

Seller beware: Advertising “on sale” pricing can lead to legal trouble

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A wave of recent putative class action cases alleging violations of federal pricing guidelines and the consumer protection laws of various states is having a major impact on the retail sector¹.

These cases all involve common allegations of a tactic known as “phantom discounts,” which plaintiffs allege are designed to trick consumers into thinking they are getting a “bargain” on items they are purchasing when in reality they are paying full price. This is accomplished by using made-up former prices that do not reflect a real price at which the items in question were ever actually sold. The fake base price’s only purpose is to convince consumers that a retailer’s current price for an item is below the price ordinarily charged for the item, and that they are therefore getting a “deal” on the purchase. However, if a retailer falsely conveys the impression that an item is being discounted when it is actually being sold for the regular price, courts may find liability for the seller under the unfair business practices and false advertising laws of the various state and federal jurisdictions.

Under FTC Pricing Guidelines, the practice of offering an item for sale at a higher price for a short period of time in order to support a seller’s claim in its advertising that an item is “discounted” when the seller lowers the price a few days later, is considered deceptive and is specifically prohibited.² In order to properly advertise a claimed former base price, the product must have been “openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith – and not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based.”³

The consumer protection laws of many states prohibit deceptive advertising, marketing, and sales practices, including advertising and selling items at purported discounts and offering purported discounts that do not actually exist.

The gravity of such false advertising consumer class action lawsuits is demonstrated by recent cases involving JC Penney, Ascena Retail Group, and Michael Kors, among other major retailers.

¹ See, e.g., *Pallagrosi v. The Gap Inc.*, U.S.D.C., N.D. Cal. Case No. 3:17-CV-05905; *Spann v JC Penney*, U.S.D.C., C.D. Cal. Case No. 8:12-CV-00215-FMO-KES; *Gattinella v. Michael Kors*, U.S.D.C., S.D. N.Y. Case No. 1:14-CV-05731-WHP; *Chowning v Kohl’s Department Stores*, U.S.D.C., C.D. Cal. Case No. 2:15-CV-08673-RGK-SP; *Rougvie v. Ascena Retail Group, Inc.*, U.S.D.C., E.D. Pa. Case No. 2:15-CV-00724-MAK; *Branca v. Nordstrom, Inc.*, U.S.D.C., S.D. Cal. Case No. 3:14-CV-02062-MMA-AGS; *Remijas v. Neiman Marcus Group, LLC*, U.S.D.C., N.D. Ill. Case No. 1:14-CV-01735; *Malik v. Saks Fifth Avenue LLC*, U.S.D.C., C.D. Cal. Case No. 2:14-CV-07600-SVW-VBK; *Dennis v. Ralph Lauren Corporation*, U.S.D.C., S.D. Cal. Case No. 3:16-CV-01056-WQH-BGS; *Teperson v. Sears Roebuck & Company*, U.S.D.C., S.D. Cal. Case No. 3:15-CV-01892-L-DHB; *Morrow et al. v. Ascena Retail Group Inc et al.*, U.S.D.C., S.D.N.Y. Case No. 1:16-cv-03340.

² 16 C.F.R. § 233.1(b).

³ *Id.*

In the *Spann* case, filed against JC Penney in the Central District of California,⁴ the lawsuit claims that JC Penney used fake “regular” and “original” prices for its branded products. The Plaintiff filed the class action after purportedly purchasing three blouses, each marked with an “original” price of US\$30, on sale for US\$17.99. However, Plaintiff later discovered that those same tops had not been priced above US\$17.99 in the three months prior to her purchase. Though JC Penney did not admit wrongdoing, it eventually settled the case for US\$50 million in August 2016.

Ascena Retail Group, Inc., owner of Justice Brand and Ann Taylor, announced this past July a settlement of a nationwide deceptive pricing class action filed against the company.⁵ According to the lawsuit filed in the Eastern District of Pennsylvania, items at Justice stores were marked as “40% off” even though this “sale” price was actually the regular retail price. Although Ascena denied any misconduct, it agreed to a US\$50.8 million settlement fund for the national class. More recently, on December 14, 2017, Ascena agreed to pay a US\$6.1 million settlement to settle a class action lawsuit that the company misrepresented discounts to customers shopping at Ann Taylor and LOFT Factory Outlet Stores. As part of the settlement, Ann Taylor will pay US\$5.1 million in the form of vouchers, US\$500,000 in cash to Class Members., and an additional US\$500,000 for administration of the class action settlement.

Michael Kors also settled a similar case in the Southern District of New York for US\$4.9 million in June 2015.⁶ The complaint against Kors alleged that clothing sold in Kors’ outlet stores was labeled with two prices: the Manufacturer’s Suggested Retail Price (MSRP) and “OUR PRICE,” which was supposedly a deep discount from the MSRP. However, according to the plaintiff, these MSRPs were “a sham.” In reality, at least some of the clothing being sold was made exclusively for sale at the outlet stores, meaning that the discounted items never were, or intended to be, sold at the MSRP. The Plaintiffs alleged that the “OUR PRICE” discount was ostensibly a “phantom markdown.” In addition to the US\$4.9 million settlement, Kors also agreed to replace the term MSRP with “Value” on all of its outlet price tags, as well as display a sign in all outlet stores explaining the meaning of “Value” to customers. Alternatively, Kors must remove “reference price” comparisons from any item exclusively sold at Kors’s outlet locations.

Lessons to be learned

With large settlements like these, this area of law will no doubt continue to be tempting for plaintiffs’ attorneys seeking new potential targets for consumer class action cases in the retail industry. Companies that frequently provide sales and advertise discounts from former or MSRP prices and do not wish to become embroiled in similar class action lawsuits should be careful how they label their products, particularly when using price comparisons. If retailers want to advertise discounted prices or the former base prices of an item, they should adhere to the following rules, derived from the FTC Pricing Guidelines:

- The former (i.e., pre-sale) price should be “the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time.”
- A seller should not represent that a price is a former selling price, as opposed to a former asking price, unless substantial sales were made at that price. For example, the advertiser should scrupulously avoid any implication that a former price is a selling, not an asking price (for example, by use of such language as, ‘Formerly sold at \$____’), unless substantial sales at that price were actually made.

⁴ *Spann v. JC Penney*, U.S.D.C., C.D. Cal. Case No. 8:12-CV-00215-FMO-KES.

⁵ *Rougvie v. Ascena Retail Group, Inc.*, U.S.D.C., E.D. Pa. Case No. 2:15-CV-00724-MAK.

⁶ *Gattinella v. Michael Kors*, U.S.D.C., S.D. N.Y. Case No. 1:14-CV-05731.

- If the former price or price reduction is not shown, the sale price should not be “so insignificant as to be meaningless” -- “[i]t should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered.”
- A list or suggested retail price should be “the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business)” -- for retailers this means the price at which “a number of the principal retail outlets in the area are regularly engaged in making sales.”

What not to do

- Do not artificially inflate a price for the purpose of enabling the subsequent offer of a large reduction.
- Do not advertise a price at which you never offered the article at all, or a price which was not used in the regular course of business, or which was not used in the recent past but at some remote period in the past, without making disclosure of that fact.
- Do not use a price that was not openly offered to the public, or that was not maintained for a reasonable length of time, but was immediately reduced.

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