



CONSUMER NEWS

SAN DIEGO CITY ATTORNEY'S OFFICE

When is "Free" Free?

January 2014

The statement, "There is no such thing as a free lunch" is a good cautionary adage for consumers. Whether or not the word "free" is being used deceptively in advertising, is often a matter of context. When we hear the word "free," we think "**what's the catch?**" There are federal and state rules that govern the use of the word "free" in advertising.

Free v. Bait Advertising

Using the word "free," "gift," or "prize," is a common method of advertising to get consumers' attention. When used improperly, this becomes a form of "bait advertising." The "bait" is the "free" item. This method of advertising is legal so long as the condition(s) and/or fee(s) are clear and the offer is temporary. Salespersons are not allowed to dissuade a customer from purchasing a cheaper promoted product in favor of a higher priced product ("up-selling"). This is an example of a classic "bait and switch" scheme. There are many different types of "bait advertising," all considered unfair business practices, but this newsletter focuses on how "free"

can be part of such a deceptive scheme.

Disclosures

In order to use the word "free" in an advertisement, there must be proper disclosures. Any condition required to obtain the "free" merchandise must be "clear and conspicuous." Like many legal definitions, "clear and conspicuous" does not have a precise meaning, but a common sense approach to its definition is often applied. Most people have probably been approached by someone selling timeshares. Often a free cruise, free tickets, or some amazing deal is offered for... "just a few hours of your time." Because the time condition is disclosed, there should not be a legal disclosure problem.

Other Misuses of the Word Free

The classic "buy one...get one free" advertisement seems like adequate disclosure, but use of the word free could still be improper for a number of reasons:

1) Timing. The buy one get one free sale must be temporary. There are specific time limitations under

the federal guidelines (see below) (usually 30 days.) If an advertisement using "free" is an ongoing deal or promotion, (semi or permanent), it is being misused.

2) Ultimate Cost. If the product which must be purchased as a precondition to receiving the free item is overpriced to begin with, the word "free" is being misused. If buying one and getting one "free" item equates to buying two at approximately the usual (or retail) price the word "free" is misused. A business cannot raise the price on one item so that the profit margin on the item purchased makes up for the "free" item.

3) Quality or Quantity. It is a misuse of the word "free" if the quality or quantity is lowered to cover the cost of the "free" item. If the difference is properly disclosed such as, "buy one get a smaller size for free," the use of "free" would not be deceptive.

4) Hidden Fees. Sometimes a "free" item has installation charges or other fees that render the "free" factor nearly nonexistent. For example, certain products are

“free,” but installation fees still apply.

Most importantly, **beware of the fine print!** A TV advertisement offering a free promotion will often have a “disclosure” displayed at the very end of the commercial and if a consumer is not paying attention, the disclosure will be missed entirely. Also, just because some words are technically there does not necessarily make the disclosure a proper disclosure.

Applicable Laws

The Federal Trade Commission (FTC) cautions the use of the word “free” in advertising because of how easily it can be misused. The FTC has published extensive information about the use of the word “free” (www.ftc.gov/bcp).

California laws governing the misuse of the word free are not as specific as the FTC’s guidelines and regulations. However, deceptive misuse of the word free is still generally covered under the Unfair Completion Law (UCL), the Business and Professional Code, and the Consumer Legal Remedies Act (CLRA); and a violation of federal guidelines may still lead to an actionable claim in California.

Conclusion

In order to use the word “free” in a legal and non-deceptive manner, there must be disclosure of the condition, the offer must be temporary, the original item’s price cannot be increased as to make up for the free item, nor should quality or quantity of the free or original item be reduced, and any extra fees must be adequately disclosed.

Just remember the old saying that if it sounds too good to be true, it probably is! When you actually consider how valuable your time is, there really is no “free” lunch.

Please contact the City Attorney’s Consumer & Environmental Protection Unit to report violations.

**San Diego
City Attorney’s Office
Consumer and Environmental
Protection Unit
(619) 533-5600**

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Sources: California Civil Code section 1770; California Business and Professional Code sections 17500 et. seq. and 17200; 15 U.S.C. Section 45; and 16 CFR Section 251.1.

The information provided in this newsletter is intended to convey general information and is not intended to be relied upon as legal advice.

To report violations of consumer protection laws, call the City Attorney’s Hotline at **(619) 533-5600**.