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Price Advertising Claims Make a Comeback – As Class Actions

In the 1950s and 1960s, many of the deceptive advertising cases brought by the Federal Trade Commission (FTC) and state attorneys general involved challenges to alleged "fictitious price advertising" by retailers. Indeed, the FTC determined that deceptive price advertising was so serious a problem (e.g., with respect to the alleged misuse of manufacturers' suggested retail prices and references to purported "former" higher prices that were in fact rarely or never charged) that, in 1964, it issued "Guides Against Deceptive Pricing" to assist retailers in compliance.[1]

Since the mid-1990s, legal challenges to allegedly "fictitious" price advertising all but vanished – until recently. This time around, however, enforcement actions are not coming from the FTC or state attorneys general, but from the private plaintiffs' class-action bar – particularly in California.

Briefly by way of background, the 1964 FTC Guides provide that a referenced "former" or "regular" price should be "the price at which the product was ***openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course***" of the retailer's business.[2] Notably, the FTC Guides do not require actual sales to occur at the referenced price – rather only the bona fide offering of the goods at that price for a recent, "reasonably substantial" period of time.

More than 40 states followed the FTC's 1964 lead in enforcement, passing legislation or adopting regulations dealing with price advertising. Many copied the FTC Guides' general language. Some, though, adopted requirements that were more detailed and stringent. Examples include the following:

- New Jersey requires disclosure of an end date for the sale-price offer and either proof that the advertised former price was in effect for 28 days immediately prior to the start of the advertised sale or a statement as to when in the past the higher price was in effect;[3]
- Missouri imposes a presumption that an advertised former price is fictitious unless 10 percent of actual sales were made at that price for at least 30 days, including the date of the advertisement;[4]
- In Massachusetts, one of the alternative tests for proving compliance requires a showing of 40 percent of sales of the advertised item at the advertised "former" price during the six months immediately prior to the sale;[5]

[1] 16 CFR § 233, effective Jan. 8, 1964.
[2] *Id.*
[3] N.J. Admin. Code Tit. 13. §45.A-9.3 & 9.6.
[4] Mo. Code Regs. Ann. 15. §60-7.060(2).
[5] Mass. Regs. Code 940 § 6.05(4).

- Oregon requires that the former higher price must have been in effect for the 30 days immediately preceding the first date the reduced price is advertised;[6]
- Washington's "industry-wide guidelines" issued in connection with a consent order require that advertised discounts off of "regular" prices may not be advertised "unless 20 percent of the total sales for that item were at the 'regular' price, and the item was offered at the 'regular' price at least 60 percent of the time.";[7] and
- California requires that the higher "former" price must have been the "prevailing market price" during the preceding 90 days, unless an earlier time period is "conspicuously stated in the advertisement."[8]

This hodgepodge of differing legal requirements makes it necessary for a multi-state retailer – including any online retailer– to adopt the advertising requirements of the most restrictive state if it wants to ensure compliance nationwide.

After a long period of active federal and state enforcement, regulatory actions by the FTC and state attorneys general slowed dramatically in the 1990s; today such actions are relatively rare, even in the states where attorneys general historically were most active. The reasons are not fully clear. However, one might surmise that it is not politically expedient to bring suits challenging what might be bargains for consumers. Moreover, with the growth of the Internet and mobile technology, many consumers can quickly compare prices – even while standing in a physical store – to ascertain whether an advertised "sale" price is in fact a bargain. Whatever the reason, the absence of regulatory enforcement in recent decades may have led some retailers to let down their guard in complying with some of the more stringent state regulatory requirements.

Nevertheless, the FTC Guides and the state statutes and regulations are still in effect, and most recently have become the basis for a growing number of consumer class actions instituted against retailers allegedly failing to comply with a particular state's price-advertising requirements. In a number of cases, the class-wide claims asserted by the plaintiffs have been dismissed for lack of evidence that issues common to the class members predominated over individual issues. For example, there are a number of reasons why a consumer may purchase a particular product at a given price other than an advertisement that the product is "on sale." Absent a reason to believe that the advertised price reduction as distinguished from the actual selling price was a material factor in the purchasing decision for each purchaser (and without having to examine each class member as to his/her motivation for making the purchase), the class allegations should fail. California federal and state courts, however, have interpreted certification requirements more liberally over the past few years, which may have propelled the institution of the most recent round of suits in California.

In addition to the above developments, a parallel phenomenon occurred this year with respect to "outlet" stores. In January 2014, four members of Congress (Sens. Sheldon Whitehouse, D-R.I., and Richard Blumenthal, D-Conn., and Reps. Ed Markey, D-Mass., and Anna Eshoo, D- Cal.), sent a strongly worded letter to the FTC. The letter referred to a perceived increase in made-for-outlet merchandise that never is offered for sale in traditional retail stores, and claimed both that the outlet-specific merchandise is at times of inferior quality, and that outlet retailers do not distinguish between merchandise manufactured exclusively for outlets versus merchandise produced for sale in traditional retail stores. The letter also asserted: "it is a common practice at outlet stores to advertise a retail price alongside the outlet store price — even on made-for-outlet merchandise that does not sell at regular retail locations. Since the item was never sold in the regular retail store or at the retail price, the retail price is impossible to substantiate. We believe this practice may be a violation of the FTC's Guides Against Deceptive Pricing (16 CFR 233)."

In the wake of the release of this January 2014 letter, we are aware of at least five class action lawsuits filed under California's consumer protection laws against national retail chains operating retail outlet stores in which the complaints rely, in large part, on the allegations contained in the legislators' letter. And plaintiff's counsel in one of the cases announced that more suits are forthcoming.

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[6] Ore. Admin. Rule 137-020-0010(6).
[7] Wash. Atty. Gen. Press Release, July 25, 1996.
[8] Cal. Bus. & Prof. Code §17201.

The tide has turned on price-advertising litigation. It is back in vogue, both for regular retailers and operators of outlet stores. Now is a good time to review your price advertising practices—particularly if you have physical locations or online sales in California.

This *GT Alert* was written by **Irving Scher** and **Ed Chansky**. Questions about this information can be directed to:

- Irving Scher | +1 212.801.9321 | scheri@gtlaw.com
- Ed Chansky | +1 702.599.8016 | chanskye@gtlaw.com
- Or your Greenberg Traurig attorney

Albany
+1 518.689.1400

Amsterdam
+31 (0) 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

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+1 312.456.8400

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+1 302.661.7000

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+1 954.765.0500

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+1 713.374.3500

Las Vegas
+1 702.792.3773

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+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2 369 1000

Shanghai
+86 (21) 6391.6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3 636 6000

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900

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