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Rubenstein v. The Gap, Inc.: Limitations as a Matter of Law on Establishing Deception Under the Reasonable Consumer Standard in Pricing Litigation

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You visit an off-price department store on a Tuesday morning in search of the perfect dress for your friend's wedding that weekend. Or you end a stressful day at work with a treasure hunt at an online discount site as you look for a great find in your size. Or you wander around the bright and airy outlet mall, kids in tow, on a Saturday afternoon this time of year doing "back to school" shopping. You appreciate the array of merchandise and the access to familiar brands and styles at favorable prices. Others shop alongside you with a variety of motivations and objectives for browsing the racks and lining up at registers to make purchases. For some, shopping is a leisure activity. For others, it's a chore. But among them are those whose shopping excursions are motivated by something else entirely—the pursuit of jackpot lawsuits. They wander around the discount stores or the outlet malls with cameras in hand, taking photos of point-of-sale devices, signage, product labels, price tags, or promotional materials, often at the direction of or even in the company of their lawyers. They are, in fact, shopping for class action lawsuits. The present litigation climate is a minefield for retailers that are seeking to provide consumers with the products, pricing, and promotions that they covet and seek out.

One example is the reference pricing cases that have been filed in California, New York, and New Jersey in the past few years. The central theory of liability in these suits is that comparative pricing is inherently misleading to "reasonable consumers." That, of course, is belied by the truth about consumer expectations, the nuances of outlet, factory, and off-price retail pricing models (which are often distinct from one another) and the overwhelming desire of savvy shoppers to access recognized brands and current trends and styles at favorable prices. Many of these reference pricing cases are plagued with pleading deficiencies, standing issues, an untenable damages calculus, individualized issues related to consumer experiences and expectations, and multiple barriers to class certification. Nevertheless, many retailers have found themselves embroiled in protracted and costly litigation that threatens to disrupt their businesses. Indeed, many companies have been subjected to full-fledged discovery and, in some cases, have agreed to class settlements at high price tags, notwithstanding the fatal issues with these claims and the fact that they are ill-suited for class treatment.

On the heels of Ross Stores, Inc.'s summary judgment win in *Jose Jacobo, et al. v. Ross Stores, Inc.*, No. 15-04701 (C.D. Cal.) (Fitzgerald, J.), another Court has disposed of a pricing action against The Gap that was filed by a serial class action plaintiff. While the former case deals with pricing practices at an off-price department store chain and the latter addresses an outlet/factory store model—a distinction that many plaintiffs and their counsel fail to appreciate—both rulings demonstrate that courts are rejecting conclusory allegations that fundamentally misrepresent consumer expectations and experiences in the current retail environment.

Mark Twain wrote that "a compliment that is charged for is not valuable." As it turns out, it also does not state a cause of action under California's False Advertising Law ("FAL"), Unfair Competition Law ("UCL"), and Consumer Legal Remedies Act ("CLRA") according to the August 24, 2017, decision of the California Court of Appeal in *Rubenstein v. The Gap, Inc.*

Plaintiff Rubenstein alleged that the use of the "Gap" and "Banana Republic" names in factory stores and on the products sold in those stores deceptively communicated to the public that the factory store products are the same products and of the same quality that consumers have come to associate with the Gap and Banana Republic brands. Based on this ostensible "compliment" regarding the quality associated with the Gap and Banana Republic brands, Ms. Rubenstein argued that the use of those well-respected brand names in a factory store context leads so-called

reasonable consumers to believe that they are buying items of a certain quality at a discount, when they are (supposedly) purchasing lesser quality apparel. Her purported injury was that she would not have paid as much for the items she purchased, if she made a purchase at all, had she known that the items were not of the same quality that she had come to associate with The Gap and Banana Republic.

The trial court sustained a demurrer to a second amended complaint without leave to amend. The Court of Appeal affirmed on the grounds that Plaintiff failed to allege any actionable misrepresentation as to the quality or attributes of the products sold at the factory stores, and thus did not address the trial court's alternative determination that Ms. Rubenstein also lacked standing because of her failure to allege the requisite loss of money or property.

The Court of Appeal easily disposed of the claim for violation of the FAL. With no allegations of any advertising or promotional material that stated that the factory store products were ever sold in traditional stores or were of a certain level of quality, the only basis for the purportedly false advertising claim was the use of the brand names themselves. However, the Court found that, as a matter of law, The Gap's use of its brand names on clothes sold at Gap-owned stores could not be deceptive, regardless of the quality of the merchandise or whether it was ever offered for sale at another Gap-owned store. (Significantly, the Court noted later in its opinion that there was no allegation that Rubenstein had any problem with the quality of any of the items that she had purchased.)

As for the UCL claim, the Court held that the frequently fact-intensive likelihood of deception element could be properly resolved as a matter of law. According to the Court of Appeal, there is no deception when the consumer received exactly what she paid for (a Gap- or Banana Republic- branded garment) and the plaintiff failed to allege any facts to show that reasonable consumers believe outlet stores' products were previously available at retail stores. The Court of Appeal also rejected the argument that The Gap had an affirmative duty to disclose that the clothing that was offered for sale at the factory store was not previously available at traditional retail stores, based on the well-settled California rules for determining when such an affirmative duty exists. The Court found that the use of The Gap's own brand names constituted neither a "partial representation" nor an "active concealment" on whether the clothes were once available in a retail store. In addition, the Court of Appeal rejected the argument that The Gap had an affirmative duty to disclose because of its alleged "exclusive knowledge" of the nonavailability of the clothes in its traditional retail stores finding (i) no factual allegations that the sales history of factory store goods is material to any reasonable consumer, and (ii) quality issues regarding the purchased clothes were not in The Gap's exclusive knowledge, since the consumer could inspect and try on the clothes themselves, read their labels, and ask questions of a sales associate.

Importantly, in the process of dismissing the fraud-based aspect of the UCL cause of action, the Court of Appeal rejected the California Attorney General's request, as *amicus curiae*, for an extension of existing law. Specifically, the Court rejected the argument that, absent a misrepresentation or duty to disclose, a defendant could be liable under the UCL for a fraudulent business practice if that practice is likely to deceive consumers by "reinforcing" their misleading expectations or assumptions.

Given the same fundamental defect in the complaint's reliance on the use of brand names to connote some level of quality or sales history of a product, the Court also had no trouble in rejecting the UCL claim on both its "unlawful" and "unfair" prongs as well as the claim under the CLRA.

The *Rubenstein* decision is significant in showing that California courts will enforce limitations on the kinds of deception claims that can survive demurrer in retail pricing actions. Simply invoking the specter of what a reasonable consumer supposedly believes does not create a cognizable cause of action when the underlying facts make any such claim implausible.

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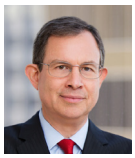

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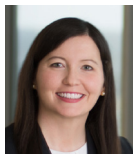

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