously mentioned, the advertising seller may not indicate a higher price for the required purchase than one which has been established for that specific item at a time when no other product was being

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35. Commissioner Elman also thought the opinion a bit difficult to understand, at least insofar as it relates to offering "free" merchandise. He stated, "[H]ow will a lawyer answer a client who asks: 'May I advertise something as 'free' to purchasers who buy another article at a stated price, if the advertisement clearly discloses all the terms and conditions of the offer?' The only safe answer would seem to be: 'I don't know. I've read all the Commission opinions on the subject, and I still don't know. What's more, I don't think the Commission knows.'" Mary Carter Paint Co., supra note 34, at 20315 (dissenting opinion).


38. See Federal Trade Commission's Trade Practice Conference Rules released on December 3, 1953, 4 Trade Reg. Rep. ¶ 40210, for the use of the word "Free." Prior to 1953, the Commission allowed the word to be used only when the gift was not conditioned on any other act. See Rosenblum v. FTC, 192 F.2d 392 (2d Cir. 1951).


40. American Photographic Soc'y, 54 F.T.C. 524 (1957); see also Federal Trade Commission's Trade Practice Conference Rules, 4 Trade Reg. Rep. ¶ 41018-41227; e.g., Commercial Dental Lab. Indus., Rul. 8(b), 16 C.F.R. 18.8(b) (1960).
given away with it. Consequently, if a product has always been sold at area prices with a “free” companion as a bonus to the customer, the price should be attributed to both products and one may not be classified as “free.”

Advertising prices, which indicate that the buyer will be able to procure the good in question for less than he will actually have to pay, are also deceptive. Thus, failure to indicate the applicability of service charges, credit costs or other comparable expenses makes advertising deceptive. Similarly, such familiar sights as the “David” sized price standing next to the “Goliath” sized price is an insufficient qualifier to avoid the charge of deceptive price advertising.

IV. THE INTERRELATIONSHIP OF HONESTY AND COMPETITION

Chairman Dixon of the Federal Trade Commission has pointed out at least one relationship between competition and honesty in advertising. The dishonest seller may have an unjustified advantage over his more trustworthy competitor. Such advantage is indefensible socially and economically. The fact that little is to be gained by funneling effort into competition via imaginative deception can hardly be denied. At the other extreme, the right of a seller to advertise his genuine advantages, quite aside from its free speech implications, is a necessary condition to effective competition. It follows that a restriction which avoids the possibility of deception may, if it also muzzles honest declarations, become anticompetitive. Furthermore, the risk of anticompetitive restrictions varies directly with the competitive usefulness of the information suppressed. Reconciliation of the competitive and honesty standards in price advertisement is made more difficult than it might appear on the surface by two factors. First, a great deal of advertising is conducted in slogans, jingles and short phrases. A large “28” with a miniscule “9” on a sign in front of a gas station informs the passer-by that the price of gasoline is twenty-eight and nine-tenths cents per gallon. “Fifty per

42. General Motors Corp. v. FTC, 114 F.2d 33 (2d Cir. 1940), cert. denied, 312 U.S. 682 (1941) (6% credit offered when, by normal computation, the amount would exceed 12%); cf. American Hosp. & Life Ins. Co., 52 F.T.C. 1100 (1956) (overstatement of benefits offered).
cent off" on a tag asserts a reduction of one half from a former price. "Free" signifies, at least under some conditions, that the product indicated is obtainable without extra charge. The fact that communication may take place in such symbolic forms reduces the effectiveness of elaborate disclaimers in indicating deviation from a standard meaning.47 Secondly, the Federal Trade Commission has announced that advertising is to be considered deceptive if it is capable of deceiving even the most credulous.48 Such solicitude, of course, also tends toward a more constricted range of permissible expression.

V. HONEST VALUATION AND COMPETITION

As previously noted,49 there has been no attempt to channel forms of valuation advertising into any predetermined modes. Instead, the present uses have been individually attacked when found to be capable of creating deception. The absence of affirmative encouragement rather than negative sanction is understandable. The Federal Trade Commission has the right to prohibit unfair and deceptive advertising50 but not the corollary duty of making it competitive. It would seem, however, that in evaluating deception, the Commission should also consider the other major responsibility given to it.51 The mere absence of sanction for favored forms of advertising, not to mention actual commendation in the Guides, would certainly amount to some encouragement.

One of the forms of valuation advertising that is not as common as the others discussed is advertisement of the cost of the product. To date, the Commission has not issued as many complaints in this area as in some others,52 though it is not possible to determine whether this is due to infrequency of use or conscious Commission abstention. Certainly, the application of the accounting rigor evidenced in the Robinson-Patman area53 would have made it possible to classify all present cost advertising as fraudulent in some particular.

In terms of giving customers useful information, cost data would

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47. General Motors Corp. v. FTC, 114 F.2d 33 (2d Cir. 1940), cert. denied, 312 U.S. 682 (1941).
48. The Commission has insisted upon, and the courts have approved, a standard of advertising "clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein . . . ." Id. at 36.
49. See note 4 supra and accompanying text.
50. See the statutes cited in note 1 supra with the exception of the Clayton Act.
51. The grant of power to prohibit anticompetitive conduct is sketched in note 2 supra.
52. The Trade Regulation Reporter identifies only nine docketed cost misrepresentation cases, and each of these was found deceptive because of a false claim that sales were being made below cost. 2 Trade Reg. Rep. ¶ 7635, at 12681.
seem to have several advantages over the other types considered. First, cost information is unlikely to be otherwise available, whereas price comparisons of similar products are obtainable if the customer is diligent and interested. Secondly, for some customers, the knowledge of the retailer's costs provides a good idea of how the product should be priced at retail. Where the retail price is determined by bargaining between buyer and seller, knowledge of cost gives the buyer a better basis for making his offer than does a system of valuation based on a more arbitrary standard. Where the price is firm, it might have the same effect through customer reaction to what might be considered too high a markup. Cost knowledge would also facilitate comparisons between a wider range of goods since the standard of valuation applicable to both would have a common basis. For the reasons suggested, retailers' cost information would seem to aid the consumer in making economical purchases.

There is, of course, no necessary connection between the retailers' cost and value since there is no legal requirement that the cost of the manufacturer correspond in any given manner to the price which is charged the retailers. On the other hand, as between the retailers as a group and the consumers, it is safe to assert a greater likelihood of an appropriate price level being set by the former. The Robinson-Patman Act requirements also tend, in many industries, to pass on to the less informed retailers the buying expertise of the larger stores since the manufacturer must often avoid price discrimination among them.

It is true, however, that requiring cost information might overbalance the consumer's position. Certainly, to the extent that it places pressure on the retailers to make their prices correspond to cost plus a reasonable profit percentage, it would require them to do something that has not been legislatively required of any group that has not correspondingly been assured of a profit. At any rate, there seems to be no statutory authority, state or federal, requiring the disclosure of costs for such ends except in industries with regulated prices. The primary state concern with costs seems to lie in assuring that goods will not be sold too

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54. It is unlawful to sell similar products to different purchasers in commerce at different prices (except insofar as the difference is cost-justified) when there is a significant anticompetitive effect of one of certain specified types. Robinson-Patman Act § 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958) (Supp. III, 1959-1961).

55. On the other hand, it is a hallmark of utility regulation to allow not only a reasonable profit on the invested funds but also to maintain prices at levels which can produce that profit. For a succinct description of utility pricing see Schwartz, Free Enterprise and Economic Organization 914-18 (2d ed. 1959); but cf. De Gorter v. FTC, 244 F.2d 270 (9th Cir. 1957), affirming sub nom. Pelta Furs, Trade Reg. Rep. ¶ 26006 (FTC Orders) (1956). This action was brought under the Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. § 69 (1958). The Commission found price tags deceptive in part because prices indicated did not have a systematic relationship to cost.
inexpensively under the Sales Below Cost statutes.\textsuperscript{56} Interestingly, neither
the Fair Trade laws which allow the fixing of retail prices under some
circumstances,\textsuperscript{57} nor the former wartime price regulation which fixed
retail prices generally,\textsuperscript{58} require a correspondence of the selling price
and cost.

An assertion by the manufacturer, the retailer or any intermediary,
that the "Usual price elsewhere is .........," is a statement of fact. Hence,
there would seem to be little justification for allowing a misstatement of
that fact. If the information required to make the assertion is absent,
alternative forms of advertising would seem to be a more appropriate
standard of value than a guess at what others are charging.

The difficulties involved in determining the retail price that is actually
being asked by competitors, while avoiding any agreement with them
relating to price,\textsuperscript{59} raises substantial problems in many industries. With
all the problems which beset this type of advertising, however, a truthful
statement concerning the present market price in the general area, if
reliable, would be helpful to consumers. Although the alternative of
comparison shopping does not present an insurmountable obstacle (espe-
cially in goods which are customarily sold at the same price to all cus-
tomers), it is an annoyance which might lead some buyers to patronize
the first store. The competitive effect, one way or the other, however,
would seem small except to the extent that a false valuation based on
fictitious area prices brings unwarranted business to the advertiser.

Price lists are another matter. While treated as identical to assertions
of normal retail price,\textsuperscript{60} they probably are not so understood by a large

\textsuperscript{56} For a list of various state provisions see Sales Below Cost—State Laws, 2 Trade
Reg. Rep. \textsuperscript{f} 6571-\textsuperscript{f} 6581.

\textsuperscript{57} See McGuire Fair Trade Act, 66 Stat. 632 (1952), 15 U.S.C. \textsuperscript{f} 45(a) (2)-(6) (1958)
(authorizing state fair trade laws on certain conditions). A typical state act is N.Y. Gen.
Bus. Law \textsuperscript{f} 369-a to \textsuperscript{f} e. No mention is made in either statute of how the price to be
maintained is to be determined. Note, however, the proviso in the McGuire Act states
that the goods fair-traded be "in free and open competition with commodities of the same
general class" thus apparently relying on competitive pressures to determine price. Cf. Gulf
Oil Corp. v. Mays, 401 Pa. 413, 164 A.2d 656 (1960) where the court on its own motion in-
validated a fair trade agreement for gasoline under the Pennsylvania Fair Trade Act, Pa.
Stat. Ann. tit. 73, \textsuperscript{f}f 7-8. The court found that there was no free competition between brands.

\textsuperscript{58} The Price Administrator was permitted to "establish such . . . maximum prices as
in his judgment [were] . . . fair and equitable . . . . So far as practicable . . . the prices prevail-
ing between October 1 and October 15, 1941. . . ." 56 Stat. 24 (1942). See Hynnin, Price
Control and the Profit System, 9 U. Chi. L. Rev. 561 (1942).

\textsuperscript{59} Except as provided in fair trade legislation, supra note 57, agreements as to retail
prices in interstate commerce violate the Sherman Act. United States v. Trenton Potteries
Co., 273 U.S. 392 (1927). In intrastate commerce, they may constitute violations of
applicable state antitrust laws. E.g., People v. Milk Exch., Ltd., 145 N.Y. 267, 39 N.E.
1062 (1895).

\textsuperscript{60} George's Radio & Television Co., 3 Trade Reg. Rep. \textsuperscript{f} 15691 (FTC Orders) (Jan.
segment of the consuming public. At the very least, it would seem a safe hypothesis that consumers believe that price lists do not represent the invariable sales price for expensive commodities and that discount houses might be expected to sell below list prices. The Federal Trade Commission's position that lists must represent the normal retail price in the trade area,\textsuperscript{61} essentially, means that goods which are sold at two price levels cannot be valued by the list price method. Continued pressure in this direction will probably result in the abandonment of list pricing in industries in which discount houses represent alternate outlets.

Even in industries in which discounting is not the norm, price lists, suggested retail prices and the like may turn out to be deceptive under the present standard. It is, after all, not the good faith in which a statement is made, but the correctness of the statement that is determinative of its legal acceptability.\textsuperscript{62} For the manufacturer, keeping track of the price charged by retailers presents a number of problems, many of which center on the prohibition against retail price maintenance.\textsuperscript{63} Although duality of action is a prerequisite to a conviction under the applicable federal antitrust provision,\textsuperscript{64} many acts which would facilitate obtaining the type of information required for accurate statements concerning prices charged would also help toward establishing duality. For example, any agreement made between the manufacturer and retailer which provided that notification must be given to the former prior to the latter's changing the price previously charged, would smack of price-fixing.\textsuperscript{65} Certainly, a wholesaler's or retailer's agreement to identify those who are selling below suggested prices to the manufacturer would indicate questionable legal judgment in light of \textit{FTC v. Beech-Nut Packing Co.}\textsuperscript{66} Although unilateral price maintenance is not an impossible goal for a manufacturer, it is a difficult one.\textsuperscript{67} Short of price maintenance or close policing, it might be troublesome to obtain the information on which a list claim could be made, at least so long as list price means area selling price. Finally, it should be noted that an accurate list (one which truly corresponds with the retail sales price) may be found to be an element in establishing duality in "fixing" the resale price.\textsuperscript{68}

\textsuperscript{61} Id. at 20525.

\textsuperscript{62} Koch v. FTC, 206 F.2d 311 (6th Cir. 1953). The court approved the Commission's interdiction of claims that certain medicinal preparations were effective against a large range of diseases despite the good faith of the respondent.

\textsuperscript{63} See note 59 supra.

\textsuperscript{64} Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958). This section prohibits a "contract, combination . . . or conspiracy, in restraint of trade . . . ."

\textsuperscript{65} Cf. Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936).

\textsuperscript{66} 257 U.S. 441 (1922).


\textsuperscript{68} United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah 1962).
The Federal Trade Commission's reasoning is that if the price lists represent fictitiously high valuations, the lists will deceive the customers as to the saving to be realized.\textsuperscript{69} That some list prices are apparently prepared with this objective in mind is undeniable. On the other hand, there are some virtues in valuations by way of price lists that may have been overlooked. To the extent that the lists represent a set amount of markup, it is possible for the customer to value various models put out by a single manufacturer without comparative shopping at all. To the extent that different manufacturers in the same industry tend toward a similar markup, the consumer can compare values without the necessity of discovering the best available discount on each model first. The lists can provide a guide to lending institutions accepting chattels as collateral or making loans to finance them. It is even possible for lists to hold down prices by preventing dealers from overcharging customers, though this would seem uncommon in present trade practice.

There may be little reason for allowing a manufacturer to produce a list with prices which he is reasonably certain none of the retailers of his products is going to charge. Even more objectionable is the price list series in which there are multiple lists available, so that one list can be custom tailored to the gullibility of the shopper.\textsuperscript{70} It makes little difference if instead of accomplishing this result through multiple lists, the seller provides tickets with varying prices to accommodate the vagaries of his buyer's customers.\textsuperscript{71} If, however, the price list has some relationship to what a dealer might be expected to charge an average customer, then it facilitates the types of comparisons suggested above and, even more significantly, gives a customer a good idea of the variance in price between various retailers. Not only may identical models be compared for price, but whole ranges of goods may also be considered in light of the percentage that will be allowed below list. Conversely, making the promulgation of list prices, the use of pre-ticketing and other similar devices more difficult, may actually assist the higher markup stores by removing the guidance given to the consumer by these devices.

Finally, there is the problem of other assertions of value for the product. Certainly, the price presently charged for it and its cost are not the only criteria of value. Even a very strict valuation standard considers

\textsuperscript{69} Baltimore Luggage Co., Trade Reg. Rep. \textsuperscript{\S} 29462 (FTC Orders), aff'd, 296 F.2d 695 (4th Cir. 1961), cert. denied, 360 U.S. 860 (1962).

\textsuperscript{70} While no Commission action on multiple price lists was found, the practice is clearly interdicted by the requirement that lists conform to the current retail price in the trade area. George's Radio & Television Co., 3 Trade Reg. Rep. \textsuperscript{\S} 15691 (FTC Orders) (Jan. 19, 1962). That such lists exist was discovered by the author in a short field study of fraudulent installment sales contracts in Chicago. See Alexander, Fraudulent Installment Sales in Chicago, 41 Chi. B. Rec. 285 (1960).

\textsuperscript{71} Rayex Corp., 3 Trade Reg. Rep. \textsuperscript{\S} 15823 (FTC Orders) (April 2, 1962).
what a willing buyer would pay a willing seller rather than the actual amount that passed on the last transaction. The variation in standard makes a significant difference if the goods have not been previously sold in the relevant market or if the market conditions are temporarily depressed. Retail prices are a significant factor for the consumer, but value and cost are not synonymous. If a seller wants to assert that a product he sells is worth five dollars because that is the usual valuation of goods which accomplish the same purpose or because it represents a relationship to the price presently commanded by inferior goods or superior goods, there would seem to be nothing necessarily untruthful in his remarks. If he wants to assert that the goods are worth a higher amount than the market presently indicates because of an over-supply, labor difficulties, or other circumstances, he will probably add information and perhaps bring another product under competitive pressure by his comparison. Actual deception could be treated as a separate problem. Certainly, it should be unobjectionable for him to claim as "value," the usual retail price of a product that differs only in brand name.

VI. PRICE COMPARISON AND COMPETITION

As noted above, the seller is quite limited in his representations of the relationship of his price for goods, list prices, the price charged by others or his own prior prices. It has already been suggested that there may be some good reasons for allowing comparisons to list prices, even if those prices are not guaranteed to be the prices charged by substantially all of the competitors. It should also be noted that requiring the retailer to be conversant with his competitors' actual practices may be no more realistic than requiring the same thing of the manufacturer. A good retailer will almost certainly know the price being charged by some of his competitors. However, if there are many sellers in the same trade area and he is able to account for the price charged by substantially all of them, that fact itself may suggest an uncompetitive retailing of the product. Nothing done under the standard of honesty ought to increase the need for a retailer to police the pricing practices of his competitors.

As far as comparisons to the products sold by others is concerned, the present requirement of substantial identity of products before comparison is allowed seems distinctly anticompetitive. Certainly, it is important

72. "[T]he word 'value', when not qualified by the context or circumstances, has often been defined as meaning 'market value', which is not what the owner would realize at a forced sale, but the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make a sale of like property." Wade v. Rathbun, 23 Cal. App. 2d 758, 760, 67 P.2d 765, 766 (App. Dep't 1937).
73. See notes 21-23 supra and accompanying text.
74. See text following note 69.
75. See note 24 supra and accompanying text.
to prevent fraudulent claims of equality in comparisons, and there seems to be no reason for allowing—a seller of books to compare a cheaply bound edition of books to one more luxuriously bound without indicating the difference,76 the claim of identity between a coat and an imitation of it made of "seconds,"77 or a false claim that the seller's perfume is regularly sold in "better shops" for a certain price.78 Such deception, however, is far removed from comparisons to products which are only slightly different from the one sold. The identity requirement, in the latter context, in essence, is the comparison rule, i.e., a seller may compare his goods to similar goods of others, even if they are not identical, if he can prove that the goods are of equal value.79 Advertising has already made too many products unique, for reasons having nothing to do with the useful features of the product, to prevent comparisons between largely identical goods. A seller ought to be encouraged to make comparisons with products for which he believes his can be substituted so that they are not artificially isolated from competition. Except in areas where there is general agreement on value (as in the case of the difference between virgin wool and seconds), it probably should be the consumer who decides the legitimacy of the comparison, and not the Federal Trade Commission. Even where the compared product is clearly inferior, a seller ought to be allowed to make his comparison if he clearly states the difference between the goods. This would appear to be an area in which the Commission might take a cautious case-by-case approach and in which it might allow all comparisons except those which it can demonstrate are unreasonable.

Finally, in the area of price comparison to other retailers' goods, one is struck by the Orwellian limitation of the language approved.80 Of all

78. Harmo Distrib., Inc. v. FTC, 263 F.2d 396 (2d Cir. 1959) (per curiam).
79. This results from the fact that the Commission, once having found value and current retail price assertions to be identical, can make out a case by proof that: (1) the products are not identical and (2) that the price listed as value is not the price which has been regularly received for the advertised product. See note 29 supra and accompanying text. Nirek Indus., Inc. v. FTC, 273 F.2d 337 (7th Cir.), cert. denied, 364 U.S. 833 (1960). The advertiser must then prove his "value" assertion. See the criticism of the sparsity of the Commission's evidence presented in Nirek Indus., Inc. v. FTC, supra at 340-41; cf. the Commission's regulation under the Fur Products Labeling Act: "(c) No person shall, with respect to a fur or fur product, advertise such fur or fur product as being 'made to sell for', being 'worth' or 'valued at' a certain price, or by similar statements, unless such claim or representation is true in fact . . . . (e) Persons making pricing claims or representations of the types described in paragraphs (a), (b), (c) and (d) of this section shall maintain full and adequate records disclosing the facts upon which such claims or representations are based." 16 CFR § 301.44(c), (e) (1960).
80. See note 21 supra and accompanying text.
forms of expressing the idea, the only one sanctioned is—"Comparable Value." It would be interesting to test the meaning of those words against the meaning of such prohibited words as "Usually" and "Regularly" to see which best communicate the thought of price comparison. Probably more people would understand the use of "Comparable" as a way of hedging inferiority to the compared good than either of the other two words. Also more people would probably agree that the latter two, i.e., "Usually" and "Regularly," relate to the price charged by others or by the advertising store, than would consider them to be limited to the store's prior prices.

Again, in the area of comparison to prices formerly charged by the same retailer, the requirement that there must be an identity of goods causes some competitive problems. There is less reason to allow the retailer to assert that goods formerly sold for a certain price are now reduced when he is discussing two different items than there is to allow him to compare his product to a competitor's different product. On the other hand, where the goods are of comparable value, such comparison may be a good way of indicating that there is a reduction in cost to the consumer. In fact, by the use of such comparisons, a seller may indicate his present sale of a competitor's product which is very similar but sufficiently different to avoid unfair competition charges. If allowing the retailer to overlook slight differences in the products for advertising purposes will facilitate his changing to the competitor's product when it is less expensive, and if that saving is passed on to the consumer, there would seem to be reasonable grounds for a change in the rule. When the variance between the two is more than miniscule, however, there probably ought to be some note of qualification, e.g., "similar" made an integral part of the ad.

**VII. Offering Price and Competition**

It is apparently a common practice in some lines to mark goods with a price but to depend on bargaining to establish selling price. In other outlets, any customer receives, on demand, a predetermined percentage off the marked price reduction. These and other discrepancies between the price marked and the price normally received by the stores are interdicted by the Federal Trade Commission. They are found deceptive either in convincing the customer that he is getting a reduction from the normal price or in extracting a price from him that is not usually expected. Whether the retailer or the manufacturer is responsible for the

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81. See note 24 supra and accompanying text.
82. Guides Against Deceptive Pricing, supra note 4.
83. De Gorter v. FTC, 244 F.2d 270 (9th Cir. 1957) (Fur Products Labeling Act violation); cf. FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937), reversing 86 F.2d 692
price tag is, for this purpose, irrelevant.\textsuperscript{81}

A number of rather difficult problems are raised in this area. For example, how much basis is there for the assumption, made by the Federal Trade Commission, that the price marked on the goods is a representation of the price which the dealer commands for the product rather than, for example, the price he would like to obtain. While there are a large number of goods that are routinely sold at the marked price, there are many other products sold only after some bargaining between the customer and the dealer. In the latter type of circumstance, might the price ticket not as legitimately represent the opening offer rather than an expectation of ultimate sales price? Since one would expect any variation of the selling price to be a reduction from the marked price, and, consequently, would expect the dealer to readily accept the marked price, is it deceptive to indicate that willingness in advance? In this area, unlike the two prior ones, the issue asserted is not the speculative one of valuation or the factual assertion of area or former prices. Here the dealer is indicating something quite subjective—the price which he would accept for the goods. Is predetermined inconsistency as to that price deceptive in fact as well as in law? The answer would seem to lie in an examination of the understanding that the consuming public has of price tags.

The writer would surmise that the general understanding concerning price tags is that the price on the tag is expected by the seller. If that guess is proven accurate, the Federal Trade Commission would be justified in its determination. If so, what may the dealer do, who is not in a position to set the price without some bargaining? He may, of course, not indicate any price on the goods and avoid the problem. Though uncommon except in noncommercial settings, he may indicate an opening price and his willingness to bargain. Finally, he may set a firm price, indicate the price on a ticket and abandon his old method of doing business. It is the pressure to do the last that seems to raise the major economic problem.

It is not at all clear whether a price fixed by bargaining with individual customers is more attuned to the competitive goal than predetermining a price which will be charged of all customers. At other levels of production, the competition for customers and among customers is supposed to accomplish a reduction of the retail price by forcing the various processors and distributors to be as efficient as possible. One wonders, however, whether any such desirable goals are achieved by having con-

\textsuperscript{81}See, e.g., De Gorter v. FTC, 244 F.2d 270 (9th Cir. 1957) (retailer); Top Form Mills, Inc., 55 F.T.C. 307 (1958) (manufacturers); Fry King Corp., 55 F.T.C. 113 (1958) (manufacturers).
sumers compete with each other for a lower price for themselves. The net result of one person's bargaining skill will not necessarily be made available to the next person. The next person may even have to pay a higher price to compensate for the lack of profit from the previous customer. The communication, which assists commercial buyers in finding the best price for their goods, may not operate to identify the best outlets for consumers. Furthermore, the knowledgeability which is assumed to characterize the buyer for a retailer may not be present in the consumer. Lack of knowledge would seem to put him at a competitive disadvantage to a bargaining dealer. Perhaps, indeed, the whole movement from "caveat emptor" to the present state of the law has been somewhat motivated by the desire to protect the consumer from the consequences of his lack of knowledge. If so, it may be the seller's duty to indicate a fair price for the goods (or at least a price which he thinks he can obtain from a number of purchasers) in the same manner as he must inform the buyer of other considerations which might influence his purchase. Furthermore, inability to bargain may have a good competitive influence. For example, knowledge that the posted price is reliable greatly facilitates comparative shopping. To the extent that a seller is likely to use a similar markup on his goods, a dependable price allows a consumer to judge the reasonableness of the general pricing structure of the store by a comparison to the prices of goods with which he is familiar. Both types of comparisons would appear to allow consumers as a group to make effective economic choices and should, consequently, be competitive. On the other hand, the responsiveness of a market price which is set by direct bargaining would seem to avoid the problems of conscious parallelism in retailing and would apparently accelerate the response to changes in demand.

A related, but not identical, problem is the one of granting a discount from a regularly established price to some, but not all, of the customers.

85. 1 Callman, Unfair Competition and Trade-Marks 334-38 (2d ed. 1950) (general duty of disclosure). Callman states that a "purchaser may reasonably expect that prices are competitive, and he should be informed when they are not." Id. at 432. His viewpoint has yet to be adopted by the courts and the Federal Trade Commission.

86. Conscious parallelism refers to price imitation by competitors. Because of the duality required under the applicable Sherman Act provisions, truly independent conduct is not a violation of federal antitrust law. See note 64 supra and accompanying text; see also Att'y Gen. Nat'l Comm. Antitrust Rep. 36-42 (1955); Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961). The resulting price maintenance is in many ways indistinguishable from the results of contractual price fixing. The Federal Trade Commission has been greatly concerned with the problem. See the consent order in Rubber Mfg. Ass'n, 3 Trade Reg. Rep. 15657 (FTC Orders) (Jan. 11, 1962). The order provides that the fourteen tire and tube manufacturers "must abandon [their] existing prices, independently furnish new ones, and furnish documentary proof to the FTC upon request that any changes after adoption were a good faith meeting of competition." Id. at 20494.
Again, this practice is apparently forbidden by the Federal Trade Commission. Many of the considerations are the same as those applied to the desirability of having some advertised price, but there are several important differences. In the first place, under this type of pricing the general consumer is getting a price which is apparently satisfactory to a number of his fellow shoppers. His inability to bargain costs him only the discount. Furthermore, there may be economic reasons for singling out certain customers for special prices. The purchaser who makes large purchases, the one who can be induced to buy all his requirements from one store by some financial arrangement, the person in a position to recommend the store to others, all might be appropriate recipients of discount privileges. While such favoritism might result in the continuation of a higher price to the general public, the seller should not be able to pass on the loss of profit on his special accounts since his usual price is already likely to represent the highest price that could be obtained. In some instances, the fact that a reduction was achieved by some of the buyers might spur others, upon finding out about the arrangement, to seek similar discounts. The net result might be tantamount to a general price reduction.

Prohibiting the advertising of a price not uniformly maintained has a tendency to stabilize retail prices. If a retailer must charge one price to all, it must be a price sufficient to insure a profit. At least there is less motivation for lowering the price.

Actually, whether economically sound or not, the legislatures and courts have been quite clear that customers must be treated equally except under the most compelling circumstances. In the regulated industries there are normally specific restrictions against favoring one customer over another, and they are often quite strictly enforced. Gaining commercial advantage by giving value for a recommendation or other influence in an activity which is not recognized as capable of purchase, is often criminal. Giving a quantity discount to attract customers that is not justified by incident economies, if of sufficient geographic and economic stature, appears to be a violation of the Robinson-Patman Act.

87. See, e.g., Lasky Enterprises, No. 7408, FTC, April 27, 1960.
although the act has not been enforced in retail pricing cases. The enforcement of the antideception provisions in this area is consistent with legislative egalitarianism irrespective of whether it is economically sound.

VIII. CONCLUSION

It has not been the purpose of this article to predict the economic effect of various policies in the Federal Trade Commission's enforcement of the antideception provisions in the Federal Trade Commission Act. Rather, it has been to point out that there is a problem in balancing this effort against the goals of a competitive economy. The relationship is more complex than the suggestion of the Chairman of the Commission would indicate. Deception, as it has been defined by the Commission, encompasses many assertions which have a purpose other than the stealing of customers from competitors by false representations. It may be that the rarefied vocabulary being urged by the Commission will have the effect of making it more difficult to communicate basic facts which customers need to know in order to make the proper economic choice. Worse yet, the Commission may succeed in making it less profitable to advertise merit at all and, consequently, drive advertising stores further in the direction of emotional appeals. There is nothing deceptive about a comely young lady driving a bicycle, but her figure does not compensate the consumer for obscuring the bicycle's price figures. This is no better than if the retailer were to give up advertising all together.

Whatever the decision about various modes of advertising, there can be no dispute over the fact that competition thrives on comparison, and comparison is generated by advertising. Any formula for truth which results in silence should be unacceptable.

different purchasers . . . for use, consumption, or resale . . . " where the effect has one of certain specified anticompetitive consequences.

92. See report of speech by Paul Rand Dixon, supra note 45.