

California Court Issues Surprising Decision in Discount Advertising Case

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On December 15, 2016, the California Court of Appeals in Los Angeles came to a surprising summary judgment decision in [*Sajid Veera et al. v. Banana Republic, LLC*](#). The court held that plaintiffs who claimed they were misled by 40% off signs raised a triable issue of whether they suffered an injury-in-fact even though they knew that the items they were purchasing were not on sale before purchasing them.

The *Banana Republic* plaintiffs alleged that they were “lured” into Banana Republic stores by window signs advertising a 40% off discount, without apparent limit. However, plaintiffs alleged that the discount was actually limited to certain goods in the store, not all goods, and that Banana Republic store personnel did not inform the plaintiffs that the items they had chosen were not 40% off until plaintiffs reached the register, although before plaintiffs purchased the goods. “Embarrassed” by the long line at the register and “humiliated,” one plaintiff claimed to have purchased at full price a new outfit her daughter had worn out of the dressing room, while electing not to purchase other items to which the 40% off sale did not apply. Another plaintiff claimed to have purchased a sweater at full price after learning it was not on sale, while choosing not to go ahead with the purchase of other previously-selected items, because he was “annoyed and very embarrassed” and felt that “to leave with nothing would be a complete and utter waste of energy and time.”

Banana Republic moved for summary judgment, arguing that plaintiffs could not establish that they were economically injured as a result of the allegedly misleading advertising, due to their discovery of the true facts prior to purchase, and therefore lacked standing. The trial court granted Banana Republic’s motion.

To establish standing under California’s Unfair Competition Law (UCL) or False Advertising Law (FAL), a plaintiff must have suffered “economic” injury – “lost money or property” – as a result of the defendant’s allegedly unfair business practice or false advertising. In addition, a UCL claim that argues that the defendant “engaged in misrepresentations and deceived consumers” requires a showing of reliance on the allegedly deceptive or misleading statements.

The appeals court reversed the trial court's dismissal of the case and found that plaintiffs had raised triable issues of fact as to (1) whether they suffered economic harm, and (2) whether reliance on the allegedly misleading advertising caused their claimed economic harm. If plaintiffs' claims were true, the court reasoned, Banana Republic illegally sold them items using "a type of 'bait and switch' advertising," luring consumers toward a decision to buy and revealing the deception only after the consumer was "invested in the decision to buy and swept up in the momentum of events." The plaintiffs' economic harm would be the difference between the advertised sale price and the full price paid.

Presiding Judge Tricia Bigelow dissented, disagreeing that plaintiffs' allegations constituted a bait-and-switch scheme and stating that the plaintiffs could not establish causation, economic injury, or reliance on the 40% off representation. She wrote that she was "aware of no legal authority" suggesting that a plaintiff's embarrassment or frustration is relevant to a determination of reliance, where the plaintiff knew the true facts before consummating the allegedly injurious transaction. While she was "sympathetic to the concern" that some misleading advertising claims would go unprosecuted under this standard, the "law as it stands" did not permit any other conclusion. "I expect the court's decision will invite exhaustive litigation," she wrote.

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