

## Retailers Continue To Be Targeted in Deceptive Pricing Class Actions

Article By:

Wilson M. Brown III

Kate S. Gold

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There has been a recent surge in deceptive pricing class actions filed against retailers. From so-called perpetual sales claims to “compare at” pricing challenges, the plaintiffs’ class action bar has aggressively pursued retailers with mixed results. Two recent class action complaints in particular offer new twists on deceptive pricing claims.

The first action, filed against Express, LLC (“Express”) on January 23, 2017, in the Central District of California, challenges shipping and handling charges for merchandise purchased online. The second action, filed against Nordstrom, Inc. (“Nordstrom”) on February 16, 2017, in the District of Alaska, centers on allegations of misleading in-store sales and promotions. Although both cases will likely face significant hurdles on the merits and at class certification (should they proceed to that stage), they serve to remind retailers of the possibility of litigation exposure related to pricing practices.

### ***Reider v. Express, LLC, No. 2:17-cv-556 (C.D. Cal. Jan. 23, 2017)***

This class action complaint was filed last month against Express by a prolific California-based firm, Pacific Trial Attorneys (formerly known as Newport Law Group). Many retailers will recognize this firm from actions and demand letters involving Americans with Disabilities Act website access claims, New Jersey’s Truth-in-Consumer Contract, Warranty and Notice Act claims (primarily attacking website terms of use and privacy policies), and, most recently, contrived Telephone Consumer Protection Act revocation of consent claims related to retail text message programs. The *Reider* action suggests that this firm may be pivoting to an attack on shipping and handling charges for items purchased on retail websites. Notably, the same plaintiff and law firm filed a nearly identical complaint against Electrolux Home Care Products, Inc. a short time ago. *Reider v. Electrolux Home Care Products, Inc. et al*, No. 8:17-cv-26 (C.D. Cal. Jan. 6, 2017).

In the Express lawsuit, Plaintiff Reider alleges that the company’s shipping and handling charges are fraudulent and deceptive in violation of Unfair Competition Laws (UCL) and the Consumers Legal Remedies Act (CLRA). He specifically challenges Express’ alleged practice of charging shipping and handling fees that exceed the actual costs for shipping and handling. The complaint also previews a challenge to the enforceability of an arbitration agreement on the Express website and purports to

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assert claims under California's UCL and CLRA on behalf of a putative class defined as "[a]ll persons in the State of California who purchased products from express.com and were charged a fee for shipping, handling, and/or delivery within the period of the applicable statutes of limitations up to the date of trial (the "Class")." Compl., ¶38.

There appear to be several glaring issues with the complaint, ranging from pleading deficiencies to lack of standing. Moreover, Express may seek to have Mr. Reider pursue his claim in individual arbitration pursuant to the agreement set forth on its website. There are also several obstacles to class certification, including but not limited to what would be an individualized inquiry regarding whether each putative class member believed shipping and handling charges were limited to the retailer's actual shipping costs and whether that belief was material. Notably, the Central District of California dismissed similar claims against Amazon on summary judgment because the plaintiff could not demonstrate that he relied on the shipping policy in deciding to purchase merchandise.

*Baghdasarian v. Amazon.com, Inc.*, No. 05-cv-8060, 2009 WL 4823368 (C.D. Cal. Dec. 9, 2009), *aff'd*, 458 F. App'x 622 (9th Cir. 2011).

### ***Keating v. Nordstrom, Inc.*, No. 3:17-cv-00030 (D. Alaska Feb. 16, 2017)**

In an action filed on February 16, 2017, Plaintiff Maureen Keating seeks injunctive relief and damages from Nordstrom. Ms. Keating asserts claims for common law fraud and violations of UCL §§ 17200 and 17500. She purports to represent similarly situated consumers in Alaska and California.

Ms. Keating alleges she was repeatedly "lured" into purchasing items from Nordstrom stores in Alaska and California based on Nordstrom's purported false promises and misrepresentations. In particular, Ms. Keating claims that Nordstrom "unfairly" solicited her and others to purchase items that were (1) improperly marked as discounted, and/or (2) not marked consistently with what was actually charged. Among other alleged incidents, Ms. Keating specifically alleges that she purchased a scarf from a "40% off" sales display, where the scarf was marked as \$23.40. Compl., ¶5. According to Ms. Keating, she was actually charged \$39.00. Compl., ¶5. Ms. Keating alleges that she "and other similarly situated customers did not know the falsity of Nordstrom's representations, and would not have purchased the items had they known that the savings were illusory and/or otherwise untrue." Compl., ¶19.

Ms. Keating seeks to enjoin Nordstrom from making "any sales" to Alaska and California customers "unless and until [Nordstrom] can demonstrate to the Court's and Plaintiff's satisfaction that it will no longer overcharge its customers." Compl., p.7. She also demands compensatory damages, punitive damages, and attorneys' fees.

Plaintiff Keating's claim appears subject to attack, as the complaint leaves a lot unsaid. For example, there may be strong defenses related to the scope of the alleged pricing practice, the point of sale disclosures about pricing, and the individualized inquiries that may be necessary to determine whether shoppers were actually subject to the challenged pricing practice, and if so, whether they relied to their detriment upon the alleged discount price in making their purchases. Given these issues and others, Ms. Keating will likely confront strong challenges from Nordstrom regarding her individualized experience and whether that forms the basis of any credible claim, much less one that could proceed on a class-wide basis.

Both of these recently filed lawsuits reflect the continued efforts of the plaintiffs' bar to impugn retailers and their pricing practices. Given their visibility, retailers continue to be a target of opportunistic plaintiffs who are literally out shopping for lawsuits. Retailers should make a concerted

effort to ensure compliance with federal and state laws and regulations, and provide appropriate disclosures to consumers both online and in stores. Although consumer protection laws vary among states, some states have taken an aggressive stance, even exposing retailers to criminal charges for certain pricing activities. The Federal Trade Commission has also confronted pricing issues; a January 30, 2014, letter from four members of Congress to the Commission asking it to investigate potentially misleading pricing practices by outlet retailers seemingly sparked the wave of outlet store pricing cases – some of which remain pending.

Perceived violations of pricing laws and regulations – regardless of the merits of such claims – can therefore land retailers in hot water. Unfortunately, retailers are often forced to incur the costs and reputational damage associated with protracted litigation where the claims are later confirmed to be manufactured, lawyer-driven, and frivolous. Given this legal landscape, it may be prudent to aggressively defend these cases to avoid being targeted by predatory lawyers and serial plaintiffs.

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