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Trade Regulation—Section 5 of Federal Trade Commission Act—"Free" Articles —FTC v. Mary Carter Paint Co.

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gested in this note, however, *Santor* is inapposite because the plaintiff in the instant case cannot properly be characterized as a consumer.

It is quite possible, then, that a good deal of the difficulty on the question of damages can be attributed to the equation of the terms "economic" and "commercial." While consumers do have "economic losses," they cannot, by definition, suffer "commercial losses." This terminology would preserve the fundamental effect of *Greenman* which recognized that ". . . the liability is not one governed by the law of contract warranties but by the law of strict liability in *tort*."[36] (Emphasis added.)

Under traditional tort theory, the "harm" is an independent step between the causative force (here the defect) and the ultimate "economic loss." Ordinarily, then, the diminished utility of a defective product would not be classified as this kind of tortious harm. Under the approach suggested here, however, it is enough that the "economic loss" results directly from the presence of the defect. This kind of result might appear to many to be undesirable or perhaps unjustifiable. It is submitted, however, that a consistent and orderly application of the rationale of *Greenman* can yield no other. An aversion to this result might well be grounds to resist any adoption of the strict liability doctrine. It should not, however, be grounds to apply the doctrine according to an evaluation of the needs of various plaintiffs. The meaning of "defect" and of "consumer" can certainly be drawn narrowly, but they ought not to be drawn artificially. If, then, the definition of "defective" is restricted to goods which are truly unmerchantable and if the term "consumer" is defined according to the nature of the transaction and not according to a judicial appraisal of "bargaining power," the *Greenman* rule can safely be given its natural effect. One who buys goods for commercial use or resale must look solely to the rules of warranty for his remedy if the goods are defective. On the other hand, one who buys for personal use will not be restricted to a warranty action but he will be entitled to pursue the non-commercial remedy of strict tort liability for all the damages caused by a defect. The effect of the approach suggested here is simply to give to the consumer an alternative remedy on the ground that he is often prejudiced by the technical rules of warranty. The warranty rules which are necessary for the orderly conduct of commercial affairs will thus not leave the "non-commercial" plaintiff entirely without a remedy.

GERALD F. PETRUCCELLI, JR.

Trade Regulation—Section 5 of Federal Trade Commission Act—"Free" Articles.—*FTC v. Mary Carter Paint Co.*[1]—Mary Carter manufactures and sells paint. For ten years it advertised, as its permanent policy, that for every can of paint purchased, it would give the buyer a "free" can of equal quality and quantity. Prior to this advertisement, however, it had never sold

[36] Greenman v. Yuba Power Prods., Inc., supra note 11, at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901.

[1] 382 U.S. 46 (1965).

single cans of paint. The Federal Trade Commission brought an action[2] against Mary Carter for violation of Section 5 of the FTC Act.[3] Adopting the trial examiner's finding that

> the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisement but was, and is now, substantially less than such price. The second can of paint was not, and is not now, "free," that is, was not, and is not now, given as a gift or gratuity. The offer is, on the contrary, an offer of two cans of paint for the price advertised as or purporting to be the list price or customary and usual price of one can[,][4]

the Commission issued a cease and desist order.[5] Commissioner Elman dissented[6] on the grounds that the order was contrary to the Commission's policy, as promulgated in *Walter J. Black, Inc.*[7] and reaffirmed in *Book of the Month Club, Inc.*,[8] and that the Commission had not explained what was deceptive in Mary Carter's practice. Elman was also disturbed that, in not overruling *Black*, the FTC introduced confusion into an area which had well-settled rules; as a result, advertisers would now be uncertain whether their use of the word "free" is deceptive. Adopting Elman's dissent, the court of appeals reversed the FTC's order as not in accord with the law.[9]

In its brief to the Supreme Court the FTC finally specified where the deception lay.[10] The Commission's contention, as summarized by Mary Carter's counsel, was "that Mary Carter advertising created the 'misapprehension' in the minds of the buyers that the 'free' offer was *for a limited time only* and that they should 'buy for fear that the offer will lapse if they delay.' "[11] Mr. Justice Harlan dissenting,[12] the Supreme Court reversed the court of appeals and HELD: The Commission's determination is neither arbitrary nor clearly wrong.[13]

The *Black* decision set down the Commission's policy as to the use of the word "free."[14] There Walter J. Black, Inc., advertised that it would give

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[2] Mary Carter Paint Co., 60 F.T.C. 1827 (1962).

[3] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1964): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

[4] Mary Carter Paint Co., supra note 2, at 1844.

[5] Id. at 1866.

[6] Id. at 1853-66.

[7] 50 F.T.C. 225 (1953).

[8] 50 F.T.C. 778 (1954).

[9] Mary Carter Paint Co. v. FTC, 333 F.2d 654 (5th Cir. 1964).

[10] Brief for FTC, p. 10, supra note 1.

[11] Brief for Respondent, p. 16, supra note 1. (Emphasis added.)

[12] Supra note 1, at 49-53. Mr. Justice Harlan was disturbed that the Commission did not demonstrate real deception and public injury. Acknowledging the Commission's position that consumers might believe the offer to be temporary when in fact it was a permanent policy, he stated that Mary Carter had always tried to associate with purchasers that their offer was permanent; therefore, there was no deception.

[13] Id. at 49. As authority for this great deference to the FTC's expertise, see FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

[14] Walter J. Black, Inc., supra note 7, at 235-36. In its Administrative Interpreta-

a free book to enrollees in its Classics or Detective Book Clubs. In both cases, the same free book was continually offered, although subsequent books purchased were always different. From this decision came the so-called *Black* rule: The use of the word "free" is not an unfair or deceptive practive under the FTC Act so long as (1) all additional requirements to receipt and retention of the free article are clearly stated at the outset so that the terms of the advertisement will not be misunderstood; and (2) with respect to the article to be purchased in order to receive the free item, the offeror does not increase the ordinary and usual price or reduce the quality, quantity, or size of the article.[15]

The FTC ruled that Mary Carter could not rely on *Black* to avoid the charge of deception for two reasons. First, unlike Walter J. Black, Mary Carter had never established a market price for a single item of its product. Second, even if Mary Carter had established a market price for one can of its paint and then had changed to its present permanent policy, it permanently offered the same free item and the same selling item at the same price.

> In *Black* . . . while the policy of offering "free" books was a continuing one, the merchandise required to be purchased in order to obtain a "free" article was not always the same merchandise. In other words, the respondents . . . made a series of offers involving entirely different books at varying prices, not a continuing offer of a combination of the same two articles. . . .[16]

The second of these distinctions is most important; the first is based on a technical requirement with which Mary Carter could have easily complied. It is noteworthy, however, that the second distinction was never evaluated in light of what was ultimately alleged as deceptive. At the commission and the court of appeals levels, the FTC's approach was mainly negative: it emphasized the importance of *Black* in determining deception and found that Mary Carter did not meet the conditions prescribed by *Black*; therefore, Mary Carter's practice was violative of section 5. Possibly because of the adverse decision in the court of appeals, the Commission broadened its argu-

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tions, 44 F.T.C. 1427 (1944), the Commission announced that the word "free" could not be used when in fact the receipt and retention of the item were conditioned upon purchase of another, even though the terms of the offer were clearly stated. See Book of the Month Club, 48 F.T.C. 1297 (1948). The *Black* decision, supra note 7, permitted what the Administrative Interpretations prohibited so long as certain rules were followed. See Puro Co., 50 F.T.C. 454 (1953). These rules were reaffirmed in Book of the Month Club, supra note 8. See Ray S. Kalwajtys, 52 F.T.C. 721, enforced, 237 F.2d 654 (1956). The *Black* rules were made part of the Federal Regulations. Guides Against Deceptive Pricing, Guide V, 23 Fed. Reg. 7966 (1958). With specific reference to two-for-the-price-of-one offers, the guides required that the price for the two be "the advertiser's usual and customary retail price for the single article in the recent, regular course of the business" or, where the advertiser had not previously sold the article, the "usual and customary" price for one in the area. Ibid. This guide was superseded on January 8, 1964, by Guides Against Deceptive Pricing, Guide VI, 29 Fed. Reg. 180 (1964). Although this guide was essentially a restatement of *Black* and the 1958 guide, the specific reference to two-for-the-price-of-one offers was conspicuously absent.

[15] Walter J. Black, Inc., supra note 7, at 235-36.

[16] Mary Carter Paint Co., supra note 2, at 1851.

ment before the Supreme Court to include an affirmative presentation of the deception involved. The Court, however, merely said that the Commission's determination that the practice was deceptive was neither arbitrary nor clearly wrong.

When the second distinction is examined in light of the deception finally alleged, serious question arises as to whether the distinction is material and whether, as a practical matter, the practice in *Black* can stand under the *Mary Carter* result. As previously indicated, the deception in Mary Carter's practice goes to the time of the offer's availability: the import of the offer is that it is for a limited time when, in fact, the offer is permanent. This reference to the time of the offer's availability, however, has two possible interpretations. On the one hand, the Commission might be referring to the time of availability of the basic article and the free article as a unit. If this interpretation is correct, *Mary Carter* does not invalidate the practice in *Black* because in that case the basic product was continually changing. This resulted in a series of different free offers. On the other hand, if the Commission was referring to the time of the free article's availability regardless of the basic product involved, then *Mary Carter* invalidates the practice in *Black* because the free article in both cases was always the same.[17]

Whichever interpretation is correct, it is obvious that an addition will have to be engrafted onto the *Black* rules if they are to continue as valuable guides in the use of the word "free." Generally speaking, this addition is that the offer must be for a limited time only. Henceforth, an advertiser who uses the word "free" in a particular offer will not be permitted to use the word indefinitely. What the present decision does not resolve is how long an offer can be characterized as free before a violation of section 5 arises—a question of considerable importance to many advertisers. The FTC ruled that ten years was too long; however, there was no indication as to what time limits it will set in the future.

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[17] Compare Commissioner Elman's dissent, id. at 1853-66, and the opinion of the court of appeals, Mary Carter Paint Co. v. FTC, supra note 9, where it was flatly stated that "the cases are 'indistinguishable.'" Id. at 657.