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Retailers Must Be Mindful Of Sale Ads As Class Actions Rise

By **Louis DiLorenzo and Paavana Kumar** (February 21, 2024, 11:00 AM EST)


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There is nothing more alluring to consumers than getting a good deal. Traditional and online retailers have long used sales, coupons, markdowns and other discounts to help move inventory while letting consumers feel that they saved money.

While this practice is not illegal in itself, regulators and class action attorneys follow the adage "if it's always on sale, it's never on sale," and are quick to file suit when merchandise is perpetually on sale, or where retailers advertise a regular, former or strike-through price — also referred to as a reference price — that they seldom charge.

These cases have shown no sign of slowing down, and retailers need to carefully monitor their pricing strategies to avoid becoming a target.

Background

The Federal Trade Commission and a number of states have regulations governing sale pricing practices. The FTC requires that any reference price advertised by a retailer be the "actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time."

Although the FTC does not define "reasonably substantial," some states have more specific requirements, often — but not always — requiring that the reference price be offered to consumers at least 28 days in any 90-day period.

While regulators have challenged false reference prices over the years, false reference pricing has recently been a target for class action lawyers. The allegations are fairly similar across cases.

Typically, plaintiffs will allege that they bought a product that was advertised as being discounted from a reference price, and then later found out that the retailer never or rarely sold the product at the reference price, giving them the false impression that they were saving money.

Although a number of federal courts have uniformly dismissed such claims — under the rationale that the consumers received exactly what they paid for, so have not been harmed — federal courts sitting in California are not permissive, turning California into a hot bed of class action activity.

The lawsuits have affected some of the largest brands, retailers and platforms, such as JCPenney, Old

Navy, Indochino, Blinds.com and even Amazon.com Inc., and settlements typically offer consumers discounts or even refunds that can range from the tens to hundreds of millions of dollars.

As one recent example, in Laura Habberfield et al. v. Boohoo.com Inc., British online retailer Boohoo settled pricing claims for a whopping $197 million last year in the U.S. District Court for the Central District of California.

What's Been Happening

Although these cases have been a persistent reality for nearly a decade, they have been on the rise in the past year. In September, SelectBlindsLLC settled for $10 million in the Central District of California over allegations that purportedly limited time discounts were actually available on a year-wide basis.

Since then, at least 13 similar cases have been filed against a broad array of other retailers, including Kipling, Lenovo Group Limited, Winn-Dixie Stores Inc., Express Inc., New York & Co. Inc., Joybird and Piping Rock Health Products.

These cases share a common thread, in that all of them involved allegations that discounts were illusory because they were always available, and the advertiser never or seldom sold products at the purported reference price.

But the truly telling aspect of these cases is the breadth of the practices being challenged.

The classic fact pattern is where the reference price is labeled as a "regular" or "original" price, or crossed through and juxtaposed with the "current" price, but is never or seldom offered to consumers.

For example, in Moody v. Hot Topic Inc. in the Central District of California, the advertiser allegedly claimed that products were "20% Off Sitewide" for more than a year, such that the regular prices listed on its website were never or seldom offered to consumers.

The court noted in November that surveys referenced by the plaintiff indicated that nearly two-thirds of consumers indicated that a promotion or coupon often closes a deal if they are wavering, and that they had made a purchase they were not originally planning to make due to a coupon or discount.

Although advertisers have gotten more creative in how they present discounts, any practice that results in a perpetual discount has been challenged by class counsel.

For example, the Lenovo case involves allegations that the retailer offered a discount code that never expired and automatically applied to all orders, effectively making it so that all purchases were necessarily made at the sale price.

The U.S. District Court for the Northern District of California went a step further on Jan. 5 in Vizcarra v. Michaels Stores Inc., finding that offering a discount on a perpetual basis can plausibly be misleading, even if the reference price is the only one displayed on a given page, and even if consumers have to affirmatively enter a coupon code in order to take advantage of a discount.

Similarly, plaintiffs have recently been pursuing allegations that the use of "free" offers is similarly likely to lead to consumer deception.

In Bechtel V. Winn-Dixie Stores, the plaintiff alleged on Dec. 14 in the U.S. District Court for the Middle District of Florida, Jacksonville Division, that the retailer's "buy one, get one free" advertisements were misleading, because Winn-Dixie increased the price of the purchased item to recoup the cost of the "free" item.

If true, these allegations would also arise due to a violation of the FTC's guide about the use of the word "free" and similar claims.

Class counsel has also zeroed in on advertisers that present discounts as being available only for a limited time, when they were in fact evergreen, on allegations that these representations created a false sense of urgency for consumers who wanted to lock in a good deal.

For example, on Feb. 5, a class complaint was filed against Brooklyn Bedding LLC in the U.S. District Court for the Western District of Washington, alleging that representations that discounts were available for a limited time only, and countdown timers purporting to represent the amount of time left for consumers to take advantage of an offer, were misleading when the offer at issue was always available.

In making this allegation, the plaintiff pointed to data showing that countdown timers in particular can cause conversion rates to quintuple. And it's not only class action counsel that has taken issue with these types of representations.

The FTC has specifically found that advertisers engage in dark patterns when "creating pressure to buy immediately by saying the offer is good only for a limited time or that the deal ends soon — but without a deadline or with a meaningless deadline that just resets when reached."

Bottom Line

Class action litigation tends to come in waves, and the current wave of lawsuits is laser-focused on retail pricing practices. And, with the FTC targeting dark practices — including those related to retail pricing — retailers will continue to face potential liability when advertising sales.

All retailers should review their retail pricing practices to ensure that they are legally compliant, and do not increase the risk of a similar action in the future.

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