

**DIVISION OF CONSUMER AFFAIRS,**  
Petitioner,  
v.  
**ARROW PONTIAC, INC.,**  
Respondent.

Initial Decision: April 2, 1982 Final Agency Decision: May 21, 1981

Superior Court, Appellate Division Decision Appears at: 193 *N.J. Super.* 613 (1984)

**SYNOPSIS**

The Director of the Division of Consumer Affairs charged that respondent had violated *N.J.A.C.* 13:45A-2.2(a)(7)(iv) by distributing an advertisement which allegedly compared vehicles offered for sale by respondent to the dealer's cost or inventory price. After a request for a hearing, the matter was assigned to an administrative law judge.

The administrative law judge found that respondent had advertised many of its cars to be "priced well below dealer invoice" which violated the intent of the regulation which was to preclude a dealer from advertising in such a manner as to lead a prospective customer to believe that the dollar amount shown is the actual, final cost to the dealer for the vehicle. The judge rejected respondent's argument that the regulation was unconstitutional noting the State's interest in regulating advertising which is inherently misleading.

Accordingly, the judge ordered a penalty of \$1,600. Upon review, the judge's initial decision was accepted by the Division of Consumer Affairs.

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**Alan S. Pralgever**, Deputy Attorney General, for petitioner (Irwin I. Kimmelman, Attorney General of New Jersey, attorney).

**Eric L. Chase, Esq.**, for respondent (Martin G. Margolis, attorney).

**Initial Decision**

**WEISS, ALJ:**

In July 1981, a complaint was filed by the Director, Division of Consumer Affairs, against Arrow Pontiac, Inc., alleging that the respondent (hereafter "Arrow") had violated *N.J.A.C.* 13:45-

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2.2(a)(7)(iv) by causing the distribution of an advertisement which allegedly compared vehicles offered for sale by respondent to the dealer's cost or inventory price. The complaint further alleged that on three previous occasions, Arrow had violated provisions of the regulations pertaining to motor vehicle advertising and had paid penalties for the same. Accordingly, alleging that the latest violation was a fourth such defalcation, the assessment of civil penalties, pursuant to *N.J.S.A.* 56:8-3.1 and *N.J.S.A.* 56:8-13 in the amount of \$1,600 was sought, together with an order, pursuant to *N.J.S.A.* 56:8-18 directing Arrow to cease and desist from committing such unlawful practices. Finally, the Director sought the assessment of costs, pursuant to *N.J.S.A.* 56:8-11.

Arrow filed an answer in which it essentially maintained that the advertisement which formed the basis of the new complaint did not violate any regulation and thus the complaint ought to be dismissed.

After the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*, Arrow moved to dismiss the complaint or, in the alternative, for summary judgment. That motion was denied,\* and a hearing was conducted on February 5, 1982.

#### *TESTIMONY FOR COMPLAINANT*

The Division of Consumer Affairs has promulgated regulations which establish rules of conduct with regard to motor vehicle advertising. In particular, *N.J.A.C.* 13:45A-2.2 sets forth a variety of practices which are defined as unlawful under the Consumer Fraud Act. Included among the specifically prohibited practices is the following: "The use in any advertisement of a comparison to the dealer's cost or inventory price." *N.J.A.C.* 13:54A-2.2(a)(7)(iv). The sole testimony offered by the Division at the hearing to support its claim that Arrow violated that provision was that of Richard DeLorenzi. He is now retired, but had been an investigator employed by the Division and supervised the implementation of the automobile regulations. He described his function during his employment as including a review of motor vehicle advertisements in order to identify whether violations had been committed. DeLorenzi identified the advertisement which is

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\* Subsequent to my letter determination denying the motion and prior to the hearing, Arrow submitted a letter requesting reconsideration of the denial based upon its belief that the regulation in question either violated the First Amendment to the United States Constitution on its face, or that the State's interpretation and implementation of the regulation constituted such a violation. A consideration of that constitutional argument was postponed and I advised that it would be addressed in my initial decision following completion of the hearing itself.

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involved in this case as a “flier” which describes a sale conducted by Arrow and which makes reference to a variety of matters surrounding that sale. Toward the bottom of the advertisement, the following language appears: “Our Sales Managers will not authorize these Special Prices on any car not in stock. (Many will actually be PRICED WELL BELOW DEALER INVOICE.)” DeLorenzi said that he cited Arrow for a violation of the particular regulation because, in his judgment, the use in that advertisement of the phrase “below dealer invoice” was tantamount to a reference to the “dealer’s cost.” In his opinion, the “dealer invoice” does not always represent the “actual end of the run cost,” and thus, the quoted language was within the scope of the prohibited practice. DeLorenzi also said that he had cited many dealers for violation of the particular regulation. On cross-examination, DeLorenzi conceded that he had neither ever worked as a car dealer nor had any experience in accounting. He insisted that the terms “dealer cost, price and invoice” have the same meaning. In his judgment, an invoice is tantamount to a bill—a piece of paper with a specific amount on it. However, from his experience having seen many invoices, they either do not include certain concessions, incentives, etc., or if included, they are not specifically identified as such. In short, reliance upon an “invoice” as a *fixed* measure of comparison is not appropriate.

#### TESTIMONY FOR RESPONDENT

Testimony on behalf of the respondent was presented by Joseph J. Waldman. He is the general manager of Arrow, and supervises the total sales and training operation of the corporation. Waldman holds a B.S. degree in Business Administration from Suffolk University.

Prior to joining Arrow, Waldman was a securities broker and worked in accounting on Long Island. The accounting firm, he said, did business with 15 to 18 dealerships, and Waldman obtained knowledge and experience with respect to the businesses of such dealerships through that association. After leaving the accounting firm, Waldman was employed by a dealer as general manager and controller and then left to work for Arrow, by which he has been employed for approximately four years.

Waldman was shown a sample dealer invoice, and he identified it as one with which he was familiar. On that invoice, the term “invoice total” with an amount of \$5,566.81 was set forth. Waldman claimed that this total was the amount that the dealer paid for the particular vehicle. Waldman also identified certain other terms and amounts contained in the sample invoice. He said that the phrase “dealer

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invoice” referred to the amount paid by the dealer to the factory and did include other items, such as commission, bonuses, etc. He insisted that he would show a customer an invoice if requested, and that, under all circumstances, the customer gets “a very good deal.”

On cross-examination, Waldman agreed that the invoice total is what the dealer pays the factory for the automobile—not what the car actually costs. He insisted that it is virtually impossible to ascertain what the true cost of each vehicle is, since there are such things as holdbacks, bonuses and contests, which result in certain reimbursements. Waldman defined a “holdback” as an amount that the factory sends to the dealer on a quarterly, semi-annual or annual basis, which reduces the dealer’s cost and helps to defray floor plan expenses.

Waldman also identified certain answers to interrogatories which had been served upon the Division by Arrow’s attorneys. In Answer No. 5, the Division stated the following: “ ‘Dealer’s cost’ and ‘inventory price’ are construed to mean the price the dealer pays the manufacturer for an automobile. Such ‘cost’ or ‘price’ includes, but is not limited to, the following factors: (a) overhead costs; (b) rebates or other case returns from the manufacturer; (c) dealer holdbacks; (d) commissions from credit sales; (e) discounts; (f) freight charges; (g) floor plan charges; (h) markup for profit; (i) allowance from the manufacturer for volume sales; (j) advertising costs; (k) incentive awards; (l) bonuses.” Answer No. 6 stated that the term “dealer invoice” is considered by the Division “to be synonymous with the terms ‘dealer cost’ and ‘inventory price,’ which terms are included in *N.J.A.C.* 13:45A-2.2(a)(7)(iv).”

### DISCUSSION

There would appear to be very little by way of actual factual dispute. Rather, the controversy concerns the question of whether the particular conduct engaged in by Arrow was a violation of the regulation. Arrow’s main point is that the use of the term “dealer invoice” means something wholly different from the terms “dealer’s cost” or “inventory price,” and thus, the use of the dealer invoice reference in its advertisement simply cannot be construed as a violation of the pertinent regulation.

Having heard and considered all of the testimony offered at the hearing, I am of the opinion that Arrow’s argument is without merit. In my earlier letter determination denying Arrow’s alternative motion to dismiss, or for summary judgment, I noted and repeat here that whether the dealer uses the term “cost,” “invoice” or “inventory

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price," all of these terms have a similar potential for deceiving customers. In essence, the intent of the prohibitory regulation is to preclude a dealer from advertising in such a manner as to lead a prospective customer to believe that the dollar amount shown on the particular instrument is the actual, final cost to the dealer for the vehicle. Since so many factors, both tangible and intangible, make up the ultimate determination of what the actual cost to the dealer is, the terms are equally susceptible of being false and deceptive to the consuming public. As I noted in that earlier determination, when approaching matters of this kind, the court is compelled to take into account the fact that some flexibility is both necessary and desirable with regard to the carrying out of consumer protection legislation which is deemed remedial in nature. The very purpose of the Consumer Fraud Act was to respond to widespread complaints about selling practices which victimized the consuming public. *See, Fenwick v. Kay American Jeep, Inc.*, 72 N.J. 372 (1977); *Levin v. Lewis*, 179 N.J. Super. 193 (App. Div. 1981); *Martin v. American Appliance*, 174 N.J. Super. 382 (Law Div. 1980) and *State v. Hudson Furniture Co.*, 165 N.J. Super. 516 (App. Div. 1979).

Waldman himself candidly admitted that the amounts and the terms set forth on an invoice are susceptible of various interpretations so that reliance upon them, even by one familiar with the industry practices, is not necessarily appropriate under all circumstances. During cross-examination, Waldman noted that the amount shown on the invoice is not what the car cost the dealer; rather, it is what he pays the factory for the vehicle. According to Waldman, it is simply impossible to tell from the invoice what the true cost actually is. It is this very uncertainty that makes the reference to dealer invoice an improper comparative term. In short, the court is convinced that the regulation here in issue does encompass the language used in the particular advertisement promulgated by Arrow, and unless the regulation is improper or unenforceable for some other reason, the advertisement does constitute a violation for which Arrow is answerable under the Consumer Fraud Act.

As noted, Arrow takes the position that it cannot be subjected to any penalty because the regulation sought to be enforced against it here cannot pass muster under the First Amendment to the Constitution of the United States. In essence, Arrow's position is that the advertisement is "commercial speech" and thus, entitled to First Amendment protection against unlawful interference. In support of that argument, Arrow cites a number of New Jersey and United States Supreme Court decisions which concern the issue of First

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Amendment protections in the commercial speech context. According to Arrow, the regulation, on its face, clearly attempts to restrict, if not entirely prohibit, certain kinds of language. Arrow concludes that the burden that rests upon the State to provide some compelling reason to justify the restriction has not been met.

The recent decision of the U.S. Supreme Court in *In re R.M.J.*, 455 U.S. 191 (1982), addresses itself to the issue *sub judice*. That case involved a challenge to the constitutionality of a disciplinary rule which attempted to regulate attorney advertising. The court held that the particular restrictions there involved could not pass First Amendment muster. However, in reviewing this area of the law, the court referred to some of its previous decisions *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), and observed as follows:

Thus, the Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. In *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462 (1978), the Court held that the possibility of “fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct” was so likely in the context of in-person solicitation, that such solicitation could be prohibited. And in *Friedman v. Rogers*, 440 U.S. 1 (1979), we held that Texas could prohibit the use of trade names by optometrists particularly in view of the considerable history in Texas of deception and abuse worked upon the consuming public through the use of trade names. *Id.* at 202.

The court then went on to set forth the “commercial speech” doctrine and the analysis which should be brought to bear in cases involving that doctrine:

Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation [citation omitted]. Although the potential for deception and confusion is particularly strong in the context of advertising of professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

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Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Central Hudson Gas Co. v. Public Service Comm'n*, 447 U.S. [557], 563-564 [1980]. Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state interest. *Id.* at 203.

The reference by the U.S. Supreme Court to *Central Hudson Gas Co.*, case indicates an adherence by it to the so-called "four-part analysis" which was formulated in that case with regard to commercial speech matters.

In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. 447 U.S. at 566.

An application of this four-part analysis to the instant matter leads to the conclusion that the First Amendment rights of Arrow have not been interfered with. Indeed, one might argue that the regulation concerns advertisements which are not even protected by the First Amendment. *N.J.A.C.* 13:45A-2.2(a)(7)(iv) concerns *unlawful* motor vehicle advertising practices and is intended to control *misleading* commercial speech. Therefore, arguably, the respondent cannot even assert a First Amendment right to challenge the regulation in the context of the *Central Hudson Gas* test. In this respect, the respondent thus could not even assert any effective challenge since the advertisement may be construed as "inherently likely to deceive." A consumer reasonably might conclude from Arrow's advertising language that the price he or she is being asked to pay affords the dealer little or no profit. The language also permits a prospective purchaser to assume that the price of the vehicle is less than that which the dealer himself must pay to the manufacturer. As noted by DeLorenzi, that type of advertising is precisely the type which led to the service of many, many citations by the Office of Consumer Protection. Surely, since New Jersey courts have recognized the value of regulations pertaining to unlawful motor vehicle advertising and automobile repairs as appropriate measures to effectuate the Consumer Fraud Act, a conclusion that the cited regulation is a measure which regulates

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inherent deceptive and/or misleading advertising would not be unreasonable. *See, Fenwick v. Kay American Jeep, Inc., supra; Levin v. Lewis, supra.*

Even assuming that the four-part analysis applies and that the respondent's challenge can overcome a contention that the advertisement is inherently misleading, the balance of the test still supports the State's position here. The substantial interest and the interference with speech proportionate to that interest are plain. The purpose of the Consumer Fraud Act, as noted, was to meet a need that arose because of widespread consumer complaints over selling practices which victimized consumers, and the legislation is specifically subject to a liberal construction. While certainly somewhat subjective, the conclusion that the interest is substantial and that interference with speech in the best interests of the public is appropriate is a conclusion which can be drawn with little difficulty.

So too, the regulation obviously directly advances the governmental interest of protecting consumers and, given the previous discussion, does not appear at all to be an overreaching. Although the regulation is of a somewhat general nature, it does relate to a particular aspect of automobile dealership practices and is designed to preclude the use of language which would lead a consumer to misconstrue a pricing policy. Although general, the regulation is narrowly enough drawn to address this particular evil.

Finally, the court must reject the argument that the regulation is unconstitutionally overbroad in the First Amendment context. As noted by the U.S. Supreme Court in *Central Hudson Gas, supra*, the commercial speech analysis is different from the overbreadth doctrine. That latter approach would permit invalidation of regulations on First Amendment grounds even where the activity engaged in by the person raising the challenge is not constitutionally protected. The purpose of the overbreadth doctrine, as noted in *Central Hudson Gas, supra*, is "the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review." 477 *U.S.* at 565, n.8. This is not such a case.

In short, a review of the pertinent decisional authority leads to the conclusion that the challenge by Arrow to the constitutionality of *N.J.A.C.* 13:45A-2.2(a)(7)(iv) must fail. As noted by the United States Supreme Court in *In re R.M.J., supra*, at 207, "We emphasize,

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as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proven to be misleading in practice." On that basis alone, Arrow's challenge could be rejected. Further, even if the four-part analysis may be applied, the regulation in question does pass muster as it asserts a substantial state interest, and the interference with speech, to the extent it even exists, is in proportion to the interest sought to be served. Finally, the regulation, on balance, is not more extensive than necessary to serve the valid public interest embodied in the Consumer Protection Act.

In view of the above determination, the allegation in the complaint that the advertising here in question violates the motor vehicle advertising regulations is **SUSTAINED**. Since this represents the fourth such violation, the assessment of a penalty in the amount of \$1,600 is appropriate. So too, in view of the violation, an Order, pursuant to *N.J.S.A.* 56:8-18 directing Arrow to cease and desist and to refrain from committing such practices is in order, together with the assessment of appropriate costs.

This initial decision may be affirmed, modified or rejected by the Director of the Division of Consumer Affairs who by law is empowered to make the final decision in this matter.

**FINAL DECISION BY THE DIRECTOR OF THE DIVISION  
OF CONSUMER AFFAIRS:**

The Director of the Division of Consumer Affairs having received and reviewed the entire Office of Administrative Law file in this matter, and having duly noted the exceptions filed by the respondent, and further, having read and reviewed the initial decision of the administrative law judge herein and adopting his findings and conclusions in their entirety,

IT IS, on this 21st day of May, 1982, ordered that:

1. In view of this being the fourth such violation of the motor vehicle advertising regulations, a penalty of \$1,600.00 be assessed against the respondent, Arrow Pontiac, Inc., to be paid to the State of New Jersey within 60 days of the date of this Order;
2. The respondent, Arrow Pontiac, Inc., cease and desist from committing such advertising violations in the future; and,
3. The respondent, Arrow Pontiac, Inc., be assessed costs in the sum of \$172.90, to be paid to the State of New Jersey within 10 days of the date of this Order.