

Fashion Retailer Zara Hit With Pricing Disclosure Lawsuit

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by Kent J. Schmidt

Zara USA, Inc., the affiliate of the Spanish fashion retailer, has been hit with a class action lawsuit in federal court in California advancing a relatively simple and novel set of theories. *Rose v. Zara USA, Inc.* Plaintiff, represented by counsel Mark Geragos, contends that Zara lures customers into purchases of its clothing and accessories by failing to disclose the true price in U.S. currency in a bait-and-switch scheme. The claim includes two sub-theories summarized in the following allegations:

1. **Clothing Tagged Only in Euros (“Bait-and-Switch Pricing”)**: Many of Zara’s products are tagged only with a euro price. This alone is confusing to many consumers and lures them to the register. Compounding matters, not only is the same product sold for a substantially higher amount in dollars, but the product is always sold well in excess of the true converted amount if the euro price on the tag were properly converted to dollars.
2. **Euro Price Covered with Dollar Sticker (“Cover-Up Pricing”)**: In those instances where Zara includes a price in dollars, the dollar amount is almost always applied in the form of a pricing label affixed over the euro price actually printed on the tag. In this context, the dollar amount similarly is far in excess of the true converted amount if the euro price printed on the tag were properly converted to dollars.

For reasons that are far from clear, the Complaint includes color photos of the Duchess of Cambridge Kate Middleton, Kim Kardashian and Brittny Gastineau with their Zara shopping bags. It does not appear that Plaintiff is alleging that these celebrities were similarly deceived -- these photos are perhaps inserted for dramatic effect.

Although more questionable claims have been allowed to proceed past a motion to dismiss in California courts, we predict that these claims will be summarily dismissed on a motion to dismiss. Here is a brief analysis why.

Zara’s business practice might be unconventional and annoying to the consumers, but it does not follow that such a practice rises to the level of a violation of California law or the law in any other jurisdiction. Analyzing the claims according to the legal requirements of each cause of action, there is no reason a court should allow these claims to continue.

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First, there are a few obligatory “junk” legal claims in the Complaint that are ill-fitted for this case, including negligence and negligence *per se*. Those claims are included in an apparent effort to make this a nationwide class, since all jurisdictions recognize these common law theories, and a Zara shopper in another state may theoretically join the class. The problem for plaintiff is that no court in the country would likely view the conduct alleged here as being negligent or negligent *per se*. Both legal doctrines are designed for purposes other than protecting consumer rights. Every state has its own consumer protection statute (similar to California’s as discussed below) and it is those remedies that govern consumers’ rights, not broad and amorphous concepts of common law negligence.

As with virtually every consumer class action filed in California, the core statutory claim is Cal. Bus. & Prof. Code § 17200, the Unfair Competition Law. This statute prohibits business practices that are “unfair,” “fraudulent” or “illegal.” Neither of the two theories alleged here come close to meeting any of these standards.

As for the first theory, the so-called “bait and switch” pricing by expressing the price in euros instead of dollars, although perhaps annoying to a customer, one can readily determine that they will have to make some sort of inquiry concerning the U.S. currency price at the time of purchase. There is no deception because any consumer will understand that, to put it in a quasi-algebraic expression, $\text{€} \neq \text{\$}$. A retailer should be able to use whatever conversion rate they deem appropriate at the time of sale, inform the consumer of the current U.S. price and allow him or her to make up their mind on the purchase. The fact that this may be an inconvenience to some consumers does not mean that there is a violation of any legal standard or statute. The conduct is not unfair or fraudulent according to the cases that have interpreted those terms under the statute.

The second theory seems even more farfetched. Plaintiff contends that some of the items have a price sticker stating a U.S. dollar amount, but under that sticker is an original price expressed in euros. Plaintiff alleges that, according to an exchange rate that he is using—presumably the exchange rate for the date of purchase—the dollar price is too high.

The core problem with this theory is that the original euro price is immaterial to the transaction. It is not illegal, under statutory or common law, for a retailer to use a price tag to cover an original price such that the new tag has a price that is either higher or lower than the original price.

For a moment, set aside the currency question because that really is irrelevant. The claim here is that one cannot increase the price of an item of clothing or other merchandise by placing a sticker over the original tag with a higher price. That’s a spurious claim. Although consumers more typically see a sticker that is placed on the original price reflecting a price reduction, there is no rule or regulation that prevents a retailer from increasing the price. The price tag that the customer sees reflects the retailer’s price on that particular day, and here it is expressed in dollars, not euros. Again, there is no deception here.

A Word to the Wise. Notwithstanding the fact that these claims are unlikely to proceed past a motion to dismiss, the case offers a reminder that consumer deception in the retail context creates a significant risk of liability. Even in scenarios that involve mere consumer confusion, surprise or an arguably sharp practice, the cost of defending these claims can be costly.

The Complaint cites a number of state statutes that prohibit, through a variety of formulations, the concept of bait-and-switch, as well as 16 C.F.R. 238 *et seq.*, a federal regulation on bait advertisements.

California law similarly prohibits “[c]harg[ing] an amount greater than the lowest price posted on the commodity itself or on a shelf tag that corresponds to the commodity . . .” Cal. Bus. & Prof. Code § 12024.2(a). There are a host of other regulations, some specific to various types of products, that should be considered in avoiding class action lawsuits arising from retail transactions.

Retailers—even those who do not use euros to indicate prices on goods offered for sale—should take heed of these and similar consumer protection statutes that may form the basis for a costly, even if defensible, class action.

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