

# Kohl's Kicks Putative Class Action Suit Alleging Deceptive Sale Prices

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On February 1, 2016, the U.S. District Court for the District of Massachusetts [dismissed](#) a consumer class action alleging that Kohl's Department Stores advertises false sale prices. The plaintiff in *Mulder v. Kohl's Department Stores, Inc.*, 15-cv-11377 (D. Mass.), asserted causes of action for fraud, breach of contract, unjust enrichment, and violations of the Massachusetts Consumer Protection Law upon allegations that she was induced to purchase merchandise from Kohl's that was deceptively advertised as on sale from "comparison prices" that she alleged were never charged by Kohl's or other retailers in the marketplace.

As we have [previously reported](#), the plaintiffs' bar has increasingly focused on retail sale prices, particularly those for outlet and discount stores, and Congress and the FTC have even taken action, with a January 2014 letter by four members of Congress to the FTC Chairwoman expressing concerns that consumers are being deceived by pricing at retail and outlet stores and asking the FTC to investigate potential violations of Section 5 of the FTC Act and the FTC's Guides Against Deceptive Pricing. State regulations also contain complex rules on how sale prices can be advertised to consumers, with many specifying how long an item must be sold at its "non-sale" price, or how retailers must disclose a source of comparison.

The court in *Mulder* found that, even accepting plaintiff's allegations as true, she had "not suffered an economic injury" cognizable under Massachusetts law: "among other things, she has suffered no loss, and there is no sum of money that could be awarded to her that could 'compensate' her without providing a windfall." Put simply, the court found that the plaintiff had purchased goods for an advertised price, and that it appeared those goods were, in fact, worth the advertised price she paid. The court applied this same "benefit of the bargain" logic to plaintiffs' claims for fraud, unjust enrichment, and breach of contract. In dismissing the case with prejudice, the court also denied plaintiffs' motion to amend and motion to certify questions relating to legally cognizable injury to the Supreme Judicial Court of Massachusetts.

The *Mulder* decision is a welcome interpretation of injury in deceptive sale price class actions for retailers in Massachusetts and other jurisdictions with strong "economic loss" or "ascertainable loss" requirements. Last year, the District of Massachusetts granted dismissal of similar claims brought against Nordstrom Rack on the grounds that the plaintiff had insufficiently pled injury, a decision which is currently on appeal in the First Circuit.