

Comparison Pricing Victory for Ross Stores in California

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On August 2, 2017, the U.S. District Court for the Central District of California dismissed a putative class action lawsuit against Ross Stores that accused the discount retailer of misleading promotional pricing practices. The lawsuit stemmed from February and May 2015 purchases by the two lead plaintiffs of items bearing price tags with a selling price and an instruction to “Compare At” the higher, reference price. Ross has since changed the reference price signal from “Compare At” to “Comparable Value.”

The Second Amended Complaint, filed in March 2016, contained the following allegations:

- The use of “Compare At” is deceptive, as the higher, reference price is not a price at which substantial sales of the item were made in California.
- The higher, reference price is the price of similar, non-identical merchandise – a material fact that Ross fails to adequately disclose.
- A reasonable consumer would expect the reference price to refer to the price of an identical item.
- The retailer’s explanation of its comparison pricing is “buried” on the website and out of view in stores. Specifically, the explanation states that the comparison pricing “represents a recent documented selling price of the same or similar product in full-price department stores or specialty stores[, and w]here identical products are not available [Ross] may compare to similar products and styles.”

According to the plaintiffs, these practices violate California law, which promotional pricing statutes (1) prohibit retailers from making a false or misleading statement of fact concerning the reason for a price reduction, and (2) require that an advertised reference price have been the prevailing market price for the item within the immediately preceding three months. See Cal. Civ. Code § 1770(a)(13); Cal. Bus. & Prof. Code § 17501.

In May, Ross and the plaintiffs filed a motion for summary judgment and motion for class certification, respectively. With respect to the new, “Comparable Value” signal, the Court determined that the plaintiffs lacked standing to challenge these tags because they failed to present evidence that they actually relied on the phrase when making their purchases, or that they suffered any economic injury as a result of Ross’s use of the phrase. As a result, the Court granted the motion for summary judgment with respect to Ross’s use of “Comparable Value.”

With respect to the “Compare At” signal, the Court found that the phrase is not “obviously false or misleading on its face,” and the plaintiffs had not presented evidence, other than their own

declarations and price tags, in support of their argument that the reasonable consumer would expect the reference price to refer to the price of an identical item. Regardless, the Court concluded, the plaintiffs also failed to demonstrate economic harm, and therefore lacked standing to pursue their claims. Importantly, the Court rejected the plaintiffs' reliance on the Ninth Circuit decision in *Hinojos v. Kohl's Corp.*, noting that, "the standard of proof on a motion for summary judgment is higher" and demands proof that the items purchased were not worth as much as Ross claims, rather than vague averments of injury.