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Practical Guidelines for Retailers Seeking to Avoid E-Commerce Marketing Class Actions

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By *Daren S. Garcia* and *Steven A. Chang* on April 11, 2016

Everyone loves a good deal—especially one discovered from the comfort of their own home. It comes as no surprise, then, that retailers that have seen declining profits in traditional brick and mortar stores have turned to the internet to drive consumer sales.^[i] A May 28, 2015, U.S. Census Bureau report found that e-commerce sales for U.S. retailers were \$261 billion in 2013, an increase of 13.6% from the previous year. And according to a handful of digital research marketing firms, that number is expected to nearly double in the next two years, with a projected \$414.0 to \$491.5 billion in e-commerce sales expected by 2018.^[ii]

The e-commerce boom is not without its challenges, however. A recent article published by the *New York Times* on March 6, 2016, illuminates the difficulties that both retailers and consumers face in the ever-expanding world of electronic retailing.^[iii] As retailers gain easier access to consumers online, so too do their competitors—driving fierce competition for the lowest price available on the next Google search. As Larry Compeau, a professor at Clarkson University, remarked in the article, “[e]veryone expects a deal on the web . . . nobody wants to pay retail.”^[iv] Retailers’ efforts to satisfy consumer demands for deals, sales, and value, have led some to criticize online marketing practices, with a growing wave of allegations that “[s]ome sellers are . . . willing to deceive consumers to make a sale.”^[v]

These allegations come on the heels of the wave of class-action lawsuits that followed the highly-publicized 2014 letter by several senators to the Federal Trade Commission (FTC) requesting that the FTC address what the senators perceived to be deceptive and unfair marketing practices at retail store outlets. The letter criticized outlet stores’ growing practice of selling items exclusively manufactured for outlet stores and suggested that outlet retailers’ routine practice of tagging items with a comparison “retail price” potentially violated the FTC Act, as well as the FTC’s Guides Against Deceptive Pricing. Class action lawsuits soon followed, asserting claims under both federal law

and state law, such as the California Unfair Competition Law (UCL), False Advertising Law (FAL) and the Consumer Legal Remedies Act (CLRA).

Although the initial flurry of lawsuits focused mainly on alleged deceptive pricing practices at outlet stores, it was not long before non-outlet retailers received similar scrutiny. Over the past two years, several lawsuits have been filed challenging retailers' bargain advertising methods, including the use of internet or e-mailed promotional material. Allegations of potentially false or deceptive internet and e-mail strategies include, but are not limited to: (1) "price anchoring," a term generally referring to the advertising of products for sale below a manufacturer or nonretail-distributor suggested retail price; (2) "perpetual sales," on the same advertised merchandise that seemingly do not end, giving rise to allegations that the sales price is, in fact, the original price; (3) deceptive "former" or "comparison" pricing that either is not based on an actual former price offered by the advertiser or does not actually reflect a true market-value price, i.e., the so-called "phantom markdown"; and (4) the use of internet or e-mailed promotional materials that advertise wide-spread discounts, but with "fine print" that excludes particular items when customers actually visit the website or retail store. If the last few months are any indication, lawsuits challenging these practices will only continue to increase in number.

This article reviews the various types of recent advertising-based claims that could be extended to online marketing strategies, provides a general overview and analysis of the FTC's guidance on avoiding claims of deceptive pricing and commonly-used state laws for enforcing the same, and provides tips to assist online retailers in avoiding advertising-based claims arising from their e-commerce marketing efforts.

Where it started: the outlet cases

Commentators have traced the recent rise of class action lawsuits against retailers to a letter from four senators to FTC Chairwoman Edith Ramirez on January 30, 2014, recommending that the Commission "investigate deceptive and unfair marketing practices at outlet stores[.]"^[vi] Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), broadly prohibits all persons from undertaking "unfair or deceptive acts or practices in or affecting commerce." Pursuant to this provision, the FTC is tasked with curbing practices it deems to be unfair and/or deceptive.

In the letter, the senators noted that "[h]istorically, outlets offered excess inventory and slightly damaged goods that retailers were unable to sell at regular retail stores. Today, however, some analysts estimate that upwards of 85% of the merchandise sold in outlet stores was manufactured exclusively for these stores."^[vii] The letter further accused outlets as having "engaged in deceptive reference pricing," by "advertis[ing] a retail price alongside the outlet store price – even on made-for-outlet merchandise that does not sell at regular retail locations."

The plaintiffs' bar was quick to act. Within the next year, numerous putative class action lawsuits were filed throughout the country against retailers with popular outlet stores. The lawsuits asserted claims under both federal law and state laws such as California's UCL, FAL, and CLRA. A common theme in these lawsuits was that the outlets had allegedly engaged in deceptive practices by advertising markdowns on products that were manufactured specifically for outlet stores and were never offered for sale at full-price retail locations. Simply because a customer was shopping at an "outlet," several plaintiffs claimed, the customers' expectation was that the store would contain out-of-season or overstock products, which resulted in a reduced sales price over products offered in full-price retail stores.

While some claim these cases were unique to outlets, the cases also challenged several more broadly used marketing practices, such as comparison and value pricing. It did not take plaintiffs long to realize that similar marketing strategies are used by retailers at non-outlet locations and online, prompting additional class action lawsuits in more recent months.

e-commerce marketing – TRENDS IN Pricing-Based Claims

In the last year, several putative class actions have been filed against non-outlet retailers, focusing on similar “compare at” pricing both in brick and mortar stores and online, as well as alleged “phantom markdowns,” including, but not limited to, perpetual sales of allegedly arbitrarily-priced items. These challenged marketing strategies have proliferated with the growth of e-commerce, as retailers have increasingly turned to online advertising as well as e-mail solicitations in an attempt to direct customers’ attention to limited-time deals on their websites.

Below is a summary of common e-commerce advertising strategies that have seen increased scrutiny by plaintiffs, commentators, and consumer advocate groups.

Former Price Reductions and Market Value Comparisons

Former price reductions or comparisons, a technique that the FTC refers to as “[o]ne of the most commonly used forms of bargain advertising,”^[viii] is one of the most common bases for alleged deceptive advertising claims.

Immediately following the senators’ 2014 letter to the FTC, a number of class action lawsuits filed against outlets focused on what plaintiffs alleged to be “former” price reductions or comparisons that never actually existed. Specifically, these cases challenged outlet stores’ practices of selling merchandise exclusively to outlet stores, and then marking these products with “compare” price tags that allegedly overstated and did not represent the actual price at which the outlet formerly sold the products. These lawsuits alleged that plaintiffs were led to believe that these products were *actually* offered at non-outlet stores when, in fact, such items were never sold at the comparison prices advertised on the merchandise. Thus, retail outlet stores allegedly created an “illusion” of bargain discounts on products made specifically for outlets that were never intended to be sold at non-outlet stores.

Recently, plaintiffs have expanded this theory beyond outlet store-specific situations. Several class actions filed against non-outlet retailers have asserted claims involving alleged “phantom markdowns” on products online (and in traditional stores) based on “original” prices that were allegedly never actually offered. As just one example, in *D’Aversa v. J. Crew Group, Inc.*, filed in the Southern District of New York on March 1, 2016, plaintiffs assert that defendants’ use of a “valued at” price for items offered for sale online was “illusory,” because defendants never allegedly “sold, or even offered for sale, [the item] at the listed ‘valued at’ price.”^[ix] The plaintiffs go further in *D’Aversa* by alleging that the defendants’ use of successive sales on its website results in fictitious “reduced” prices, which actually “constitute the everyday, regular prices of the items.”^[x] *D’Aversa* is unique in that it appears to be the first lawsuit following the outlet cases that rely exclusively on the retailers’ online marketing practices and website for plaintiffs’ claims.

Notably, plaintiffs' claims in *D'Aversa* rest upon their assumption that a "valued at" price is a *former price comparison* rather than a *market value comparison*, which, as explained below, are two separate forms of advertising under the FTC's Guides. At least two federal courts, the Southern and Central Districts of California, have dismissed similar claims that a "Compare At," or "Compare To," advertisement is deceptive, holding that a reasonable consumer would not believe that a comparison price was a former price at which the retailer actually sold the items, but rather, represented a market-value comparison for like items of similar grade and quality.^[xi]

"Price Anchoring" – List Prices of Manufacturers and Non-Retailer Distributors

Another common retail advertising method is the use of a "list price," which is a suggested price, reference price, or manufacturer's suggested retail price, alongside a lower price offered by the retail seller.^[xii] A recent *New York Times* article noted that "list prices are even more important" for retailers selling merchandise online. While "[o]ffline retailers need blowout sales to draw traffic due to the costs of visiting a store . . . [o]nline retailers don't use blowout sales since it's so easy to shop there."^[xiii] As a result, price comparisons, such as "list prices," are more heavily relied upon by online retailers. This technique has sometimes been negatively referred to as "price anchoring," where shoppers use and rely on list prices to determine whether they are receiving a good value, but, the prices might have no real bearing on the actual market value of the item or the standard price at which it is sold. Recently, the use of list prices has faced increased criticism and legal challenges, particularly for items that are sold online.

Perpetual Sales – the "Limited Time" Offer or "High-low" Promotional Pricing

A number of retailers are facing new class action lawsuits based on alleged permanent online sales resulting in what has been dubbed "phantom markdowns." These new class actions argue that, because these online sales never *actually* end, the advertised prices are not, in fact, "reduced" at all, but instead constitute the original price intended to be sold by the advertiser. This advertising method is sometimes referred to as "high-low" promotional advertising, but when overzealously used, can lead to deceptive advertising claims.

As a recent example of this type of claim in the e-commerce context, in *D'Aversa v. J. Crew Group, Inc.*, plaintiffs asserted that defendants' alleged use of repeated, successive sales resulted in "reduced" prices that were, in reality, defendants' regular prices. Specifically, plaintiffs pointed to defendants' use of single-day sales where everything on their website was advertised—typically using a brightly-colored banner at the top of the website page—at a certain percentage off. Plaintiffs cite to one example where a 24-hour "30% off" sale on the retailers' website was immediately followed by a "50% off" sale for an additional 24 hours. Plaintiffs allege that defendants' use of "another similar, albeit slightly different sale . . . [results in a] series of successive sales [that] continues *ad infinitum*, such that all of the items of Defendants' website are always 'on sale' and offered to the public at a purported discount[.]"^[xiv] Plaintiffs further allege that this type practice violates 16 C.F.R. § 233.1—the "Former Price Comparisons" section of the FTC's Guides—which generally prohibits non-*bona fide* former price reductions or comparisons. The matter is still pending.

General Sales Advertising with Exclusions in Fine Print

Some class action lawsuits have also raised challenges to general advertising techniques used on retailer websites or through e-mail advertising campaigns, such as advertisements promoting sales for “30-70% off the original prices each and every day,” without specifying what items are actually on sale, or setting forth certain exclusions in fine print. Some plaintiffs have alleged that these advertising techniques are false and misleading because consumers are led to believe that *all* items for sale online or in-store are on sale, when, in fact, they are not. Although these allegations have had limited success—and have been dismissed in some cases on standing grounds—they will likely continue to provide fodder for class counsel in future cases.

federal GUIDANCE – the ftc guides against deceptive pricing AND THE “RULES OF THE ROAD” FOR advertising on the internet

Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), broadly prohibits “unfair or deceptive acts or practices in or affecting commerce.” In 1964, the FTC first released its Guides Against Deceptive Pricing codified in the Federal Code of Regulations, 16 CFR 233.1, *et seq.*, to help marketers avoid engaging in deceptive pricing advertising.

In December of 2000, coinciding with the rising popularity of the Internet, the FTC published additional guidance on entitled “Rules of the Road For Advertising on the Internet.” The “Rules of the Road” reminds advertisers that “[t]he FTC Act prohibits unfair or deceptive advertising in any medium,” and that advertisements must be:

- Truthful and not deceptive or misleading;
- Substantiated, in that advertisers or marketers must have evidence to back up their claims or representations, whatever they may be;
- Not unfair, meaning generally that the advertisement or claim cannot cause “substantial” injury that is “outweighed by other benefits,” and “not reasonably avoidable.”^[xv]

The Rules of the Road, however, contain little additional guidance regarding pricing. For that, marketers must still look to the Guides Against Deceptive Pricing. Although the FTC Act does not create a private right of action for individuals, and thus the Guides isn’t necessarily binding with respect to private claims against advertisers or marketers, courts in California, and several other states, have increasingly looked to the Guides as helpful guidance, particularly when claims under state law depend on a determination of what a “reasonable consumer” would believe.

The FTC Guides separates pricing advertising into five separate categories: (1) former price comparisons; (2) “retail” or “comparable value” comparisons; (3) advertising “list” prices established by manufacturers or nonretail distributors; (4) “bargain offers” based on the purchase of other merchandise; and (5) “miscellaneous price comparisons,” a catchall category, including, without limitation, advance sales or “limited” time offers.

Former Price Comparisons – 16 CFR § 233.1

Former price comparisons are a form of bargain advertising generally defined as “offer[ing] a reduction from the advertiser’s own former price for an article.”^[xvi] A reduction of the advertiser’s former price is a “legitimate basis for the advertising of a price comparison,” if the former price was: (1) an actual, *bona fide* price (not a price established for the sole purpose of a later reduction); (2) offered to the public; (3) on a regular basis; and (4) for a reasonably substantial period of time.^[xvii]

According to the Guides, a former price is “not necessarily fictitious merely because no sales at the advertised price were made,” however, in such a case the marketer must have offered the price “honestly and in good faith”—and “not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based.”

Section 233.1 goes on to set forth examples of fictitious price comparisons, which include:

- Using a former price that was never offered for the article at all;
- Using a former price that was not used in the “regular course of business”;
- Using a former price that “was not used in the recent past, but at some remote period in the past,” without disclosing that fact;
- Using a former price that was not “openly offered to the public,”
- Using a former price that was not “maintained for a reasonable length of time, but was immediately reduced.”

With respect to the last example, the Guides do not define what the FTC considers to be a “reasonable length of time.” Some states, such as California, have defined it as three months or longer.^[xviii] Retailers should look to the state statutes and common law of their respective markets for additional guidance.

Lastly, the Guides cautions that if a former price is set forth in the advertisement *generally* without reference to a specific former price, such as an ad that merely states “sale,” the reduction in price must be “sufficiently large [so] that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered.”

Retail Price Comparisons; Comparable Value Comparisons – 16 CFR § 233.2

Another common form of advertising addressed by the Guides is “retail” or “comparable value comparisons.” A retail comparison is defined as a “form of bargain advertising . . . offer[ing] goods at prices lower than those being charged by others for the same merchandise in the advertiser’s trade area[.]”^[xix] For a comparative value price to be legitimate it must: (1) be based upon fact, and not fictitious or misleading; and (2) the higher price must not exceed “the price at which substantial sales of the article are being made in the area,” meaning that there must be “a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or savings.”^[xx]

A closely-related form of advertising is “comparable value comparisons,” defined as a “reduction from the prices being charged either by the advertiser or by others in the advertiser’s trade area for other merchandise of like grade and quality[.]”^[xxi] Such advertising is not deceptive if: (1) “it is made clear to the consumer that a comparison is being made with other merchandise”; (2) the merchandise is actually of similar quality and obtainable in the area advertised; and (3) the price of the comparable merchandise

“does not exceed the price at which such merchandise is being offered by representative retail outlets in the area.”

Retail Prices Suggested by Manufacturers or Nonretail Distributors – 16 CFR § 233.3

The FTC Guides also addresses the use of a manufacturer's list price, or suggested retail price, alongside the retailer's for a particular product. The FTC Guides cautions that there has been “a widespread failure to observe manufacturers' suggested or list prices, and the advent of retail discounting on a wide scale, have seriously undermined the dependability of list prices as indicators of the exact prices at which articles are in fact generally sold at retail.”^[xxii] Thus, if a list or suggested retail price does not actually “correspond to prices at which a substantial number of sales” of the product are made, then comparing the retailers' price with the list price may be deceptive.^[xxiii]

For a comparison of the retailers' price and the list price to be legitimate, the list price should be “the price at which substantial . . . sales are made in the advertiser's trade area,” and this general principle applies “whether the advertiser or manufacturer is national or regional[.]”^[xxiv]

Bargain Offers Based Upon The Purchase of Other Merchandise – 16 CFR § 233.4

The FTC Guides recognizes “bargain offers,” occurring when “advertisers choose to offer bargains in the form of additional merchandise . . . on the condition that he purchase a particular article at the price usually offered,” as a legitimate form of advertising.^[xxv] An advertiser may not, however: (1) increase the regular price of the article that is required to be bought; (2) decrease the quantity or quality of the article; or (3) attach strings other than that the article be purchased.^[xxvi]

Miscellaneous Price Comparisons – Advance Sales, “Limited” Time Offers, and Other Categories – 16 CFR § 233.5

The final section of the FTC Guides is a catchall section stating that, although there are many variations of pricing comparison and advertising techniques/methods, on a global basis, “the same general principles,” apply. Notably, this section specifically cautions advertisers against making a “limited” offer “which, in fact, is not limited,” or “offer[ing] an advance sale under circumstances where [the advertiser] does not in good faith expect to increase the price at a later date[.]”^[xxvii] This section is often cited in litigation challenging retailers' alleged “perpetual sale” of merchandise.

state law – california leads in advertising-BASED claims

California has seen the bulk of recent advertising-based claims against retailers under the state's broad consumer protection laws. California has enacted several statutes that have been a wellspring of false advertising class action lawsuits in recent years including the UCL, FAL and the CLRA.

Statutory Provisions

California's FAL generally prohibits “unfair, deceptive, untrue, or misleading advertising.”^[xxviii] Although the FAL addresses deceptive advertising in several contexts, it specifically addresses price comparisons in Section 17501, which states, in relevant part:

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.^[xxix]

The Ninth Circuit Court of Appeals and other courts have interpreted the statute broadly, noting that “[t]he statute . . . encompass[es] not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.”^[xxx]

California’s UCL similarly prohibits false or misleading advertising, but in the context of viewing such conduct as an unfair business competition act or practice. The UCL generally prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”^[xxxi] Unique to the UCL, however, is that it “expressly incorporates the FAL’s prohibition on unfair advertising as one form of unfair competition.”^[xxxii] The result is that courts have interpreted any violation of the FAL as also a violation of the UCL.^[xxxiii]

The CLRA is a third California law that supplements both the FAL and UCL, and is aimed at protecting consumers from “unfair methods of competition,” as well as “unfair or deceptive acts or practices.”^[xxxiv] The CLRA expressly addresses advertising, and prohibits “[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.”^[xxxv]

The Reasonable Consumer Test

Federal courts interpreting California law have looked to a single standard in determining whether a particular advertising practice violates any of these three statutes—the “reasonable consumer.”^[xxxvi] To state a claim under any of the statutes, a plaintiff must plead that the alleged misrepresentations “are likely to deceive a reasonable consumer.”^[xxxvii] A “reasonable consumer” is generally defined as “the ordinary consumer acting reasonably under the circumstances.”^[xxxviii] In determining whether any particular advertisement is “likely to deceive” a reasonable consumer, the allegations must set forth “more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.”^[xxxix] Rather, it must be “probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.”^[xl]

Incorporating the FTC Guides into State Law

Recent decisions in California and other states have made clear that courts are likely to consider the FTC Guides in determining whether a particular practice is unreasonable, misleading, or deceptive, and this trend is likely to continue as such cases expand into the marketing practices of retailers online. Not only do some state statutes incorporate language similar to the FTC Guides into their provisions, but in jurisdictions (such as California) that rely on a “reasonable” consumer test, the FTC Guides often provide a starting point for courts in determining how a reasonable consumer would interpret a given advertisement.^[xli]

For example, in *Branca v. Nordstrom, Inc.* and *Rubenstein v. The Neiman Marcus Group, LLC*, two putative class actions filed in the Southern and Central Districts of California, plaintiffs challenged defendants' general practices of listing "Compare At" or "Compare To" prices on their products, arguing that these labels lead a reasonable consumer to believe that the comparison price was a former price at which the retailer actually sold the items. In both cases, the federal courts dismissed plaintiffs' claims, holding that a reasonable consumer would likely interpret "Compare At" or "Compare To" language as a comparable value comparison, not a former price comparison. Relying on the FTC Guides, both courts noted that the Guides distinguish between "former price comparisons," "retail price comparisons," and "comparable value comparisons," and the absence of any words such as "regularly," "formerly," or "reduced to," compelled the conclusion that a reasonable consumer would not interpret "Compare To" language as a former price tag.

Accordingly, although the FTC Guides may not have the force of law in certain jurisdictions with respect to state-law claims, retailers and marketers should look to the Guides as a reasonable starting point when evaluating the propriety of their e-commerce marketing plans, especially with respect to interpreting state laws that contain similar language or address similar price advertising methods.

Other States

Almost all other states have some form of deceptive advertising, unfair competition, or consumer protection laws that may be applicable to advertising claims in the e-commerce area. Although California has seen the most class action litigation to date due to its expansive consumer protection laws, retailers and marketers should be familiar with local state laws in any state in which they operate or advertise. Indeed, online retailers are potentially susceptible to efforts by plaintiffs to assert claims based on the laws of multiple jurisdictions. For example, in *D'Aversa v. J. Crew Group, Inc.*, plaintiffs brought the putative class action pursuant to the "consumer protection statutes and deceptive trade practices acts," of all 50 states and the District of Columbia, citing to approximately 65 separate laws.^[xliii]

APPLICABILITY TO E-COMMERCE ADVERTISING – GENERAL TIPS FOR AVOIDING DECEPTIVE ADVERTISING OR MARKETING CLAIMS

Although there are no hard rules for avoiding allegations of deceptive advertising in the e-commerce context, a review of the FTC's Guides, trends in recent advertising-based class-actions, and state law, can provide helpful guidance for online retailers to avoid such claims.

(1) Provide Additional Information. In terms of advertising or marketing on the internet, less is not necessarily more. The Guides make clear that a failure to provide information may be just as deceptive or misleading as conveying false information. The unique medium of the internet provides retailers with the opportunity to provide such additional information without losing value due to the potentially unlimited space on the internet—a luxury not necessarily enjoyed in traditional brick and mortar stores where such information may be limited to being placed on price tags or signs through the store.

(2) Be Specific. Is a "compare at" reduced price, for example, comparing the reduced price to a *former price* that was specifically offered by the retailer, the *estimated value* of the product to the same or similar products in the market, or a *suggested list or retail price* provided by a manufacturer or nonretail distributor? These distinctions can be material. Or, at least, purported consumer confusion can lead to deceptive advertising claims. As seen in the *Branca v. Nordstrom, Inc.* and *Rubenstein v. Neiman Marcus*

Grp., LLC cases, listing a comparison price without further information may lead to false advertising claims, with plaintiffs arguing that they believed—reasonably or unreasonably—that a comparison price was *actually offered* by the retailer as opposed to the general value of the product in the marketplace.

Providing additional information with respect to the basis of price comparisons may be sufficient to avoid such claims altogether. At the very minimum, more information is likely to deter potential plaintiffs from bringing false advertising claims. For example, if a retailer wishes to make a former price comparison as opposed to a market value comparison, using descriptive terminology such as “Formerly,” “Regularly,” or “Usually Sold At,” may be preferable to a “Compare At,” description, which can be interpreted as a market value comparison as opposed to a former price. Further, listing the *actual* former price may preclude false advertising claims. If the former price is not listed, under the FTC Guides, a retailer must show that the reduction is “sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered,” which is open to interpretation.^[xliii]

(3) Avoid Using List Prices That Are Never Offered. List or suggested prices have become a staple advertising technique for products sold on the internet. However, if no retailers are actually selling a particular product at the list price, this opens the door to false advertising claims. As a recent article by the New York Times aptly notes, “with many products online, you could not pay the list price even if you wanted to.”^[xliv] The FTC Guides are particularly skeptical of list prices, noting that “[t]oday, only in the rare case are all sales of an article at the manufacturer’s suggested retail or list price.”^[xlv] The Guides provide some guidance on this issue – a list price comparison is viable if the list price is not “significantly in excess of the highest price at which substantial sales in the trade area are made[.]”^[xlvi] Determining the “trade area” for sales made on the internet, however, can be difficult. The Guides notes that this principal applies regardless of whether the advertiser is national or regional. Thus, while using list prices may be a useful advertising technique for retailers, determining whether the list price is ever actually used is advisable prior to listing it on particular products.

(4) Avoid Consecutive Sales of the Same Product. Repeated, consecutive sales have been a hotly-contested issue and fertile ground for potential false advertising plaintiffs. Several retailers have come under fire for what is seen as “sales” of specific products that never end, leading plaintiffs to argue that the sale price is, in fact, the original price for such products. The recently filed case *D’Aversa v. J. Crew Group, Inc.*, is a good example of this. In *D’Aversa*, the retailers’ use of site-wide online sales in quick succession is the primary basis for all of plaintiffs’ claims in the lawsuit. Retailers should take heed that, although the FTC Guides do not define how long a “reasonably substantial period of time” is for purposes of having a valid former price comparison, jurisdictions such as California have statutorily defined such time as **up to three months**. Accordingly, it may be prudent for retailers to avoid repeated, duplicate sales of the same product in short timeframes to avoid allegations that the sale price is illusory.

(5) Be Able To Substantiate Value Comparisons. The FTC Act and Guides make clear that an advertised higher comparison price must be based upon fact, and in the context of comparable value comparisons, must not exceed the price at which substantial sales of a particular item are being made in the area (or, in the case of the internet, nationally).^[xlvii] Put simply, any advertised comparison value must be able to be substantiated by retailers, and the more information provided in any given advertisement that conveys the basis of the compare at price, the less likely a reasonable consumer could be confused by the comparison.

conclusion

Over the past two years, we have seen a rise in class action lawsuits brought against retailers for allegedly deceptive online advertising techniques. As these lawsuits make their way through the courts, retailers and marketers should closely monitor developments in case law and thoroughly analyze the legal implications associated with their respective online advertising to avoid unwanted class litigation.

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questions

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[i] For example, in the last major holiday shopping season—Black Friday and Cyber Monday—in-store sales were estimated to have declined by 4.7%-10%, but online sales boomed, setting a record as the largest online sales day ever at \$3.07 billion. <https://www.internetretailer.com/trends/sales/us-e-commerce-sales-2013-2017/>

[ii] <https://www.internetretailer.com/trends/sales/us-e-commerce-sales-2013-2017/>.

[iii] Streitfield, David, *It's Discounted, but Is It a Deal? How List Prices Lost Their Meaning*, The New York Times, March 6, 2016.

[iv] *Id.*

[v] *Id.*

[vi] Press Release, *Sens. & Rep. to FTC: Outlet Stores May Be Misleading Consumers*, <http://www.whitehouse.senate.gov>, January 30, 2014.

[vii] *Id.*

[viii] 16 CFR 233.1(a).

[ix] Complaint filed in *D'Aversa v. J Crew Group, Inc., et al.*, No. 1:16-cv-01590 (Mar. 1, 2016) (“D'Aversa Compl.”), ¶¶ 28-29.

[x] *Id.* at ¶ 44.

[xi] See, e.g., *Branca v. Nordstrom, Inc.*, No. 14cv2062, 2015 U.S. Dist. LEXIS 99157 (S.D. Cal. Mar. 19, 2015); *Rubenstein v. Neiman Marcus Grp, LLC*, No. 14-07155, 2015 U.S. Dist. LEXIS 55736 (C.D. Cal. Mar. 2, 2015).

[xii] Streitfield, David, *It's Discounted, but Is It a Deal? How List Prices Lost Their Meaning*, The New York Times, March 6, 2016.

[xiii] *Id.*

[xiv] D'Aversa Compl., ¶ 40.

[xv] <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road#general>.

[xvi] *Id.*

[xvii] 16 CFR 233.1(a)-(b).

[xviii] Cal. Bus. & Prof. Code § 17501.

[xix] 16 CFR 233.2.

[xx] 16 CFR 233.2(a).

[xxi] 16 CFR 233.2(c).

[xxii] 16 CFR 233.3(c).

[xxiii] 16 CFR 233.3(a).

[xxiv] 16 CFR 233.3(d).

[xxv] 16 CFR 233.4(a).

[xxvi] 16 CFR 233.4(b).

[xxvii] 16 CFR 233.5.

[xxviii] Cal. Bus. & Prof. Code § 17500.

[xxix] Cal. Bus. & Prof. Code § 17501.

[xxx] *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012).

[xxxi] Cal. Bus. & Prof. Code § 17200.

[xxxii] *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1103 (9th Cir. 2013).

[xxxiii] *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

[xxxiv] Cal. Civ. Code § 1770.

[xxxv] Cal. Civ. Code § 1770(a)(9).

[xxxvi] *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) (noting that “violations of the UCL, FAL, and CLRA are evaluated from the vantage point of a ‘reasonable consumer.’”).

[xxxvii] *Branca v. Nordstrom, Inc.*, No. 14cv2062, 2015 U.S. Dist. LEXIS 99157, at *14-15 (S.D. Cal. Mar. 19, 2015)

[xxxviii] *Davis*, 691 F.3d at 1161-62.

[xxxix] *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 967 (S.D. Cal. 2012).

[xl] *Id.*

[xli] See, e.g., *Branca v. Nordstrom, Inc.*, No. 14cv2062, 2015 U.S. Dist. LEXIS 99157 (S.D. Cal. Mar. 19, 2015); *Rubenstein v. Neiman Marcus Grp, LLC*, No. 14-07155, 2015 U.S. Dist. LEXIS 55736 (C.D. Cal. Mar. 2, 2015).

[xlii] D'Aversa Compl., ¶ 106.

[xliii] 16 CFR 233.3 (e).

[xliv] Streitfield, David, *It's Discounted, but Is It a Deal? How List Prices Lost Their Meaning*, The New York Times, March 6, 2016.

[xlv] 16 CFR 233.3 (c).

[xlv] *Id.*

[xlvii] 16 CFR 233.2(a).