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Class Action ADVISORY ■

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Retail Advertising: Consumer Class Actions Gaining Traction

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Retailers continue to face litigation and enforcement activity concerning their price advertising practices. In particular, comparisons of "regular," "former" or competitor's sale prices in advertising continue to be frequent targets of court challenges and government investigations.[1] A recent class certification decision in California is yet another warning that companies should closely examine their price advertising models and continue to be prepared to defend those models as consistent with both federal and state laws and regulations.

In May 2015, the U.S. District Court for the Central District of California certified a class of J.C. Penney customers who purchased private branded and exclusive branded apparel and accessories that were advertised at a discount of at least 30 percent off the stated "original" or "regular" price. (*Spann v. J.C. Penney Corp.*, No. SA CV 12-0215 FMO, 2015 WL 3478038 (C.D. Cal. May 18, 2015)). In that case, the plaintiff alleged that Penney engaged in a "false price advertising scheme" in which it "advertised false former prices and false price discounts" by intentionally misleading customers and advertising discounted sale items alongside "original" or "regular" prices at which the items were never actually sold. *Id.* at *1-2. The plaintiff contended that this conduct violated the popular trio of California's consumer protection statutes: the False Advertising Law, the Unfair Competition Law (UCL) and the Consumer Legal Remedies Act (CLRA).

In support of her motion for class certification, the plaintiff used Penney's own "Price Pacing Flow Charts" to show that both a "regular" price and an initial discounted price were set for numerous items before the items were ever offered to consumers. The plaintiff also used Penney records to show that "only thirteen of the thousand-plus items [offered during the relevant period] were ever offered at the advertised regular price." Penney's opposition to class certification was further complicated by its shifting price advertising

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[1] Other recent rulings in California state and federal courts demonstrate that Spann is part of a growing trend. See e.g., *People of the State of Cal. v. Overstock.com, Inc.,* No. RG10-546833 (Cal. Sup. Ct. Alameda Cty. Jan. 3, 2014), ordering Overstock.com to pay more than $6.8 million to settle claims that it falsely advertised the original list price of its products, and *Hinojos v. Kohl's Corp.*, 718 F.3d 1098 (9th Cir. Cal. 2013), holding that when a consumer purchases merchandise on the basis of false price information and alleges that he would not have made the purchase but for the misrepresentation, the consumer has standing to bring a class action because he has suffered an actual economic injury.

strategies in recent years. The plaintiff alleged that Penney briefly abandoned its alleged "false price advertising scheme" in 2012 for what the company called "fair and square" pricing but reversed course and reinstated its "false comparative price advertising" tactics by early 2013. The plaintiff framed this reversal as further evidence that Penney "marked up … the prices of many of its private and exclusive branded apparel and accessories, well above the former 'fair and square' prices and well above the prevailing market price for such items, without any good faith intention of selling such items … at those higher prices."

In its order certifying the class, the court found that a number of common questions predominated over individual issues, including the potential for the class to show that Penney's advertisements were misleading or contained false statements and that those statements were material to consumer purchasing decisions. Although the case has survived the class certification phase, the plaintiff may still face substantive hurdles to clear her quest to prove Penney's ultimate class wide liability. For example, if Penney can establish the former price is the actual, bona fide price or prevailing market price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it may be able to substantiate a legitimate basis for the advertising of a price comparison. A former price is not necessarily fictitious merely because no sales at the advertised price were made. See Cal. Bus. & Prof Code § 17501; 16 CFR § 233.1; see also 16 CFR § 233.2-233.3. In addition, Penney undoubtedly will continue to assert its other defenses to class-wide liability, based on the individualized nature of purchase decisions.

Spann v. J.C. Penney Corp. is yet another reminder to retailers that if they chose to utilize comparative and former price advertising as part of their advertising strategy, they should review and be prepared to document – and if necessary, defend – their sales and advertising practices.

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