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## Online Advertising

### LA City Attorney's Actions Against False Reference Pricing Target Online Sales

#### ONLINE ADVERTISING

A city attorney's recent lawsuits against well-known retailers over allegedly misleading sales price advertising are the latest in a trend of crackdowns focused on online advertising, Joseph Lewczak of Davis & Gilbert writes. Lewczak analyzes the trend and lists steps advertisers can take to avoid enforcement actions.



By JOSEPH LEWCZAK

In December 2016, the Los Angeles City Attorney's office filed civil lawsuits on behalf of the State of California against J.C. Penney Corporation Inc., Kohl's Department Stores Inc., Macy's Inc., and Sears Roebuck and Co.—four of the largest retailers in the U.S.—alleging that they engage in deceptive “false reference pricing” (also known as “deceptive price anchoring”) and that their sales “in significant part” have been the product of “unlawful, unfair, and fraudulent marketing and advertising practices.” These actions represent the latest in a trend of crackdowns on retail-

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ers for their pricing practices. Over the past couple of years there's been a large increase in these types of legal actions by state attorneys general, and more notably, a spate of class actions against Kohl's, J.C. Penney, The TJX Companies and others. This latest salvo is coming from a somewhat unexpected source and focusing on online advertising. It may be the signal of a trend that should have all advertisers worried.

**The Law.** Under California (as well as federal and most other states, in general) retailers are not permitted to advertise a former price of a product unless it was the prevailing market price within three months of the advertisement, or unless the date when the former price prevailed is clearly and conspicuously stated in the advertisement. Cal. Bus. & Prof. Code § 17501. California law also prohibits advertisements from making false or misleading statements of fact concerning reasons for, the existence of, or amounts of price reductions. Cal. Civ. Code § 1770(a)(13).

Violations of these provisions of the California Business and Professions Code can lead to civil penalties of up to \$2,500 per violation, as well as an additional \$2,500 per violation for those involving senior citizens or disabled persons, and finally, injunctive relief, all of which remedies and penalties are cumulative. Cal. Bus. & Prof. Code § 17203, 17206, 17534.5 and 17536.

It's interesting to note that these laws were enacted well over 40 years ago, when the internet wasn't yet even a remote consideration. However, the complaints in these actions focus heavily on advertising that took place online. The robustness of these laws prohibiting deceptive reference pricing, and indeed all deceptive

advertising laws, is such that they will continue to apply across all media, including online, mobile, in-app advertising and beyond.

**The Complaints.** The city attorney's complaints accuse the retailers of engaging in false reference pricing and misleading consumers by advertising a "sales price" alongside an allegedly inflated "original," "regular," "former" or "list" price to create what the city attorney's office characterizes as a false sense of value and to persuade customers to purchase their merchandise at an allegedly reduced "sale" price. In addition, the City Attorney asserts that J.C. Penney uses "false free offers" by advertising a product for sale as "Buy 1 Get 1 Free" or "Buy 1 Get 1 For A Penny," when in truth that product is never actually offered as a single item at what it contends is the false and inflated reference price. The complaints allege that each of the retailers advertises thousands of "sale" items at false reference prices.

The complaints relied heavily on the retailers online sales. As just two of a multitude of examples, the complaints allege, among other things, that:

- In February 2016, J.C. Penney's website advertised a maternity swim top with an "original" price of \$46 and a "sale" price of \$31.99, an alleged 30-percent discount. However, the purported "original" price of \$46 was a false reference price because J.C. Penney didn't offer the item for sale online for any more than \$31.99.

- In January 2016, Kohl's offered Belted Cargo Shorts for sale online for a reduced price of \$35.99 from an "original" price of \$60. However, the purported "original" price of \$60 was a false reference price because Kohl's didn't offer the item for sale online for more than \$35.99.

Without getting into the merits of the complaints, what's surprising here is not the fact that the actions were brought—they're part of the larger trend after all—but that they were brought by a local law enforcement official. Local officials typically stay out of national advertising (notable exceptions have always been the New York City Department of Consumer Affairs and, on occasion, local law enforcement officials in California), but this recent complaint by the LA city attorney could be part of a much larger emerging trend. In California, not only is the attorney general authorized to enforce state laws, certain local law enforcement officials are as well. In particular, the laws can be enforced by: a district attorney or a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance; a city attorney of a city having a population in excess of 750,000; a city attorney in a city and county; or, with the consent of the district attorney, a city prosecutor in a city having a full-time city prosecutor. Cal. Bus. & Prof. Code § § 17204 and 17205.

What we are also seeing here is that a smart law enforcement official is using limited resources to maximum effect. With online sales continuing to grow and, according to some reports, at least 80 percent of Americans doing some shopping online, the risk of online legal violations is growing. This is likely making law enforcement easier. Regulators can prove violations merely by checking periodically online and logging visits with screen shots, saving significant sums in investigation dollars.

With a new Republican president now firmly in place, there will likely be a change of enforcement priorities at the Federal Trade Commission and Republican-leaning states (although we have no clear idea yet of how such changes could impact advertising practices, if at all). On the other side of the equation, we have outspoken politicians in Democrat-leaning states vowing to protect the rights of their citizens when the federal government may not. In these circumstances, it seems likely that state and local officials will be filling the void. Expect more advertising-related challenges from local enforcement officials in California, New York and other states where consumer protection is a priority, and more of a focus on online violations.

**Key Takeaways.** The California actions highlight the importance of ensuring accurate pricing statements are presented in all advertising, and that a retailer's reference or anchor price is an accurate and, more importantly, legitimate, price. Some steps that advertisers can start doing to protect themselves:

- Review your pricing strategies. Perform a comprehensive analysis of how you compare prices to set discounts.

- Create a pricing policy that's in-line with what the law requires.

- Monitor your own compliance with the policy.

- Understand that you are now dealing with not only the typical list of third parties that could take legal action against allegedly deceptive advertising practices—the FTC, state attorneys general, competitors and self-regulatory organizations (CARU, the NAD and the television networks)—but also local officials, who are likely to take a different, and potentially more aggressive, approach in dealing with an alleged violation.

- Don't forget that online is as important as brick and mortar, and this includes advertising on social media. Treat this media as seriously as your in-store activities.

While retailers may have thought the recent spate of class actions and other regulatory enforcement of price advertising may have been the last word, it appears that this issue is not going away any time soon.