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Best Practices for Online Advertising

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Speakers



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Overview

- Purpose of Today's Conversation
- Background
 - Federal Trade Commission
 - California Law
- Summary of the Law
- Rules of the Road
- Cautionary Tales
- Hypotheticals

Purpose of Today's Conversation



Background – The Rules and Who Makes Them





Background – The Federal Trade Commission



Background – The Federal Trade Commission

- The FTC protects consumers against "unfair and deceptive acts or practices."
- Authorized by the FTC Act, the FTC:
 - Investigates unfair competition and unfair or deceptive acts or practices.
 - Seeks relief for consumers, including injunctions, restitution, and civil penalties.



Background – California



Background – California

- The California State Legislature <u>makes</u> the rules and the California Attorney General and City Attorneys <u>enforce</u> them.
- 3 laws:
 - Unfair Competition Law (UCL) 1935
 - False Advertising Law (FAL) 1941
 - Consumer Legal Remedies Act (CLRA) 1970

CALIFORNIA REPUBLIC

The Law on Deceptive Advertising



Statement in Regard to

FILTERS

This letter responds to the Committee's inquiry regarding the Commission's enforcement policy against deceptive acts or practices. We also hope this letter will provide guidance to the public.

specifically prohibits false ads likely to induce the purchase of food, drugs, device Section 15 defines a false ad for purposes of Section 12 as one which is "mislead respect."2 Numerous Commission and judicial decisions have defined and elabor phrase "deceptive acts or practices" under both Sections 5 and 12. Nowhere, how single definitive statement of the Commission's view of its authority. The Comthat such a statement would be useful to the public, as well as the Committee in i

general applicability. We have attempted to provide a concrete indication of the the Commission will enforce its deception mandate. In so doing, we intend to add concerns that have been raised about the meaning of deception, and thereby atte greater sense of certainty as to how the concept will be applied.3

I. SUMMARY

Certain elements undergird all deception cases, First, there must be a represen practice that is likely to mislead the consumer. 4 Practices that have been found in deceptive in specific cases include false oral or written representations, misleadi sales of hazardous or systematically defective products or services without adequ failure to disclose information regarding pyramid sales, use of bait and switch to to perform promised services, and failure to meet warranty obligations.⁵

Second, we examine the practice from the perspective of a consumer acting reason circumstances. If the representation or practice affects or is directed primarily to group, the Commission examines reasonableness from the perspective of that gro

Third, the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances,



The Law on Deceptive Advertising

- Advertising must be truthful.
- Advertising cannot be unfair, deceptive, untrue,
 - false, or misleading.

(15 U.S.C. Section 45(a)(1), "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful") (www.ftc.gov/bcp/policystmt/ad-decept.htm) (Cal. Bus. & Prof. Code § 17500) (Cal. Bus. & Prof. Code § 17200) (Cal. Civ. Code § 1770(13))

When Is Advertising Unfair?

Advertising is unfair if the injury it causes or is likely to cause is:

- 1. Substantial
- 2. Not outweighed by countervailing benefits to consumers or competition
- 3. Not avoidable by consumers.

(15 U.S.C. Section 45(a)(1))

When Is Advertising Deceptive?

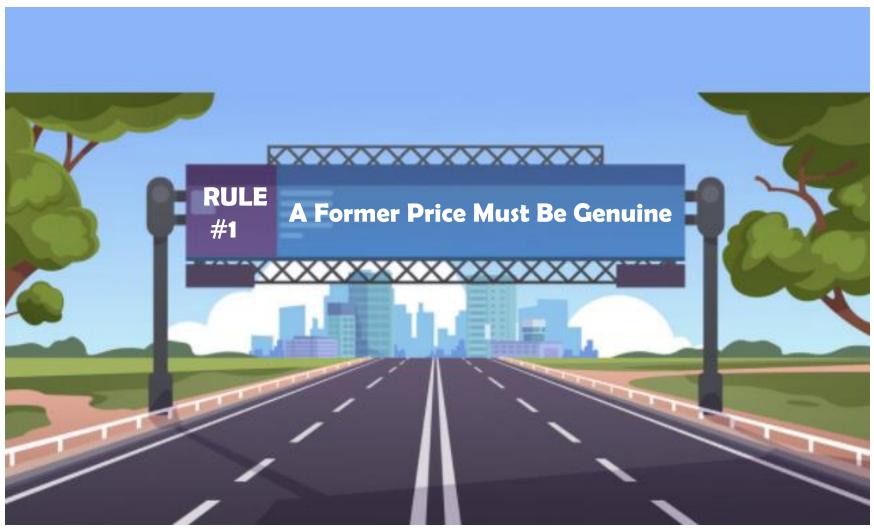
- 1. There is a representation, omission or practice that is likely to mislead
- 2. A reasonable consumer
- 3. And the representation, omission, or practice is material to the consumer's decision.

(15 U.S.C. Section 45(a)(1))

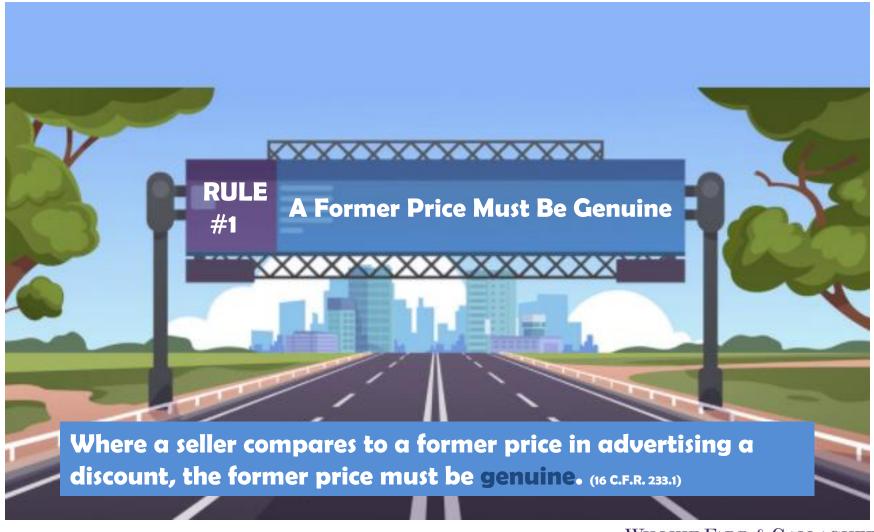
When Is Advertising Deceptive?

- There is a representation, omission or practice that is likely to mislead
 - E.g., misleading price claims, false oral or written representations, failure to meet warranty obligations
- 2. A reasonable consumer
 - Perspective of consumer acting reasonably under the circumstances
- 3. And the representation, omission, or practice is material.
 - Likely to affect a consumer's choice of or conduct regarding a product

Rule #1: Former Price Comparisons



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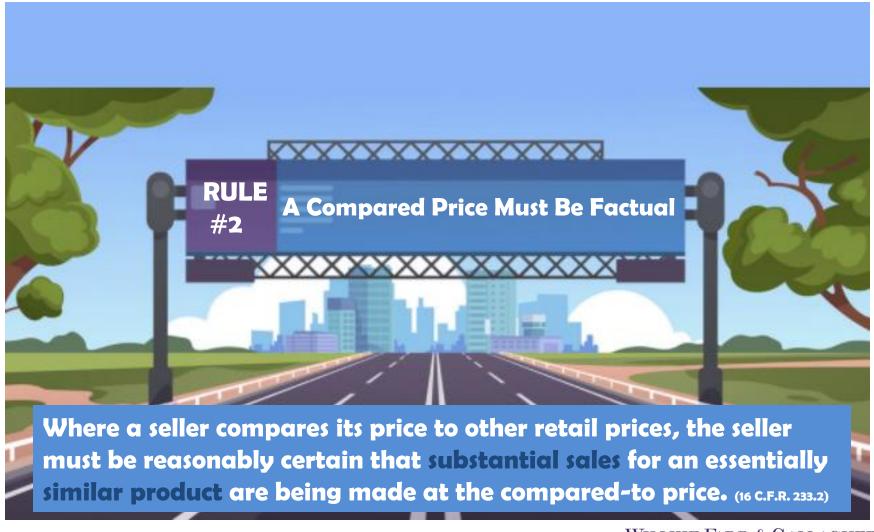
Rule #1: Former Price Comparisons



Rule #2: Competitor Price Comparisons



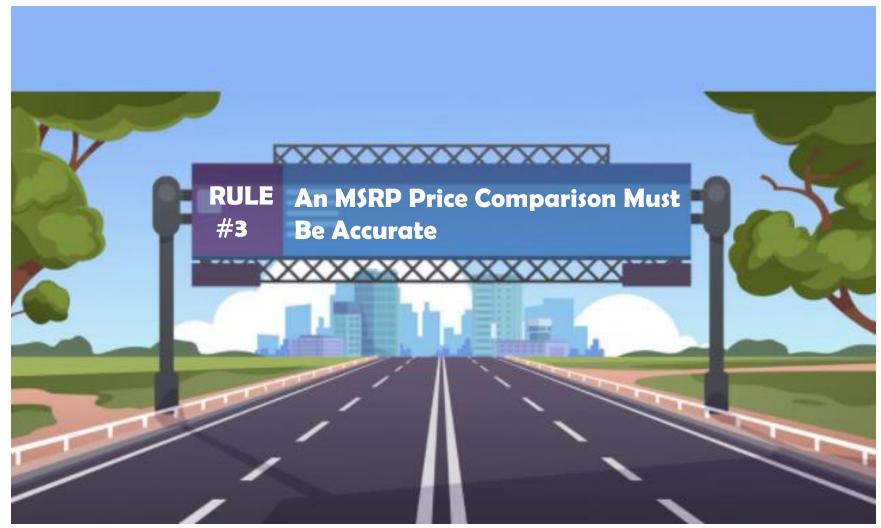
Rule #2: Competitor Price Comparisons



Rule #2: Competitor Price Comparisons



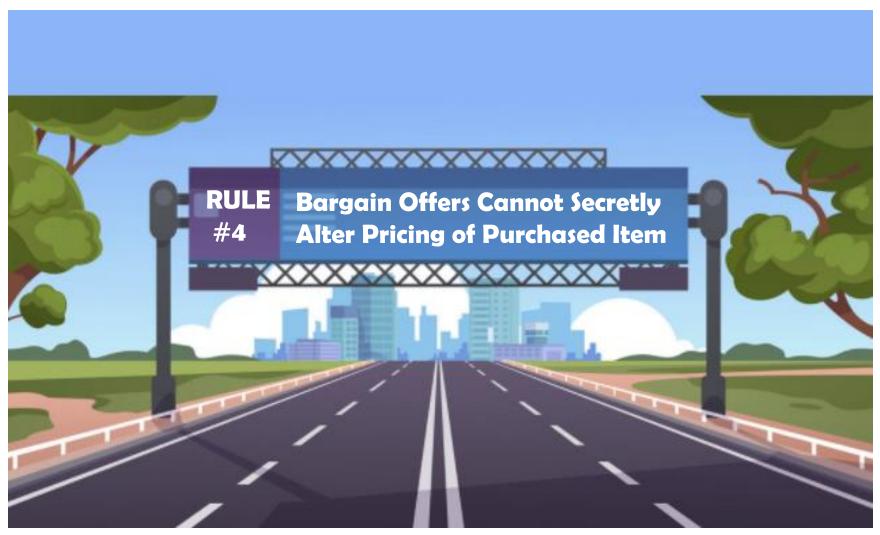
Rule #3: List Price Comparisons



Rule #3: List Price Comparisons



Rule #4: Bargain Offer Pricing



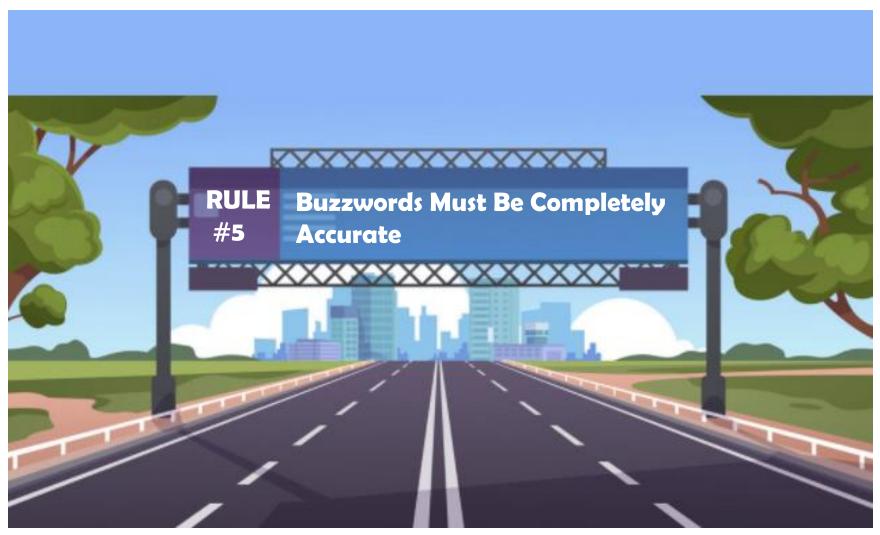
Rule #4: Bargain Offer Pricing



Rule #4: Bargain Offer Pricing



Rule #5: Buzzword Advertising



Rule #5: Buzzword Advertising



Cautionary Tales





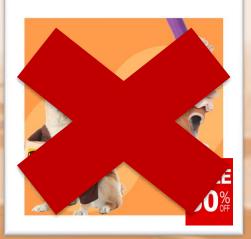
- California lawsuit against J.C. Penney, Kohl's, Sears, and Macy's.
- The consumers said that the department stores sought to increase their sales through a "false reference pricing."
- The scheme: advertising a "sales price" alongside an inflated "original price."



 The advertisement must show discount of either prevailing market rate in last 3 months <u>OR</u> prevailing market price on a specified date.

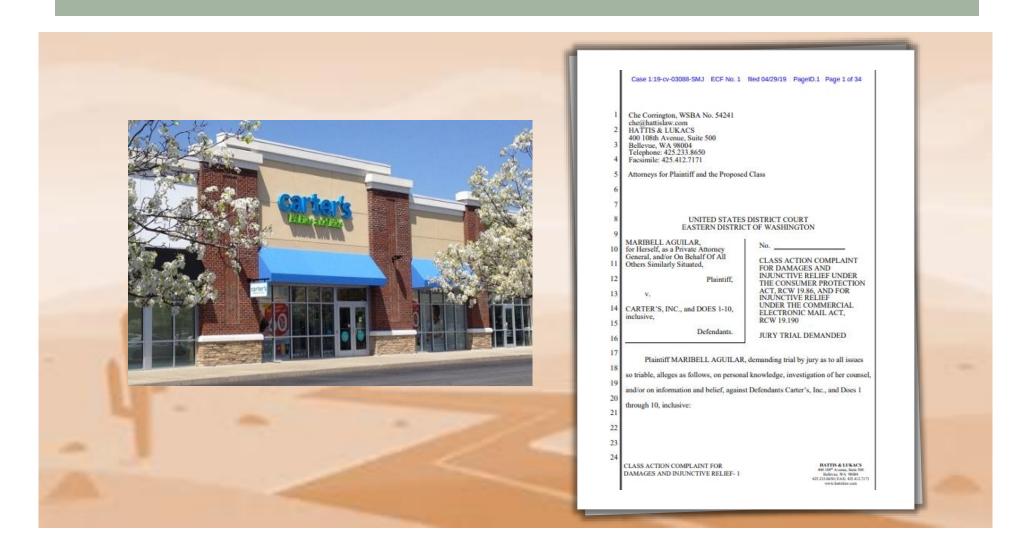
 The Court said: "The prohibition does, in fact, ban . . . a considerable amount of truthful and nonmisleading advertising regarding former prices, including a good deal of discount advertising by individual retailers regarding



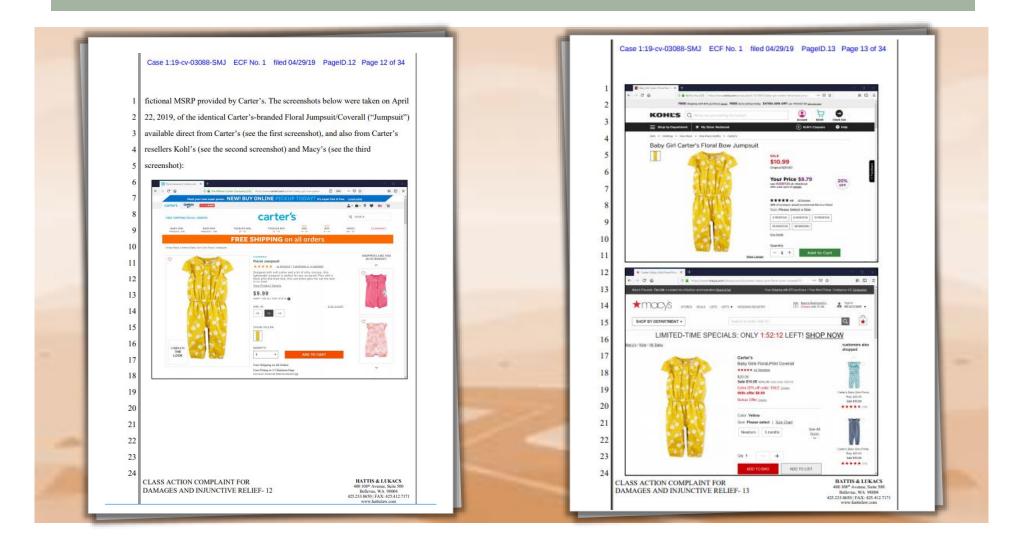




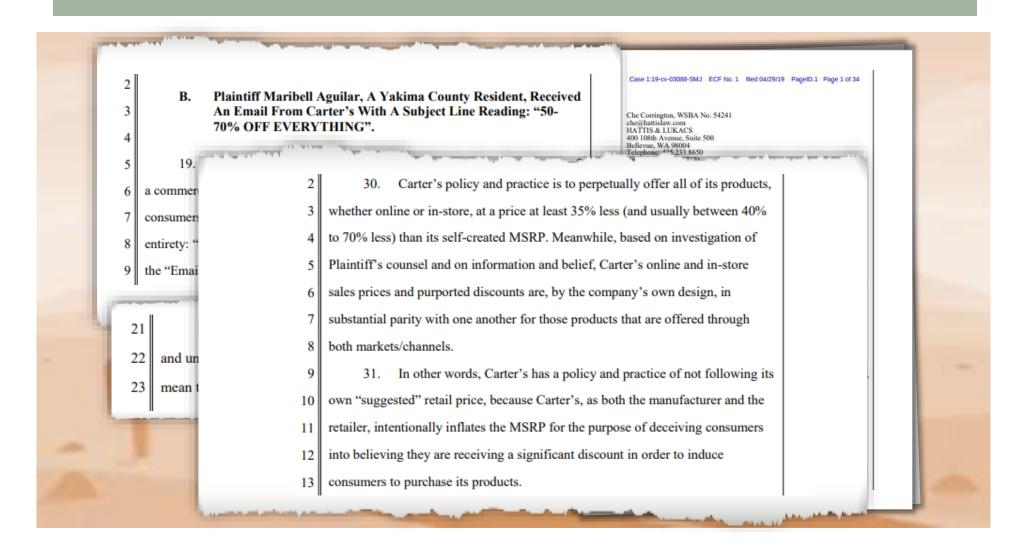
Cautionary Tale: Sales Off Everything



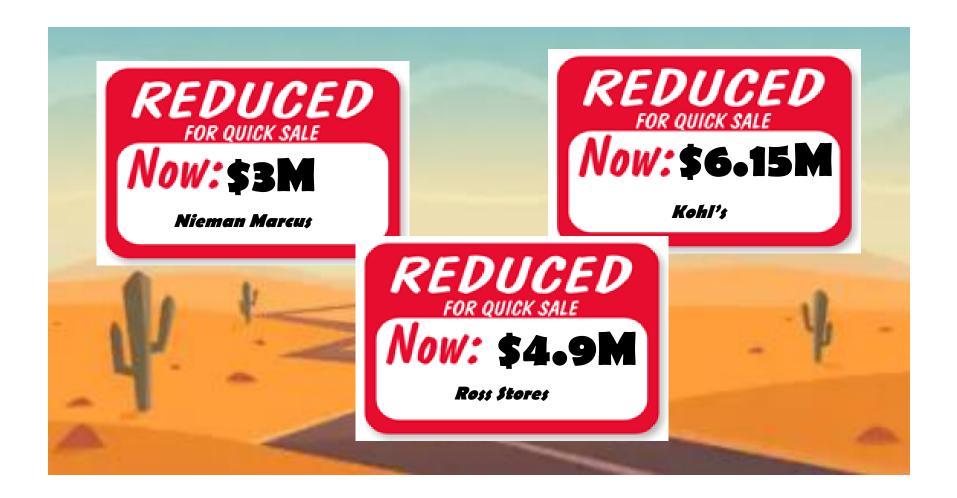
Cautionary Tale: Sales Off Everything



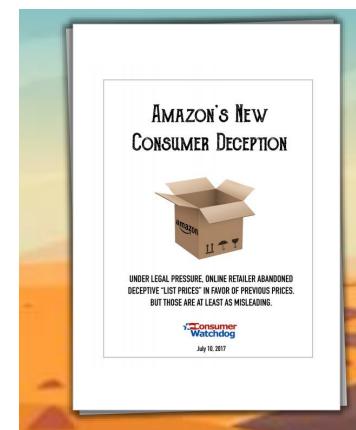
Cautionary Tale: Sales Off Everything



Cautionary Tale: The Price of Deceptive Advertising



Cautionary Tale: FTC Investigates Allegations



Consumer Watchdog looked at around 1,000 products on Amazon's website. Alleged that Amazon put list prices on about 46% of its products, but 61% of those prices were higher than any price used in past 90 days.

"The conclusions the Consumer Watchdog group reached are flat out wrong," Amazon said. "We validate the reference prices provided by manufacturers, vendors and sellers against actual prices recently found across Amazon and other retailers."

QUESTION

John Doe sells lawn chairs, which cost him \$25 each. His regular retail price is \$35 but in light of Memorial Day, John increases the price to \$45 per chair. On Monday, he cuts the prices back to \$35 and advertises: "Bargain: Lawn Chairs, Were \$45, Now Only \$35!" **Is this an acceptable advertisement**?

ANSWER

No. This is a false claim because the advertised sale is not genuine. John did not offer his chairs for \$45 for a substantial amount of time; selling the chairs at his regular price of \$35 is not a "bargain."

QUESTION

EZ-Mart sells microwaves with an MSRP of \$100. EZ-Mart advertises that the microwaves are available for "20% off—discounted price of \$80." **Is this an acceptable advertisement**?

ANSWER

It depends. We need to know whether EZ-Mart and a substantial amount of competitors in EZ-Mart's trade area regularly offer the microwaves at the list price of \$100. If EZ-Mart is a national chain, then EZ-Mart should ensure that the price does not exceed the highest price for sales in that trade area. If the microwaves regularly retail for \$80, then the advertisement misleads the consumer into thinking he got a better deal than he did.

QUESTION

For the past 2 months, Phil Mickelson Inc. (PMI) has sold Titleist golf balls for \$65/dozen. PMI's competitors always sell at \$55/dozen. Starting in November, PMI offers the balls for sale \$48/dozen with a good-faith advertisement saying "Compare at \$65." **Is this an acceptable advertisement**?

ANSWER

No. Under California law, PMI could either use "compare at" price of \$55, or he could indicate that his "compare at" price was for September and October 2020.

QUESTION

Jane Doe runs a corner book shop. Due to COVID-19, she now offers "FREE SHIPPING" on book purchases, so long as the purchaser buys four or more books and spends over \$60. **Is this an acceptable business practice**?

ANSWER

Yes, it is. However, Jane should be sure to clearly disclose the terms of receiving free shipping up front and along with the advertised deal. If she adjusts the pricing of the books in any way to make up for the lost shipping expenses, she should disclose that to the consumer.

QUESTION

Every Sunday evening, The Tire Store announces a "limited time offer" on 2-for-1 tires. The Tire Store removes the sale from the website every Monday evening. **Is this an acceptable advertisement?**

ANSWER

No, it isn't. In reality, the offer isn't "limited" but instead is a regular component to The Tire Store's sales plan.

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Questions