

California Court Imposes \$6.82 Million Civil Penalty in Comparative Pricing Action

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Still recovering from the holiday sales? If you're a retailer or a manufacturer pricing your own products, don't forget about the state laws governing promotional pricing and deceptive pricing claims. The state of California certainly hasn't – on Friday, a California judge issued an almost \$6.82 million civil penalty against Overstock.com via a [tentative ruling and proposed statement of decision](#) regarding the company's comparative price advertising. The court also imposed stringent injunctive provisions regarding comparative price advertising. Yesterday, Overstock announced that it will appeal.

The complaint alleged that Overstock made false and misleading price comparisons to products' "advertised retail price" ("ARP"), in violation of California's False Advertising Law and Unfair Competition Law. Specifically, the state alleged that Overstock exaggerated the Overstock discount by referencing the highest price found for the ARP or constructing an ARP using a formula that applied an arbitrary multiplier to Overstock's wholesale cost. Additionally, the company allegedly failed to disclose that some ARPs were based on the retail price of a similar, but non-identical, product. The court concluded that comparisons to ARPs identified as "list prices" and based on a formula or the price of a different, non-identical product were false and misleading representations, and every such ARP was an untrue statement because those ARPs did not actually exist. The court dismissed Overstock's argument that its pricing strategy caused no consumer harm because customers always received the lowest price available on the internet, ruling that harm is presumed when an ad is demonstrated to be false, deceptive, or misleading.

Pursuant to the tentative ruling, Overstock is enjoined from: (1) posting an ARP without verifying the reference price and documenting that verification; (2) using ARPs based on a formula, multiplier, or other method that would set the ARP on any basis other than the actual price offered at the time the advertisement is first placed; (3) using ARPs based on a similar but non-identical product, without disclosing the basis of the ARP; and (4) using the highest price found to set ARPs without regard to whether that price reflects a substantial volume of recent sales, without disclosing the basis of the ARP. Additionally, if the ARP is indicated by an unmodified term like "compare," it must reflect a good faith effort to determine the prevailing market price. No ARP may remain posted for longer than 90 days past the date on which the ARP was validated, and that date must be noted on the product page or by hyperlink to "ARP." Determining that it was impossible to discern how many California consumers saw the advertisements at issue or were harmed by them, the court imposed a daily civil penalty, totaling \$6,819,000. The court considered that the "seriousness of the misconduct" was moderate, mitigated in part by the fact that Overstock's prices were lower than its competitors' and that the conduct did not affect all product categories. However, the court also found that the violations were "numerous" and "persistent" and that Overstock's conduct was willful and inconsistent with FTC guidance or "what prudent counsel would have advised."

Retailers and manufacturers often struggle with how to advertise the value or savings associated with a particular price and should keep this case in mind when making any comparison to a list price, competitor's price, or the company's own previous price because it demonstrates the aggressive posture that regulators are taking. This case is one of several we continue to watch.