
retail

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Dear Retail Clients and Friends,

In January, the Superior Court of the State of California issued a decision in the California attorney general's long-standing case against Overstock.com related to the retailer's use of comparative price advertising on its e-commerce website. This edition of ***Morgan Lewis Retail Did You Know?*** describes the decision and its potential impact on retailers.

Background

One area of advertising that has been subject to increased attention over the last several years is retailers' use of comparison prices or advertised reference prices (ARPs) when advertising the comparative savings or discount available. For instance, retailers often advertise the percentage or dollar amount off of a "regular" price or may invite their customers to "compare" the retailer's own former price or to a higher price offered elsewhere. Many states have detailed laws and regulations regarding the use of ARPs, and the Federal Trade Commission (FTC) has issued regulatory guidance on the topic. The regulations and laws in this area have become more important with the growth of e-commerce.

The lawsuit against Overstock was originally filed in November 2010 and was brought by seven Northern California district attorneys. The complaint alleged that the price comparisons advertised on Overstock.com were deceptive and falsely led consumers to believe that they were obtaining products at significant discounts from prices available elsewhere. We reported on the lawsuit at the time it was filed.

The Decision

After a lengthy bench trial, the court issued a decision, finding that Overstock's use of ARPs violated California law. The court found that Overstock used comparative prices in a manner that was designed to overstate the amount of savings found on the website. In particular, Overstock's calculation of "list price," which was based on a markup formula or a nonidentical product, was a false representation to consumers. The court also found that Overstock's use of "compare at" and "compare" listings were misleading because they were based on the highest price that Overstock or its partners could find from a single competitor, without regard to the prevailing market price and without any disclosures. The court imposed \$6.8 million in penalties for Overstock's advertising practices dating back to 2006 and issued an injunction with specific requirements for Overstock's ongoing use of ARPs.

The court's injunction included the following rules applicable to Overstock, which will likely have a broader application:

- ARPs cannot be calculated based on a formula, multiplier, or other method that sets the ARP on a basis other than an actual price offered in the marketplace at or about the time the ad is first placed.
- Use of ARPs based on similar, but nonidentical products, must be disclosed (e.g., by using "compare similar," "like product at," etc.).
- Marketing terms or acronyms (e.g., MSRP or list price) must be accompanied by a hyperlink that defines the term and states that it may not be the prevailing market price or regular retail price.

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- The use of an unmodified term, such as “compare” or “compare at,” must reflect a good faith effort to determine the prevailing market price for an identical product rather than the price offered by a single competitor.
- Although there is no one way that the prevailing market price must be determined, the requirement can be met where (1) the ARP is a range of actual prices validated by the retailer; (2) the ARP is a price from one of the five largest Internet shopping sites and the method is disclosed; or (3) the ARP is a price from one of the three largest shopping sites for the product category and the method is disclosed.
- ARPs must be substantiated with documentation kept by the company for two years and are valid for no longer than 90 days after they are verified. The time parameter used (e.g., 90 days, 30 days, etc.) must be noted either on the product page (e.g., “Compare \$9.99 as of 12/27/2013”) or with a hyperlink connected to the ARP nomenclature.

Practical Implications

Although Overstock has already announced that it will appeal, the decision will likely be a guidepost for the application and enforcement of comparative pricing laws in California and across the United States. The decision is generally consistent with previous guidance from the FTC and other sources, but it does provide specific and helpful guidance on the use of ARPs, particularly the use of the popular “compare” and “compare at” listings. The court’s determination that Overstock improperly set its ARP based on the price of a single competitor, rather than making an effort to determine the prevailing market price, is particularly important and may require changes in the way retailers determine and advertise comparative prices. More generally, the decision is a good reminder of the potential pitfalls in this area and the consequences that may result when companies fail to develop and follow appropriate guidance and procedures for their marketing teams.

How We Can Help

We can assist our clients with understanding this decision and its impact on current advertising practices. We have experience developing retail marketing programs that comply with FTC guidance and state laws regarding comparative price advertising and have advised numerous U.S. and international retailers on the proper use of ARPs.

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If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact or any of our Retail Practice leaders:

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These individuals are part of our international Retail Practice. Lawyers from our 25 offices regularly represent national, regional, and local retailers in a broad array of subject matters including litigation, labor and employment, real estate, tax, transactional, and regulatory.

About Morgan Lewis Retail Did You Know? This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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