

The following is a Presentation by Miss Wendy Duncan, Legal Officer, at the Merchants' Seminar held at the PCJ Auditorium on November 7, 2001

III. DISCLOSURE OF INFORMATION

Warranties and Guarantees (Including Implied)

Relevant sections of the Act 37(1), (b), (c), (d), 37(3), (4), and (5).

What are warranties and guarantees?

When a consumer makes a major purchase, the manufacturer or seller makes an important promise to stand behind the product. This promise is known as a warranty or guarantee and can be oral (for example, if a sales representative tells the consumer that he/she can return the item within 1 month if it doesn't work) or it can be written. Written warranties can be contained in a receipt or they can be more elaborate documents with lengthy terms and conditions. There are also certain warranties which are implied in law so that even if the seller does not make an actual promise to stand by the product, the law imposes a duty on him to do so.

There is a very slight distinction between warranties and guarantees. Put simply, it can be said that a warranty is a promise that certain represented facts are true while a guarantee is a promise that something will be done exactly as it is agreed to be done. I will use the terms interchangeably to mean a promise by a merchant to stand behind his product.

What does the Fair Competition Act say about Warranties and Guarantees?

- (a) Merchants must not give the public a statement, warranty or guarantee on the performance, effectiveness or life of goods unless that warranty is based on an adequate and proper test of the good. The proof that an**

adequate test has been made lies on the person making the representation (37(1)(b)).

Examples

There are about two complaints that come to mind which can serve as examples. One complaint was made about an advertisement that, in effect, guaranteed that a particular type of air conditioning unit was more effective than certain others on the market, for example, that it could cool a greater area while using much less electricity. That Company was called upon to prove the accuracy of the statement. It was able to do that because it had a catalogue of information which had recorded the tests which were done by the Manufacturer. The Commission obtained a report from the Bureau of Standards. The Bureau's report verified the information that the Company had and based on all the information supplied, the Commission came to a decision not to pursue the matter because, based on all the evidence, the statement was true.

Another complaint had to do with a motor car muffler on which the merchant had given a 1 year warranty that it was high quality and able to withstand a certain amount of pressure. A few months after the purchase the muffler became porous and needed repairs. The merchant refused to repair it claiming that the problem was due to bad installation and abuse by a third party rather than to the defect in the material of the muffler. The merchant sent to the Manufacturer and was able to provide records in proof of tests which had been done to prove that the muffler could withstand a certain amount pressure. The merchant, in this case, also obtained from the Bureau of Standards a report which corroborated the Manufacturers findings. It was concluded that the muffler had been damaged due to bad installation and 'misuse' and therefore could not withstand the pressure which it was built to withstand. The Commission did not pursue the matter.

Another method which helps in proving a statement is when a person of repute is used to speak to the quality of a product. This is usually in the form of testimonials. An interesting example of a simple testimonial is that of a recent matter which we had with a particular Company. The issue in that matter did not concern testimonials but the matter involved a testimonial. The Company was running a promotion of its product 'V-Power' Gas and the radio advertisement, briefly, went something like this: The announcer asked an executive member of the Corporate Taxi Association, whether V-Power Gas made a difference to his car's performance. His reply was something like:

“Yeah man, as a taxi man I know my car inside out and since I started using V-Power I can definitely feel the difference.”

When asked what he thought made V-Power different, his reply was:

“the clean burning in the engine man! Yeah man! It gives me the maximum response when I'm making the rounds. Trust me – no other gasoline going give you that.”

That is an example of a testimonial of the performance of the product. It is not necessarily, by itself, adequate proof of the effectiveness of a good but can help to attest to the quality of the product. If there is a complaint then, sometimes, scientific and more substantial proof will also have to be will have to be produced as well.

FTC's Approach

In these cases, if there is a complaint that the representation is not true and there is some evidence of this, then the Commission will ask the merchant to give proof that the warranty was based on accurate tests. Since, by law, the merchant is responsible to prove that proper tests were done, if that proof is not

provided then the Commission will treat the matter as a breach of the Act. But let me hasten to say that we are not on a fishing expedition to find breaches, we fix the consumer with a responsibility to provide sufficient evidence of his claim. So we don't just take the consumer's word that the statement is untrue, we don't investigate the matter unless we have some credible evidence from the consumer.

Let us look at some...

Do's and Don'ts for Merchants

- Ensure that all warranties that relate to performance, effectiveness or life of goods, are based on proven tests.
- Ensure that written proof of these tests is always available so that complaints can be quickly put to rest.
- Don't make a public statement or give a warranty on the performance or life of goods if you know that you can't prove that proper tests were done.

What does the Fair Competition Act say in relation to services?

(b) A merchant must not give a warranty or guarantee that services are of a certain type, standard, quality or amount or that they are provided by a particular person or by a person of a particular trade, qualification or skill if they are not. (37(c)).

Examples

A recent case which illustrates a guarantee being given that services are of a particular quality is the case involving **Pyramid Roofing System**. That

Company advertised in the yellow pages of the telephone directory that it offered high quality roofing. The Informant contracted the Company to install a new roof on her house but the job was badly done, resulting in several leaks and a generally poor appearance of the roof. The Commission went to Court with the matter and the Court found that the Company had breached the Fair Competition Act and ordered that a fine of \$700,000.00 be paid by the Company.

Another example of a complaint in this area is that of a resort which guaranteed that it was offering a special package with certain benefits on payment of a certain sum. The consumer paid the money and was then told that only certain limited types of the benefits were available. This matter is still being pursued by the Commission.

We have one or two matters in which complaints are made about 'healers'. Persons who claim to be able to heal various diseases such as cancer, aids etc. Obviously if, for example, a 'healer' promises to heal 'love worries' that would be very difficult to prove but if it can be proven by medical evidence that advertisements by persons claiming to 'heal' are untrue, then the Commission will pursue these matters.

Do's and Don'ts for Merchants

- Don't make any false representations as to the type of services offered or the person who offers the services.

What else does the Fair Competition Act say about warranties?

- (c) Merchants must not give to the public a warranty or guarantee that is materially misleading or that is not likely to be carried out. Neither must a merchant make a promise to replace, maintain or repair an item**

or continue service until it has achieved a specified result if that promise is not likely to be carried out. (37(d)).

Examples

We get many complaints in this area and most of them concern warranties given for motor vehicles and electrical appliances.

With regard to motor vehicles, usually there is a warranty on the car, for example a 90 day or 1 year warranty. Something goes wrong with the car and the consumer takes it to the merchant whose technician/mechanic repairs it. It runs well for a while and then the problem reoccurs. It is fixed again and runs for a while. By the time the problem reoccurs the warranty has expired. The consumer returns to the merchant and is told that the warranty has expired, he has made every effort to repair the car and has therefore fulfilled his obligation.

The same problem arises with appliances. For example, a compact disc (c.d.) player, computer, television set or washing machine is bought and a 3 month warranty provided. A problem surfaces and the item is continually 'repaired' by the merchant until the warranty expires. The merchant then says that he has honoured the warranty because he has made every effort to repair.

FTC's approach

Our approach is that once the item is defective and the problem is clearly not due only to fair wear and tear, misuse or abuse by the consumer, then once the problem has emerged during the warranty period, the merchant has a duty to honour the warranty even though it has expired. In other words, once the problem surfaces during the warranty period and the consumer brings it to the merchant's attention, then they have a duty to honour it. We are not saying that the merchant must indefinitely repair the item because an effort to repair is not of itself enough unless a satisfactory result can be achieved. The Commission will

look at all the circumstances including the number of times the item has been repaired. We suggest that if the item is defective and cannot be repaired, it is best to replace it. We look at reasonableness of effort to repair, and reasonableness in determining what the cut-off point is. There are some defects which can be rectified but if the defect is such that it cannot be fixed, then the consumer must have redress.

Do's for Merchants

- Provide refunds or replacements when it is clear that items cannot be repaired – this is to prevent the matter coming to the Commission.

I had said that a merchant must not give a warranty that is materially misleading. As the previous presenter explained, materiality is the extent to which the information provided would affect the consumer's ability to make an informed decision and the extent to which the information would influence his/her decision to buy. For example, imagine that a merchant is selling a particular brand television set that was obtained in England. The situation is that appliances in England work on 220 volts and appliances in Jamaica use 110 volts. Also, as I understand it, the method of transmission in England is the 'Pal System' and we use the "American Standard System' here. So a television from England will not work in Jamaica unless certain adjustments are made to it by a certified technician. He would also have to buy a transformer. The consumer would not know this. All he knows is that the television is a 'nice' 29 inch television, looks new and should work. If he knew that the television could not work without the adjustments which he will have to pay someone to have done, and that he cannot just go and plug it in, then he would not buy that brand. He would get another brand that can work in Jamaica. The fact that England uses a different system entirely that is incompatible with ours in Jamaica is material information.

Important Note

Most merchants do not know that under the Fair Competition Act once you are an importer of a good then you become responsible for any guarantees or warranties which are attached to, accompany or inserted in the item or its wrapper or container. So if, for example, a manufacturer's warranty of 1 year is attached to an item and you import that item and you, as ***the importer***, sell it to the consumer, the Act states that you must honour the warranty. If you are not the person who imported it, the consumer would have to have the warranty fulfilled by some other person.

Implied Warranties

I had mentioned earlier that, even if the merchant does not provide a warranty, there are certain implied warranties under the law, specifically the Sale of Goods Act. There are two types of implied warranties:

1. **“Warranty of Merchantability”** which means that the seller promises that the product will do what it is supposed to do. For example, a car will run and a toaster will toast and a watch will tell time.
2. **“Warranty of fitness for a particular purpose”**. This applies when a customer, on your advice, buys a product that purports to be suitable for a particular use. For example, if a merchant suggests that the consumer buy a certain type of tick spray, he warrants that it will kill ticks. Or if he tells the consumer that a certain type of crane is able to lift a particular weight he warrants that it should lift that weight.

The merchant is also responsible if the consumer discovers a hidden defect which could not have been detected by ordinary examination. For example, a friend of mine bought a 'hi-fi' Aiwa component set. The set played beautifully when it was tested in the store, however, when he took it home and played it for an extended period at $\frac{3}{4}$ of its maximum volume it lost all power. However, if he discovered that if he waited for a few minutes for it to cool off and played it at a

lower volume it would play all day. So, he thought he was buying a 'hi-fi' and ended up with a 'low-fi'. He didn't return the stereo but if he had, he would have been entitled to a refund or replacement.

However, if the buyer examined the goods before purchase the merchant is not responsible for defects which he should have seen. In law, this principle is called 'caveat emptor' or 'let the buyer beware'.

Refund Policy

This is an area which I know is of great interest to you. Earlier, I mentioned materiality. Under the Fair Competition Act, **merchants must not make a representation to the public that is false or misleading or is likely to mislead in a material respect.** As you saw in the previous presentation, a representation can be express, implied or by omission. We consider the information regarding a merchant's refund policy to be material information because there are many consumers who would not buy goods from some merchants if they knew that they could not get a refund under any circumstance.

If a merchant does not indicate his refund policy before a purchase is made and problems arise, then the Commission will treat the matter as a misrepresentation by failure to provide material information.

There are certain instances in law when the consumer is entitled to a refund, for example, where there is an implied warranty (as I mentioned earlier) and therefore, merchants who put up a sign 'no refund' (without any further qualification) may be in breach of the Sale of Goods Act. The law allows the consumer the right in these circumstances, to get a refund, so the merchant cannot override the law or deny the consumer his right by posting such a sign.

Do's and Don'ts for Merchants

- Merchants must establish a refund policy as the law requires it in certain instances
- Display that Refund Policy prominently in your business place
- Include in that policy important information such as:
 - ✓ Length of time within which a claim for refund must be made
 - ✓ Whether refunds will be in cash or credit notes
 - ✓ Whether a claim must be accompanied by a receipt
- Information concerning the Refund Policy must be made available before the purchase so that the consumer can have the relevant information to make up his mind.

Advertised Offers and Discounts (Bait and Switch Tactics) Referred to in the Act as Sale at Bargain Price

Relevant section of the FCA – s. 40

What does the Fair Competition Act say?

Merchants must not advertise at bargain price goods which they do not supply in reasonable quantities.

This offence is commonly known as 'bait and switch' and describes instances when merchants use advertisements to lure consumers into their store in a guise to sell some other good apart from the one advertised. So usually the advertisement is designed to catch the consumer's attention and excite him and then when he comes to the store he learns that the advertised good is not available and he is encouraged to buy something else, usually at a higher price.

The statute sets out the factors to consider when determining whether there is a breach. The Commission will therefore look at whether the merchant supplied reasonable quantities of the good. In determining this, we look at the nature of the market in which the merchant's business is carried on, the type and size of the his own business and the nature of the advertisement that he puts out.

We use two main categorizations: regular and non-regular sales. Regular sales are when the goods are restocked all year round (e.g. a Tile Company or a supermarket that sells household items) and non-regular sales are where the goods are not normally restocked; for example, clearance sales, closing down sales, end of line sales and discontinued line sales (e.g. a certain Company has a sale on for year 2001 model motor vehicles which it will not restock).

In determining reasonable stock for regular sales we look at the average sales of the particular good over at least a 3 month period and that indicates the stock which should exist for the particular sale. For non-regular sales, a reasonable quantity would be considered to be any positive amount.

Examples

One complaint comes to mind. A merchant issued a Christmas brochure (from as early as October) stating that consumers were to 'hurry, hurry' because a particular type of children's tricycles were on sale at a greatly reduced price. The advertisement was issued on the Sunday; however, on the following Monday when the consumer went to purchase a tricycle for his son, he was told that they were not in stock at any of the store's outlets and that it could not be said when they would be in stock. He was, however, told that a tricycle of a higher price was in stock and he could buy that one. He was furious and complained to the Commission. When the matter was investigated it was revealed that the merchant had ordered the tricycles but they were delayed in shipping and clearing.

In this example, it would have been better for the merchant not to have issued the advertisement until the stocks were actually at the store.

Defences

There are 3 defences under the Act which the merchant can use to avoid being found guilty of a breach in advertising. These are: having regard to the nature of the advertisement:

1. If the merchant, within a reasonable time, took reasonable steps to get an adequate quantity of the item and was unable to do so because of events beyond his control which he could not have foreseen. For example, the ship which was to deliver the goods was diverted or sank or fire destroyed the goods at the warehouse where the goods were in stock.
2. The merchant obtained a reasonable quantity of the item but could not meet the demand because it surpassed his reasonable expectations. For example, he is selling dust masks to get rid of his stock and because of a sudden anthrax scare or outbreak, everybody is running to the store to buy dust masks after the Ministry of Health announces that this can help to prevent infection.
3. After the merchant is unable to supply the article he undertakes to supply the same or a similar item of equal or better quality at the advertised bargain price within a reasonable time to all those persons who had asked for the item and didn't get it during the sale.

Do's and Don'ts for Merchants

- All advertisements must be clear, honest and unambiguous. It should not create a false impression of the characteristics or usage of the item so that the consumer might be 'switched' to another product.

- Do not advertise goods or services which you cannot supply.
- To be safe, do not advertise goods before you have them in stock or on hand.
- If, for any reason, you cannot supply the goods advertised, then offer the customer similar goods at the same price or endeavour to provide the advertised goods at the advertised price within a reasonable time.
- If you have a business with several outlets, make sure that the advertisement clearly specifies those outlets which are participating in the sale.
- For regular sales, state a closing date. (see Tile City slide and optical)
- For non-regular sales state clearly the type of sale (for example, “clearance sale”) and include a qualifying statement e.g. “limited quantity” or “first 100 purchasers” or “while stocks last”.

Concluding Statements

So, in the 3 categories which I have mentioned, that is, offences relating to warranties and guarantees, our approach to ‘refund policies’ and the use of ‘bait and switch’ tactics, our main focus is on the provision of **information**. Material information must be given at all times so that the consumer can make an informed choice. That information must be valid, true, clear and unambiguous and it must be reliable. The provision of information will usually prevent misunderstandings and will help to create and maintain good relationships between the merchants and customers, which is good for business. Ultimately should also help to reduce the number of complaints the FTC receives against merchants.