

**THE PRICE IS NOT RIGHT:
CLASS ACTION RISKS OF COMPARATIVE PRICE ADVERTISING**

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Introduction

“Was that retail ‘bargain’ you received really a bargain?” That is the question being asked by a recent spate of lawsuits filed against prominent retailers. Most of these actions have been brought as private party class actions, but price discount claims have also attracted renewed regulatory attention in recent years. The facts and circumstances of these cases have varied. Some actions have challenged as false a retailer’s assertion that a product is “on sale” or has been “discounted” from the retailer’s former or regular price. Others have challenged a retailer’s supposedly favorable price comparisons to prices of a competitor’s same products or to prices of other “similar” products that are not actually of like grade and quality. Still others have challenged a retailer’s supposed “discount” from a list price or MSRP at which the product has never sold. Despite these differences, the gravamen of the claim in each instance is typically the same: the retailer is allegedly misleading consumers into believing they are receiving a bargain when they are in fact paying the price at which the product normally sells.

While the majority of these cases have been brought in California (with the benefit of California’s liberal consumer protection laws), cases are appearing nationwide and the publicity surrounding them suggests their numbers will only grow. That is especially true given the proliferation of internet price searching tools and the resulting pressure that retailers feel to compete on price and to respond to “bargains” being offered by their competitors. The risk to retailer clients is substantial: some of these claims have resulted in multimillion dollar settlements and/or regulatory fines. Even where cases are terminated early, defense costs can be significant.

In this article, I first summarize the historical background and legal bases of these “false discounting” claims. I review how the FTC, which had developed deceptive pricing guides and then vigorously pursued such claims in the 1960’s, had – most likely for policy reasons – all but abandoned enforcement actions related to pricing by the 1980’s. I also mention generally various state law deceptive pricing provisions, most of which derive from the FTC model. I next

discuss the recent resurgence of these claims over the last few years, primarily via private class actions, but also by regulatory (primarily state regulatory) enforcement actions. After summarizing some of the cases and their outcomes, I conclude by suggesting a few measures that retailers can take to mitigate the risks.

FTC Guides Against Deceptive Pricing

The FTC developed “guides” against deceptive pricing in the late 1950’s and subsequently amended them throughout the 1960’s; the current guides still date back to 1967.¹ The guides do not have the force of law; they instead “provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry.” 16 C.F.R. § 1.5. However, “[f]ailure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions.” *Id.* Under Section 5 of the FTC Act, the Commission has authority to prevent “unfair or deceptive acts or practices in or affecting commerce” which are broadly declared as being “unlawful.” 15 U.S.C. § 45. As discussed more fully herein, while there is no private right of action under Section 5 of the FTC Act, many state statutes addressing deceptive trade practices and unfair competition contain restrictions similar to those in the FTC guides. In addition, the guides are often cited in private litigation as setting the norms that should be enforced under state consumer protection law. The guides are thus a critical starting point for analyzing the bona fides of an advertiser’s pricing claims.

The guides specifically address several forms of pricing claims relevant here, including (1) “former price comparisons,” *i.e.* claimed discounts from an advertiser’s own normal price, 16 C.F.R. § 233.1, (2) “retail price” or “comparable value” comparisons, *i.e.*, claimed discounts from what others in the locale are selling the same or similar product, *id.* § 233.2, and (3) claimed discounts from a list price or MSRP, *id.* § 233.3. The guides note, however, that “[t]he practices covered in the provisions . . . represent [only] the most *frequently employed* forms of bargain advertising,” and warn that “there are many variations which appear from time to time and which are, in the main, controlled by the same general principles.” *Id.* § 233.5 (emphasis added).

¹ Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (Oct. 15, 1958); 16 C.F.R. § 233.1(a) *et seq.*; 32 Fed. Reg. 15534 (Nov. 8, 1967).

The FTC guides expressly address and provide commentary with examples concerning “former price comparisons,” which are described as “[o]ne of the most commonly used forms of bargain advertising,” *i.e.*, the “offer of a reduction from the advertiser’s own former price for an article.” 16 C.F. R. § 233.1(a). While it is certainly risky to claim a discount from a former price at which substantial sales were not actually made, the guides note that “[a] former price is not necessarily fictitious merely because no sales at the advertised price were made.” *Id.* § 233.1(b) They warn, however, that in such cases the advertiser “should be especially careful . . . that the price is one at which the product was 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, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based.” *Id.* Each factor is important: thus, comparisons to prices that were not *openly offered in the recent past for a reasonable period of time in the ordinary course of business* are suspect. *Id.* § 233.1 (d). The guides also warn that comparisons to former prices may be scrutinized regardless of whether the advertisement expressly uses such words as “Regularly,” “Usually,” or “Formerly” to describe the former price. *Id.* § 233.1 (e). They also caution against misleading discount claims concerning trivial reductions, such as advertising that an item has been “‘Reduced to \$9.99,’ when the former price was \$10.” *Id.*

The guides also expressly address “retail price comparisons” and “comparable value comparisons.” *Id.* §233.2. A “retail price comparison” is where an advertiser “offer[s] goods at prices [claimed to be] lower than those being charged by others for the *same* merchandise in the advertiser’s trade area.” *Id.* § 233.2(a) (emphasis added). A “comparable value comparison” is “[a] closely related” claim where an advertiser “offer[s] a reduction from the prices being charged either by the advertiser or by others in the advertiser’s trade area for *other merchandise of like grade and quality.*” *Id.* § 233.2 (c) (emphasis added). Both types of pricing claims are treated similarly. For “retail price comparisons, the advertiser should “be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area.” *Id.* § 233.2(a). For “comparable value comparisons,” the advertiser should “be reasonably certain, just as in the case of comparisons involving the same merchandise, that the price advertised as being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the

area.” *Id.* § 233.2(c). Of course, “comparable value comparisons” carry the additional warning that the other comparable merchandise should “in fact, [be] of essentially similar quality and obtainable in the area.” *Id.*

Finally, the guides expressly address price comparisons to a manufacturer’s “list price” or “suggested retail price,” *i.e.*, MSRP.² The guides note that a claimed discount from MSRP can be misleading, reasoning that “only in the rare cases are all sales of an article at the manufacturer’s suggested retail or list price.” *Id.* § 233.3(c). They go on to state that “this does not mean that “all list prices are fictitious and all offers of reductions from list, therefore deceptive.” *Id.* § 233.3(d). The guides reason that even if a list price is not the actual price for all sales, it may still be the actual price for many sales “at least in the principal retail outlets which do not conduct their business on a discount basis.” *Id.* The guides thus conclude that an advertised discount from MSRP “will not be deemed fictitious if [the MSRP] is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser’s trade area” *Id.* “Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.” *Id.* In addition to offering a few illustrative examples, the guides do recognize that one “who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles sold throughout so large a trade area.” *Id.* § 233.3(g). However, they also warn that every advertiser must “in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area.” *Id.* 233.3(i).

As can be readily seen, the guides talk in general undefined terms like “substantial sales,” “reasonably substantial period of time,” “recent past,” “comparable merchandise,” and “good faith.” While this flexibility is perhaps needed for regulatory enforcement decisions, use of the guides for standard setting in private litigation has led to much uncertainty, and thus risk.

² The guides also expressly cover advertising of additional merchandise promised to a customer on the condition that s/he buy a particular other product at a particular price. *Id.* § 233.4. Litigation involving these types of claims has been less frequent and is not addressed herein.

Early FTC Enforcement, and Then Abandonment, of Deceptive Pricing Claims

While the FTC's 1960's-era pricing guides still remain in effect, vigorous FTC enforcement of the guides is now rare. So called "fictitious price claims" were in fact a prime focus of the FTC during the 1950's and 1960's, accounting for as much as 30 percent of the Commission's advertising related actions.³ But as former FTC Chairman Robert Pitofsky noted in 2004:

By the mid-1970's, however, the FTC's enthusiasm for these cases had cooled considerably. The FTC has not brought a single fictitious price case since 1979, and the last two chairs of the FTC – one presiding during a Democratic Administration and the other during a Republican Administration – have indicated that enforcement actions in the area often do more harm than good.⁴

The reasons for the FTC's change of direction can be surmised from public comments. Pitofsky has noted that a FTC Director of Consumer Protection attributed the Commission's cessation of enforcement in this area to an increase in state enforcement and an unwillingness to use Commission resources merely to "duplicate" those efforts.⁵ But the reality is more complicated. Pitofsky himself has argued that FTC enforcement of pricing claims is unnecessary because consumers are in a position to check the validity of exaggerated claims and are unlikely to believe or rely on claims that are seriously exaggerated.⁶ He has also argued that such enforcement may actually dampen the very vigorous price competition that ultimately benefits consumers. Because discounters are a natural target for discount pricing claims, aggressive FTC enforcement could raise the costs to sellers "of ascertaining whether particular discount claims are accurate [and thus] deter them from making such claims at all."⁷ Another former FTC Chairman, Timothy Muris, has made similar arguments, noting the "risk that such an enforcement campaign will discourage exactly the kind of aggressive price competition that the

³ R. Pitofsky, R. Shaheen and A. Mudge, *Pricing Laws Are No Bargain for Consumers*, 18-SUM Antitrust at 62 (citing to T. Muris, *Economics and Consumer Protection*, 60 Antitrust L.J. 103, 112 (1991)).

⁴ *Id.*; see also R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661 (1977).

⁵ *Id.* at 63.

⁶ *Id.*

⁷ *Id.*

government should seek to encourage”⁸ In other words, cessation of aggressive FTC enforcement was likely related to economic policy concerns, namely a desire to encourage, rather than dampen, retailers’ competition on price rather than just on service or reliability. Aggressive price competition is good for consumers and consumers have the ability, especially now with online price checking tools, to compare prices and evaluate the meaningfulness of claimed discounts.

These same policy concerns and conclusions do not drive the decision making of private class action plaintiff attorneys armed with the still-in-effect FTC guides and an arsenal of state consumer protection laws. Partly for this reason, Pitofsky and others argued in 2004 that “it is time for the FTC to formally abandon its Pricing Guides and for the states, perhaps through the leadership of the National Association of Attorneys General, to repeal their deceptive pricing statutes and regulations.”⁹ The recent explosion of pricing litigation, increased publicity around misleading pricing claims, and renewed regulatory interest all suggest that outcome is highly unlikely. Retailers, therefore, need to renew and, indeed, ramp up their attention to pricing policy and applicable law.

State Baby FTC Act Analogs for Deceptive Pricing Claims

In evaluating pricing policies, it is also important to take account of state law variations. It is beyond the scope of the article to address applicable law in the 50 different states, but most states have consumer protection statutes modeled on the FTC Act, sometimes called “baby” or “little” FTC acts, some of which expressly incorporate FTC guidance and standards. These state law provisions are typically broad enough to attack any “deceptive” sales practice, whether related to pricing or otherwise.¹⁰ Some states also have statutes that expressly address some

⁸ T. Muris, *Economics and Consumer Protection*, 60 Antitrust L.J. 103, 113 (1991)

⁹ R. Pitofsky, R. Shaheen and A. Mudge, *Pricing Laws Are No Bargain for Consumers*, 18-SUM Antitrust at 64.

¹⁰ Many of these state law provisions are based on uniform or model acts approved by the National Conference of Commissioners on Uniform State Laws, including the 1964 Uniform Unfair and Deceptive Trade Practices Act (“UDTPA”), the 1971 Uniform Consumer Sales Practices Act (“UCSPA”) and the 1971 Model Unfair Trade Practices and Consumer Protection Law (“UTPCPL”).

types of pricing claims.¹¹ These state laws vary in whether they permit private rights of action under their provisions, whether class actions are allowed and the types of remedies available. Understanding unique state law is obviously important to evaluating claims in any particular state. But also in any class action asserting nationwide or multistate claims, understanding and

¹¹ See, e.g., Alaska Admin. Code tit. 9, § 05.030(1) (illegal to advertise a price comparison “which is based on any price other than the seller’s own regular price, unless the seller discloses the nature and source of the referenced comparison price, such as ‘manufacturer’s list price’ or ‘comparable retail value.’”); Cal. Civ. Code § 1770(a)(13) (prohibiting “[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.”); Cal. Bus. & Prof. Code § 17501 (“No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.”); D.C. Code Ann. § 28-3904(j) (illegal to “make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, or the price in comparison to price of competitors or one’s own price at a past or future time.”); 815 Ill. Comp. Stat. Ann. 510/2(a)(11) (a seller violates the law if he “makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions”); 940 Mass. Code Regs. 6.05 (providing very detailed restrictions on comparative price advertising including both comparisons to former prices and to other seller’s prices); Mich. Comp. Laws Ann. § 445.903, Sec. 3(1)(i) (unlawful to “make[] false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions”); Minn. Stat. Ann. § 325D.44, Subdivision 1 (11) (same); Ohio Statutes Title XIII, Commercial Transactions, Chapter 1345, Consumer Sales Practices, § 1345.02(B)(8) (unlawful to represent “[t]hat a specific price advantage exists, if it does not.”); Ohio Administrative Code, Chapter 109:4-3-03 (providing detailed regulations of comparative price advertising for out of store ads); 73 Pa. Stat. Ann. § 201-2(4)(xi) (declaring as deceptive “[m]aking false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions”); Tex. Bus. & Com. Code Ann. § 17.46(b)(11) (declaring as deceptive “making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions”); Wis. Admin. Code ATCP § 124.03(1) (illegal to make price comparison “[b]ased on a price other than one at which consumer property or services were sold or offered for sale by the seller or a competitor, or will be sold or offered for sale by the seller in the future, in the regular course of business in the trade area in which the price comparison is made”); *id.* § 124.03(2) (illegal to make price comparison “[i]n which the consumer property or services differ in composition, grade or quality, style or design, model, name or brand, kind or variety, or service and performance characteristics, unless the general nature of the material differences is conspicuously disclosed in the advertisement with the price comparison”); Wis. Admin. Code ATCP §§ 124.04, 124.05 (providing detailed regulations for when price discounts can be claimed); Va. Code Ann. § 59.1-207.41 (provisions governing former price comparisons); *id.* § 59.1-207.42 (provisions governing comparing prices to competitor’s prices); *id.* § 59.1-207.43 (provisions governing comparisons to market value, list price or MSRP).

evaluating state law differences that can create individualized issues and help defeat class certification is essential.¹²

The Recent Resurgence of Comparative Pricing Claims

After decades of relative quiet, deceptive pricing, and related litigation, has again become headline material. A recent *New York Times* article headline proclaimed “Some Online Bargains May Only Look Like One,” and its author opined that “[I]st price is a largely fictitious concept, promoted by the brand or manufacturer and adopted by the retailer to compel the customer into pushing the buy button.”¹³ The sheer number of these headlines is a wake-up call for retailers: “More Retailers Accused of Misleading Consumers with Fake Price Schemes,”¹⁴ “Los Angeles Sues Four National Retailers Over Sale Prices,”¹⁵ “J.C. Penny Sued for Never Charging Full Price,”¹⁶ “It’s Discounted, but Is It a Deal? How List Prices Lost Their Meaning,”¹⁷ “Fake Sales

¹² See, e.g., *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) (vacating nationwide class certification order finding material differences in state consumer protection laws made class overbroad).

¹³ D. Streitfeld, *Some Online Bargains May Only Look Like One*, N.Y. Times, Apr. 13, 2016, https://www.nytimes.com/2016/04/14/technology/some-online-bargains-may-only-look-like-one.html?_r=0.

¹⁴ B. Tuttle, *More Retailers Accused of Misleading Customers with Fake Price Schemes*, Money, Jan. 7, 2016 (mentioning suits against J.C. Penny, Kohl’s, Macy’s, Bloomingdale’s and Jos. A. Bank), <http://time.com/money/4171081/macys-jc-penny-lawsuit-original-prices/>.

¹⁵ *Los Angeles Sues Four National Retailers Over Sale Prices*, Wall St. J., Dec. 9, 2016 (AP) (describing four lawsuits filed against J.C. Penny, Sears, Macy’s and Kohl’s by the Los Angeles City Attorney’s Office wherein the retailers were accused of “duping shoppers into believing they got bigger discounts than they actually did.”), <https://www.wsj.com/articles/los-angeles-sues-four-national-retailers-over-sale-prices-1481250632>.

¹⁶ B. Tuttle, *J.C. Penny Sued for Never Charging Full Price*, Money, May 20, 2015 (claiming that: “items were given inflated original prices solely for the purpose of making the inevitable discounts seem more impressive. It’s a classic sales strategy known as ‘price anchoring,’ and J.C. Penny is hardly the only store known to engage in the practice,” and commenting “Let’s hope that regardless of the results of any lawsuits, stores get the message that the common practice of listing items at inflated, meaningless original prices is bad for business.”), <http://time.com/money/3890762/jc-penny-lawsuit-deceptive-pricing/>.

¹⁷ D. Streitfeld, *It’s Discounted, but Is It a Deal? How List Prices Lost Their Meaning*, N.Y. Times, Mar. 6, 2016 (referencing lawsuits against Overstock, Amazon and Wayfair), <https://www.nytimes.com/2016/03/06/technology/its-discounted-but-is-it-a-deal-how-list-prices-lost-their-meaning.html>.

Can Cost You,”¹⁸ “The Dirty Secret of Black Friday ‘Discounts’: How Retailers Concoct ‘Bargains’ for the Holidays and Beyond,”¹⁹ “J. Crew Sued Over Misleading Online Sales,”²⁰ “Justice Stores to Give Refunds to Shoppers Through Class-Action Settlement,”²¹ “DSW Class Action Says Pricing Strategy Deceives Customers,”²² “TJ Maxx Sued Over ‘Compare At’ Prices,”²³ “Is the Price Right? Nordstrom Facing Class Action Over ‘Compare At’ Pricing,”²⁴ “Outlet Store Bargains May Be Cheaper Quality, Lawsuit Claims,”²⁵ “‘Fake’ Sales Trick Customers at Major Stores, Study Says.”²⁶

¹⁸ A. Giorgianni, *Fake Sales Can Cost You*, Consumer Reports, June 22, 2013, <http://www.consumerreports.org/cro/news/2013/06/fake-sales-can-cost-you/index.htm>.

¹⁹ S. Kapner, *The Dirty Secret of Black Friday ‘Discounts’: How Retailers Concoct ‘Bargains’ for the Holidays and Beyond*, Wall St. J., Nov. 25, 2013, <https://www.wsj.com/articles/SB10001424052702304281004579217863262940166>.

²⁰ E. Adams & A. Chapin, *J. Crew Sued Over Misleading Online Sales*, Racked, Mar. 3, 2016 (noting lawsuits against J. Crew, T.J. Maxx, DSW, Guess, Kohl’s and Burberry), <http://www.racked.com/2016/3/3/11153726/j-crew-website-sale-lawsuit>.

²¹ S. Harris, *Justice Stores to Give Refunds to Shoppers Through Class-Action Settlement*, Cleveland Plain Dealer, Mar. 12, 2015 (describing settlement in class action brought under Ohio’s Consumer Sales Practices Act challenging illusory discounts), http://www.cleveland.com/consumeraffairs/index.ssf/2015/03/justice_stores_to_give_refunds.html.

²² P. Tassin, *DSW Class Action Says Pricing Strategy Deceives Customers*, Top Class Actions, June 17, 2016 (describing allegations in California lawsuit that DSW “uses . . . ‘Compare At’ prices to give customers the impression that the item is being offered at a bargain price, when in fact it’s not being offered at any discount at all”), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/338103-dsw-class-action-says-pricing-strategy-deceives-customers/>.

²³ *TJ Maxx Sued Over “Compare At Prices”*, ABC News, July 23, 2015, <http://abcnews.go.com/Business/tj-maxx-sued-compare-prices/story?id=32636566>.

²⁴ A. Lupo, S. Bruno, E. Pulliam & T. Maginnis, *Is the Price Right? Nordstrom Facing Class Action Over “Compare At” Pricing*, Fashion Counsel, Dec. 1, 2015, <https://fashioncounsel.com/articles/price-right-nordstrom-facing-class-action-over-%E2%80%9Ccompare-at%E2%80%9D-pricing>.

²⁵ R. Mac & C. Cutler, *Outlet Store Bargains May Be Cheaper Quality, Lawsuit Claims*, NBC Los Angeles, Nov. 25, 2015 (describing class action lawsuits filed against Michael Kors, Kenneth Cole, Nordstrom Rack, Columbia, Guess, Levi Strauss and Jos. A. Bank, alleging that their outlet stores carry cheaper, inferior versions of products sold in their regular stores, but misleadingly compare outlet product prices to the prices of the non-comparable regular store products), <http://www.nbclosangeles.com/news/local/Outlet-Store-Bargains-May-Actually-be-Cheaper-Quality-Lawsuit-Claims-353906491.html>.

²⁶ H. Weisbaum, *‘Fake’ Sales Trick Customers at Major Stores, Study Says*, NBC News, May 29, 2015, <http://www.nbcnews.com/business/consumer/fake-sales-trick-customers-major-stores-study-says-n366676>.

And this sampling of headlines is just that; there are many more articles, reports and cases out there – and not all lawsuits receive significant media attention so the numbers are probably higher than might otherwise be estimated. According to one source, the organization Truth In Advertising.org has recently been tracking 61 federal class actions alone involving alleged fictitious pricing.²⁷ Forty-nine of those cases had been filed in 2015-16 alone.²⁸ This, of course, does not account for state court actions or regulatory proceedings. So the numbers are clearly meaningful, perhaps to some even staggering, and on the rise.

Possible Explanations for The Renewed Interest in Pricing Claims

While it is not clear what triggered this avalanche of renewed pricing litigation, several factors undoubtedly contributed to the trend. The early 2000s' saw some isolated activity,²⁹ but perhaps the first truly high-profile case in recent years was the State of California's enforcement action against Overstock.com. In November 2010, a group of California District Attorneys sued Overstock.com in California state court in Alameda County alleging violations of various California consumer protection laws.³⁰ They alleged that Overstock deceptively displayed a "list price" above a price at which Overstock offered an item, with a representation of the supposed "savings" (in dollar amounts and as a percentage), and then also used the terms "compare at" or "compare" instead of "list price." *Id.* They alleged that the list price was false because Overstock instructed its employees to choose the highest price they could find as a reference price ("list price") or that they simply made up a reference price using a multiplier on Overstock's wholesale cost. *Id.* In 2014, following trial, the court rejected an award of consumer restitution, but awarded \$6,828,000 in civil penalties, and an injunction against the conduct it found to be false or misleading. The judgment is now on appeal, but regardless of

²⁷ C. Salls, *Group Tracking 61 Federal Class Actions Over Alleged Fictitious Pricing*, Legal Newline, July 12, 2016, <http://legalnewline.com/stories/510955269-group-tracking-61-federal-class-actions-over-alleged-fictitious-pricing>.

²⁸ *Id.* (noting 25 filed in 2015 and 24 filed in 2016). The article specifically discusses a false discounting claimed filed in Los Angeles federal court against Harbor Freight Tools.

²⁹ *Harris v. HSN LP*, 2007 WL 61068 (Cal. App. 4th Dist. Jan. 10, 2007), State Unfair Trade Practices Law (CCH) ¶ 31,353 (unpublished and non-citable decision denying class certification of false pricing claims); *Mahfood v. QVC, Inc.*, 2008 WL 5381088 (C.D. Cal. Sept. 22, 2008) (denying class certification of false pricing claims finding that individual issues predominated).

³⁰ *People of Cal. v. Overstock.com, Inc.*, No. RG10-546833, Statement of Decision (Alameda Cnty. Super. Ct., Feb. 5, 2014).

outcome, the publicity surrounding the case, especially in California, has no doubt spurred interest by the plaintiffs' class action bar in these types of cases.

This type of high-profile regulatory publicity has not been limited to California. While coming later in the timeline, the New York Attorney General began investigating Walgreens' advertising and pricing practices in early 2014. The investigation became public when in April 2016 it entered into a settlement with the retailer over allegations, among others, that Walgreen misrepresented some deals as "Smart Buy" or "Great Buy" when the advertised price was not different than the original selling price.³¹ It also alleged that Walgreen's labeled some items as "Last Chance" or "Clearance" when the items would remain on sale for many months. *Id.* In addition to agreeing to a compliance program, Walgreens agreed pay the state \$500,000 in penalties, fees and costs. *Id.* This renewed interest in pricing litigation by state authorities certainly helps to explain the willingness of class action attorneys to invest in these types of cases.

There has also been renewed interest in, and publicity concerning, pricing claims even at the federal level. On January 30, 2014, three U.S. Senators and a Congresswoman³² sent a letter to FTC Chairwoman Edith Ramirez, calling on the agency to look into claims that merchants may be selling lower quality items produced specifically for outlet stores without properly informing consumers about the difference between those items and the higher-quality products found in regular retail stores. The letter stated in relevant part:

We have no objections to the evolution of the type of merchandise offered at outlets. However, we are concerned that outlet store consumers are being misled into believing they are purchasing products originally intended for sale at the regular retail store. Many outlets may also be engaged in deceptive reference pricing. It is a common practice at outlet stores to advertise a retail price alongside the outlet store price—even on made-for-outlet merchandise that does not sell at regular retail locations. Since the item was never sold in the regular retail store or at the retail price, the retail price is impossible to substantiate. We

³¹ *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of Walgreen Co.*, Attorney General of the State of New York Bureau of Consumer Frauds & Protection, Assurance No. 16-085.

³² Senators Sheldon Whitehouse (D-RI), Richard Blumenthal (D-CT), Ed Markey (D-MA) and Rep. Anna G. Eshoo (D-CA).

believe this practice may be a violation of the FTC’s Guides Against Deceptive Pricing (16 CFR 233).³³

Then, on Black Friday in 2014, Senator Blumenthal of Connecticut, one of the authors of the letter to the FTC, held a news conference warning holiday shoppers of deceptive price comparisons and mentioning his call to the FTC for action. At least one news report covering the press conference mentioned the California District Attorneys’ case against Overtok.com and the \$6.8 million in fines that the company was ordered to pay.³⁴

But aside from publicity that regulatory action has generated, an important factor contributing to increased pricing litigation is the California Supreme Court’s 2011 decision in *Kwikset Corp. v. Superior Court*.³⁵ That case did not involve deceptive pricing, but rather allegations that a lock manufacturer misrepresented its products as “Made in the USA,” when in fact many of the lock components were manufactured abroad. The principal legal issue was whether the plaintiffs “had been injured in fact” and “lost money or property” as a result of the alleged misrepresentation, as required by the standing provisions of California’s Unfair Competition Law, one of California’s most prominent consumer protection statutes. The Supreme Court sided with plaintiffs, rejecting the argument that there had been no actual loss of money or property because the plaintiffs had received locksets that were not overpriced or defective. *Id.* at 331-32. The Court instead held that when a consumer relies on misrepresentations in purchasing a product that the individual would not have purchased but for the misrepresentation, the consumer has not received the “benefit of the bargain” even if the product is worth in market terms the price that was paid. *Id.* at 333-34.³⁶ Thus, while the decision did not address deceptive pricing, it provided at least the theoretical vehicle by which the private plaintiff’s bar could claim class-wide damages in deceptive pricing cases; they could allege a false representation of price without –at least for standing purposes under California law – having to further allege (and then prove) that the products were not worth what was paid (an

³³ Text of letter available at: <https://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers>

³⁴ M. Pazniokas, *On Black Friday, Blumenthal Shops for Media*, The CT Mirror, Nov. 28, 2014.

³⁵ *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011).

³⁶ The Supreme Court offered several analogies, reasoning for example that a Jew or Muslim does not receive the benefit of the bargain in purchasing food falsely represented as kosher or halal even if the food is otherwise fairly priced from a general market perspective. *Id.*

issue that could implicate individualized issues in any putative class action case involving multiple products).³⁷

The Ninth Circuit Court of Appeals then gave a boost to pricing litigation in its 2013 *Hinojos v. Kohl's*³⁸ decision by applying the *Kwikset* holding in a deceptive pricing case. Plaintiffs there asserted class action claims under California's consumer protection statutes against a retailer accused of claiming its prices were discounted from the "original" or "regular" price when in fact the products typically sold at the supposed discounted price. The district court had dismissed the action for lack of standing because, unlike in *Kwikset* where the composition of the products (locksets) was different than represented (because they were not actually "Made in the USA"), the *Kohl's* plaintiffs received the exact items they wanted at the exact prices they agreed to pay. Whether or not those prices were in fact discounted did not, according to the district court, cause any economic injury to plaintiffs. The Ninth Circuit reversed finding that *Kwikset* controlled, thus signaling to the plaintiffs' class action bar that these kinds of actions were clearly in play, at least at the pleadings stage.

These California legal developments helped open the door to class action pricing claims which had previously been met with resistance in some jurisdictions that did not recognize actual loss based solely on the allegation of a false discount. Thus, in *Kim v. Carter's, Inc.*, 598 F.3d 362, 363-64 (7th Cir. 2010), the Seventh Circuit dismissed false pricing claims under Illinois law, explaining: "The plaintiffs agreed to pay a certain price for Carter's clothing, which they do not allege was defective or worth less than what they actually paid. Nor have plaintiffs alleged that, but for Carter's deception they could have shopped around and obtained a better price in the marketplace." *Id.* at 365. The court concluded that the plaintiffs "got the benefit of their bargain and suffered no actual pecuniary harm." *Id.* at 366; *see also Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1197 (Ill. App. Ct. 2008) (finding that the plaintiff suffered no actual damage from QVC's listing its actual sales prices next to substantially higher, but allegedly fictitious "retail values" where the plaintiff "agreed to purchase some jewelry items for a certain price" and could not show "that the value of what she received was less than the value of what she was promised").

³⁷ The Court was careful to note the issue of standing is distinct from the issue of restitution, so courts can still require evidence of economic harm in evaluating whether and in what amount restitution is appropriate. *Id.* at 335-37 & n. 15.

³⁸ *Hinojos v. Kohl's Corp.*, 718 F.3d 1098 (9th Cir. 2013).

Some recent cases outside California still take that approach. Thus, in *Shaulis v. Nordstrom Inc.*, 120 F. Supp. 3d 40 (D. Mass. 2015), the court accepted plaintiff’s allegation that she would not have purchased a sweater but for an alleged false discount, but still dismissed the claim under Massachusetts law. The court reasoned that “there is no amount of money damages that could be awarded to plaintiff to make her whole” because, although “[s]he paid \$49.97 for a sweater on the alleged belief ‘that she saved at least 77% on her purchase,’” “it appears that she paid \$49.97 for a sweater that is, in fact, worth \$49.97” and plaintiff “still has the sweater in her possession.” *Id.* at 51. The court concluded that “the fact that plaintiff may have been manipulated into purchasing the sweater because she believed she was getting a bargain does not necessarily mean she suffered economic harm: she arguably got exactly what she paid for, no more and no less.” *Id.* at 51–52. While it is not yet clear what impact California’s *Kwikset/Hinojos* decisions will have outside California, those decisions have clearly opened the floodgates to pricing litigation in California.

Also likely contributing to the increase in pricing litigation is the “the one thing begets another” syndrome: some recent class action pricing cases, including cases outside California, have resulted in substantial settlements. For example, in 2016, Justice Stores agreed in a federal action brought in Pennsylvania to create a \$50.8 million settlement fund for the claims of class members who bought products advertised as 40% off when they in fact allegedly sold at the regular price.³⁹ In 2016, a court-approved settlement in New York required Michael Kors to create a \$4.875 million settlement fund and pay \$975,000 in fees to resolve allegations that it (1) advertised discounts in its outlet stores off supposed MSRPs that the products had never actually sold at and (2) falsely compared inferior products manufactured exclusively for its outlet stores to different products sold in its regular retail outlets.⁴⁰ These kinds of public settlements are, of course, the best advertising to get the plaintiffs’ bar’s further attention.

Finally, while strictly supposition, this author believes that the recent increase in false pricing claims results in part from an actual increase in deceptive pricing advertisements fostered by an internet economy. Because internet pricing tools have enabled consumers instantly to check prices across a wide spectrum of sellers, retailers are pressured to compete more and more

³⁹ *Rougvie v. Ascena Retail Grp., Inc.*, No. CV 15-724, 2016 WL 4111320, at *1 (E.D. Pa. July 29, 2016).

⁴⁰ *Gattinella v. Kors*, No. 14CV5731, 2016 WL 690877, at *1-*2 (S.D.N.Y. Feb. 9, 2016).

on price. Whenever a retailer exaggerates pricing claims, others may likely feel compelled to follow or be left behind in the race to claiming the “lowest” price. Ironically, the ability of consumers to check prices, and thus exaggerated discount claims, also mitigates any claimed harm from such misrepresentations. Thus, the very factors that caused the FTC to stop policing these claims – the ability of consumers to protect themselves and the desire to promote vigorous price competition – have come full circle to the opposite result: an increase in pricing claim enforcement and litigation.

Some Recent Cases and Results

Although some of these recent cases have settled for substantial amounts, the results of cases actually litigated have been mixed. Aside from factual differences that drive different results, the courts have naturally been struggling develop a consistent approach to these claims given their sudden appearance in large volumes and the lack of any (yet) well-established appellate authority. But several cases are now pending on appeal, so the legal landscape is beginning to take shape. While the cases are too numerous to summarize, a few examples are illustrative.

A number of cases have been dismissed at the pleading stage because the court found the allegedly false representation to be too unspecific to be misleading or to pass muster under fraud pleading requirements. Thus, for example, in *Rubenstein v. Neiman Marcus Grp. LLC*, No. CV 14-07155 SJO (JPRX), 2015 WL 1841254 (C.D. Cal. Mar. 2, 2015), the court dismissed a complaint alleging that Neiman Marcus through the use of “Compare To” labels falsely compared prices of inferior Last Call outlet store products to regular products sold in traditional Neiman Marcus stores. *Id.* at *1. In a decision that is now on appeal, the court found that there was no advertising that indicated Neiman Marcus’ “Last Call” stores sold products that were formerly sold at Neiman Marcus’ flagship stores, and that consumers would mostly likely view the “Compared To” tags as a comparable value comparison and not a former price comparison. *Id.* at *5-*6. The court reached a similar result in *Sperling v. DSW Inc.*, No. EDCV 15-1366-JGB (SPX), 2016 WL 354319, at *6 (C.D. Cal. Jan. 28, 2016), where it dismissed claims that DSW’s “Compare At” prices falsely suggested that the same products regularly sold elsewhere at the “Compare At” prices when in fact those prices were substantially higher than actual market prices. The court found plaintiffs’ allegations to be too conclusory and lacking the necessary

specifics showing the actual prevailing prices elsewhere of the products she purchased at the time she purchased them. Again, the decision is currently on appeal.⁴¹

Other courts have found similar allegations adequate to survive a motion to dismiss. Thus, in *Branca v. Nordstrom, Inc.*, No. 14CV2062-MMA (JMA), 2015 WL 10436858, at *1 (S.D. Cal. Oct. 9, 2015), the court after partially granting an earlier motion to dismiss, denied a motion to dismiss an amended complaint challenging pricing comparisons at Nordstrom’s Rack (outlet) stores. *Id.* at *1. The court found that plaintiffs had properly stated a claim by alleging that Nordstrom’s “Compare At” price was misleading because it implied that the products had previously sold at Nordstrom or elsewhere for that amount when in fact the products were manufactured exclusively for Rack stores and thus never sold elsewhere at any price. *Id.* at *7. In *Chester v. TJX Companies, Inc.*, No. 5:15-CV-01437-ODW (DTB), 2016 WL 4414768, at *7 (C.D. Cal. Aug. 18, 2016), the court denied a motion to dismiss by TJ Maxx, Marshalls and HomeGoods, finding that those retailers use of ambiguous “Compare At” pricing could falsely suggest that substantial sales of the products had occurred elsewhere at those prices. Similarly, in *Jacobo v. Ross Stores, Inc.*, No. CV-15-04701-MWF-AGR, 2016 WL 3483206, at *3 (C.D. Cal. June 17, 2016), the court denied dismissal of certain of plaintiffs’ claims finding adequate the allegation that consumers were misled by Ross’ “Compare At” prices because those prices referred to similar, and not identical, items sold elsewhere.

Many of these recent pricing cases are still pending, on appeal or have settled, but a few examples of those that have proceeded past the pleading stage highlight the risks. Thus, in *Spann v. J.C. Penney Corp.*, 307 F.R.D. 508, 517 (C.D. Cal. 2015), *modified*, 314 F.R.D. 312 (C.D. Cal. 2016), the court granted certification of a California class of purchasers who bought a private or exclusive J.C. Penney brand that was advertised at a discount of at least 30% off of a stated “original” or “regular” price and who had not received a refund. It found that class

⁴¹ See also *Nunez v. Best Buy Co.*, 315 F.R.D. 245 (D. Minn. 2016) (dismissing false discount allegations under FRCP 9(b) for failure to provide details of the fraud including information showing that the advertised regular price for his product was different than represented on a date prior to his purchase); *Waldron v. Jos. A. Bank Clothiers, Inc.*, No. 12CV02060DMCJAD, 2013 WL 12131719, at *3 (D.N.J. Jan. 28, 2013) (dismissing allegations that Jos. A. Bank falsely promotes “sales” of limited duration when in fact its products are perpetually on sale, finding that plaintiffs did not adequately allege that Jos. A. Bank’s conduct deviated from the norm of reasonable business practices or that the purported “sale” price is the same as the true regular price.).

certification was appropriate because “the thrust of plaintiff’s claim . . . is that defendant operated a systematic and pervasive unlawful price comparison policy” that did not require individual proof, and because “causation, on a classwide basis, may be established by materiality, meaning that if the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class[.]” *Id.* at 522. Since the items at issue were sold only in J.C. Penney stores, it found that sales at J.C. Penney stores (and not sales of similar items in other stores) was the proper baseline for determining the actual prevailing prices. This also led the court to conclude that that common questions predominated. *Id.* at 523-27. Most troubling from a defense perspective was the court’s analysis of possible classwide monetary relief which it concluded could be measured under various methods: “1) complete restitution, measured by the full purchase price paid by each class member; 2) restitution based on the false ‘transaction value’ promised by JC Penney, measured by the amount that each class member would have paid had JC Penney offered a discount from the actual ‘regular’ price; or 3) restitution in the amount that JC Penney profited from sales of products based on deceptive price comparisons.” *Id.* at 529-31. Not surprisingly, the case settled soon after this ruling with J.C. Penny agreeing to pay up to \$50 million in claims and to modify its sales practices. *Spann v. J.C. Penney Corp.*, No. SACV 12-0215 FMO (KESX), 2016 WL 5844606, at *2-*3 (C.D. Cal. Sept. 30, 2016).

In *Chowning v. Kohl’s Dep’t Stores, Inc.*, No. CV 15-08673 RGK(SPX), 2016 WL 1072129 (C.D. Cal. Mar. 15, 2016), the court took a different approach and granted summary judgment on plaintiffs’ restitution claims. Citing to the *Kwikset/Hinojos* decisions, the court found that plaintiffs had sufficiently alleged economic harm *for standing purposes* under California law. *Id.* at *2. But it also found that to obtain *restitution*, plaintiff must abide by three principles: “restitution cannot be ordered exclusively for the purpose of deterrence”; “any proposed method [of restitution] must account for the benefits or value that a plaintiff received at the time of purchase”; and “the amount of restitution ordered must represent a measurable loss supported by the evidence.” *Id.* at *6. Using these principles, the court found that plaintiff was not entitled to restitution. The court concluded that a “full refund” model (*i.e.*, rescission) was inappropriate because it did not account for the value received. *Id.* at *7. The court also for the same reason rejected the notion that restitution could be measured by the profits earned on the

deceptively labeled goods: “Plaintiff does not dispute that she gained some value from the mislabeled items. Therefore, a disgorgement of full profits would be inappropriate because the amount of Defendant's profit does not accurately represent the amount Plaintiff lost in this case.” *Id.* at *9. Finally, the court rejected a restitutionary model whereby the plaintiff received the benefit of the discount she was promised in the deceptive labels because it is more akin to expectation damages instead of plaintiff’s lost money. *Id.* at *10. Thus in short, although plaintiff suffered “lost money or property” (because she purchased a product she would not have purchased had she known the truth), the court found the plaintiff did not pay more than what she received and was not entitled to restitution and thus granted summary judgment as to the restitution claim in favor of the defendant.

Despite this favorable defense outcome, Kohl’s ended up having to pay a lot of money to resolve the claims. After granting Kohl’s summary judgment, the *Chowning* court went on to deny class certification of an injunctive relief class, finding the *Chowning* action duplicative of another action against Kohl’s brought by plaintiff Russell. *See Chowning v. Kohl’s Dep’t Stores, Inc.*, No. CV 15-08673 RGK (SPX), April 1, 2016 Civil Minutes, Docket No. 123) (C.D. Cal.). But in the *Russell v. Kohl’s* action, Kohl’s ultimately settled with the court certifying a settlement class consisting of California consumers who purchased from Kohl’s items at a discount of at least 30% off the stated “original” or regular price. *See Russell v. Kohl’s Dep’t Stores, Inc.*, No. EDCV 15-1143 RGK (SPX), 2016 WL 6694958, at *3 (C.D. Cal. Apr. 11, 2016); *see also id.* at Docket Nos. 86-1 (8/15/16 Memo. In Support of Motion for Final Approval), 89 (9/12/16 Minutes Granting Approval). Under the settlement terms, Kohl’s agreed to make available \$6.15 million to resolve the litigation, with roughly \$3.6 million available to the Class and to be distributed in the form of gift cards, and with the remainder set aside of administration costs, attorneys’ fees, and class representative payments. *Russell*, 2016 WL 6694958, at *3; Docket No. 86-1 at 1.

In sum, there presently is no consistent outcome in these cases even on basic issues such as whether the term “Compare At” is alone actionable or whether restitution is available and if so how it is measured. The risks, especially of class certification, are thus substantial.

Some Modest Proposals for Mitigating the Risks

Retailers facing these risks can take several measures to help mitigate these growing risks.

First, and perhaps obvious, retailers should familiarize themselves with the laws applicable to their sales. As noted, the FTC guides are an important starting point, but some states have very specific requirements for making certain kinds of price comparisons and the rules do vary, sometimes significantly, by state.

Second, retailers should develop a pricing policy that is both substantively and procedurally defensible under applicable law. This will likely mean putting into place more robust controls and practices around how a “comparable” price reference is derived. While retailers will not have access to competitors’ sales information, they can research competitor prices online or at stores. Choosing as the comparison price only the highest price observed at a single outlet will be riskier than choosing a price advertised extensively by others. The latter is easier to defend as a “prevailing” price while the former could easily be discounted as isolated and insignificant. Retailers choosing to compare discounts to their own former prices should ensure that the products were offered at the former price for a reasonable period of time in the recent past. For example, some states, including California, require that former prices be the prevailing price at which the product was offered in the prior three months. *See supra* at n. 11. Pricing personnel should receive regular training on pricing laws and company policies. Comparison prices should be updated on a periodic basis so they do not become stale, and retailers, especially large retailers, should consider a periodic internal audit/approval process to ensure that comparisons are defensible.

Third, retailers should (1) document and (2) preserve records showing the work they put into deriving accurate and contemporaneous reference prices. Without written records of what was done, pricing personnel will unlikely remember what they did to verify any price, let alone the hundreds of prices over time that are typically at issue in any litigation. Factfinders may also disbelieve retailers who claim price verification without written records or at least conclude that the lack of written records demonstrates a lack of seriousness in documenting accurate prices. Whatever survey information was relied upon in adopting reference prices should be preserved

for the length of any applicable statute of limitations period. In California, the four-year limitations period under the Unfair Competition Law would be a sensible guide.

Fourth, retailers should consider the context and ordinary meaning of terms used in any comparative pricing claims. For example, “Compare to MSRP” will be more meaningful than simply “Compare At” if the reference is to MSRP.⁴² Similarly, if the comparison reference price is at the higher end of the spectrum of observed prices elsewhere, consider adding descriptive language to the comparison, such as “up to__ elsewhere.”

Fifth, retailers should where possible provide customers with accessible disclosure of the meaning of terms used in any comparative pricing claims. Thus, for example, if a “Compare At” price is meant to refer to a “comparable value,” item, and not the same exact item, that fact should be disclosed to customers at point of sale. This is easier to do for online sales where terms and conditions can be provided to customers prior to check out. Even there, retailers should consider the conspicuousness considerations set forth in the FTC guides for .com disclosures or in other applicable state law. While point of sale disclosures are more difficult for brick and mortar stores, retailers should consider making the most important disclosures on any “Compare At” type labeling or at least on signage in the stores. If detailed disclosures are not practical, consider at least signage that says something like: “For more information on our ‘Compare At’ Prices, Please Consult A Sales Associate or visit www.___.com” Sales representatives should then be given scripts with appropriate disclosures that can be provided on request.

Sixth, certainly for any online sales, retailers should consider adding a class-waiver arbitration provision to the terms and conditions of service. The provision should clearly and conspicuously disclose that by buying items online, customers are (1) agreeing to individually arbitrate any disputes arising out of or relating in any way to their purchases, (2) waiving any right to a trial in court or by jury and (3) waiving any right to proceed in arbitration or elsewhere is a class or other representative capacity.

Seventh, retailers should consider offering a written price guaranty or other money back policy to dissatisfied customers who claim they were misled by any price comparison and should

⁴² This is example is used for illustrative purposes only. Thus, as described elsewhere herein, any reference to MSRP can be risky if actual sales do not occur at MSRP. But the point is to include enough information in the description so as to avoid misinterpretation.

advertise the guaranty as part of any price claim. While perhaps not dispositive from a legal perspective, courts may be less likely to certify a class where consumers have a much simpler, convenient and expeditious remedy that would afford them complete relief.

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