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New York Federal Court Latest to Dismiss Outlet Pricing Class Action

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Last month, Judge Valerie Caproni of the Southern District of New York dismissed with prejudice a putative deceptive pricing class action filed against Burberry. This is the first decision within the Second Circuit to determine whether shoppers claiming to have been victimized by discount price advertising in outlet stores have suffered actual injury for purposes of Article III standing.

During the past few years, there has been a virtual explosion of consumer class action lawsuits asserting claims against retailers for allegedly fraudulent outlet store price discount advertising. The crux of these claims is that the retailer, through the use of "Was," "MSRP," "Compare at" or similar terms on price tags or in store signage, usually at outlet stores, has misled shoppers into believing they are getting a bargain, when they are not. The lawsuits generally do *not* claim the items purchased were not worth the price paid for them.

Federal courts across the country have grappled with the question of whether the plaintiffs in these cases suffered any actual injury.

Most of these cases have been brought in California, and the answer to that question both from California state appellate courts and the Ninth Circuit has been yes. These decisions hold that if deceptive price advertising caused an individual to purchase an item that he or she otherwise would not have purchased, or would have purchased elsewhere, there is an actual Article III injury.

But last year, the First and Sixth Circuits came out the other way. In *Shaulis v. Nordstrom*, 864 F.3d 1 (1st Cir. 2017), and *Mulder v. Kohl's Department Stores,* 865 F.3d 17 (2017), the First Circuit held that a consumer's subjective belief that he or she got a "bad deal" is not an actual injury where there are no allegations that the product was deficient in an objectively identifiable way. In *Gerboc v. ContextLogic*, 867 F.3d 675 (6th Cir. 2017), the Sixth Circuit similarly held that the plaintiff suffered no injury where an item not alleged to be worth $27 was offered as a $27 item and worked like a $27 item, even if a struck-through "$300" price appeared next to the purchase price.

Recently, In *Belcastro v. Burberry*, Judge Caproni in the Southern District of New York followed the approach of the First and Sixth Circuits, finding that the plaintiff failed to allege any injury.

Belcastro's initial complaint asserted that Burberry's outlet pricing misled him into thinking he was purchasing goods at bargain prices. The Court, holding that subjective disappointment was not actual injury, dismissed plaintiff's claims. Belcastro then filed an amended complaint adding two new injury theories. Belcastro alleged that deceptive pricing caused him to overpay for the outlet goods. He also claimed that he was tricked into purchasing products he believed were manufactured for "real" Burberry stores, but which were actually made-for-outlet products.

The Court rejected both new theories. The "price premium" theory failed because Belcastro did not allege he overpaid for the goods by any objective measure (as would be required to state a claim under such a theory). Instead, Belcastro claimed that he paid a premium because he did not get a shirt worth objectively *more* than the price he paid. This, the Court ruled, was not an injury.

Although the Court found Belcastro's allegations of injury based on the quality of the goods purchased to be "more promising," she dismissed them as inadequately pleaded. Belcastro did not explain how the outlet-only goods differed from the "mainline" goods plaintiff believed he was purchasing.

As noted, most of the supposed phantom discount outlet pricing suits have been brought in California, where state and federal district courts are constrained by state and federal appellate decisions rejecting Article III standing challenges. But, there now is a contrary emerging trend in other circuits. Given the conflict between the circuits, and because there is no sign that plaintiffs plan to stop filing these actions any time soon, whether plaintiffs in outlet pricing cases have standing to sue is an issue now ripe for Supreme Court review.

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