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Pricing Litigation: How Big Decisions Set the Stage for 2018

Deceptive pricing claims have the potential to target retailers of all types and sizes, including retailers that are exclusively online, attorneys Stephanie Sheridan and Meegan Brooks say. The authors review important decisions from 2017, and encourage in-house counsel to monitor developments in pricing litigation and take steps to assess and limit their business's risk.

BY STEPHANIE SHERIDAN AND MEEGAN BROOKS

Over the last several years, a wave of nearly 150 lawsuits has blanketed the retail community, alleging that more than 80 retailers deceived consumers through their price advertising practices.

At the beginning of 2017, very few of these cases had gotten past the pleadings stage—starting the year off with big questions as to the value of these cases, and how they would fare at summary judgment and class certification.

2017 shed some highly anticipated light on these questions. This article covers how the year began with several decisions that were far from great for retailers, followed by subsequent decisions that have provided welcome counter-arguments and defenses, which bode well for cases on appeal.

Below, we summarize the biggest decisions of 2017, and highlight those we'll be watching closely in the coming year.

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Appellate Decisions Largely thanks to the onslaught of cases that were filed when this litigation began gaining momentum in 2014 and 2015, numerous appellate decisions were issued in the last year or so, both in state and federal courts.

2017 kicked off with three decisions against retailers:

- Setting the stage, the tail end of 2016 saw the California Court of Appeals issue a heavy blow to retailers in *Veera v. Banana Republic*, when it reversed the

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lower court's decision dismissing the plaintiff's claim to have been injured by the defendant's alleged failure to adequately disclose exclusions from a storewide sale. The court found that even though plaintiffs decided to complete their purchases after becoming aware at check-out that the items were excluded from the promotion, plaintiff nevertheless raised a triable issue as to causation based on ''the embarrassment and frustration they felt when, as the items were being rung up, they learned that discount did not apply.'' Justice Bigelow, in dissent, described the majority's decision as a major departure from previous case law, stating, ''I see the majority's 'momentum to buy' theory as both a departure from well-settled principles regarding reliance in ordinary fraud actions and as a dilution of the Prop. 64 requirement that the plaintiff suffer economic injury as a result of the defendant's improper conduct.''

■ On April 18, 2017, the Ninth Circuit in *Rubenstein v. Neiman Marcus*, reversed the district court's granting of Neiman Marcus's motion to dismiss, finding that the plaintiff had stated a claim that the retailer's ''Compared To'' pricing was deceptive. The court's decision was largely based on its finding that Neiman Marcus' pricing information was exclusively within the retailer's knowledge, and that the plaintiff could thus satisfy Rule 9(b)'s heightened pleading standards by bringing claims based merely on ''information and belief.''

■ Then on June 2, 2017, on the heels of the Ninth Circuit's *Rubenstein* decision, the California Court of Appeal issued its long-awaited opinion in *People of California v. Overstock*, by affirming the trial court's imposition of $6.8M in penalties against Overstock for its pricing practices. The court affirmed the trial court's finding that the People had introduced sufficient evidentiary support for their claim that certain pricing terms, such as ''List Price'' and ''Compare at,'' were deceptive under the facts of that case.

Luckily for retailers, the tide seemed to turn at the close of summer 2017, when appellate courts issued several decisions in a row in favor of retailers:

■ On August 24, 2017, the California Court of Appeal in *Rubenstein v. The Gap* (ironically, brought by the same plaintiff in the Neiman Marcus case) held that ''selling nonidentical brand name clothing in a factory store is not fraudulent.'' The court explained that the fact that an outlet store and retail store share the same brand name is not enough for the reasonable consumer to believe that outlet merchandise was previously carried at the full-priced store. The decision also emphasizes that consumers have some responsibility for their purchasing decisions, stating that ''a consumer for whom the retail history of factory store items is material can ask Gap employees about this,'' that consumers could have returned merchandise after purchase if it was unsatisfactory, and that consumers also ''had the ability to examine and try on the apparel prior to purchase and to read garment labels for information on fabrics and materials used in manufacture.'' More generally, *Rubenstein v. The Gap* should assist any defendant facing allegations that it violated a duty to disclose material information, as it rejects the expansive arguments often advanced by class counsel, and even by the California Attorney General, who filed an amicus brief in support of the plaintiff.

■ On September 19, 2017, the Ninth Circuit affirmed a lower court's dismissal of deceptive pricing claims against Amazon, holding that the plaintiff was bound by Amazon's arbitration clause. In *Wisely et al v. Amazon.com, Inc.*, the plaintiff argued that the lower court erred in enforcing the arbitration and class waiver provisions in Amazon's ''conditions of use'' (COU), which were included in a link on the check-out page. On appeal, the plaintiff argued that the court should have applied California law, rather than Washington law, in determining the enforceability of the COU, and that the COU were unenforceable under California law. In an unpublished, unanimous, six-page decision, the panel rejected the plaintiff's arguments, stating that Washington's and California's consumer protection laws and protections against unconscionable contracts are ''substantially similar,'' that the district court was correct in applying Washington law, but that regardless, Amazon's COU would be enforceable under either state's laws.

■ On October 6, 2017, the Ninth Circuit delivered retailers a strong counter-argument to plaintiffs citing *Rubenstein v. Neiman Marcus*, when it affirmed the district court's dismissal of pricing claims in *Sperling v. DSW*. In *Sperling*, the Ninth Circuit explained that it is insufficient to point to a reference price and claim that it is false, without any factual support for that theory. Instead, the plaintiff must ''allege sufficient facts to show with particularity how [and] why . . .the [reference] price was false or deceptive.'' In *Sperling*, the plaintiff claimed to have conducted an investigation and even ''alleged that she found [the shoes she purchased] elsewhere'' for less than the reference price she allegedly relied on. The court still found these factual allegations to be deficient under Rule 9(b), because ''she did not allege when she found them, so it could well have been long after her purchase.''

■ The First and Sixth Circuits also affirmed the dismissal of pricing claims, based on the plaintiffs' failure to allege economic harm. On July 26, 2017, in *Shaulis v. Nordstrom*, the First Circuit explained that ''the subjective belief as to the nature of the value [Shaulis] received — does not state a legally cognizable economic injury,'' and that the plaintiff ''arguably got exactly what she paid for, no more and no less.'' Just weeks later, on August 16, 2017, the Sixth Circuit affirmed the dismissal of similar claims in *Gerboc v. ContextLogic* based on the same type of reasoning. Indeed, the first two sentences of the opinion state: ''As best we can tell, Max Gerboc is happy with the $27 speakers he bought from Wish.com. Yet he wants back 90% of what he paid for them.''

Summary Judgment & Class Certification Developments 2017 also offered welcomed guidance with respect to summary judgment and class certification. At the beginning of the year, the district courts were split as to whether a plaintiff in a pricing case is able to establish an entitlement to monetary relief, where the items she purchased were not worth more than the amount she actually paid for them.

Previously, in *Spann v. J.C. Penney*, Judge Olguin of the Central District of California denied J.C. Penney's motion for summary judgment in March 2015, ruling that a plaintiff would be entitled to relief if she could prove that she would not have purchased items from the retailer if she had known that their advertised price comparisons were inaccurate. Two months later, the *Spann* court also granted plaintiff's motion for class certification, recognizing three possible restitutionary

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models: (1) ''complete restitution, measured by the full purchase price paid'' (full refund model); (2) ''restitution based on the false 'transaction value' promised by J.C. Penney'' (the percentage of the promised discount, applied to the amount paid); or (3) ''restitution measured by the net profits that J.C. Penney received from sales of its products based on deceptive price comparisons'' (profit disgorgement).

By contrast, almost exactly one year later, in *Russell v. Kohl's* and *Chowning v. Kohl's*, Judge Klausner, also of the Central District, reached the opposite outcomes as to both class certification and summary judgment. On March 15, 2016, Klausner specifically rejected each of the restitutionary models used in *Spann* in his order granting summary judgment in favor of the defendant as to restitution. The court explained that none of the restitutionary models proposed by the plaintiff accounted for the value received by the plaintiff in the form of the purchased product.

Both pricing cases to decide summary judgment motions since *Chowning* have agreed with Judge Klausner where the value of an item exceeds the amount a consumer paid for it, the consumer would not be entitled to restitution—thus, what once appeared to be a split now has three courts in a row in agreement.

First, in *Stathakos v. Columbia* (N.D. Cal), the court denied certification as to restitution under all three statutes, leaving plaintiffs' with only a claim for injunctive relief. The court analyzed each of the plaintiffs' three proffered methods for calculating monetary relief, which generally mirrored those from *Spann*, *Russell*, and *Chowning*. The court quickly rejected the full-refund model and profit disgorgement because neither took into consideration the value received by the plaintiffs. Under the plaintiffs' third proposed model, the promised discount model, the percentage discount advertised is applied to the amount actually paid by the customer, such that, where an item has a reference price of $30, an outlet price of $24.90, and an actual purchase price of $11.98, the promised discount (17%) would be applied to the $11.98 paid, to arrive at the amount of restitution for that customer ($2.04). As in *Chowning*, the court rejected this model because it does not measure the value received by plaintiffs in the form of their products, but rather, ''would be the equivalent of awarding plaintiffs expectation damages, without accounting for the amount of money plaintiffs actually lost in the process.''

Most recently, on August 2, 2017, in *Jacobo v. Ross Stores, Inc.* (C.D. Cal), Judge Fitzgerald granted Ross' motion for summary judgment and denied as moot the plaintiffs' motion for class certification. Like in *Chowning* and *Stathakos* the court was clear that the plaintiffs had not established any economic harm.

Notably, the *Jacobo* decision included two additional discussions not present in *Chowning* and *Stathakos*. First, although the court did not decide whether the plaintiffs had raised a genuine dispute as to whether Ross' ''Compare At'' pricing was deceptive, it noted that, ''Nor is the phrase 'Compare At' obviously false or misleading on its face. Although the label implies (without saying so directly) that Ross' prices compare favorably to other retailers, Plaintiffs suggest the labels go a step further,'' and that ''If pressed, the Court would probably conclude . . . that Plaintiffs have failed to raise a genuine issue of fact as to deception.''

Additionally, the Ross court held that the plaintiffs lacked standing to seek injunctive relief because Ross had already changed its pricing practices by replacing the phrase ''Compare At'' with ''Comparable Value.'' This is significant, because in *Stathakos* and *Chowning*, the courts allowed the plaintiff to continue pursuing injunctive relief, even after the courts dismissed plaintiffs' claims for economic damages. Indeed, if Ross had not changed its pricing here, Judge Fitzgerald might have allowed plaintiffs' class claims to proceed as to an injunctive relief class. However, his comment that ''it would be difficult to show reliance [on 'Compare At'], given that the plaintiffs had by that point been made aware of the dual meaning behind Ross' price tags'' suggests that the court would have found a lack of standing regardless.

Decisions to Watch Although recent victories for retailers certainly bodes well for defendants in pricing cases, everything could change with the appeal of *Chowning*, currently pending in the Ninth Circuit. The matter is currently being considered for oral argument in San Francisco in May, 2018. The Ninth Circuit's decision in *Chowning* will likely vastly impact the value of these cases, either by clearing a path for plaintiffs to seek restitution, or alternatively, making clear that restitution in these cases will be impossible to attain.

The second big case to watch in 2018 is *Hansen vs. Newegg.com Americas*, currently pending in the California Court of Appeal. There, the lower court sustained Newegg's demurrer without leave to amend, finding that the computer-savvy plaintiff could have easily comparison shopped on the internet to make sure that the motherboard he purchased was a good deal. Quoting a 2008 California Court of Appeal decision in *Hall v. Time Inc.*, the *Hansen* court explained:

''Hansen did not allege he suffered an injury in fact . . . . He expended money by paying [$169.99 + $152.99] -but he received [a power supply and a motherboard] in exchange. He did not allege he did not want the [power supply and motherboard], the [power supply and motherboard were] unsatisfactory, or the power supply and motherboard were] worth less than what he paid for [them].' . . . Hansen does not allege the products Newegg sent him were defective in any way. He got what he wanted at the price he agreed to pay.''

The *Hansen* court ''decline[d] to follow'' *Hinojos v. Kohls* —where the Ninth Circuit in 2011 found that a plaintiff establish statutory standing when a reference price induces him to make a purchase that he otherwise might not have made, regardless of whether the item was worth the amount paid—because it did not cite or apply *Hall v. Time*. The trial court in *Hansen* emphasized that this was not a case where the product was unsatisfactory, and that consumers have a responsibility to make sure that they are getting their money's worth: ''Today, clicking around to compare internet prices is simple, speedy, costless, and customary. Internet shoppers cannot create injury 'in any nontrivial amount' by buying before comparing internet prices.''

Government Investigations Finally, retailers should keep a close eye on government involvement in this arena, which has recently experienced an uptick.

People v. Overstock, discussed above, was brought by a group of California district attorneys, and highlights the interest that government actors have in deceptive pricing litigation. Originally, portions of the Court of

Appeal's decision were unpublished. However, on June 23, 2017, the California Court of Appeal reversed its prior position and allowed publication of the entire decision. This decision came in response to four separate requests for publication, each submitted by government actors who described in detail why deceptive pricing is an issue of public concern, and thus the import to have the whole decision published.

First, on June 13, 2017, the Sonoma County District Attorney (one of the seven district attorneys to bring *Overstock*) sent a letter urging the Court to publish the opinion because it ''demonstrates how traditional false advertising laws apply to advertised reference prices (ARPs) displayed in an online environment. . . Appellate Court guidance on this point would be extremely helpful not only to future litigants but also to retailers seeking to conform their conduct to the law.'' Second, on June 15, 2017, the California District Attorneys Association (composed of 58 district attorneys and numerous city attorneys throughout the state) submitted a similar request, arguing that ''there is a compelling need for California appellate guidance on the proper application of established false advertising principles to the ARP context, including the use of the 'list price,' 'compare at' and 'compare' claims which are increasingly prevalent in online marketing.'' Third, on June 19, 2017, the California Attorney General's office submitted a similar request, stating that ''there is an on-going interest in the use of comparative pricing in advertising and the evidence necessary to prove whether such advertising is deceptive or misleading.''

The fourth letter came on June 21, 2017, from Los Angeles City Attorney Michael Feuer. Notably, Feuer's office is currently prosecuting civil actions against four of the nation's largest retailers, based on his claim that they perpetually offer items at a discount. Citing to those cases, which the letter describes as ''much like those discussed in [Overstock],'' it argues that, ''Publication . . . will assist the City Attorney in its prelitigation investigatory strategy, in its discretionary decision-making, and in the quick resolution of a commonly-raised dispositive issue.''

On June 23, 2017, just days after receiving these requests, the court issued a two-page order modifying the original order such that the order is published in its entirety (the judgment itself was not changed).

Although some feared that the *Overstock* decision itself, combined with the prosecutors' interest in making the decision published, were signs that government action in this area would immediately increase, so far, that does not appear to be the case. One notable exception, however, is *People of California v. Groupon*, which was filed on November 17, 2017 by the district attorneys for San Diego, Shasta, and Riverside Counties. Although the five-page Complaint offers little by way of detail, the *People* allege that Groupon falsely represented false savings or discounts on products or services, and falsely advertised that goods were a particular brand or make when they were not.

So far, government actions have been generally confined to the state and local levels. Although the FTC's ''Guides Against Deceptive Pricing'' have been persuasive to courts in currently pending pricing litigation, the agency itself has not been active in this wave of litigation—the last enforcement action of which we are aware was brought in 1979, and indeed, two former FTC chairmen have criticized deceptive pricing claims as deterring retailers from listing reference prices and discouraging price competition. *See* Robert Pitofsky, ''Beyond Nader: Consumer Protection and the Regulation of Advertising,'' 90 HARV. L. REV. 661 (1977); Timothy Muris, ''Economics and Consumer Protection,'' 60 ANTITRUST L.J. 103, 112 (1991).

According to the FTC's Regulatory Review Schedule, the agency was slated to review its pricing guides in 2017, which has not yet taken place — even though the review was previously scheduled to take place in 2012, but was continued, leaving the retail industry without guidance from the federal government for almost six years—at a time when there has been more litigation in history over these issues

Given the FTC's silence in pricing guidance, retailers were nervous to hear in July of 2017 that the agency was reportedly looking into allegations that Amazon misleads customers about its pricing discounts, as part of its review of Amazon's agreement to buy Whole Foods for $13.7 billion. The investigation was apparently the result of a complaint brought forth by the advocacy group Consumer Watchdog, which concluded that 61% of the time, Amazon's reference prices were higher than any price Amazon sold the same product in the previous 90 days. Amazon issued a public statement describing the Consumer Watchdog study as ''deeply flawed.'' On August 23, 2017, the FTC issued a statement that it had decided not to further pursue an investigation of Amazon.com, Inc.'s acquisition of Whole Foods.

This was not Amazon's only brush with government officials over pricing practices. The online retailer also settled pricing claims brought by Canada's Competition Bureau in January of 2017, agreeing to pay a fine of CA $1 million (US-$756,658.60). The Bureau noted that Amazon had already made changes to the way it advertises list prices on its Canadian website to accurately represent the savings available to consumers.

Conclusion Deceptive pricing claims have the potential to target retailers of all types and sizes, including retailers that are exclusively online. Three years in, this litigation is far from over. In-house counsel should make sure to monitor developments in pricing litigation, and to take steps to assess and limit their business's risk.

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