

# Advertising Age

February 9, 2017

## What L.A.'s Pricing Suit Against Major Retailers Means

By Joseph Lewczak

As important as retail discounts were for holiday sales this past season, aggressive sales and pricing practices may be leading to a pricing war of a different type -- this one between parties protecting consumer rights on the one side, and retailers on the other.

During the past two years, we've seen a large increase in legal actions relating to deceptive price anchoring (where a sales price is compared to an original, former, competitor or other "anchor" price) by state attorneys general. More notably, there have been a spate of class actions against Kohl's, J.C. Penney, The TJX Companies and others.

But the latest salvo is coming from a somewhat unexpected source, and it may signal a trend that should have all advertisers worried.

In late December, the Los Angeles City Attorney filed civil lawsuits on behalf of the State of California against four of the largest retailers in the United States -- J.C. Penney, Kohl's, Macy's, and Sears -- alleging that they 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." (J.C. Penney and Sears declined to comment for this column; Macy's and Kohl's did not reply by deadline, though Macy's previously told the Los Angeles times that it does not comment on litigation.)

Federal and most state laws, including California's, generally prohibit comparing a sale price against some other price (like an MSRP, competitor price or some other former price) unless the anchor price was offered to the public for some reasonable period. The logic here is that if the anchor price was never reasonably available to consumers, there's no real sale, and so the sale price is deceptive. This is exactly what is at issue in the current actions, where the

L.A. city attorney alleges that all four retailers engaged in such practices in one form or another, including with their online advertising, which the complaint includes AS examples of the alleged violations. The L.A. city attorney is asking the court to enjoin future violations of the laws, and to impose a \$2,500 civil penalty for each violation, plus an additional civil penalty in the amount of \$2,500 for each violation against senior citizens or disabled persons.

Given the amount of price anchoring advertising that most retailers engage in, it's easy to see how these numbers could easily extend into the millions of dollars.

### A larger legal trend

Without getting into the merits of the complaint, what's surprising here is not the fact that the actions were brought -- they're part of a larger trend after all -- but that they were brought by a local law enforcement official. Local officials typically stay out of national advertising. (One notable exception has always been the New York City Department of Consumer Affairs.) California consumer protection law gives certain local law enforcement officials the power to enforce state law in a range of circumstances, but there hasn't been much activity in this regard. The L.A. city attorney's recent complaint therefore could be part of a much larger, emerging trend.

### Filling the void

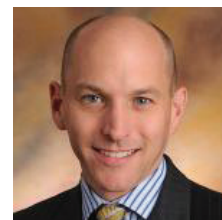
With a new Republican president now firmly in place, the likely changing of enforcement priorities by the Federal Trade Commission (but without yet any clear idea of how President Trump and his administration will impact the advertising industry), and outspoken politicians in more Democrat-leaning states vowing to protect the rights of their citizens when the federal government may not, it seems

likely that state and local officials will be filling the void.

With respect to the matter at hand, what can retailers do? If it hasn't been done already, all retailers should be reviewing their pricing strategies. A "keeping up with the competition" methodology won't work as a defense. Therefore, each retailer should perform a comprehensive analysis of how they compare prices to set discounts, and create a policy that's in-line with what the state and federal law requires.

For agencies working with retail clients, make sure the risk of aggressive advertising is shouldered by clients, not the agency. Agreements should clearly apportion the responsibility in the appropriate manner.

For everyone involved in advertising, when working with your legal counsel to assess the risks associated with any campaign, understand that you are now dealing with not only the typical list of third parties that could take legal action -- the FTC, state attorneys general, competitors and self-regulatory organizations like the National Advertising Division of the Council of Better Business Bureaus, the Children's Advertising Review Unit and the television networks) -- but also local officials, who are likely to take a different, and potentially more aggressive, approach in dealing with an alleged violation.



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