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First Circuit Requires Identifiable Injury for Claims Asserting Deceptive Retailer "Compare At" Prices

The Bottom Line

- *Recent decisions from the First Circuit reign in consumers' ability to bring actions alleging false advertising in retailers' "Compare At" pricing, unless a consumer can demonstrate actual, identifiable harm separate from the mere purchase of a good in order to claim damages.*
- *However, even with the recent First Circuit opinions, many courts have left open the possibility of alleging injury based on theories of overpayment or price premiums, and therefore it is still critical for retailers to review their pricing policies and disclosures both online and in their stores to avoid future actions alleging that their pricing practices are deceptive.*

Consumer class actions alleging that retailers are using deceptive comparison pricing tactics online and in stores are becoming increasingly common under state consumer protection statutes and common law causes of action.

In these cases, a retailer's success in making a motion to dismiss the action depends, in large part, on the jurisdiction in which the case is filed. The U.S. Court of Appeals for the First Circuit recently provided additional support for retailers operating under Massachusetts law by affirming the dismissal of two separate deceptive pricing class action complaints against national retailers Nordstrom and Kohl's. In its opinions, the court held that the Massachusetts Consumer Protection Act (MCPA) and Massachusetts common law require an identifiable injury beyond a plaintiff's subjective belief about the value the product he or she is purchasing.

The Complaints

The plaintiff in the Nordstrom action purchased a cardigan sweater from Nordstrom Rack for $49.97. The tag on the sweater showed an "original" or "Compare At" price of $218.00. The plaintiff in the Kohl's action purchased two items, one with a sale price of $29.99 and a "Compare At" price of $55.00 and one with a sale price of $17.99 and a "Compare At" price of $26.00. Both of the complaints alleged that the "Compare At" prices on the items they purchased did not represent a bona fide price at which the items were previously offered or the prevailing market retail price for those items. Accordingly, the plaintiffs alleged that they had been deceived into making purchases that they would not have otherwise made, in violation of Massachusetts common law and the MCPA, which provides a private cause of action to any consumer who "has been injured" by "unfair or deceptive practices in the conduct of any trade or commerce."

The Decisions

The district court granted Nordstrom's and Kohl's motions to dismiss, holding that the plaintiffs had failed to state a claim under the MCPA because their "subjective belief that [they] did not receive a good value" for

the discounted clothing did not constitute a legally cognizable injury. On appeal, the plaintiffs argued that the district court incorrectly applied the "injury" standard, and that they had in fact suffered a legally cognizable injury in that they were induced to make a purchase they would not have otherwise made. The First Circuit rejected that argument and affirmed the district court's judgment. Specifically, the First Circuit noted that the plaintiffs' argument unacceptably merged the harm requirement into the deceptive conduct itself. The First Circuit held that under Massachusetts law, a consumer must have an identifiable harm that is separate from the alleged deception (i.e., a plaintiff's alleged injury cannot merely be that he was deceived into making a purchase). The claims in the Nordstrom and Kohl's actions failed because they identified no injury traceable to the purchase itself (e.g., that the goods were poorly made or the materials were misrepresented). Accordingly, the First Circuit held that the plaintiffs did not suffer injury because they received everything they bargained for.

Conclusion

The First Circuit upheld the motions to dismiss the Nordstrom and Kohl's actions, citing state consumer protection law requirements that call for plaintiffs to prove actual, identifiable harm separate from the mere purchase of a good in order to claim damages. The decisions provide additional clarity for retailers who use "Compare At" pricing. Other courts have similarly interpreted several other states' consumer protection laws, including those in Massachusetts, New York, Florida, Illinois and Ohio, making it significantly more difficult for plaintiffs to state a claim under those laws. Importantly, many of these courts have left open the possibility that a plaintiff may adequately allege injury based on a "price premium" or actual overpayment theory. However, it is also important to note that several of California's consumer protection statutes have been liberally interpreted by courts, including on the issue of injury. For example, a leading California case on this topic stated that "when a consumer alleges that he would not have made the purchase but for the misrepresentation … he has suffered an economic injury." There is also the possibility that the Federal Trade Commission or a state attorney general could bring a claim on behalf of consumers at large to address this issue. Therefore, even with the recent First Circuit opinion, it is still critical for retailers to review their pricing policies and disclosures both online and in their stores to avoid actions alleging that their pricing practices are deceptive.

Related People

Marc J. Rachman
Partner
212 468 4890
mrachman@dglaw.com