

Sent by
Certified Mail

October 13, 2009

[REDACTED]

Re: Notice of Unlawful Marketing and Sales Practices in Home Remodeling Industry

Dear [REDACTED]

The Consumer Protection Division of the Washington State Attorney General's Office is investigating the marketing and sales practices of several companies in the home remodeling industry doing business in Washington. Our primary mission is to foster a marketplace free of unfair and deceptive acts and practices. We seek to accomplish our mission by notifying you of some of the more prevalent unlawful practices we've encountered during our investigation so you may review your own business practices to ensure compliance with all applicable laws.

Applicable Laws

Based upon the current status of our investigation, it's apparent that a number of companies are engaging in unlawful practices in violation of several consumer protection laws. These laws include but are not limited to Washington's Consumer Protection Act, chapter 19.86, RCW; Commercial Telephone Solicitation Act, chapter 19.158, RCW; Roofing and Siding Contractors and Salespersons Act, chapter 19.186, RCW; Retail Installment Sales of Goods and Services Act, chapter 63.14, RCW; and Mechanics' and Materialmen's Liens Act, chapter 60.04, RCW. There are a number of additional consumer protection laws, both state and federal, that may apply to your business practices we have not listed here.

False Reference Pricing Scheme

One of the more significant unlawful practices we've encountered during our investigation is what's commonly referred to as a false reference pricing scheme. The gist of this scheme is to misrepresent that a product or service ordinarily sells for an artificially inflated price but that it is being offered at a special reduced or discount price, even if the offered price represents the actual value of the product and the purchaser is receiving his money's worth. Simply put, companies that engage in this scheme deceive consumers by telling them they're buying at a substantially discounted price when in fact they are not. Courts have considered this an unlawful practice for over 70 years.¹

¹ *FTC v. Standard Education Soc.*, 302 U.S. 112, 58 S. Ct. 113, 82 L. Ed. 141 (1937); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965); *B. Sanfield, Inc., v. Finlay Fine Jewelry Corp.*, 258 F.3d 578 (7th Cir. 2001); *Carpets 'R' Us*, 87 F.T.C. 303 (1976); *Hollywood Carpets, Inc.*, 86 F.T.C. 784

Misrepresentation of Discounts

Furthermore, companies that use a false reference pricing scheme engage in several other unlawful acts to make the scheme work. (But the unlawful practices we've encountered during our investigation need not be part of a false reference pricing scheme to be considered unlawful.) For example, companies attempt to conceal their false reference pricing scheme from consumers by making up bogus justifications for taking steep discounts on their artificially inflated prices. These bogus justifications range from getting consumers to agree to post the company's sign in their yards to misrepresenting to consumers that the discounts are based on a manufacturer's rebate or discount program that in reality does not exist. The truth is that the sole justification for offering the discounts is to deceive consumers into thinking they are buying at a substantially discounted price when in fact they are not.

Misrepresenting Sales Presentations

Another unlawful act some companies regularly engage in is using ruses to make appointments for in-home presentations. Because the typical in-home sales presentation associated with false reference pricing schemes lasts several hours, companies make appointments (i.e., get leads for their salesmen) by misrepresenting what the appointment is about or how long it will last. For example, some companies have their telemarketers or canvassers misrepresent that they'll be sending out a technician to conduct an energy audit and not a salesman to pitch a sale. Other companies misrepresent that their presentations are "no pressure" and take only a short time when in fact they are high pressure and take several hours. Others misrepresent to consumers that they aren't even sending out their own employees but rather some factory representatives. Still other companies refuse to give consumers a straight answer when asked how long the presentation will take because companies know if they told them the truth, no consumer would agree to make such an appointment. The point is that a company that misrepresents, whether directly or by implication, the character or nature of their sales presentations to consumers is acting unlawfully.²

High Pressure Sales Tactics

We've also encountered a number of companies apparently engaging in unlawful high-pressure sales tactics. One such tactic is creating a false sense of urgency or an unfounded fear of losing out in consumers by misrepresenting the scarcity of an object. This includes product scarcity, misrepresenting that a product is rare; winner scarcity, misrepresenting that a consumer is the only one of a lucky few who are getting this offer; time scarcity, misrepresenting that an offer is only available for a limited time; and take away scarcity, misrepresenting that if the consumer does not want the offer, it will be given to someone else. Putting this tactic in the context of a false reference pricing scheme, we've encountered companies misrepresenting that the bogus discounts are available for a limited time or are available to only a few lucky consumers.

(1975). And although Washington courts have not yet directly addressed a false reference price scheme case, we are confident they will find the scheme to be unlawful if given the opportunity to do so. Indeed, RCW 19.86.920 directs Washington courts to take guidance from final decisions of federal courts and final orders of the federal trade commission in construing Washington's Consumer Protection Act.

² *Encyclopedia Britannica*, 87 F.T.C. 421(1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *modified*, 100 F.T.C. 500 (1982).

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Of course, the truth is the bogus discounts are available to all consumers at any time or else the scheme does not work.

Another example of high pressure sales tactics some companies use are scare tactics such as exaggerating the dangers posed by small amounts of mold salesmen may find around a consumer's windows. Yet other high pressure tactics we've seen include designing sales presentations to last several hours, scheduling them so that they last late into the night, or refusing to end presentations and thus wear consumers down so they say "yes" just to get the salesmen out of their homes.

Fraudulent Endorsements and Testimonials

We've also observed companies misrepresenting to consumers that they are a reputable and dependable business through the use of fraudulent endorsements or testimonials. For example, some companies mischaracterize awards to imply they are based on great customer service or reliability when in fact the awards were solely based on annual gross revenue amounts. Other companies misrepresent that they were ranked higher in some trade publication's list of top companies than they actually were. Still others misrepresent their rating with the Better Business Bureau. And there are those companies that use wholly fictional endorsements and testimonials or falsely imply that certain manufacturers and suppliers chose to do business with them because of their great business reputation to the exclusion of other companies when in fact no such thing occurred.

Other Unlawful Practices

There are numerous other unlawful practices that we've encountered during our investigation of the marketing and sales practices of companies in the home remodeling and window replacement industries doing business in Washington. They include but are not limited to the following:

Representing without supporting competent and reliable scientific evidence³ that customers will realize specific energy cost savings if they purchase the company's products and services.⁴

Failing to clearly and conspicuously disclose material limitations of any offer, guarantee, cost or price of a product or service.

Using fraudulent documents to advertise its products and services.

Failing to perform pursuant to any agreement companies entered to resolve a customer complaint, or failing to otherwise review and resolve customer complaints or inquiries within a reasonable time period.

³ Competent and reliable scientific evidence means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area or of governmental agencies that have been conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted in the profession to yield accurate and reliable results.

⁴ *Thiret v. Federal Trade Commission*, 512 F.2d 176, (10th Cir. 1975).

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Failing to timely provide proper notices of cancellation rights or failing to timely provide refunds as required by law.

Interfering with consumers' rights to cancel or obtain refunds. For example, some companies have consumers sign an agreement during the in-home presentation that may be construed as an unlawful attempt to have consumers waive their cancellation rights.

Engaging in conduct the natural consequences of which is to harass, intimidate or torment any person, including but not limited to making repeated telephone calls, sending multiple emails, repeatedly canvassing homes, ignoring "no trespassing" or "no solicitation" signs or otherwise repeatedly soliciting customers who have communicated they are not interested in purchasing a company's products or services.

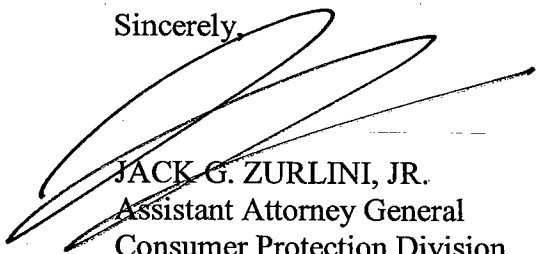
Misrepresenting, directly or impliedly, who sells, manufactures, installs, repairs or otherwise services a company's products. For example, companies misrepresent to consumers that they install windows when in fact they hire subcontractors to do so.

Enforcement Actions

Finally, if a company is currently engaging in any unlawful act or practice, it should immediately cease doing so. For example, if a company is currently conducting sales presentations that use a false reference pricing scheme, it should immediately stop conducting them. Or if a company's website contains misrepresentations about its products or services, the statements should be immediately corrected or deleted, or the website taken down until corrected. The bottom line is that once a company has been put on notice of its unlawful conduct, it should take decisive and immediate steps to cease doing so and to correct it. Indeed, another way we seek to accomplish our mission of fostering a marketplace free of unfair and deceptive acts and practices is to identify and prosecute businesses that violate consumer protection laws.

Our investigation of the home remodeling and window replacement industries operating in Washington State is continuing. If you have any questions or concerns about the issues raised in this letter, please feel free to contact me at my telephone number or email set out below.

Sincerely,



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