

Smooth Sale-ing: Jos. A. Bank Wins Before Seventh Circuit

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Late last week, the Seventh Circuit affirmed the dismissal of a putative class action alleging that Jos. A. Bank advertises its normal retail prices as temporary price reductions, in violation the Illinois Consumer Fraud and Deceptive Business Practices Act. The company's pricing practices, the plaintiff argued, constituted a "fraudulent sales technique." Illinois law, like most state promotional pricing laws, requires that an advertised former price be equal to or below the price at which a seller made a substantial number of sales, or made a good faith attempt to sell the product, in the recent regular course of business.

According to the complaint, in July 2012, the plaintiff, Patrick Camasta purchased six shirts for \$167 after seeing an ad publicizing "sales prices" in a JAB Illinois retail store. Pursuant to the terms of the promotion, he purchased one shirt for \$87.50 and one shirt for \$79.50, and received two free shirts with each purchase. Camasta alleged that he later learned that the sale was not a temporary price reduction, but was the normal retail price at which JAB offers the items and advertises them as "sales" to Illinois consumers.

In July 2013, the U.S. District Court for the Northern District of Illinois dismissed the lawsuit in its entirety, with prejudice, determining that Camasta failed to adequately plead the circumstances constituting the alleged fraud and to demonstrate that he had suffered actual pecuniary loss as a result of the transaction – i.e., that he paid more than the value of the shirts he purchased. The court concluded that the complaint was predicated on speculative statements about the allegedly deceptive ad and JAB's pricing practices, and that Camasta would not have purchased the shirts had he known the "sale" price was actually the normal retail price. The Seventh Circuit agreed, noting that Camasta had neither satisfied Rule 9(b)'s heightened pleading requirements for claims of fraud nor pled facts sufficient to support his claims for actual damages. Furthermore, the court concluded, "[s]ince Camasta is now aware of JAB's sales practices, he is not likely to be harmed by the practices in the future . . . [and] not entitled to injunctive relief."

While Jos. A. Bank emerged from this fight victorious, other retailers have not been so lucky. Kohl's, for example, was involved in a similar action in California, and, on appeal, the Ninth Circuit concluded that the plaintiff had adequately alleged economic injury under California law by claiming that the advertised discounts conveyed false information about the goods and that he would not have purchased them absent the misrepresentation. The Kohl's case, and others, serve as a reminder that promotional pricing is a hot topic for class action plaintiffs, and we recommend that retailers review their sale policies to make sure they are in compliance with applicable state laws.