

ADVERTISING AND SALES CLAIMS

Savings Claims

The Wisconsin Department of Agriculture, Trade and Consumer Protection regulates unfair and deceptive business practices. DATCP has adopted rules for price comparison advertising. These rules prohibit deceptive price comparison claims, and provide standards for compliance. The rules are found in Wisconsin Administrative Code chapter ATCP 124. Rule violators may be prosecuted, and there is a private remedy for consumers.

Coverage

ATCP 124 covers *all price comparisons* made by a seller, whether in printed or broadcast advertisements, catalogues, in-store labels, signs, tags, electronic communications, or oral statements by sales personnel.

A *price comparison* is any direct comparison, expressed wholly or in part in dollars, cents, fractions or percentages, of a seller's current price with any other price or statement of value. It includes, for example, claims like: "50% off," "Save 1/3," "Half-price sale," "Was \$20, now \$5," "\$50 value, now \$15" or "\$20, compare elsewhere at \$45."

Deceptive Claims Prohibited

ATCP 124 prohibits deceptive savings claims based on arbitrary or inflated comparison prices:

- Comparison values must be based on *actual sale prices, bona fide offer prices, future prices or representative competitor's prices* in the trade area.
 - An *actual sale price* is one at which the seller has actually sold goods or services in the past.
 - A *bona fide offered price* is one at which the seller has actually offered goods or services for at least 4 weeks.
 - A *future price* is one at which the seller will offer goods or services for sale in the future. A future price comparison must be identified as such.
 - A *representative competitor's price* is one at which a competitor has sold or offered goods or services.
- Sellers may not deceptively compare "apples to oranges" – for example, by comparing a sale price to the regular price of a *different* (better) product – without disclosing that the products are different.

Rule Background

DATCP adopted ATCP 124 as a *general order* (rule) under Wisconsin's Unfair Business Practices Law, Wisconsin Statutes section 100.20.

- DATCP adopted ATCP 124 effective January 1, 1974 (DATCP Docket No. 960).
- DATCP amended ATCP 124 effective February 1, 1978 (DATCP Docket No. 1239).

Rule Enforcement

Private Remedy

A person who suffers a monetary loss because of a seller's violation of ATCP 124 may sue the seller under Wisconsin Statutes section 100.20(5), and may recover twice the amount of the loss, together with costs and attorney's fees.

Injunction and Restitution

DATCP may seek a court order under Wisconsin Statutes section 100.20(6), enjoining violations of ATCP 124 and ordering a seller to pay restitution to consumers. The Department of Justice or a district attorney may represent DATCP in court.

Civil Forfeiture

DATCP or any district attorney may start a court action, under Wisconsin Statutes section 100.26(6), to recover a civil forfeiture from a seller who violates ATCP 124. The court may impose a civil forfeiture of up to \$10,000 per violation. The Department of Justice or a district attorney may represent DATCP in court.

Criminal

A district attorney may start a criminal prosecution, under Wisconsin Statutes section 100.26(3), against a seller who violates ATCP 124. A seller may be fined up to \$5,000 or sentenced to as much as a year in jail, or both.

Selected Court Cases

State v. Menard, Inc., 121 Wis. 2d 199 (Wisconsin Court of Appeals, 1984).

- Each publication of an improper advertisement constitutes a separate violation of ATCP 124.

- ATCP 124 is constitutional. The rule is not unconstitutionally vague, nor does it violate the equal protection clause of the constitution.
- Violation of ATCP 124 is a violation of Wisconsin Unfair Business Practices Law, Wisconsin Statutes section 100.20. Since ATCP 124 interprets Wisconsin Statutes section 100.20, and has the force and effect of law, the state need only prove a violation of ATCP 124. The state is not also required to prove a violation of Wisconsin Statutes section 100.20.