

CONSUMER CLASS ACTIONS TAKE A HIT: COURT HOLDS MADE-FOR-OUTLET PRODUCTS NOT DECEPTIVE

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In the face of a growing number of lawsuits against retailers for deceptive sales, advertising and pricing practices, a California court recently affirmed dismissal of a consumer's false advertising lawsuit against The Gap, holding that it is not false advertising for the retailer to put its brand and trademark on lesser quality goods sold at its outlet stores.

In *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870 (Cal. App 2d 2017), plaintiff argued that that advertising a Gap Factory or Banana Republic Factory item as "Gap" or "Banana Republic" was deceptive because the item was of lesser quality than a Gap or Banana Republic item. The California Court of Appeals rejected the argument that a brand's use of its own name for its factory or outlet stores is deceptive. The court stated, "Gap's use of its own brand name labels on clothing that it manufactures and sells at Gap-owned stores is not deceptive, regardless of the quality of the merchandise or whether it was ever for sale at other Gap-owned stores. Retailers may harm the value of their brands by selling inferior merchandise at factory stores, but doing so does not constitute false advertising."

The plaintiff also alleged that "reasonable consumers believe outlet stores sell products that were previously available for purchase at retail stores," but failed to allege any facts showing that this is true. The court held that retailers do not have a duty to disclose the items sold in a factory or outlet store were not previously sold in its mainline store.

Under *Rubenstein*, a retailer does not act deceptively when it sells items of a lesser quality or type at its factor or outlet store than its mainline store, or when it uses its brand for its factory and outlet items. Significantly, the plaintiff did not allege that any of the items she purchased from Gap Factory or Banana Republic Factory had any issues with quality.

This case arms retailers facing litigation regarding sales, advertising and pricing practices with guidelines with what makes a consumer "reasonable." The court noted that if sales history of an item is material to a consumer, then the consumer could ask a sales person if that item was previously sold at the mainline store. The court further indicates that the "reasonable" consumer is not one that buys something unsatisfactory and then claims deception. When making a purchase,

the consumer has the opportunity to examine the item and its labels, and if they don't like the quality or materials, they can choose not to purchase it or return it if already purchased.

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