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## Deceptive Advertising and Inconsistent Guarantees

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class of visitors to whom reasonable care is owed.<sup>42</sup> Furthermore, the test more adequately reflects foreseeability, a vital element of a general negligence rule. Occupier foreseeability of risk is partially dependent upon visitors' reasonable expectations, because these expectations influence the likelihood of a visitor's presence and care taken for his own safety. The invitation test accurately reflects such visitor's reasonable expectations by correlating the occupier's duty to the nature of the invitation.<sup>43</sup> Use of the invitation test as an alternative method of determining an occupier's duty will result in closer relation of the law of landowner liability to general negligence principles, and should prevent many of the strained and unpredictable results under exclusive use of the economic benefit test. The conformity with general negligence principles, however, is still incomplete, representing an appropriate area for further judicial reform.<sup>44</sup>

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### DECEPTIVE ADVERTISING AND INCONSISTENT GUARANTEES

Respondent, a national retailer of general merchandise, inserted in guarantee certificates accompanying some of its products conditions and limitations not disclosed in guarantees contained in newspaper advertisements. The Federal Trade Commission charged respondent with a violation of section 5 of the Federal Trade Commission Act for making false and misleading representations.<sup>1</sup> Respondent asserted that whenever a customer made a claim guarantees were honored as advertised without regard to conditions and limitations contained in the certificates. On appeal to the Commission, the hearing examiner's initial decision dismissing the complaint was reversed, and a final order

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<sup>42</sup> The reasonable care owed to an invitee in Washington, however, is not the same as that owed under general negligence principles; there is no duty to protect a Washington invitee from open and obvious dangers. *Caron v. Grays Harbor County*, 18 Wn. 2d 397, 139 P.2d 626 (1943). The Washington rule should be changed to require a duty of protection if an occupier foresees that a visitor will fail to protect himself from the danger. See *RESTATEMENT (SECOND), TORTS* §§ 343, 343A (1965).

<sup>43</sup> See James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 *YALE L.J.* 605, 620-21 (1954).

<sup>44</sup> See Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 *MINN. L. REV.* 265, 309-10 (1963).

<sup>1</sup> Federal Trade Commission Act, § 5(A)(1), 52 Stat. 111 (1938), 15 U.S.C. § 45(a) (1964), amending 38 Stat. 719 (1914), provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

The Commission also charged respondent with engaging in unfair methods of competition in violation of § 5.

to cease and desist was issued. *Held*: An uncommunicated policy of honoring advertised guarantees without regard to limitations in guarantee certificates accompanying the merchandise does not eliminate the capacity to deceive inherent in the advertisements. *Montgomery Ward & Co.*, TRADE REG. REP. (1966 Trade Cas.) ¶ 17635 (Aug. 4, 1966).

Deceptive advertising is an unfair or deceptive practice in violation of section 5 of the Federal Trade Commission Act.<sup>2</sup> Actual deception need not be shown, the test being whether the advertising has a capacity to deceive.<sup>3</sup> Courts and the Federal Trade Commission have held unfair or deceptive the practice of limiting in the guarantee accompanying the merchandise a broader guarantee contained in advertisements.<sup>4</sup> However, in a recent case involving conflicting guarantees, actual honoring of the advertised guarantee was held a valid defense.<sup>5</sup> The question presented by the principal case is whether the merchandiser should be exonerated because it honored the guarantees as advertised.

The Commission treated the question whether or not respondent actually honored its advertised guarantees as irrelevant.<sup>6</sup> It reasoned that absence of communication of respondent's policy to its customers was crucial.<sup>7</sup> Holding that misrepresentation and deception occurred when the advertisement was read, the Commission determined that actual deception did not have to be shown. *Brite Mfg. Co.*,<sup>8</sup> the apparently conflicting precedent, was distinguished by the majority primarily because respondent in the principal case was a large retailer depending almost exclusively on national advertising, and because the guarantees in the principal case involved advertisements in a newspaper rather than point of sale material. The majority also emphasized that there was uncontradicted testimony in *Brite* showing that the

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<sup>2</sup> False advertising was involved in the first two cases decided by the Federal Trade Commission. *FTC v. Abbott & Co.*, 1 F.T.C. 16 (1916); *FTC v. Circle Silk Co.*, 1 F.T.C. 13 (1916).

<sup>3</sup> *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Goodman v. FTC*, 244 F.2d 584, 602 (9th Cir. 1957).

<sup>4</sup> *Clinton Watch Co. v. FTC*, 291 F.2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); *Baldwin Bracelet Corp.*, TRADE REG. REP. (1962 Trade Cas.) ¶ 16119 (Oct. 2, 1962), *aff'd on other grounds*, 325 F.2d 1012 (D.C. Cir. 1963).

<sup>5</sup> *Brite Mfg. Co.*, TRADE REG. REP. (1964 Trade Cas.) ¶ 16964 (June 18, 1964), *aff'd on other grounds*, 347 F.2d 477 (D.C. Cir. 1965).

<sup>6</sup> *Montgomery Ward & Co.*, TRADE REG. REP. (1966 Trade Cas.) ¶ 17635, at 22901 (Aug. 4, 1966).

<sup>7</sup> The majority stated that "an uncommunicated policy of honoring the advertised guarantee rather than imposing the limitations set out in the certificate accompanying the merchandise does not eliminate the capacity to deceive inherent in the advertisement." *Id.* at 22901.

<sup>8</sup> TRADE REG. REP. (1964 Trade Cas.) ¶ 16964 (June 18, 1964), *aff'd on other grounds*, 347 F.2d 477 (D.C. Cir. 1965).

limitations were not imposed. Commissioners Reilly and Elman, in separate dissents, challenged the majority's conclusion that the advertised guarantees were deceptive and suggested that the deceptive practice, if any, was in issuing the limited guarantee accompanying the merchandise.

The principal case cannot be meaningfully distinguished from the Commission's holding in *Brite Mfg. Co.*<sup>9</sup> The distinction raised by the majority based on size of the respective businesses in *Brite* and the principal case is not one of substance. The size of a business seems immaterial in determining the deceptiveness of its advertisements.<sup>10</sup> Nor does the distinction between point of sale advertisements and advertisements in a newspaper obviate the existence in each case of two conflicting representations as to guarantee.<sup>11</sup> Affirmative evidence showing that respondent honored the guarantee without qualification was the basis of the holding in *Brite*. The majority apparently treated the presence of affirmative evidence in *Brite* as a basis for distinguishing the principal case;<sup>12</sup> however that distinction is meaningless since the majority considered affirmative proof that the unqualified guarantee was honored irrelevant to a determination of deceptiveness.

While properly considering the question of actual honor of the broad guarantee irrelevant, the Commission, nonetheless, used the wrong approach by charging deceptive advertising. Although it appears that the Commission may construe against the advertiser statements susceptible of both a misleading and a truthful interpretation,<sup>13</sup> an advertisement with an unambiguous, unqualified guarantee does not have an inherent capacity to deceive. In the principal case, the

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<sup>9</sup> In *Brite*, display cards for watch bands were marked "fully guaranteed," although the cards on which the bands were mounted indicated that respondent would replace defective bands only if claim was made within thirty days of purchase and accompanied with a fifty cent payment. The examiner found that respondent never insisted on either of these conditions, and further found affirmative evidence that respondents honored the guarantee without qualification. The examiner dismissed that part of the complaint concerning the guarantee and the Commission concurred on appeal. *Brite Mfg. Co.*, TRADE REG. REP. (1964 Trade Cas.) ¶ 16964 (June 18, 1964), *aff'd on other grounds*, 347 F.2d 477 (D.C. Cir. 1965).

<sup>10</sup> The volume of advertiser's business should be considered in determining whether the public interest is great enough to justify the Commission's attention, but it is not a test of the propriety of issuing a cease and desist order. See *Barnes, False Advertising*, 23 OHIO ST. L.J. 597, 656 (1962).

<sup>11</sup> While there may be less likelihood of deception with point of sale advertisements, the Commission has found deception under facts nearly identical to those in *Brite*. *Baldwin Bracelet Corp.*, TRADE REG. REP. (1962 Trade Cas.) ¶ 16119 (Oct. 2, 1962), *aff'd on other grounds*, 325 F.2d 1012 (D.C. Cir. 1963). However, the defense in *Brite* of honoring point of sale guarantees had not been presented in *Baldwin Bracelet Corp.*

<sup>12</sup> TRADE REG. REP. (1966 Trade Cas.) ¶ 17635, at 22901 (Aug. 4, 1966).

<sup>13</sup> *Continental Wax Corp. v. FTC*, 330 F.2d 475, 477 (2d Cir. 1964).

advertised guarantees—considered apart from the certificate guarantees—were susceptible of only one interpretation: truthful on their face.<sup>14</sup> It was uncontroverted that respondent fully performed all advertised guarantees in accordance with the terms of its advertising.<sup>15</sup> Therefore, there would appear to be no basis to claim deception in the advertisement, as a purchaser received the guarantee coverage he anticipated from the advertisement.

While the rationale of the majority's holding is unsound, a cease and desist order was warranted under the facts presented.<sup>16</sup> Advertising a broad guarantee while inserting limitations in guarantee certificates would appear to be unlawful as a false and deceptive business practice.<sup>17</sup> While the majority was wrong in concluding that the advertised guarantees were deceptive, it did recognize that the *inconsistency* between the advertised guarantees and guarantee certificates created a deception.<sup>18</sup> Indeed, an advertised guarantee cannot be considered alone in determining the deceptiveness of a merchandiser's business practice. Although this was recognized by the dissenters, their contention was that respondent had not been charged with presenting conflicting guarantees.<sup>19</sup>

The dissenters were unnecessarily technical in concluding that the complaint should have been dismissed, for the facts amply indicated that respondent's practice was deceptive.<sup>20</sup> Even though the adver-

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<sup>14</sup> One of the dissenters stated: "[I]n the face of two conflicting representations . . . neither of which is deceptive on its face, the majority selects the ad as the deceptive one and relies on the certificate as evidence of this deception." TRADE REG. REP. (1966 Trade Cas.) ¶ 17635, at 22904 (Aug. 4, 1966).

<sup>15</sup> The hearing examiner found no evidence indicating that respondent failed to satisfy any claim under any of its guarantees. *Id.* at 22899.

The Commission did not overrule this finding, the majority maintaining that complaint counsel's "failure to adduce affirmative evidence that respondent in fact failed to honor the guarantee as advertised is [not] fatal to his proof of deception here." *Id.* at 22901.

<sup>16</sup> The order required respondent to cease and desist from representing that any of its merchandise was guaranteed unless all conditions and limitations thereon were clearly and conspicuously disclosed. *Id.* at 22903.

<sup>17</sup> See cases cited note 4 *supra*.

<sup>18</sup> TRADE REG. REP. (1966 Trade Cas.) ¶ 17635, at 22903 (Aug. 4, 1966).

The basic problem, indeed, would not seem to be so much whether the Commission precisely articulates where the misleading tendency lies (not in the advertising itself, but in the inconsistency), as whether an imprecise articulation might lead to an inadequate cease and desist order here or in future cases following the majority's reasoning. The order issued in the principal case at least appears to be the same as would be expected if the articulation had been more precise. See note 16 *supra*.

<sup>19</sup> *Id.* at 22904.

<sup>20</sup> The appendix to the majority opinion presented a summary of the evidence supporting the Commission's allegation that respondent's advertised guarantees failed to disclose all of the terms and conditions stated on the guarantee certificates supplied with the merchandise. *Id.* at 22903.

The Commission's Guides Against Deceptive Advertising of Guarantees, adopted on April 26, 1960, provides that any guarantee must clearly disclose the identity of

tised guarantee was honored when claims were made, customers could be under the impression that certificates accompanying the merchandise described the extent of the guarantee. The limitations on the certificates could discourage submission of many proper claims.<sup>21</sup> Thus, although respondent's advertised guarantees were not deceptive, when they were combined with the guarantee certificates the result was most certainly deceptive.

Why would a retailer adopt a policy of presenting two conflicting guarantees and honoring the broader one as advertised when claim was made by a customer?<sup>22</sup> Guarantees in advertising are presented to increase salability of an advertised product. As guarantees with limitations are unattractive to customers,<sup>23</sup> a broad guarantee is inserted in the advertisement even though it may not be what the company actually desires to offer.<sup>24</sup> One is inclined to believe that respondent in the principal case thought it was achieving some economic benefit in distributing the second, narrower description of its guarantee and then defending its policy before the Commission. That respondent honored its advertised guarantees when asked can hardly be an adequate justification for this practice. The issue of actual honor should be irrelevant; rather, the proper test should be whether the merchant's combined statements of guarantee are deceptive or unfair.

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the guarantor, the nature and extent of the guarantee, and the manner in which the guarantee will be performed. The Commission's standards are fairly precise. Disclosure must be made of: (1) What product or part thereof is guaranteed; (2) What characteristics or properties of the product or part thereof are covered by, or excluded from, the guarantee; (3) What is the duration of the guarantee; (4) What, if anything, any one claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges. 2 TRADE REG. REP. ¶ 7895 (1965).

<sup>21</sup> No evidence on this point was presented to the Commission. However, the Commission may proceed against practices which have the tendency or capacity to deceive. See cases cited note 3 *supra*.

<sup>22</sup> The hearing examiner found that as to twenty-two of respondent's products, the guarantee certificates contained conditions and limitations not disclosed in the newspaper advertisements. Respondent apparently admitted that the advertisements had been authorized in all but two instances. TRADE REG. REP. (1966 Trade Cas.) ¶ 17635, at 22899 (Aug. 4, 1966). The Commission's order covered all of the above products.

<sup>23</sup> At the time of purchase does the average consumer examine the guarantee accompanying the merchandise? One may entertain an initial, strong suspicion that many customers do not examine the accompanying guarantee upon purchase (especially if it is finely printed, or folded, or tucked inside the merchandise—all of which might be relevant inquiries), but do examine it if a defect is subsequently discovered.

<sup>24</sup> The majority was correct in noting the effect of such advertisements on competitors: "In this age of mass production and large-scale retailing the offer of guarantee coverage is an important instrument of competition . . . . If respondent is allowed to continue such a practice protected by a policy of honoring these broader claims only where demand is made, competition would no longer exist in the amount of guarantee services offered customers . . ." TRADE REG. REP. (1966 Trade Cas.) ¶ 17635, at 22902-03 (Aug. 4, 1966).