Kelley Drye

"Psychological Commitment" as a Basis for a Promotional Pricing Lawsuit?

Christie Grymes Thompson

June 4, 2014

Class action plaintiffs continue to explore new theories under state promotional pricing statutes. Last week, a plaintiff filed a class action complaint against Gap Inc. in California state court, alleging that the company violates several state laws by not adequately disclosing which products are excluded from an advertised sale. As a result, consumers make a psychological commitment to purchase the items before they realize the items are not actually on sale and end up purchasing those items. Particularly in light of the decision in the Overstock case, this will be a case to watch closely.

The plaintiff claims that Gap's in-store and email advertising fails to adequately disclose limitations on sale offers. Specifically, the plaintiff states that Gap advertises that certain categories of clothing are on sale, but does not disclose (or does not adequately disclose) that the sale does not apply to all clothing in that category, or does not identify (or does not adequately identify) the clothing that is excluded from the sale.

As an example, the plaintiff points to an in-store, on-rack ad displaying, “DRESSES $25,” with the statement “SELECT STYLES. DISCOUNT TAKEN AT REGISTER.” in the corner of the ad. Additionally, the plaintiff states that she received an email with “Hours to Shop!; Happy Monday; 40% Off Your Purchase; Ends Tonight” appearing in dark letters against a white background and in “barely noticeable lettering against a colored background” the disclaimer “EXCLUSIONS APPLY.” The plaintiff claims that consumers cannot discover whether an item is included in or excluded from a sale until the item is scanned at the register or placed in the online shopping cart for purchase.

According to the plaintiff this failure results in consumers “psychologically committing” to purchase the items before they realize that those items are not subject to the advertised sale. The plaintiff seeks an injunction and restoration of all monies that Gap received as a result of its practices – i.e., the amount that consumers “overpaid” for items that were not on sale. The plaintiff estimates the total consumer injury exceeds $10 million.