

California Alleges Four of the Largest U.S. Retailers Engage in ‘False Reference Pricing’

The Bottom Line

- *The California actions highlight the importance of ensuring accurate pricing statements are presented in print and online ads. That these suits were filed in California is not particularly surprising, given the state’s history of aggressive protection of consumers, and suggests that, this year, the state may become even more active in challenging what it perceives to be unfair competition and false advertising by retail companies and others, especially at the local level.*
- *While retailers may have thought the recent spate of class actions and other regulatory enforcement of price advertising may have been the last word, it appears that this issue is not going away any time soon.*

The Los Angeles City Attorney’s office has filed civil lawsuits on behalf of the State of California against four of the largest retailers in the United States, alleging that they have engaged in deceptive “false reference pricing” and that their sales “in significant part” have been the product of “unlawful, unfair, and fraudulent marketing and advertising practices.” These actions represent the latest in a trend of crackdowns on retailers for their pricing practices.

Background

Under California law, retailers are not permitted to advertise a former price of a product unless it was the prevailing market price within three months of the advertisement, or unless the date when the former price prevailed is clearly and conspicuously stated in the advertisement.

California law also prohibits advertisements from making false or misleading statements of fact concerning reasons for, the existence of, or amounts of price reductions.

A retailer that violates these rules may be charged with engaging in false reference pricing.

Four Complaints

The state’s complaints accuse J.C. Penney Corporation Inc., Kohl’s Department Stores Inc., Macy’s Inc., and Sears Roebuck and Co. of engaging in false reference pricing and misleading consumers by advertising a “sales price” alongside an allegedly inflated “original,” “regular,” “former” or “list” price to create what the City Attorney’s Office characterizes as a false sense of value and to persuade customers to purchase their merchandise at an allegedly reduced “sale” price.

In addition, the City Attorney asserts that J.C. Penney uses “false free offers” by advertising a product for sale as “Buy 1 Get 1 Free” or “Buy 1 Get 1 For A Penny,” when in truth that product is never actually offered as a single item at what it contends is the false and inflated reference price.

The complaints allege that each of the retailers advertises thousands of “sale” items at false reference prices.

As just two of a multitude of examples, the complaints allege, among other things, that:

- In February 2016, J.C. Penney’s website advertised a maternity swim top with an “original” price of \$46 and a “sale” price of \$31.99, an alleged 30-percent discount. However, the purported “original” price of \$46 was a false reference price because J.C. Penney did not offer the item for sale online for any more than \$31.99.
- In January 2016, Kohl’s offered Belted Cargo Shorts for sale online for a reduced price of \$35.99 from an “original” price of \$60. However, the purported “original” price of \$60 was a false reference price because Kohl’s did not offer the item for sale online for more than \$35.99.

The retailers allegedly violated the state’s unfair competition law (UCL) and false advertising law (FAL). The complaints ask the court to enjoin future violations of the laws and to impose a \$2,500 civil penalty for each violation of the UCL and the FAL plus an additional civil penalty in the amount of \$2,500 for each violation of the UCL against senior citizens or disabled persons.

It should be noted that perhaps what is of greater importance here is not that the action was brought – it’s part of a larger trend after all – but that it was brought by a local, and not state or federal, enforcement official. Violations of the California consumer protection laws can be enforced not only by the state attorney general, but also by, among others, any district attorney, or by any city attorney of a city having a population over 750,000. This local enforcement of national advertising law, where authorized, could itself be a new trend.

Related People

Ronald R. Urbach

Partner/Co-Chair

212 468 4824

rurbach@dglaw.com