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Carleton A. Harkrader

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FICTITIOUS PRICING AND THE FTC: A NEW LOOK AT AN OLD DODGE

CARLETON A. HARKRADER †

Everyone loves, and hopes to find, bargains. It is this universal human trait that is exploited by the practice of fictitious pricing, whatever its form.

Rayex Corp., No. 7346,

FTC, April 2, 1962.

There's a sucker born every minute.

—*Phineas Taylor Barnum*

THE consumer's understandable desire to buy at a bargain price prompts him to spend money he might otherwise save or spend for something else. It is the vendor's long-time goal to convert this all-too-human trait into the sale of his goods. Yet theoretically, the market price in a competitive economy is set by supply and demand to afford an optimum return to the manufacturer and others in the distribution system for their efforts and capital. Inducing further sales by lowering prices below this point means a loss for some along the line. To solve this dilemma, sellers

† A.B., Virginia Military Institute, LL.B., Yale University; partner, Wald, Harkrader & Rockefeller, Washington, D. C. The author acknowledges the invaluable assistance of his colleague, Phillip D. Bostwick, and the forbearance of his partners, Robert L. Wald and Edwin S. Rockefeller, during preparation of this article.

over the years have hit upon the device of creating illusory bargains in the minds of purchasers, thus playing upon the purchasers' cupidity without sacrificing profits. The infinite variety of techniques for accomplishing this paradox is a tribute, if not to the "morals of the market place,"¹ at least to the inventive genius of businessmen. Such schemes have given rise to a new economic and legal concept: fictitious pricing.²

The Federal Trade Commission, throughout its nearly half-century of existence, has condemned many different methods of "fictitious" pricing as injurious to competition or misleading to consumers.³ Most have involved retailers,⁴ but

¹ Cardozo, J. in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

² "Fictitious" prices may result not only from businessmen's efforts to mislead bargain hunters, but may be implied even where the manufacturer or retailer acts in good faith, but objective circumstances result in some unintended "fiction." In FTC matters it is ordinarily immaterial whether the respondent knows his representation is false. *Gimbel Bros. v. FTC*, 116 F.2d 578 (2d Cir. 1941). *But see Regina Corp.*, 3 CCH TRADE REG. REP. ¶15936, at 20745 (FTC June 13, 1962).

³ The FTC was created in 1914 by the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. § 41 (1958). Whereas the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958), had been passed in an effort to *maintain* competition by prohibiting the ends that eliminate it (monopoly and monopolistic practices) and the means by which these are achieved (contracts, combinations and conspiracies in restraint of trade), the FTC Act was passed to *regulate* competition by insuring that competitive practices meet a certain acceptable standard. Section 5 declared that "unfair methods of competition in commerce" were unlawful, and was later amplified by the Wheeler-Lea Amendment, 52 Stat. 111 (1938), 15 U.S.C. § 45 (1958), to include "unfair or deceptive acts or practices." This language was added to nullify the effect of the Supreme Court's holding in *FTC v. Raladam Co.*, 283 U.S. 643 (1931), requiring proof of injury to competition under section 5; it became necessary to show only substantially injurious effects upon the consuming public. See generally Moore, *Deceptive Trade Practices and the Federal Trade Commission*, 28 TENN. L. REV. 493 (1961); note, 36 ST. JOHN'S L. REV. 274 (1962). The FTC has the power to curb acts in their incipiency which, if full blown, would constitute violations of the Sherman Act, but which cannot yet be proceeded against by the Department of Justice. *FTC v. Cement Institute*, 333 U.S. 683 (1948). (For a discussion of the division of functions in antitrust enforcement see Rockefeller, *Antitrust Enforcement: Duopoly or Monopoly?*, 1962 Wis. L. Rev. 437.) Fictitious pricing may violate Section 5 of the FTC Act as an unfair method of competition, as deceptive of consumers, or both. If fur products are fictitiously priced, there is also a violation of the Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. § 69 (1958). *Mandel Bros. v. FTC*, 254 F.2d 18 (7th Cir. 1958), *rev'd on other grounds*, 359 U.S. 385 (1959); *De Gorter v. FTC*, 244 F.2d 270 (9th Cir. 1957); *The Fair v. FTC*, 272 F.2d 609 (7th Cir. 1959).

⁴ See, e.g., *Niresk Indus., Inc. v. FTC*, 278 F.2d 337 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960).

several have attacked manufacturers.⁵ The nub of the retailer cases, despite shifting phraseology used by different respondents, has been the actual or implied comparison of two prices: a fictitious higher or "usual" price and a lower or "reduced" actual selling price.⁶ The core of the manufacturer cases has been the promulgation of a "normal" retail value for the product through methods such as retail price lists, price tags or marks on the product, which is in fact greater than the price at which the product usually sells.⁷ An impressive volume of precedent in both lines of cases had evolved by 1958, when the Commission promulgated its Guides Against Deceptive Pricing.⁸ But since that time there have been several important new decisions not anticipated in the Guides. The implications and overtones of these cases pose significant pricing problems for those engaged in the manufacture and distribution of consumer goods.

BACKGROUND

The Revolution in Retailing

Since 1920, when the FTC first held that a piano manufacturer had violated Section 5 of the Federal Trade Commission Act by stencilling his instruments with prices "grossly in excess of the prices at which such pianos . . . are usually sold at retail,"⁹ an increasing number of Commission cases have dealt with the problem of fictitious pricing. Today it is the leading type of deception practiced

⁵ See, e.g., *Clinton Watch Co. v. FTC*, 291 F.2d 838 (7th Cir. 1961), cert. denied, 368 U.S. 952 (1962).

⁶ E.g., "The use by the respondents in this case [electrical appliance retailers] of manufacturers' suggested list prices and other higher prices in comparison with lower advertised sales prices were misrepresentations as to usual and customary prices and as to savings afforded purchasers . . ." *George's Radio & Television Co.*, 3 CCH TRADE REG. REP. ¶ 15691, at 20526 (FTC Jan. 19, 1962).

⁷ This theory stems from language of Mr. Justice Brandeis in *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922): "That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition."

⁸ *Guides Against Deceptive Pricing*, FTC, 23 Fed. Reg. 7965 (1958), 2 CCH TRADE REG. REP. ¶ 7835.48 (1961).

⁹ *Holland Piano Mfg. Co.*, 3 F.T.C. 31 (1920).

in violation of the FTC Act.¹⁰ The upswing in cases can be traced to one paramount factor—the “Revolution in Retailing” of the 1950’s.¹¹

From the turn of the century until after World War II, retail trade revolved around the downtown department stores. These stores were generally operated on a large (usually forty percent) retail markup over cost, whether on a handkerchief or a refrigerator. Stores were designed to provide the shopper with a large selection of merchandise, each item available at two or three different qualities, brands or prices. Regular customer services included floor clerks, wrapping, packaging, delivery, credit terms and acceptance of returned goods. During this period the manufacturers’ suggested retail prices simply reflected the prevailing forty percent markup, hence were clearly not fictitious.

The post-World War II climate, however, produced a new brand of merchandiser: the low-markup, high-volume, quick-turnover discount retailer who dispensed with expensive frills associated with the traditional department store.¹² The birth of the discount house brought a wave of unprecedented competition in selling in an industry already vigorously competitive. “Discounters” cut the retailers’ traditional forty percent markup in half, compensating for loss of revenue by holding operating expenses to a minimum. Stores were opened in buildings that were often little more than warehouses, located in the suburbs to take advantage of low rentals and the population migration; employees reduced by self-service techniques; usual customer services ruthlessly eliminated. Because their lower prices meant cold cash savings to consumers when compared with competitive department store

¹⁰ In a typical recent year, over thirty per cent of the FTC’s cease and desist orders dealt with fictitious pricing. U.S. FTC Press Release, Aug. 22, 1958.

¹¹ See generally Silberman, *The Revolutionists of Retailing*, *Fortune*, April 1962, p. 99.

¹² For a discussion about Eugene Ferkauf, originator of the first discount house, New York’s E. J. Korvette, Inc., see *Retailing: Everybody Loves a Bargain*, *Time*, July 6, 1962, p. 57.

prices, and the discount houses specialized in flamboyant advertising of this fact, they flourished.

In many cases aggressive discount house competition brought about the demise or "modification" of department stores. Some failed altogether; others fought back by reducing their prices on competitive items.¹³ This in turn triggered a chain reaction of extravagant pricing claims by both kinds of merchants, often abetted by inflated manufacturers' retail price lists and tickets.

But since the department stores could seldom advertise that their new low prices afforded a saving over discount house prices, they had to compare them either with their own former prices or with the manufacturers' suggested retail prices, which generally reflected the traditional forty per cent markup. On the other hand, as department store prices dropped to approach discount house prices, the discounters could no longer compare prices with department stores so dramatically. Thus, they too began to compare their prices with the manufacturers' suggested retail prices.¹⁴ As time went on, there came to be little or no difference in the price of many comparable items between discount houses and department stores,¹⁵ and the manufacturers' list prices had become meaningless because very few retailers continued to use the traditional forty percent markup.¹⁶ Yet, whether businessmen might have preferred to operate otherwise or not,¹⁷ price competition forced them to advertise comparatively as their competitors did. The consumer became

¹³ See Silberman, *The Department Stores Are Waking Up*, *Fortune*, July 1962, p. 143.

¹⁴ Compare Silberman, *The Discounters Choose Their Weapons*, *Fortune*, May 1962, p. 118.

¹⁵ For a survey comparing the variation between list prices and retail prices of automatic washing machines sold by four groups of retailers (discount houses, department stores, large volume outlets, and small volume outlets) in nine major United States cities, see Jung, *Price Variations Among Discount Houses and Other Retailers: a Re-Appraisal*, 37 *J. OF RETAILING* 13 (1961).

¹⁶ See Weiss, *The Decline of the List Price*, *Advertising Age*, Nov. 13, 1961, p. 140.

¹⁷ See FOY, *MANAGEMENT'S PART IN ACHIEVING PRICE RESPECTABILITY* 7 (1958): "The roll call of those in favor of sound pricing would be almost as impressive, I am sure, as the classical census of those in favor of motherhood. For as surely as he votes against sin on an open ballot, every good business man decries cutthroat pricing."

confused, critical and skeptical.¹⁸ By 1958, there was a sizable agitation for reform.¹⁹

*Fictitious Pricing Case Law to 1958, As
Reflected in the Guides*

The FTC issued its Guides Against Fictitious Pricing on October 2, 1958.²⁰ The Guides were intended to spell out in layman's language the requirements of trade regulation law applicable to price advertising. They also served the purpose of "spotlighting persistent violations." Thus, they reflected the Commission's informal experience in this field, as well as the accumulated case precedent. Perhaps, also, in ambiguous areas they projected the FTC staff's view, with some blessing by the Commission, of what the law ought to be. Although the Guides state that they were adopted by the FTC "for the use of its staff in the evaluation of pricing representations in advertising," they also note that they were released to the public "in the interest of obtaining voluntary, simultaneous and prompt cooperation."²¹

¹⁸ *Phoney Price-Cutting: Threat to Advertising Confidence*, Time, Nov. 10, 1958, p. 78: "More and more customers are becoming suspicious of price cuts. A study by Pittsburgh's Duquesne University shows that buyers strongly suspect claims of price cuts above 27.5%." See ZELOMEK, *THE INTERRELATIONSHIP OF MERCHANDISING AND PRICING III* (1958).

¹⁹ This agitation for truth in advertising was not a new phenomenon. In 1911 the trade magazine *Printer's Ink* published a Model Statute which many states subsequently adopted. Revised in 1945, some forty-three states had passed the *Printer's Ink* Model Statute or a variation of it by 1957. See Day, *Ad Ethics Are Higher Today Because Honest Ads Work Best*, *Printer's Ink*, June 14, 1957, p. 21.

²⁰ The Guides Against Fictitious Pricing were issued as a part of the FTC's Guide Program, begun several years earlier. See address by John P. Sullivan, Legal Adviser on Guides, FTC Bureau of Consultation, Federal Trade Commission Conference on Public Deception, December 21, 1959: "The Guide Program had its beginning on September 15, 1955 with the issuance of Cigarette Advertising Guides. This was followed on August 27, 1958 by Advertising Guides for the Tire Industry. On October 10, 1958, the Commission launched a new approach in issuing Guides against a practice that was common to many industries. Trade Practice Rules and prior Guides were issued to particular industries, but the new Guides against Fictitious Pricing cut across all industry lines."

²¹ "In issuing Guides, it was neither the intent or purpose of the Commission to inform the adventuresome how far they can skate on thin ice. Rather, they may be likened to caution signs on the highway, warning the motorist where he must slow down to take other action to avoid mishap." *Ibid.*

The Guides set forth nine principles which the Commission uses to evaluate price representations in advertising. These principles were distilled from past cases and represented an informal "codification" of the law as reflected in those cases. Also included in the Guides were examples of specific words and phrases the Commission had previously held to be deceptive. Thus, it may serve as a useful review of the fictitious pricing methods used up to 1958 briefly to examine the Guides *seriatim*.

The three most common pre-Guide advertising dodges used by retailers were: (1) advertising an article for sale at a low price when the specific article available for sale was not the one advertised, but a similar or comparable one;²² (2) quoting a bargain price below a purported regular retail price which was not in fact the regular retail price for the article in the trade area where the statement was made;²³ and (3) quoting a bargain price below the advertiser's recent selling price when in actuality he had made no recent sales at that price.²⁴ Guide I proscribes

²² *E.g.*, *Mandel Bros. v. FTC*, 254 F.2d 18 (7th Cir. 1958), *rev'd on other grounds*, 359 U.S. 385 (1959) (respondent advertised in a newspaper that fur products offered at a price of \$244 were "Usually \$299 to \$399"; evidence showed that the specific garments advertised had never retailed at those prices, having instead a usual and regular retail price of \$244 or \$288).

²³ *E.g.*, *Awon Film & Supply Co.*, 54 F.T.C. 1144 (1958); *Maxwell Distrib. Co.*, 54 F.T.C. 260 (1957); *Charlet Undergarment Corp.*, 52 F.T.C. 924 (1956); *Benjamin & Edward J. Gross Co.*, 51 F.T.C. 1248 (1955); *Household Sewing Mach. Co.*, 52 F.T.C. 250 (1955); *Robert Hall Clothes, Inc.*, 50 F.T.C. 196 (1953); *Plaza Luggage & Supply Co.*, 44 F.T.C. 443 (1948); *Firestone Tire & Rubber Co.*, 33 F.T.C. 282 (1941); *Goodyear Tire & Rubber Co.*, 33 F.T.C. 398 (1941); *B. F. Goodrich Co.*, 33 F.T.C. 312 (1941); *Sears, Roebuck & Co.*, 33 F.T.C. 334 (1941); *Western Auto Supply Co.*, 33 F.T.C. 356 (1941). Post Guide cases: *e.g.*, *Niresk Indus., Inc. v. FTC*, 278 F.2d 337 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); *Harsam Distrib., Inc. v. FTC*, 263 F.2d 396 (2d Cir. 1959); *Gimbel Bros.*, 3 CCH TRADE REG. REP. ¶ 16020 (FTC July 26, 1962); *Giant Foods, Inc.*, 3 CCH TRADE REG. REP. ¶ 15937 (FTC June 13, 1962); *George's Radio & Television Co.*, 3 CCH TRADE REG. REP. ¶ 15691 (FTC Jan. 19, 1962); *Bond Stores, Inc.*, 56 F.T.C. 716 (1960); *Filderman Corp.*, 56 F.T.C. 685 (1959); *Hutchinson Chem. Corp.*, 55 F.T.C. 1942 (1959). For a case dismissing such a charge on grounds that the evidence was insufficient to establish what the usual and regular retail price of the advertised product was, see *Sun Gold Indus.*, 56 F.T.C. 1368 (1960).

²⁴ *E.g.*, *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937); *Mandel Bros. v. FTC*, *supra* note 22; *Consumer Sales Corp. v. FTC*, 198 F.2d 404 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953); *Thomas v. FTC*, 116 F.2d 347 (10th Cir. 1940); *Awon Film & Supply Co.*, *supra* note 23; *Southern*

those three types of representations by stating that a savings claim should not be used unless it applies to the specific article offered for sale and is either a saving from the usual and customary retail price²⁵ of the article in the trade area when it is advertised or from the advertiser's usual retail price of the article in the recent, regular course of business.²⁶ In addition, the advertisement must clearly show which of these two types of discount applies.

Guide II states some specific limitations on "reduction" or "savings" claims. Some advertisements had compared a low "bargain" price with a higher "retail" price, on the theory that the comparison was justified by a few isolated sales at the higher price, even though the majority of previous sales had been made at the lower price.²⁷ Savings claims, according to this Guide, should not be made if based on an artificial markup, infrequent or isolated sales, or on

Piano Co., 54 F.T.C. 640 (1957); Walside, Inc., 54 F.T.C. 572 (1957); Artistic Modern, Inc., 54 F.T.C. 225 (1957); Rena-Ware Distrib., Inc., 54 F.T.C. 94 (1957); American Albums, Inc., 53 F.T.C. 913 (1956); Approved Photographer's Ass'n, 53 F.T.C. 610 (1956); American Broadloom Carpet Co., 53 F.T.C. 239 (1956); George's Radio & Television Co., 50 F.T.C. 580 (1953); Zlotnick The Furrier, Inc., 48 F.T.C. 1068 (1952); The Camera Man, 42 F.T.C. 393 (1946); United Art Studios, 36 F.T.C. 977 (1943); Erwin Feather Quilt Co., 30 F.T.C. 1079 (1940); M. E. Moss Mfg. Co., 19 F.T.C. 467 (1934); Perfolastic Inc., 16 F.T.C. 157 (1932); Domino House, Inc., 14 F.T.C. 432 (1931); School of Applied Art, 11 F.T.C. 431 (1927). Post-Guide cases: *e.g.*, Niresk Indus., Inc. v. FTC, *supra* note 23; Basic Books, Inc. v. FTC, 276 F.2d 718 (7th Cir. 1960); Gimbel Bros., *supra* note 23; Encyclopaedia Britannica, Inc., 3 CCH TRADE REG. REP. ¶ 15246 (FTC, June 16, 1961). For a case dismissing such a charge on grounds that the evidence was insufficient to establish the respondent had never sold at the advertised price, see City Stores Co., 3 CCH TRADE REG. REP. ¶ 15805 (FTC March 27, 1962).

²⁵ Guide I(b) lists as examples the following phrases used in advertisements which have been held to be interpreted by the consumer to mean the usual and customary retail price: "Maker's List Price," "Manufacturer's List Price," "Manufacturer's Suggested Retail Price," "Sold Nationally At," "Nationally Advertised At" and "Value."

²⁶ Guide I(c) lists as examples the following phrases used in advertisements which have been held to be interpreted by the consumer to mean the retail price charged by the advertiser in his recent, regular course of business: "regularly," "usually," "formerly," "originally," "reduced," "was — now —," "made to sell for," "woven to sell for," "our list price," "— % off," "save up to \$ —," "special," "you save \$ —" and "\$50 dress—\$35."

²⁷ *Cf.* Harsam Distrib., Inc. v. FTC, *supra* note 23. For a case dismissing such a complaint on grounds that respondent had disposed of the business in which the practice occurred, see Chester H. Roth Co., 55 F.T.C. 1076 (1959).

a past price that was not in use in the recent, regular course of business, unless this fact is adequately disclosed.

Other advertisements claimed that the price of an article affords the buyer a saving when in fact the article advertised is compared pricewise with a different article of superior quality.²⁸ Guide III attempts to discourage this type of advertising without forbidding honest savings claims on truly comparable products. It thus requires the advertiser to disclose that the low price of the advertised article is not being compared with the former or with the usual and customary price of that same article, but rather with similar but comparable merchandise of like grade and quality. Furthermore, the more expensive merchandise mentioned in the advertisement must in fact be generally available in that trade area at the comparative price stated, or its unavailability must be stated.²⁹

A favorite trick of advertisers is to represent that prices are reduced because of alleged special events such as "clearance" or "manufacturer's close out," which in fact never occur.³⁰ Guide IV declares that advertisements should not imply that an article was offered for sale at a saving because of some "unusual event or manner of business" unless the statement is true.³¹ Some advertisements have represented that two articles could be purchased for the price of one when in fact the price charged for both articles was twice the usual price of one such article.³² Guide V states that no claim to sell two articles for the price of one should be made unless the price for both is the usual and customary retail price in the recent, regular course of

²⁸ *E.g.*, *Mandel Bros. v. FTC*, *supra* note 22; *Miss Youth Form Creations Corp.*, 52 F.T.C. 413 (1955).

²⁹ Guide III(c) states: "An example of a statement which would be proper within the provisions of Guide III if based on facts is: 'Dacron suit \$20.00—Comparable suits \$25.00.'"

³⁰ *E.g.*, *Kay Jewelry Stores, Inc.* 54 F.T.C. 548 (1957); *Del Mar Sewing Mach. Co.*, 49 F.T.C. 1257 (1953); *Illinois Merchandise Mart*, 45 F.T.C. 58 (1948).

³¹ Guide IV sets forth the following phrases as illustrative of those which so imply: "Special Purchase," "Clearance," "Marked Down From Stock," "Exceptional Purchase," "Manufacturer's Close-Out," "Advance Sale" and "Sale."

³² *E.g.*, *Thomas v. FTC*, *supra* note 24.

business for the single article. Similarly, Guide VI governs the announcement of an offer of a "1¢ sale" or "half-price sale," when the offer of an article at this special price is conditioned upon the purchase of another article at the same time. Purchasers may be misled if the price charged for the additional article required to be purchased is not the usual and regular price but rather a higher price which will afford the seller a profit on the combined sale.³³ When an advertisement states that an article can be purchased for 1¢ or at half-price, this Guide requires that it be accompanied by a disclosure of the conditions of the offer and that the stated price for the additional article not be inflated.

Mail-order sellers often represent to consumers that they are wholesalers, and are able to offer their merchandise to those on a special mailing list at wholesale prices. In fact, the price offered in such cases has sometimes been higher than the wholesale price paid by retailers, the sellers have not actually been wholesalers but retailers, and the price quoted in the catalog has been the usual retail price for the article.³⁴ To deter this type of advertising, Guide VII prohibits claims that a price is a "factory" or "wholesale" price when it is not the same as that paid by retailers.

In fact, most fictitious price advertisements have originated with retailers. But one common method of fictitious pricing is peculiar to manufacturers and arises out of the practice of preticketing. Many manufacturers affix retail price tags or labels to their products at the factory, thus "suggesting" the retail value to the retailer and, ultimately, to the consumer. If retailers generally sell this pre-priced article for less than the price on the preticket, fictitious price-

³³ *E.g.*, Electrical Center, 48 F.T.C. 726 (1952); Firestone Tire & Rubber Co., 33 F.T.C. 282 (1941); Goodyear Tire & Rubber Co., 33 F.T.C. 298 (1941); B. F. Goodrich Co., 33 F.T.C. 312 (1941); Sears, Roebuck & Co., 33 F.T.C. 334 (1941); Western Auto Supply Co., 33 F.T.C. 356 (1941); *cf.* Kalwajtys v. FTC, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957).

³⁴ *E.g.*, Progress Tailoring Co. v. FTC, 153 F.2d 103 (7th Cir. 1946); L. & C. Mayers Co. v. FTC, 97 F.2d 365 (2d Cir. 1938); Brown Fence & Wire Co. v. FTC, 64 F.2d 934 (6th Cir. 1933); Macher Watch & Jewelry Co., 32 F.T.C. 763 (1941).

ing problems arise.³⁵ The Federal Trade Commission has held that the preticketed price constitutes a representation to the consumer of the usual and regular retail price.³⁶ Thus the retailer who uses the preticket while the product is generally selling for less engages in a deceptive act or practice by holding forth a nonexistent saving to the consumer.³⁷ But in the same situation the manufacturer has also been held to have engaged in deceptive practices because he supplied the means used to deceive the consumer.³⁸ The Commission states in Guide VIII that an article should not be preticketed with a price figure which is greater than the usual and customary retail price of that product, and a manufacturer who puts erroneously marked products in the hands of retailers will himself be guilty of deception; furthermore, it is no defense to say that he thought the preticketed price was the usual retail price since he is legally charged with knowledge of the merchandising "facts of life"³⁹ about his products after they leave the factory.⁴⁰

³⁵ *E.g.*, Ma-Ro Hosiery Co., 53 F.T.C. 862 (1957); Neuville, Inc., 53 F.T.C. 436 (1956); Orloff Co., 52 F.T.C. 709 (1956); Trade Labs., Inc., 25 F.T.C. 937 (1937); Mills Sales Co., 23 F.T.C. 518 (1936); FTC v. Holland Piano Mfg. Co., 3 F.T.C. 31 (1920). Post Guide cases: Baltimore Luggage Co. v. FTC, 296 F.2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962); Clinton Watch Co. v. FTC, 291 F.2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); Rayex Corp., 3 CCH TRADE REG. REP. ¶15823 (FTC April 2, 1962); Helbros Watch Co., 3 CCH TRADE REG. REP. ¶15654 (FTC Dec. 26, 1961).

³⁶ *E.g.*, Mills Sales Co., *supra* note 35.

³⁷ See, *e.g.*, Niresk Indus., Inc. v. FTC, 278 F.2d 337 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); see note 6 *supra*.

³⁸ *E.g.*, Clinton Watch Co. v. FTC, 291 F.2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); see note 7 *supra*.

³⁹ Orloff Co., *supra* note 35.

⁴⁰ Guide IX deals with the relatively infrequent practice of advertising price savings on "imperfect, irregular, seconds" items. It provides: "No comparative price should be quoted in connection with an article offered for sale which is imperfect, irregular, or a second, unless it is accompanied by a clear and conspicuous disclosure that such comparative price refers to the price of the article if perfect. Such comparative price should not be used unless (1) it is the price at which the advertiser usually and customarily sells the article without defects, or (2) it is the price at which the article without defects is usually and customarily sold at the comparative price in the trade area, or areas, where the statement is made, or if such article is not so available, that fact is clearly disclosed."

Present Status and Effect of the Guides

The Guides close with the statement that they "do not constitute a finding in and will not affect the disposition of any formal or informal matter before the Commission." Read in conjunction with their opening sentence—*i.e.*, that the Guides have been adopted "for the use of [the Commission's] staff in the evaluation of pricing representations in advertising"—it is apparent that the original purpose for which the Guides were promulgated did not necessarily contemplate their use as substantive law.⁴¹ A recent decision of the FTC, *Gimbel Bros.*,⁴² however, has apparently raised their status as legal guideposts for pricing practices.

Gimbel's had used the words "list price," "usually," "regularly" and "originally" in advertisements which the Commission alleged were fictitious because of implied false representations about the prices at which the goods had actually been selling in the area.⁴³ The hearing examiner's initial decision dismissed the complaint on the ground that there was no evidence in the record to prove what meaning the public attached to these particular words despite the specific meaning given to them in the Guides; therefore, since the Guides could not be looked to as substantive law or as a substitute for evidence, the Commission's burden of proving customer deception had not been sustained.

On appeal, the Commission reversed the hearing examiner's initial decision. Recognizing that the Guides are "not substantive law in and of themselves," Commissioner MacIntyre's opinion declared that "this does not mean that they may be completely ignored and rejected in the fashion herein accomplished."⁴⁴ The opinion then explained the function of the Guides in these significant words:

⁴¹ See address by John P. Sullivan, Federal Trade Commission Conference on Public Deception, December 21, 1959; "Guides are exactly what their name purports them to be. They are not law."

⁴² 3 CCH TRADE REG. REP. ¶ 16020 (FTC July 26, 1962).

⁴³ These words are found in Guide I(c) as examples of words which have been held to be representations of the usual and customary price. See note 26 *supra*.

⁴⁴ *Gimbel Bros.*, 3 CCH TRADE REG. REP. ¶ 16020, at 20858 (FTC July 26, 1962).

What, then, is the proper status of the "Guides" with respect to a Commission proceeding? When viewed as a compilation and summary of the expertise acquired by the Commission from having repeatedly decided cases dealing with identical false claims, the role of the "Guides" becomes apparent. *They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out.* It is our view that words and phrases of the type set out in the "Guides" must be consistently dealt with by the Commission or its decisions will have no meaning or value. Only by consistent interpretation can some order be brought to the semantic jungle of advertising.⁴⁵

The Commission then went ahead to hold that Gimbel had engaged in deceptive advertising and entered its order to cease and desist.

Such emphasis on the Guides by the Commission in its decisions makes it increasingly important that they reflect accurately the current thinking of the Commission. At this writing, FTC staff attorneys are in fact engaged in the preparation of a revised version of the original Guides⁴⁶ which may be adopted by the Commission in the next few months. If they follow past precedent, the revised Guides will incorporate the most recent case law developments as well as the FTC's administrative experience since promulgation of the original Guides in 1958.

RECENT FICTITIOUS PRICING CASES INVOLVING MANUFACTURERS

Predictably, the merchandising world has shown an avid interest in the Guides Against Deceptive Pricing. A half-million copies were distributed in the first year after their issuance.⁴⁷ Moreover, they stimulated state and local action. On January 1, 1959, for example, the Better

⁴⁵ *Ibid.* (Emphasis added.)

⁴⁶ Interview with William D. Dixon, Attorney, FTC Bureau of Industry Guidance, Sept. 5, 1962.

⁴⁷ U.S. FTC, ANNUAL REPORT 67 (1961).

Business Bureau of New York City issued its "Standards for Retail Advertising of Price Reduction, Comparison and Saving Claims," which were based upon the FTC's Guides. But the dynamics of retail merchandising defy any static solution; new and even more perplexing problems have arisen to plague the Commission since 1958.

The recent cases point up four common practices of manufacturers not clearly or adequately covered by the Guides. In each instance the Commission has nonetheless claimed that the manufacturer is guilty of placing in the hands of a reseller an instrument of price deception. The practices, to be described in detail, are: (1) a manufacturer's purposeful promoting of periodic reduced-price sales by retailer-customers to insure that a significant proportion of the manufacturer's total sales will be at below-normal sale prices; (2) his supplying of mail-order houses with catalog insert sheets listing both a purported "retail" price and a so-called "wholesale" price at which the goods are actually sold; (3) the preticketing of nationally-distributed products with a uniform price when the regular retail price varies in different parts of the country; and (4) the furnishing of retailers with "suggested" list prices.

Manufacturer-Sponsored Sales

The periodic or seasonal sale is a traditional and effective method by which retailers seek to stimulate business. These sales are frequently promoted by the manufacturer-supplier, who temporarily cuts his own price to facilitate the retailer's price reduction. Seemingly, no deception occurs if the retailer's sale price is actually lower than the usual price charged during the rest of the year. The *Kreiss*⁴⁸ case stands as a warning, however, that such sales cannot be depended upon to mask fictitious pricing schemes.

Kreiss involved department store sales of women's hosiery which the manufacturer advertised in cooperation with its retailers at a stated retail price. But twice each

⁴⁸ 56 F.T.C. 1421 (1960).

year, for periods of two to four weeks, the manufacturer offered the hosiery to retailer-customers at fifty percent off the regular wholesale price on condition that the retailers, in turn, would sell the hosiery at half the advertised price during corresponding sale periods. Although the advertised price was maintained throughout the year except during the sale periods, ninety-five percent of all the manufacturer's sales to the retailers were at the lower sale price. In a three-two decision, the Commission dismissed the complaint, finding decisive the fact that the higher price was actually maintained throughout the year except for the two brief sale periods. But the two FTC members dissenting were convinced that the sale price at which such a large percentage of the hosiery was sold was in reality the "customary and usual" retail price and the advertised price was a fictitious one.⁴⁹

On the basis of the close split in the *Kreiss* case and changes in the Commission membership since it was decided,⁵⁰ it would be surprising if the FTC did not challenge similar types of promotional schemes, particularly where the sales price is far below an advertised or preticketed price and the sales endure for unusually long periods of time or recur at frequent intervals.⁵¹

Catalog Insert Sheets

In addition to their "regular" line of merchandise sold through traditional retail outlets, many manufacturers also market a "special," "promotional," or "jobber" line. This merchandise, which is frequently of distinctive design

⁴⁹ "In my opinion the price at which 95% of respondent's merchandise is sold is the regular price as indicated by this record." *Id.* at 1431 (dissenting opinion of Commissioner Secret).

⁵⁰ Four of the members who participated have been replaced (only Commissioner Anderson remains). This makes the precedential value of the *Kreiss* case doubtful, especially since the majority relied mainly on a narrow pleading ground—*i.e.*, that it was not false, as alleged in the complaint, for *Kreiss* to represent that the amount charged ten or eleven months a year was "customary and usual." Compare the Commission's more recent use of the phrase "generally prevailing" in *Rayex Corp.*, 3 CCH TRADE REG. REP. ¶ 15823 (FTC April 2, 1962).

⁵¹ See *Chester H. Roth Co.*, 55 F.T.C. 1076 (1959).

and may be of lower quality than the regular line, is marketed through a relatively new type of distributor known as the "catalog jobber."

Though methods vary considerably, the typical catalog jobber is essentially a retailer.⁵² He purchases merchandise from a number of manufacturers and solicits prospective customers through a handsome color catalog. His clientele ranges from individual consumers to business and fraternal organizations and a few small town retail merchants. Some catalog jobbers also maintain display rooms where they sell some merchandise to all comers.

Each manufacturer supplying the catalog jobber customarily furnishes printed "insert sheets" or, more recently, a "color positive" from which the catalog jobber may print such insert sheets, illustrating the manufacturer's products. Two prices are given in the catalog for each item. In some instances they are stated as "retail price" and "your cost," the latter being half the stated "retail price." Other catalogs use "coded prices" and instruct the manufacturers to make up the insert sheets accordingly. Here the "retail price" is preceded by a series of letters and numbers, such as "20 K 0169 TG 525 Necklace \$10.50."⁵³ The catalog contains an explanation that the cost of the item is concealed in these numbers and sets forth the decoding procedure. The price when decoded is typically exactly half the "retail price." For example, the coded price of the "\$10.50" necklace above is found in the numbers 525, being \$5.25 or half of \$10.50. All of this so-called jobber merchandise is sold to all customers at the "coded" or "your cost" price rather than at the higher "retail price."

Oddly, the FTC's first case on this method of pricing did not involve a catalog jobber, but a manufacturer which had furnished catalog insert sheets. In *Leeds Travelwear, Inc.*,⁵⁴ the Commission found that supplying such insert sheets was deceptive because the generally prevailing retail

⁵² For a complete discussion of a catalog jobber's operation, see *Coro, Inc.*, No. 8346, FTC, June 1, 1962 (Initial Decision).

⁵³ *Ibid.*

⁵⁴ 3 CCH TRADE REG. REP. ¶ 15997 (FTC July 20, 1962).

price of the manufacturer's merchandise was not the price stated as "retail," but rather the coded price.

In *Leeds*, however, it would seem the Commission has attacked the wrong end of the dragon. There are many more manufacturer-suppliers than catalog jobbers, and the pressure for two-price insert sheets comes from the catalog houses. The Commission's pending cases against catalog jobbers, on the other hand, obviously are more sensible in terms of effort and prospective results.⁵⁵ When and if this method of doing business is clearly condemned in a catalog-jobber case, the way will be cleared for an industry-wide reform of the two-price catalog insert sheet.

Nationwide Preticketing

Preticketing cases were routine long before 1958.⁵⁶ and Guide VIII covered the standard technique up to that time. The cases generally involved extremely exaggerated price tickets where the manufacturer, actually or in effect, informed the retailer that his product could be advertised at the preticketed figure, sold for a much smaller sum, and still provide an adequate profit. The more recent case of *Baltimore Luggage Co.*,⁵⁷ however, involved much less extreme facts which were in a legal limbo under the standards laid down in the Guides.

The respondent sold its product to 1,276 retailers located in 46 states and the District of Columbia. It preticketed the merchandise with tags bearing the price of \$12.95. The record indicated that 70 percent, or 889, of its retailer-customers, located in 34 states, sold the luggage at the preticketed price. The remaining 30 percent, or 387 retailers, located in 12 states, including the metropolitan trade areas of New York, Philadelphia and Washington, D. C., sold the luggage for approximately \$2.00 less. In dollar-volume

⁵⁵ *Majestic Elec. Supply Co.*, 3 CCH TRADE REG. REP. ¶ 15972 (FTC Aug. 13, 1962). A complaint was issued against another catalog jobber (*Continental Products, Inc.*, No. 8517) on June 29, 1962.

⁵⁶ See note 35 *supra*.

⁵⁷ *Baltimore Luggage Co. v. FTC*, 296 F.2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

terms, 62.5 percent of the merchandise was sold at the preticketed price.

On those facts, the Commission held that the preticketed price could mislead consumers in the trade areas in which it did not correspond with the usual and regular retail price.⁵⁸ This conclusion was affirmed by the Court of Appeals for the Fourth Circuit. The Commission rejected the Baltimore Luggage Company's argument that its pretickets should be judged on the basis of the entire national retail market,⁵⁹ reasoning that the consumer is not interested in bargains available in another section of the country, but only "in the trade area in which he is making his purchase."⁶⁰

Manufacturers' List Prices

Many manufacturers furnish retailers with illustrative literature containing "suggested list prices" or "suggested retail prices."⁶¹ These are purportedly for the retailer's use, to aid him in pricing the product to consumers at a competitive, yet profitable, figure. If this were the only use made of price lists, they would occasion no fictitious pricing problems for the retailer or the manufacturer.⁶² Retailers, however, sometimes display "list" or "suggested retail" prices directly to consumers or use them in com-

⁵⁸ Baltimore Luggage Co., No. 7683, FTC, Mar. 15, 1961.

⁵⁹ See Brief for Petitioners in Court of Appeals, pp. 5-7, Baltimore Luggage Co. v. FTC, *supra* note 57.

⁶⁰ Baltimore Luggage Co., *supra* note 58, at 3. In affirming this holding, the Court of Appeals' opinion commented that "no authorities have been cited to us, nor do we find any, which hold that, before the Commission may proscribe a deceptive practice on the part of a manufacturer which is widespread, it must be shown that the practice is not only widespread but universal." 296 F.2d at 611.

⁶¹ *E.g.*, Morris Lober & Associates, 55 F.T.C. 209 (1958); National Silver Co., 27 F.T.C. 596 (1938).

⁶² There can be no deception to the consumer if he does not see the price the manufacturer has suggested as a retail price. In a preticketing case, the Commission said: "There is, of course, no convention requiring manufacturers and distributors to use preticketing as a means for 'suggesting' resale prices to their dealers. They could as well simply enclose a list of suggested prices with each shipment. That procedure would involve no possibility of the sort of deception with which we are concerned, assuming the price list information was not passed on to the public." Rayex Corp., 3 CCH TRADE REG. REP. ¶ 15823 (FTC April 2, 1962).

parative advertising as the basis for price-saving claims.⁶³ Thus, representations such as "G. E. Automatic Toaster \$13.27, Mfg. List \$19.95" have been held to be deceptive on the part of a retail seller unless \$19.95 is in fact the usual and regular retail price, because they misleadingly imply that the consumer can save \$6.68 by buying the article at the advertiser's store.⁶⁴ Moreover, the FTC has emphatically held that this particular deception was not cured by a disclaimer elsewhere in the advertisement, obviously based upon a reading of the 1958 Guides, stating that the use of the term "manufacturer's list" does not imply that the advertiser has ever sold the products at that price or that the products are for sale generally in the area for that price.⁶⁵

Despite the earlier retailer cases, it was not until the recent decision in *Regina Corp.*⁶⁶ that a manufacturer was held responsible for furnishing deceptive price lists to retailers.⁶⁷ The Commission found that Regina's "suggested list prices" were higher than the usual and customary prices at which its floor polishers and vacuum cleaners sold at retail, and that Regina was aware that this was so when it made up the lists. Emphasizing the respondent's knowledge, the Commission ordered Regina to cease and desist from supplying distributors or retailers with price lists or

⁶³ *E.g.*, Giant Foods, Inc., 3 CCH TRADE REG. REP. ¶ 15937 (FTC, June 13, 1962).

⁶⁴ *Ibid.*

⁶⁵ *Id.* at 20746. The disclaimer stated in part: "The manufacturer's list prices referred to in this advertisement are inserted to assist you in identification of the products and to allow you to compare accurately the selling prices offered here and elsewhere. The use of the term manufacturer's list or similar terminology in our advertising is not to imply that Giant has ever sold the advertised products at such list prices or that the products are being offered for sale generally in the area at such list prices. . . . Giant includes these manufacturer's list prices so that you may make simple, intelligent comparisons between our selling prices and those of others."

⁶⁶ 3 CCH TRADE REG. REP. ¶ 15936 (FTC June 13, 1962).

⁶⁷ *Regina* was perhaps foreshadowed by *National Silver Co.*, 27 F.T.C. 596 (1938), which held a wholesaler (which had falsely represented itself to be a manufacturer) for publishing price lists greatly in excess of the "reasonable or normal" retail value of its products. See also three cases involving manufacturers which sold their goods through company-owned outlets: *Firestone Tire & Rubber Co.*, *Goodyear Tire & Rubber Co.* and *B. F. Goodrich Co.*, *supra* note 23.

other literature when it "knows or has reason to know" that such prices are in excess of the usual and customary retail price of the product.⁶⁸

THE MANUFACTURER'S DILEMMA

Functions of Manufacturer-Suggested Retail Prices

The *Regina* case pinpoints a basic dilemma faced by any manufacturer who wants to use either suggested list prices or preticketed as part of his distributional mechanism. Any discussion of the legal and policy considerations involved in these practices should be preceded by understanding what functions they serve in the commercial world.⁶⁹ It would be gross error to assume that most manufacturers who preticket their products or distribute price lists to their customers do so to promote deception, when in fact those practices are traditional in many lines and are thought to serve legitimate business ends.⁷⁰ Therefore, the question

⁶⁸ *Regina Corp.*, 3 CCH TRADE REG. REP. ¶ 15936 (FTC June 13, 1962). A reading of the *Regina* opinion raises the additional question whether the Commission considered the manufacturer's knowledge or reason to know that its list prices would be used as part of the retailer's advertising campaign. Price lists themselves vary greatly and may provide clues to their intended use. Some are attractively illustrated and printed, and thus easily adapted for sales promotion at the retail level. On the other hand, simpler printed or mimeographed lists, especially if they reveal "dealer's cost" as well as the suggested retail price, are unlikely to be shown to customers. But prices from any kind of list are equally usable as the basis for price comparisons in media advertisements.

⁶⁹ Although the FTC has never proceeded in any case involving only a manufacturer's nationally advertised price, this practice would appear to have at least as much potentiality for deception as preticketing—*i.e.*, the manufacturer's statement of the item's retail price is directly communicated to the consumer; if it overstates the generally prevailing price in any area, prospective buyers may be deceived. Nationally advertised prices were indirectly involved in *Niresk Indus., Inc. v. FTC*, 278 F.2d 337 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960) (mail-order firm unsuccessfully attempted to justify "list" price advertisement on ground that manufacturer advertised product in "Life" at that price), and *Harsam Distrib., Inc. v. FTC*, 263 F.2d 396 (2d Cir. 1959) (manufacturer advertised White Christmas perfume in "Vogue" at \$18.50, then furnished retailer with store display, "Advertised in Vogue at \$18.50—save 90%").

⁷⁰ *But cf.* *Baltimore Luggage Co. v. FTC*, 296 F.2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962). Although the evidence in that case showed that seventy percent of the respondent's retail dealers sold the manufacturer's products at the preticketed price, the Court of Appeals quoted with approval the Commission's language: "Respondent's purpose is self-evident—to make it

arises, "Why attempt to price the product at all at the primary level of distribution?" Wouldn't it be simpler and safer for the manufacturer simply to set the price he charges others for the product, based on his cost plus a margin of profit, and then leave other members of the distributional hierarchy free to determine the markup necessary to cover their own cost and profit?⁷¹

One answer is that the manufacturer does it to meet competition. It is a commercial fact of life that pretickets and price lists are customary concomitants of many kinds of merchandise. When retail merchants demand them for their own competitive use, any manufacturer who refuses to comply places himself at a disadvantage to other manufacturers who are willing to oblige.⁷² A second reason for such devices is that, despite the spate of fictitious pricing cases, many—perhaps most—preticketed or price listed items are actually sold at their indicated prices.⁷³

Thus manufacturers are impelled by the same kind of motives that lead them to support fair trade laws. They

appear to the store customers that the store was selling the luggage at approximately two dollars less than the regular retail price, and the customer would believe that he or she was getting a reduced price." 296 F.2d at 611.

⁷¹ For a discussion of the premise that some manufacturers determine first the retail price at which a planned product will sell and work backward from that figure to see how much can be spent for production costs, see the testimony of Lannon F. Mead, president of Regina Corporation, in *Regina Corp.*, *supra* note 68, reproduced in *Electrical Merchandising Week*, Sept. 25, 1961, p. 9. For an indication that one large retailer also operates in this manner, supervising the manufacture and transportation of the product to its stores, see Silberman, *The Department Stores Are Waking Up*, *Fortune*, July 1962, p. 143, at 251.

⁷² It might appear that if such conduct were flatly declared illegal in one case, all other manufacturers would then discontinue it; but experience teaches otherwise. *Cf. FTC v. C. E. Niehoff & Co.*, 355 U.S. 411 (1958).

⁷³ Many low cost items have the price printed on the product itself or upon the container in which it comes at the request of the retailer because such printing adds nothing to the manufacturer's costs, whereas a retailer may devote as much as twenty-two percent of its total man-hours to having retail prices stamped on its inventory, much of which is sold at the price that the manufacturer would print on it. See *The Price-Marking Problem*, *Modern Packaging*, Sept. 1959, p. 99. See generally *Sounding Board: What Do You Think of Pre-Pricing By Packagers?—Part I*, *Modern Packaging*, Dec. 1959, p. 65; *Part II*, *Modern Packaging*, Jan. 1960, p. 57. Anent products that are sold below pre-marked prices, see S. 3745, 87th Cong., 2d Sess. (1962), the "Truth in Packaging" bill that would prevent manufacturers from making any "cents-off" markings on labels. See *Advertising Age*, Oct. 1, 1962, p. 70.

are unconvinced by the apparent economic paradox that a manufacturer should be able to increase sales and profits by lowering retail prices rather than maintaining them. Indeed, it has been suggested that manufacturers who favor fair trade probably already have some degree of monopoly power over their products, so that they will not lose sales and profits by maintaining a higher price.⁷⁴

Attempts to justify manufacturer-suggested prices have also relied upon their claimed usefulness to retailers and consumers in providing a price norm or standard of comparison. It has been contended, for example, that retailers carry so many goods in such varying levels of quality that they have no way of knowing that \$29.95 is the "proper" retail price for an automatic coffeemaker—that only the manufacturer has sufficient knowledge to predict what consumers will pay.⁷⁵ This argument may have some validity for inexperienced retailers or ones in small towns. Similarly, it is contended that manufacturers' prices aid the consumer by protecting him against being overcharged⁷⁶ and also by giving him a method of identifying the particular item that is more comprehensible than model numbers or product names.⁷⁷ The FTC's position, however, is that the utility of manufacturers' prices as a superior means of identification is more than offset by the greater possibility of deception inherent in their use if they do not accurately reflect the generally prevailing retail price.⁷⁸

⁷⁴ Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. of L. & ECONOMICS 86 (1960).

⁷⁵ See the testimony of Neil H. Borden, Professor of Marketing, Graduate School of Business Administration, Harvard University, before the hearing examiner in Regina Corp., *supra* note 68, reproduced in *Electrical Merchandising Week*, *supra* note 71.

⁷⁶ This argument generally includes a reference to the Automobile Information Disclosure Act, 72 Stat. 326, 15 U.S.C. § 1232 (1958), which requires manufacturers to "preticket" automobiles with a suggested list price. In *Baltimore Luggage Co. v. FTC*, 296 F.2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962), the court rejected this argument by noting that the policy behind this Act was the protection of the public against "price packing"—a phenomenon peculiar to the automobile industry.

⁷⁷ Regina Corp., *supra* note 68.

⁷⁸ *Id.* at 20835.

*The Legal Distinction Between Pretickets and
Price Lists*

For whatever reason the manufacturer decides to influence the retail price, his next problem is whether to use pretickets, list prices, or both. His choice may be governed by the differing legal standards applicable to the different categories.

Although preticketing is not yet illegal *per se*,⁷⁹ it has become a very dangerous activity. In the first place, this practice often occurs in highly competitive lines where prices fluctuate from one trade area to another and even in the same trade area, often making the concept of a "generally prevailing" retail price virtually meaningless.⁸⁰ Moreover, while lack of knowledge of the inaccuracy of the "list prices" cited in the retailer-advertisements appears to be a defense in price list cases,⁸¹ the Commission has held in *Leeds*, which involved both preticketing and catalog insert sheets, that it would look to only two factors: the generally prevailing price in the area and the preticketed price. If they are different, there is a violation of the FTC Act.⁸² This means that once a manufacturer pretickets his product he may be at the mercy of market fluctuations.⁸³ Thus the

⁷⁹ *Baltimore Luggage Co. v. FTC*, *supra* note 76. "The Commission does not contend that for the manufacturer to place tickets on its products before delivering them to retailers indicating the retail purchase price, a practice known as 'preticketing,' is illegal or deceptive *per se*. But the Commission does maintain, and Baltimore agrees, that manufacturers who preticket their products fictitiously are guilty of engaging in an unfair trade practice in violation of the Act." *Id.* at 610.

⁸⁰ See, *e.g.*, *Rayex Corp.*, 3 CCH TRADE REG. REP. ¶ 15823 (FTC April 2, 1962).

⁸¹ See note 67 *supra*.

⁸² *Leeds Travelwear, Inc.*, 3 CCH TRADE REG. REP. ¶ 15997, at 20835 (FTC July 20, 1962): "Where, as here [the amounts designated as 'retail' in the catalog sheets] . . . are in excess of the generally prevailing retail prices, the practice has a tendency or capacity to deceive. This is the test of legality under Section 5. Knowledge on the part of respondents is not a material consideration under these circumstances."

⁸³ This is consistent with the provision of Guide VIII that "they [who preticket] are chargeable with knowledge of the ordinary business 'facts of life' concerning what happens to articles for which they furnished 'preticketed prices.'" See note 39 *supra* and accompanying text. *Quaere*, however, whether the FTC would rigidly follow the *Leeds* standard where a

national manufacturer honestly attempting to print the "generally prevailing" price on his pretickets has little chance of finding the magic figure at which all retailers throughout the nation will sell his product. While there might be no violation if only a few dealers cut this price, there is clear warning that missing the mark by \$2.00 in thirty percent of the trade areas is a violation.⁸⁴ The fact that the manufacturer's purpose may have been beyond reproach and that the preticket may have been followed in seventy percent of the trade areas will be immaterial.

Supplying retailers with price lists involves many of the same prediction problems as preticketing. A difference between the two practices, however, is that the preticket is clearly intended to be seen by the consumer, whereas, at least arguably, the price list may only be intended to assist the retailer in setting his resale price. This difference has been suggested as the reason why *Regina*, a price list case, requires proof that the manufacturer "knew or ought to have known" that its list prices were fictitious, whereas *Leeds*, a preticketing and catalog sheet case, holds that such knowledge is immaterial in its circumstances. The Commission's opinion in *Regina*, however, does not illuminate this aspect of the problem.

Antitrust Implications

But even if the manufacturer makes an accurate future prediction of the sale price of his product and pretickets it or furnishes suggested list prices that all retailers thereafter follow, he faces the possible accusation of violating another statutory antitrust provision. As Commissioner Elman pointed out in *Rayex*:

Such conduct would not necessarily be immune from scrutiny under other statutory provisions regulating business activity. For example, it might in some circumstances suggest the existence of

precipitous market drop occurred *after* the manufacturer had distributed the preticketed merchandise.

⁸⁴ Baltimore Luggage Co. v. FTC, *supra* note 76.

illegal anti-competitive pricing conditions in the industry. Compare, e.g., *United States v. Parke, Davis & Co.*, . . . 362 U.S. 29. . . . It may be, for example, that the industry in which the practice is undertaken is characterized by price rigidity or uniformity. That is to say, all dealers in a particular product may be content to sell at the same price. If a manufacturer of such a product pretickets it at what is in fact the uniform retail price in the area, he is not engaging in false or misleading pricing. Of course, rigidity and uniformity of price may make preticketing even more suspect as a manifestation of some form of illegal restraint of trade, but in such circumstances the practice is not vulnerable as deceptive to consumers.⁸⁵

This is a warning to manufacturers of another danger awaiting them once the decision to preticket is made: they may be accused of violating the Sherman Act and, consequently, Section 5 of the FTC Act, by entering into an illegal resale price maintenance agreement with the conforming retailers.⁸⁶ This danger is acute if the manufacturer attempts to coerce recalcitrant retailers to sell at the preticketed or suggested price.⁸⁷

⁸⁵ *Supra* note 80, at 20627.

⁸⁶ *But see* *Sidney J. Kreiss Inc.*, 56 F.T.C. 1421 (1960). Apparently oblivious of any vertical price-fixing problem, a differently-constituted Commission recited that a manufacturer "required" retailers to sell at prescribed prices and "permitted" them to reduce these prices by half during special sales.

⁸⁷ In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the Supreme Court decided that no Sherman Act offense was charged by an indictment alleging only that a manufacturer specified resale prices to wholesalers and retailers and told them he would refuse to deal with those who did not adhere to such prices. "In the absence of any purpose to create or maintain a monopoly," the Court stated at 307, "he may announce in advance the circumstances under which he will refuse to sell." Subsequent decisions, however, narrowly confined the *Colgate* doctrine. *United States v. A. Schrader's Son*, 252 U.S. 85 (1920); *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208 (1921); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). The *Parke, Davis* case involved a manufacturer who told wholesalers he would not deal with them if they supplied retailers who cut prices below the manufacturer's suggested retail prices. Because the wholesalers had acquiesced and withheld supplies from price-cutting retailers, the manufacturer was found to have entered into an illegal combination with them in violation of the Sherman Act. "When the manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . ." the Court said, "he has put together a combination in violation of the Sherman Act." 362 U.S. at 44.

But *Klein v. American Luggage Works, Inc.*,⁸⁸ indicates that conduct falling short of coercion may still be illegal. There a manufacturer preticketed its luggage and announced to its three retailer-customers in one trade area that it would refuse to supply retailers who undercut the preticketed price—a seemingly logical course for a manufacturer interested in avoiding fictitious pricing problems. Yet, when the manufacturer refused to sell to a price-cutting retailer, the court held that the manufacturer *and* the two price-conforming retailers had violated the Sherman Act.⁸⁹

It is implicit in the *Klein* decision that, where a manufacturer sets a retail price for a product, announcing in advance that he will not supply retailers who sell below that price, and some retailers accept the manufacturer's goods, if the manufacturer acts on the prompting of those retailers to refuse to sell to a price-cutter, he may be a candidate for a price-fixing charge.⁹⁰

Thus the manufacturer who makes the decision to place a preticket on his product or to suggest the retail price for it sails henceforth in perilous waters. If he has misjudged the "going" price, a fictitious pricing charge may be forthcoming; if some retailers actually sell at the preticketed price and, at their urging, he cuts off others who do not, he is in peril of being charged with a Sherman Act violation; if *all* retailers sell at the manufacturer's price, even though no one complains, there may be a clear-cut

⁸⁸ 206 F. Supp. 924 (D. Del. 1962).

⁸⁹ The court admitted there was no precedent in the authorities for this part of the decision but reasoned that the two price-conforming retailers and the manufacturer were co-conspirators by drawing analogies to *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) and *United States v. Masonite Corp.*, 316 U.S. 265 (1942).

⁹⁰ *Quaere* whether the Supreme Court, when and if it reviews the *Klein* case, will find that American Luggage Co. used sufficient "other means" to forfeit protection of the *Colgate* doctrine.

In holding the three defendants liable to the plaintiff the court paid homage to the *Colgate* doctrine, but noted: "The conceptual difficulty which inheres in this seemingly forthright line drawing process [of the *Colgate* Doctrine] is the element of agreement which attends a seller's adherence to a manufacturer's schedule of resale prices. In the face of an advance announcement by the manufacturer that price-cutters will be denied supply, a seller's compliance with prices suggested strongly infers a tacit or implied resale price maintenance agreement." 206 F. Supp. at 937.

Sherman Act violation. This may well cause the manufacturer to decide against any preticketing or price listing at all.

CONCLUSION

A genuine bargain, something-for-nothing, is the utopian dream of many consumers. Since the end of World War II, sellers have fed the public appetite for bargains with a growing variety of phony comparative-price sales appeals. In the fierce competitive in-fighting for the consumer dollar, fictitious pricing has become a common vice of the market place.

The persistence of these schemes has generated stepped-up regulatory efforts by the Federal Trade Commission. In 1958, the Commission promulgated its Guides Against Fictitious Pricing, which memorialized the considerable body of Commission fictitious price rulings since 1914. The Commission's more recent decisions have reinforced the Guides and, in important cases, have gone beyond the Guides to extend the businessman's periphery of hazard.

The standard of care which the Commission applies to retail comparative price advertising has been drawn with relative precision. Generally speaking, the higher price (however described) against which the retailer lays his "bargain" price must be truthfully told: it must either be an actual immediately-precedent price of the advertiser or a prevailing current price in the relevant trade area. The Commission's test—ordained and largely inflexible—imposes no unconscionable burden on the retailer. The Commission's Guides and adjudicative rulings have defined the terms used by the retailer and have fixed the retailer's responsibility to predetermine the factual truth of his comparative claims.

While the retailer's road, however rough, is traversable, the manufacturer who involves himself in the pricing process through preticketing or list price suggestions runs a considerably more perilous course. If a manufacturer pretickets his product, he will run afoul of the Federal Trade Commission Act wherever the retail price of the product does not substantially conform to the ticketed price. Since

preticketed merchandise almost inevitably emerges into competitive markets where retail prices may be highly volatile, it is incumbent upon the manufacturer to ascertain that the ticketed price is actually the price at which the retailers are selling the product to consumers. Short of an automated ticketing program, instantly responsive to shifting market trends, the preticketing manufacturer avoids involvement in deception at the risk of conduct courting antitrust involvement.

The perils of list price suggestion may be even more severe. While the *Regina* doctrine is not yet secure, its gloomy premonitions can already be felt. At the very least, a manufacturer is implicated where he has knowledge that his suggested list prices are in excess of prevailing retail prices (and hence "fictitious"); at the most, he may be vulnerable, with or without knowledge, whenever his list prices, in fact, exceed retail prices. Here, too, the manufacturer assures against deception, reinforces truth, only at a risk of antitrust offense through efforts to stabilize retail prices.

The Federal Trade Commission has raised storm signals in clear view of the businessman determined to use pretickets or suggested list prices. He must now frankly appraise the hazards of such activities in the light of the Commission's newly sensitized alertness to possible deception. At the same time, he must avoid the antitrust implications of too-scrupulous retailer adherence to his ticketed or suggested list prices. In the glare of official scrutiny, ordinary prudence may require extraordinary care.