California Consumers Have Standing to Sue When Merchandise Is Falsely Advertised as “On Sale”

By Brian D. Martin and Connie J. Wolfe

The Ninth Circuit has held that allegations a consumer was misled into purchasing merchandise based on false advertising that the items had been marked down from a fictitious “original” price are sufficient to confer standing under California’s Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act.

In Hinojos v. Kohl's Corporation, No. 11-55793, 2013 WL 2159502 (May 21, 2013), the U.S. Court of Appeals for the Ninth Circuit reversed the district court’s dismissal of Unfair Competition Law (“UCL”), False Advertisement Law (“FAL”) and Consumer Legal Remedies Act (“CLRA”) claims regarding false price advertisements. The Ninth Circuit held that the economic injury requirement under the UCL and FAL is met when a consumer is induced to purchase merchandise based on false price representations (i.e., that the goods purchased sold at a substantially higher price at the retailer in the recent past and/or in the prevailing market) and that the consumer would not have purchased the goods absent the misrepresentation. The Ninth Circuit further held that any plaintiff who satisfies the economic injury requirement of the UCL and FAL also satisfies the “any damage” standard for establishing CLRA standing.

Background of the Underlying Dispute and District Court Proceedings

The plaintiff purchased several items from a Kohl’s department store that were advertised as being substantially reduced from their original price. The plaintiff alleged that the items were in fact regularly sold by Kohl’s at the advertised “sale” price and that the “original” or “regular” prices did not reflect prevailing retail prices during the three months prior to the advertisements. The plaintiff further alleged that he would not have purchased the items from Kohl’s in the absence of the misrepresentations. The district court granted a motion to dismiss the UCL and FAL claims, holding that the plaintiff lacked standing because he had obtained the merchandise he wanted at the advertised price. Following the dismissal, the California Supreme Court published its opinion in Kwikset Corp. v. Superior Court, 51 Cal.4th 310 (2011), which held that allegations that consumers purchased goods in reliance on false “Made in the U.S.A.” labeling were sufficient to establish UCL and FAL standing under the “lost money or property” requirement. The plaintiff
filed a motion for reconsideration, but it was denied by the district court on the grounds that *Kwikset* only applied to false advertisements regarding a product’s “composition, effects, origin, and substance.” The defendant then brought a motion for judgment on the pleadings seeking dismissal of the plaintiff’s CLRA claim (the only remaining claim), and the district court granted the motion on the grounds that the plaintiff failed to establish “any damage” caused by the alleged false advertising.

**UCL and FAL Standing Requirements**

On appeal, the Ninth Circuit first noted that the FAL contains a specific provision regarding pricing representations:

> No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price … within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

Cal. Bus. & Prof. Code § 17501. The court further pointed out that the UCL broadly encompasses any conduct prohibited by the FAL; thus the misrepresentations alleged by the plaintiff were expressly prohibited under both laws. Cal. Bus. & Prof. Code § 17200. The Ninth Circuit clarified that the plaintiff was not required to plead how much he would have paid for the items had he known their true market value, as *Kwikset* had “explicitly rejected that argument.”

The court also declined to interpret the *Kwikset* decision as limited to misrepresentations about a product’s “composition, effects, origin and substance.” The Ninth Circuit said that such a test “ignores the fact that, to other consumers, a product’s ‘regular’ or ‘original’ price matters.” The Court reasoned that the pre-discount price of a product provided consumers with valuable information regarding the product, and that misinformation regarding such price would be significant to many consumers, as they would be purchasing based on a higher perceived value. The Ninth Circuit also rejected the district court’s alternative reasoning that the plaintiff obtained the “benefit of the bargain” because he kept the goods he purchased and they were not defective, stating that such rationale was “explicitly rejected” in *Kwikset*. The court noted that the “benefit of the bargain” defense is only permissible if the misrepresentation was not “material.” The Ninth Circuit pointed to state and federal laws prohibiting retailers from advertising false “sales” as being proof of the materiality of such misrepresentations. Cal. Bus. & Prof. Code § 17501; Cal. Civ. Code § 1770(a)(13); 16 C.F.R. 233.1(a). In sum, the court held that “when a consumer purchases merchandise on the basis of false price information, and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL and FAL because he has suffered an economic injury.”

**Standing Requirements Under the CLRA**

The Ninth Circuit concluded that economic injury under the UCL and FAL meant the plaintiff could also satisfy the standing requirements under the CLRA. The court noted that the CLRA forbids “[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.” Cal. Civ. Code § 1770(a)(13). The CLRA provides a cause of action to consumers who have suffered “any damage” as a result of an act or practice proscribed by the act. The Ninth Circuit noted that the California Supreme Court has interpreted the “any damage” requirement to be “a capricious one that includes any pecuniary damage as well as opportunity costs and transaction costs that result when a consumer is misled by deceptive marketing practices.” In light of this standard, the Ninth Circuit concluded that any
plaintiff who has standing under the “lost money or property” requirement of the UCL and FAL will also have suffered “any damage” so as to establish CLRA standing.

**Conclusion**

_Hinojos_ extends the reasoning of _Kwikset_ to cases beyond those dealing with misrepresentations as to the “composition, effects, origin and substance” of retail products. In the court’s view, consumers have standing to bring UCL, FAL and CLRA actions based on allegations of misrepresentations about pricing discounts even when the origin, quality and nature of the product is as advertised and it is sold at the advertised price. While the plaintiff here was able to satisfy the threshold standing issue, the California Supreme Court made clear in _Kwikset_ that standing and the eligibility for restitution under the UCL are wholly distinct. If the plaintiff is able to prove his claim, the issue of whether he or putative class members will be entitled to restitution (and how any such relief would be calculated) remains and could be quite challenging, particularly in the class context, given that the origin, quality and nature of the product was not misrepresented. In any event, retailers should carefully consider their advertising policies regarding “sale” or “marked down” prices in order to avoid lawsuits alleging inaccurate pricing representations following _Hinojos_.

Click here to read _Hinojos v. Kohl's Corporation_, No. 11-55793 (May 21, 2013).

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

<table>
<thead>
<tr>
<th>Brian D. Martin (bio)</th>
<th>Connie J. Wolfe (bio)</th>
</tr>
</thead>
<tbody>
<tr>
<td>San Diego</td>
<td>San Diego</td>
</tr>
<tr>
<td>+1.619.544.3204</td>
<td>+1.619.544.3139</td>
</tr>
<tr>
<td><a href="mailto:brian.martin@pillsburylaw.com">brian.martin@pillsburylaw.com</a></td>
<td><a href="mailto:connie.wolfe@pillsburylaw.com">connie.wolfe@pillsburylaw.com</a></td>
</tr>
</tbody>
</table>