

ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

SUIT CHALLENGES JOS. A. BANK CLOTHIERS' "UP TO" PERCENT OFF ADVERTISING

A proposed class action lawsuit has been filed in New Jersey asserting that Jos. A. Bank Clothiers, Inc. violated state law by improperly promoting sales with "up-to-a-specific-percentage-off" advertisements.

THE COMPLAINT

A New Jersey resident has filed a class complaint against Jos. A. Bank Clothiers asserting that the retailer violated New Jersey law by, among other things, advertising sales of merchandise discounted "UP TO" a specified percentage, such as "UP TO 70% OFF All Outerwear," in mailings, emails, in-store displays and on the company's website.

According to the complaint, not all merchandise included in the sale was discounted by the percentage specified in the advertisement. Rather, the percentage was the "maximum discount" that applied "only to a small subset of all the merchandise included in the advertised sale."

The "vast majority" of merchandise on sale, was discounted by a lesser percentage than the advertised maximum percentage – and the company did not disclose that lesser percentage in any of its advertising.

The complaint asserted that under New Jersey law, the challenged advertising should have noted the full range of discounts applied to merchandise included in the sale, (e.g., "30-70% off"). Moreover, the company did not mention the specific percentage discount on any individual item.

THE BOTTOM LINE

The class action lawsuit against Jos. A. Bank should serve as a reminder to advertisers to carefully consider state laws when advertising "up to" discounts or price ranges. Furthermore, this shows how class actions are serving in a very real capacity to replace regulatory actions. Many retailers choose to overlook price advertising regulations, or apply their own interpretation, because of fierce competition and lack of enforcement by state authorities. Class actions in the retail category have changed the legal landscape and should give all sellers reason to reexamine statutes (and related practices) that they long thought were dormant.

NEW JERSEY TRUTH IN CONSUMER CONTRACT, WARRANTY AND NOTICE ACT

The New Jersey Administrative Code provides that, among other things and subject to certain exceptions, an advertiser offering merchandise for sale at a savings of a percentage or a range of percentages (such as "save 20%" or "20%-50% off") must state the minimum percentage reduction as conspicuously as the maximum percentage reduction.

CONCLUSION

The ultimate outcome of the action against Jos. A. Bank remains to be seen. The lawsuit, however, offers a reminder to advertisers to acknowledge all state laws when utilizing "up to" discounts or price ranges. While using a range, such as "30-70% off select merchandise,"

could help to lower litigation risk, it may not be a silver bullet if state statutes are not otherwise met (for example, offering a certain percentage of merchandise at the highest end of the savings range).

FOR MORE INFORMATION

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