

The Pink Tax: A Litigation and Legislation Update

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We previously [reported](#) on an emerging legislative and litigation trend relating to the “pink tax” – a gender-based pricing phenomenon that allegedly results in higher prices for goods and services marketed towards women as compared to substantially similar alternatives marketed towards men. As predicted, the last two years have shown an uptick in litigation (which has been largely unsuccessful) and legislative action (some finalized and some pending).

Litigation

Last year, we discussed an early [blow](#) to the pink tax theory of liability in *Schulte v. Conopco, d/b/a Unilever, et al.* In *Schulte*, the plaintiffs alleged that various personal care manufacturers and retailers violated the Missouri Merchandizing Practices Act (MMPA) by charging more for deodorants marketed for women than allegedly similar deodorants marketed for men. The product lines at issue contained similar, but not identical, ingredients, came in different sizes, and were available in different scents (fifteen “feminine” scents in the line marketed for women and five “masculine” scents in the line marketed for men). The Eastern District of Missouri dismissed the complaint, ruling that “Missouri law does not compel identical products to be sold at the same price” and that the plaintiff’s remedy “lies with legislation, not litigation.” The Eighth Circuit affirmed on the grounds that the plaintiff mistook “gender-based marketing for gender discrimination.” In order to state a claim, the court ruled that the plaintiff would have to allege that the *only* difference between the products was the price and the intended target of the marketing. Here, because the plaintiff conceded that the products were, in fact, different, thus dismissal was appropriate.

In *Lowe v. Walgreens Boots Alliance, Inc., et al.*, the Northern District of California dismissed another pink tax putative class action, albeit on different grounds. In *Lowe*, the plaintiffs alleged that the price of Walgreens’ hair regrowth treatment for women (a generic alternative to Rogaine) was almost 1.5 times higher than the male-marketed alternative. The plaintiff alleged that the products had identical active ingredients, and that the only differences were the dosing instructions and the price tag. The court’s justification for the dismissal was twofold. First, the court ruled that the plaintiff’s state consumer protection claims were preempted because, under the Federal Food, Drug Cosmetic Act (“FDCA”), Walgreens’ generic product labels were required to exactly mirror the brand-name label. Thus, to the extent the plaintiff claimed that the products labels were deceptive, such claims were preempted. The court also dismissed the plaintiff’s claim under California’s Unruh Act because the statute does not apply to goods, but rather to “accommodations, advantages, facilities, privileges, or services.” *Lowe* has appealed the decision to the Ninth Circuit.

While California's Unruh Act seems to be a dead end for product pricing discrimination claims (at least for now), courts have applied the Unruh Act to claims alleging gender-based pricing discrimination in services. For example, in *Department of Fair Employment and Housing v. M&N Financing Corp., et al.*, the plaintiff alleged that M&N Financing purchased retail installment contracts from used car dealerships, and that the gender of the purchaser of the car factored in to how much M&N would pay for the contract. The Court of Appeal found that this practice was a "per se" violation of the Unruh Act warranting statutory damages even though the plaintiff had not demonstrated actual injury.

State Legislation

In September 2020, New York passed a law prohibiting individuals and entities, including retailers, suppliers, manufacturers, or distributors, from charging a different price for two "substantially similar" goods or services based on the gender for whom the goods or services are marketed. As in the litigation context, this concept of "substantial similarity" is the key. Substantially similar goods are defined as two goods that exhibit *no* substantial differences in the materials used in production, intended use of the good, the functional design and features of the good, and the brand of the good, and substantially similar services are defined as two services that exhibit *no* substantial difference in the amount of time to provide the service, the difficulty in providing the service, and the cost in providing the service. An individual or entity charged with violating the law can avoid liability by proving that any price difference is based upon a number of gender-neutral factors including, but not limited to, the additional time or cost of manufacturing such goods or providing such services. While the new law does not provide a private right of action to consumers, it permits the attorney general to obtain an injunction against such prohibited sales, as well as restitution for consumers and civil penalties.

New Jersey also recently proposed a bill that prohibits discriminatory pricing with respect to substantially similar services and consumer products. The definition of "substantially similar" is, on its face, almost identical to the one adopted under the New York law. Under the proposed law, certain services providers (including tailors, barbers, hair salons, and dry cleaners) would be required to clearly and conspicuously disclose to the customer in writing the pricing for each standard service provided, along with a clearly visible sign notifying customers that gender-based price discrimination is prohibited under New Jersey law. This bill is currently under review by the Assembly Consumer Affairs Committee.

A similar bill was introduced in Massachusetts creating a 15-member working group on gender equity regarding the pricing of items marketed towards women in Massachusetts. The group will report its findings and recommend any changes in current law by the end of 2022.

Federal Legislation

In June 2021, California Congresswoman Jackie Speier reintroduced the *Pink Tax Repeal Act*, a bipartisan bill that seeks to end gender discrimination in the pricing of goods and services. The bill would prohibit the sale of substantially similar goods or services that are priced differently based on gender, allow the Federal Trade Commission to take enforce violations, and permit State Attorneys General to take civil action on behalf of wronged consumers. Currently the bill is before the Subcommittee on Consumer Protection and Commerce.

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We will be following this issue closely in 2022, and will report on new developments as they occur.

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