



Retailers Beware: 1.8 Million Reasons To Be Careful About Comparison Advertising

October 5, 2011

To grab the attention of customers that are not in the mood to part with their dollars, many retailers resort to comparison pricing advertisements. This creates pitfalls that retailers should be aware of. Michaels Stores, a large retail chain, recently ran afoul of New York's deceptive advertising statutes and settled the case for \$1,800,000.

Admittedly, Michael's may have gotten carried away. The Attorney General found that Michael's advertised its custom framing services on sale for "50% off," "55% off," "60% off," and "\$50 to \$150 off" its regular store prices for over 104 consecutive weeks. And I guess because that wasn't enough to drive traffic, each advertisement claimed that the sale was for a limited time only. The AG claimed that due to the extended sale, the discounted price was no longer a sale price but was now the stores "regular" price and therefore the ads were deceptive.

The linchpin of any comparison pricing ad is establishing the "regular" or "former" price from which the discount is taken. The [FTC](#) advises that a former price must be an "actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time." The settlement agreement with Michaels gives examples of fictitious former price claims:

- Prices that were not used in the regular course of business.
- Prices that were not used in the recent past but at some remote period in the past without making disclosure of that fact.
- Prices that were not openly offered to the public.
- Prices that were not maintained for a reasonable length of time, but were advertised and then immediately reduced.
- Prices that were rarely paid by consumers because reductions were offered by sales people.
- Prices reduced as a result of negotiation.

The settlement agreement provides a guideline stating that a regular price is presumptively bona fide if the item was offered for sale at the regular price more than 55% of the time during the prior business year and 30% of sales were made at the regular price during that period. Although the percentages seem arbitrary and perhaps harsh, they provide a safe haven for retailers, at least in New York. The agreement also sheds light on other types of bargain advertising such as advertisements comparing prices charged by others in the area for the same merchandise or merchandise of like quality, free offers, "factory direct," and "sale" claims.

If you would like a copy of the settlement agreement which is a good resource, please email me at jcohen@ctswlaw.com. How are you using comparison advertising? Does it work for you?

Let us know your comments at [Jerry FT Blog](#) or email me at jcohen@ctswlaw.com.

Y. Jerry Cohen, Partner
(212) 586-5800

jcohen@ctswlaw.com
jcohen@homefurnishingslaw.com