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Deceptive Pricing: Unlawful Trickery or Skillful Selling?

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Hard core shoppers love scouring department store racks in hopes of finding a fashion bargain. The thrill of finding that perfect garment and discovering that the “original” has been heavily discounted to a “sale” price elicits delight for many consumers. Retailers know that often translates into sales. But, in recent years, consumers have grown skeptical about the legitimacy of “original” prices on these comparative price tags, and some even file class-action lawsuits against large-scale retailers. In these lawsuits, consumers argue that retailers deceptively inflate the “original” price, or display “original” prices at which the goods were never sold, resulting in duped consumers. Even if these lawsuits don’t make it to court, they frequently result in substantial monetary settlements in favor of plaintiffs and their attorneys.

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Pricing Practices

There are several points to consider when analyzing the pricing practices of retailers and lawsuits that sometimes follow. First, retailers continue to employ comparative pricing tactics even though such practices are widely known to result in class actions because “compare to” and “originally sold for” techniques obviously connect with consumers and generate revenues. Perhaps retailers even consciously factor in the risk of lawsuits and settlement when adopting these strategies. Alternatively, some retailers are sufficiently confident that their pricing methods do not rise to the requisite level of deception capable of supporting a deceptive pricing lawsuit. Either way, the practice has not been deterred and deceptive pricing litigation is showing no signs of abating.

Second, when examining any trend in class-action litigation, consider the role that attorneys may play in effectuating that trend. Courts have approved significant attorney fees as part of settlements arising out of these deceptive pricing lawsuits, strongly encouraging attorneys to continue to bring new litigation.

Finally, it would be remiss to discuss the pricing practices of retailers without directing at least some of the focus toward the pervasive e-commerce industry. Online retailers, such as Amazon and Overstock, have garnered unwanted attention over the past couple of years regarding their use of comparative pricing. Given the size, exposure, and growth of the e-commerce industry, deceptive pricing litigation has extended to online retailers, in addition to the traditional brick and mortar targets.

Settlements

A recent class-action settlement reached by Neiman Marcus is representative of the traditional deceptive pricing suits plaintiffs tend to file against brick and mortar retailers. In 2014, named plaintiff Linda Rubenstein sued Neiman, alleging that the company misled consumers at its discount Last Call stores by putting a disingenuous original price on price tags to be “compared to” the discounted sale price. Rubenstein alleged that the goods were never actually offered for sale at the original price, as suggested by the price tag, and that the false higher price was

designed to deceive consumers into believing they were getting a bargain by purchasing goods at Last Call.

A district court dismissed Rubenstein's claims under California's False Advertising Law, Unfair Competition Law, and Consumer Remedies Act. However, she appealed the ruling and the U.S. Court of Appeals for the Ninth Circuit reversed the dismissal last year, remanding to the district court for further proceedings.

In light of this, the parties reached a settlement, in which Neiman agreed to pay \$2.9 million, with no more than \$400,000 toward administrative fees/expenses, no more than \$870,000 in class counsel fees/litigation expenses, and a class representative fee to Rubenstein not to exceed \$5,000. The remaining \$1,625,000 is scheduled for distribution among authorized class members.

Similar settlements have been reached by other brick and mortar retailers. In 2015, Michael Kors agreed to pay just under \$4.9 million to settle claims brought under California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, alleging that clothing items sold in Michael Kors Outlet Stores are deceptively priced. Specifically, the complaint alleged that at least some of the clothing sold in the outlets was manufactured exclusively for sale in the outlets. As those items were never intended for sale at the manufacturer's suggested retail price (MSRP) displayed on the price tag, the sale "OUR PRICE" reflected a "phantom markdown." In addition to monetary payment, Michael Kors agreed to replace the terms MSRP with "Value" on all outlet price tags, displaying a sign in all outlets explaining the definition. As an alternative, Michael Kors Outlet

Stores could elect to remove these "reference price" comparisons from any item sold exclusively in outlet locations.

Additionally, Ann Taylor, Burberry, and The Gap have all reached similar settlements in cases based on similar claims.

High-Payout Settlements

Standing out from the crowd of settled lawsuits are two noteworthy settlements with startlingly high monetary components. Both JC Penney and tween brand Justice agreed to pay over \$50 million to settle deceptive pricing class actions. In the JC Penney case, the plaintiffs alleged that the retailer tricked millions of shoppers by displaying fake "original" prices on "sale" merchandise. In the Justice case, the plaintiffs alleged

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that the retailer marked items as "40% off," when in reality the items had never been offered for sale at the full advertised price.

These eight-figure settlements have attracted the attention of certain commentators, suggesting that such large settlement amounts undoubtedly fuels further litigation. Notably, in the JC Penney case, the court approved attorney fees of \$13.5 million, approximately 27 percent of the settlement fund. The

potential for plaintiff's attorneys to reap such a significant upside is surely one of the driving forces in the ongoing pursuance of deceptive pricing litigation.

No Sure Thing for Plaintiffs

Bringing a deceptive pricing lawsuit against a retailer is not a slam dunk for plaintiffs, as retailers have had success in defending them. Last year, the U.S. Court of Appeals for the First Circuit upheld the dismissals of two deceptive pricing lawsuits brought against retailers Nordstrom and Kohl's Department Stores. As with many of these cases, the plaintiff alleged that the listed "compare at" price was deceptive. The district court of Massachusetts, however, found that the plaintiff had "failed to plead a legally cognizable injury" separate from the alleged deceptive act, and therefore dismissed the claims. Although these dismissals provide what is presumably a welcome reprieve for retailers in a sea of large settlements, it is important to reinforce that deceptive pricing lawsuits continue to be filed, and retailers continue to agree to substantial monetary settlements rather than take the risk of having a class of consumers certified against them.

Online Retailers

Of course, with the ubiquitous e-commerce industry forever changing the way in which consumers purchase goods, it is no wonder that claims of misleading sales practices have infiltrated the online retail business. Amazon, the largest online retailer in the world, has attracted some unwanted attention in this area, both in the United States and abroad.

Criticism of Amazon's pricing techniques in the United States reached a peak in 2017 when non-profit organization, Consumer Watchdog, released a study in support of its assertion that Amazon uses phony reference prices to entice consumers to purchase goods believing they are receiving a generous discount when that is not actually the case. In this study, Consumer Watchdog found that Amazon displayed reference prices (e.g. "was," "sale," "before-sale," "strikethrough") on 46 percent of the products surveyed. Further, 61 percent of all reference prices were higher than any observed price charged by Amazon in the recent past 90 days, and simultaneously, 38 percent of all reference prices were higher than any price charged by Amazon in observed history. Thus, Consumer Watchdog argued that in that 38 percent of cases, Amazon's "was" (or before-sale) prices were "entirely fictitious."

Consumer Watchdog flagged this issue with the Federal Trade Commission (FTC) during the FTC's assessment of Amazon's purchase of Whole Foods last year. The organization implored the FTC to examine Amazon's pricing practices alongside the FTC's "Guide Against Deceptive Pricing." Defending itself against Consumer Watchdog's accusations, Amazon asserted that the study was "deeply flawed" and that the conclusions reached by Consumer Watchdog were "flat out wrong." Ultimately, the FTC gave the green light to Amazon's purchase of Whole Foods and declined to comment on this issue, effectively leaving Consumer Watchdog's claim unresolved.

This was not the first time Amazon confronted a challenge to its pricing practices. In 2015, Amazon was the defendant in a deceptive pricing suit filed in California in which the plaintiff claimed that Amazon determined its list prices by using the highest price the item has ever sold for, when a more accurate comparison would have been the item's "prevailing market price." Amazon escaped further public litigation of this action—but not ultimate responsibility—when the Southern District of California dismissed the action and compelled the case to arbitration.

The court found that the plaintiff agreed to arbitrate the dispute when she was notified of Amazon's privacy policy and conditions of use at checkout, and chose to finalize her purchase. Arbitration proceedings are private, and therefore not subject to media scrutiny. As arbitration eliminates a consumer's right to legal vindication, Amazon's arbitration agreement has acted as an effective aid to combatting deceptive pricing class actions against the world's largest online retailer.

Amazon has not been so successful in dodging similar accusations abroad. Last year Canada's Competition Bureau levied a \$1 million fine against Amazon Canada for using deceptive price listings. In a news release, Canada's Competition Bureau stated that Amazon often displayed a regular price, or "list price," reflecting significant savings for consumers. The bureau asserted that Amazon relied on its suppliers to provide those list prices without verifying their accuracy, thus potentially resulting in misleading price comparisons between inflated and

inaccurate original prices, and the purported "sale" prices.

Conclusion

Although deceptive pricing litigation is not necessarily a new phenomenon, it continues to pose an issue to retailers, both storefront and online retailers alike. As part of settlement agreements, some retailers have agreed to reform their pricing practices so as to make clear to the consumer the true value of the product they are purchasing and any actual savings. That said, plaintiffs continue to file deceptive pricing lawsuits, and retailers engaging in comparative pricing techniques continue to be confronted with the practices they employ. This litigation trend appears to have staying power.

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