Retailers Score a Victory on Multiple-Unit Pricing Sales Ads

Eric J. Weiss, Esq.
Reminger Co., LPA

Ohio's Consumer Sales Practices Act ("CSPA") is codified in Chapter 1345 of the Revised Code. R.C. 1345.02(A) prohibits unfair or deceptive acts or practices in connection with a consumer transaction.

Pertinent to this article are sales ads run by local retailers that involve "multiple-unit pricing" – i.e., sales ads that reflect that a specific price advantage exists if consumers purchase a specified number of units of a particular product during a specified period of time. For example, a sales ad offers ten cans of pizza sauce for $10. The regular price for one can of pizza sauce is $1.69, so the sale represents a total saving of $6.90 if the consumer purchases ten cans. The sales ad does not, however, expressly state that the discounted sales price remains applicable if the consumer purchases less than the stated multiple of ten cans.

A recent Eighth Appellate District case addressed whether this type of price promotion violates the CSPA. In *Grgat v. Giant Eagle, Inc.*, 2019-Ohio-4582, 135 N.E.3d 846 (8th Dist.), a consumer commenced a declaratory judgment action against a local retailer in Cuyahoga County challenging the legality of multiple-unit pricing ads under the CSPA. The consumer contended that price promotions (like the pizza sauce ad discussed above) was deceptive because it suggests that the discounted price is only available if the consumer purchases the specified quantity in the sales ad – when in reality the discounted sales price is available irrespective of the quantities purchased. The consumer did not, however, seek damages for the alleged CSPA violations.

In support of his position, the consumer cited R.C. 1345.02(B)(8), which states that it is deceptive for a supplier to represent "that a specific price advantage exists, if it does not." In addition, the consumer relied on OAC 109:4-3-02(A)(2)(g), which requires that "If there is a minimum amount (or maximum amount) that must be purchased for the advertised price to apply, that fact must be stated."

After the completion of discovery, the retailer moved for summary judgment arguing that the sales ad was neither unfair nor deceptive. The trial court granted the retailer's motion for summary judgment. The consumer timely appealed.

On appeal, the Eighth Appellate District overruled the consumers' assignments of error and affirmed the trial court's decision holding that the sales ads did not violate the CSPA. In doing so, the appellate court held, among other things:

- The trial court correctly found, in order to be deceptive under the CSPA, the act or practice in question must be both false and material to the consumer transaction."

- The CSPA is not a strict liability statute: "Rather than applying strict liability, courts have held that whether a supplier's act or omission is a violation of the CSPA depends on how a reasonable consumer would view it."

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- The consumer presented no evidence that any of the retailer's multi-unit pricing promotions represented that a specific price advantage existed when it did not. To the contrary, the advertised item was, in fact, being sold at a discounted sales price.
- The trial court did not err in determining that OAC 109:4-3-02(A)(2)(g) did not require the retailer to expressly disclose the fact that the purchase of lesser quantities than the total number indicated in multi-unit pricing promotions would be charged the pro rata price per individual item.[1]

The *Grgat* decision is important because it provides clarity as to the legality of these commonly used multiple-unit price promotions.

The *Grgat* decision also is important for perhaps a more subtle reason. As outlined above, the consumer in *Grgat* did not seek damages, but sought only declaratory and injunctive relief. In fact, the consumer in *Grga*t did not even allege that he was deceived by the sales ads, or that he purchased more quantities than he initially wanted to just so he could take advantage of the discounted sales price. This begs the question: why incur the time, cost, and energy associated with bringing this action in the first place?

These facts suggest that the declaratory judgment action may have been only the first step in a more complex, far-reaching legal battle under the CSPA. If the consumer in *Grgat* prevailed in obtaining a declaration that these commonly used price promotions violated the CSPA, such decision would inevitably form the basis for subsequent consumer class action suits against numerous retailers (both national, regional, and family-owned companies). Simply put: the retailer's victory in *Grgat* may have prevented a subsequent wave of CSPA class action lawsuits against retailers throughout Ohio.

So do not expect local sales ads to change in any significant manner in the near future.

Endnotes

1 On March 3, 2020, the Supreme Court of Ohio declined review of the appellate court's decision. See *Grgat v. Giant Eagle, Inc.*, 158 Ohio St.3d 1422, 2020-Ohio-647, 140 N.E.3d 741.

Eric J. Weiss is a shareholder at Reminger Co., LPA, wherein his practice emphasizes commercial and professional liability litigation.