DON'T LET STRIKE-THROUGH PRICING STRIKE OUT YOUR DTC WEBSITE: COMPARISON PRICING IS EFFECTIVE, BUT CARRIES RISK

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US Litigation and Dispute Resolution Alert

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As consumer brands look to expand direct-to-consumer (DTC) sales, they often seek to distinguish their online stores through comparison or strike-through pricing on a product display page where a higher reference price is listed, crossed out, and the “discounted” lower price is listed next to it. This is a great marketing tool, as it makes the price reduction more tangible to the customer. We all love to feel like we are getting a good deal.

The problem is that sometimes these promotions can be portrayed as misleading to consumers and even illegal under applicable law. To make matters more complicated, determining which law applies in this area is not straightforward, as both federal regulations and state statutes may apply, with material differences across jurisdictions. Not surprisingly, California has become a hotbed for these types of misleading pricing claims, which are typically asserted as class-action lawsuits.

WHAT IS COMPARISON PRICING?

Comparison pricing, also referred to as strike-through pricing or reference pricing, is a popular marketing technique where a product's current, discounted price is listed beside that product's regular, former price with a line through it. In other words, the product is advertised as “on sale” or discounted from its former price by means of a visual comparison of the past and current price. Comparison pricing is regulated by both federal and state laws addressing deceptive sale pricing.

FEDERAL REGULATIONS

Section 233.1 of the Federal Trade Commission's (FTC) *Guides Against Deceptive Pricing* addresses “Former price comparisons,” also known as comparison pricing.[1] Specifically, the authority requires that the former price on a comparison pricing advertisement—the price listed with a line through it— be (1) the “actual, bona fide price” (not an artificial, inflated price) and (2) offered to the public both “on a regular basis” and for a “reasonably substantial period of time.”[2] Neither “actual, bona fide price” nor “reasonably substantial period of time” are defined. The authority also explains it is deceptive to temporarily raise the regular price of a product in order to support a claim that an item is discounted when the price is subsequently lowered.[3]

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STATE REGULATIONS

In addition to federal regulations, many states have enacted state-specific regulations. Some states require, for example, that the former price in a comparison advertisement be the price at which the seller (1) made a *substantial number of sales* in the recent, regular course of business; or (2) advertised in good faith for a reasonably *substantial period of time* in the recent, regular course of business. What constitutes "substantial" is often a fact-specific inquiry, the scope of which may differ from state to state. For example, Virginia defines "substantial sales" in this context as a "substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison price in the supplier's trade area."[4] In Missouri, however, there is a rebuttable presumption that a seller has not complied with the requirement that the former price be a price at which "reasonably substantial sales of the product were made" *unless* the seller can show sales of 10% or more of the total sales of the product not less than 30 days and no more than 12 months from the time of the advertisement.[5]

Other states specifically regulate the *length of time* an item must be offered at a regular price before it can be placed on sale and used in comparison. To comply with these statutes, a seller must offer an item at a regular price for a specific period of time in close proximity to the promotional period. Oregon, for example, requires that products sold at a promotional price be sold at the regular price within the preceding 30 days of the advertisement (or another time which is specifically identified).[6] In New Jersey, an advertiser may not use a fictious former price, i.e., a price that an advertiser cannot prove was offered for at least 28 days out of the immediately preceding 90 days on a rolling basis.[7] Additionally, in Connecticut, comparison pricing is considered deceptive unless (1) the former price is the price used by the seller in the last 90 days, or (2) the advertisement discloses the time when sales at the former price were made.[8]

ENFORCEMENT: FEDERAL AND STATE REGULATIONS

Brands and retailers that fail to comply with these federal and state regulations may face enforcement penalties and consumer litigation. On the federal side, while FTC guidelines have not recently been enforced, it is possible that the FTC may increase its enforcement activities under the new Trump administration.

Litigation based on state regulations is far more common. Recently, there has been a rise in litigation—including both preliminary demand letters and formal lawsuits—stemming from the violation of laws surrounding comparison pricing.

For example, in Oregon in 2023, in *Clark v. Eddie Bauer LLC*, a plaintiff alleged that Eddie Bauer violated Oregon's Unlawful Trade Practices Act (UTPA) by advertising garments as "40% to 70% off" a list price that had never existed.[9] The Oregon Supreme Court held that the consumer had suffered an "ascertainable loss" under the UTPA—meaning she could bring the action against Eddie Bauer—because if she had known the advertised former price was misleading, she would not have purchased the product.[10]

Additionally, in *Gattinella v. Kors*, Michael Kors was sued for advertising discounts in its outlet stores off supposed former market prices, when, in reality, it had never sold at those prices.[11] The company was also accused of falsely comparing inferior products manufactured exclusively for its outlet stores to different products sold in its regular retail outlets. Ultimately, Michael Kors agreed to create a US$4.875 million settlement fund and pay US$975,000 in attorneys' fees to resolve allegations.[12]

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CALIFORNIA LAW AND ENFORCEMENT

As most brands are aware, California has strong consumer protection laws. Notably, California operates under the California Business and Professions Code § 17501, which was designed to prevent deceptive pricing practices.[13] In a comparison advertisement, two things must be true under this statute:

1. The former price must be the *prevailing market price*, and
2. The former price must have been the prevailing market price *within three months* prior to the publication of the advertised price (or some other disclosed period).

Courts in California have consistently enforced this statute. For example, in 2014 in *People v. Overstock.com, Inc.*, Overstock was sued by state regulators for deceptive advertising. A California court issued a US$6.8 million judgment for civil penalties, finding that Overstock engaged in comparison advertising and holding that it made false and misleading representations about the advertised prices of its products.[14] The court also imposed an injunction, which, in part, required Overstock to make a good faith effort in determining the prevailing market price and set a 90-day limit on the advertised former prices.[15]

Additionally, in 2015 in *Spann v. J.C. Penney Corp.*, a class action was brought against J.C. Penney for violating the California Business and Professions Code § 17501.[16] Specifically, plaintiffs complained that the company's advertising was deceptive because the advertised regular price of a product was not the "prevailing retail price" of that product for the preceding three months.[17] J.C. Penney settled for US$50 million.[18]

California courts continue to address this issue today. For example, in May 2023, a class action was filed against Shade Store, LLC, a manufacturer and seller of window covering products, for deceptive advertising based on the use of fake prices and discounts.[19] While litigation remains ongoing, in June 2024, the court denied Shade Store's motion to dismiss, reasoning the allegations were sufficient to establish that the reference pricing and sales were likely to deceive a reasonable consumer.[20]

In May 2024, a class action was brought against La-Z-Boy, a retailer and manufacturer of furniture and home décor products, for using strike-through pricing to mislead consumers into believing they were receiving a substantial discount.[21] In November 2024, the US District Court for the Central District of California denied La-Z-Boy's motion to dismiss, reasoning the complaint was sufficiently detailed, showing both that strike-through pricing was used and that the strike-through benchmark prices were rarely, if ever, the sale price.[22] Litigation in this case remains ongoing.

Similarly, in June 2024, a class action was brought against FullBeauty Brands Operations LLC (the owner of plus-size fashion company "Eloquii") for Eloquii's comparison advertisements based on alleged falsely inflated former prices.[23] In January 2025, the US District Court for the Northern District of California denied Eloquii's motion to dismiss on the claim based on California Business and Professions Code § 17501, and the litigation remains ongoing.

Generally, in addition to these cases, there are hundreds of other cases that have settled before filing or just after being filed.

Ultimately, strike-through pricing is an effective marketing strategy. However, brands and retailers must be cautious to avoid being accused of misleading pricing, which can be costly, time-consuming to dispute, and lead to negative media attention.

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WHAT CAN YOU DO TO MITIGATE RISK?

- Clearly state the basis of the strike-through price on the product display page—for example, by indicating that the strike-through price refers to the list price or the manufacturer's suggested retail price.
- Do not show fake discounts by artificially raising the strike-through price to make the deal look better.
- Limit promotion periods and return the pricing back to the higher price point at the end of promotional period.
- Regularly review your website to make sure reference pricing does not get outdated.
- Keep detailed and accurate records of past pricing and promotional periods in order to be able to defend and substantiate former pricing.
- Educate employees in charge of pricing on your DTC website.

We closely monitor developments related to strike-through pricing on both federal and state levels. We can assist you in adapting your advertising strategy to ensure your company remains in compliance.

FOOTNOTES

[1] *See* 16 C.F.R. § 233.1.

[2] *See id*. § 233.1(a).

[3] *See id*. § 233.1(b).

[4] *See* VA. CODE ANN. § 59.1-207.40.

[5] *See* MO. CODE. REGS. tit. 15 § 60-7.0609(2)(B)(1).

[6] *See* OR. ADMIN. R. 137-020-0010(6).

[7] *See* N.J. ADMIN. CODE § 13:45A-9.6.

[8] *See* CONN. AGENCIES REGS. § 42-110b-12a.

[9] 371 Or. 177, 532 P.3d 880, 882–83 (2023).

[10] Id. at 891–93 (reasoning if the “plaintiff paid money … for articles of clothing that she would not have bought had she known their true price history,” then “[t]he money that [the] plaintiff is out as a result is her 'loss'”).

[11] No. 14CV5731, 2016 WL 690877, at *1–2 (S.D.N.Y. Feb. 9, 2016).

[12] *Id*. at *3.

[13] *See* CAL. BUS. & PROF. CODE § 17501.

[14] No. RG10546833, 2014 WL 657516, at *1, 36–39 (Cal. Super. Feb. 05, 2014).

[15] *Id*. at *34–36.

[16] 307 F.R.D. 508 (C.D. Cal. 2015).

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[17] *Id*. at 513.

[18] The State of California also filed a related lawsuit in October 2017 against J.C. Penney alleging it sold products online by means of misleading, deceptive, or untrue statements regarding the former prices of those products. The state sought both civil penalties and declaratory and injunctive relief against J.C. Penney. This lawsuit, including the California Court of Appeals' 2019 decision to deny J.C. Penney's demurrer (questioning the sufficiency of the state's complaint against them), ultimately drove the settlement. *See People v. Superior Ct. (J.C. Penney Corp.)*, 34 Cal. App. 5th 376, 416, 246 Cal. Rptr. 3d 128, 160 (2019) (issuing writ of mandate for trial court to deny demurrer).

[19] *See* Crowder v. The Shade Store, LLC, 5:23-cv-2331 (N.D. Cal. 2023).

[20] *See* id.

[21] *See* Jacobs v. La-Z-Boy Inc., No. 2:24-cv-4446, 2024 WL 5194976 (C.D. Cal. 2024).

[22] *See* id. at *3–5.

[23] *See* Broomes v. FullBeauty Brands Operations, LLC, 3:24-cv-3558 (N.D. Cal. 2024).

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