

When Is Discount Pricing Considered to be Deceptive? Practical “Tips”

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A recent spate of consumer class-action lawsuits has brought attention to discount- and outlet-pricing tactics. A number of well-known fashion designers and retailers have been sued under various state and federal laws for deceptive pricing practices. Many of these lawsuits allege that the use of “false” original prices on discounted or outlet merchandise (where the referenced “retail” price for the item is either artificially inflated or never existed) communicates “illusory discounts” or “phantom markdowns” and violates various state unfair competition and false advertising laws, among others, and the Federal Trade Commission Act.

In January 2014, a group of congressional Democrats wrote to Federal Trade Commission Chairwoman Edith Ramirez, voicing concern that outlet stores, which have become an increasingly popular retail forum, “may have fueled some deceptive marketing practices.” Multiple lawsuits have been filed in California, Florida, New York and elsewhere against numerous designers and retailers including, among others, Macy’s, Bloomingdale’s, Nordstrom, Neiman Marcus, Saks Fifth Avenue, Ralph Lauren, Kate Spade, Michael Kors, Amazon, Gap, Burlington Coat Factory, TJX and Kohl’s.

In view of this rising tide of litigation, and the potential costs associated with it, here are a few takeaways from recent cases:

- If using a “reference” price, it is a good idea to use a combination of (1) language on hangtags, such as “Compare At...,” “Comparable Value” or “Value,” AND (2) signage posted throughout the store or online explaining the meaning of the language on the hangtag.
- A reasonable consumer should easily be able to (1) see the signage, and (2) understand what the hangtag and signage mean. To this end:
 - It is helpful for signage to be written clearly, in plain English, so it is unambiguous and easy to understand; and it is most effective when posted in plain view in retail locations and/or on applicable website pages.
 - It is helpful if hangtags use language that is consistent and parallel with the language used on signage, and vice versa.

- It is important for language on hangtags and signage to be (1) based on fact, and (2) able to be substantiated. For example, ideally, a "Compare At" price should not exceed the price at which comparable products were actually offered for sale in that locality.
- Consider not using a "reference" price and, instead, using the one, actual price for each product. If a product is actually offered at a price for a substantial amount of time (e.g., three months in California) and then offered at a lower discounted that price, then a second, lower, discounted price could be placed on the label without it being considered deceptive.
- Consider identifying when certain products are made only for outlet stores with special labels and/or hangtags; it is helpful for any ancillary tags and signage to be consistent with such "outlet exclusive" messaging.
- Ultimately, the criteria to satisfy is that the language on any hangtag and signage should be truthful, accurate, substantiated, and not deceptive.

As lawsuits involving deceptive pricing proliferate, "best practices" will continue to evolve.

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