A comparative advertising campaign based upon price is an important weapon in the arsenal of a retailer executing an Everyday Low Price strategy.

Perhaps you have seen a leading big box retailer’s recent television commercial showing a man eagerly whisk a woman down an isle; as he deposits products in her shopping cart, a comparison of prices for selected goods sold at competing retailers scrolls across the screen while savings are tallied at the bottom. And maybe you have seen print advertisements comparing the prices of the same product across retailers or the total cost of groceries on a shopping list across different supermarkets. These advertisements are a form of comparative advertising.

The Federal Trade Commission (“FTC”) long ago concluded that comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchasing decisions. Statement of Policy Regarding Comparative Advertising, Federal Trade Commission, Washington, D.C., August 13, 1979. Today, comparative advertising is an important weapon in the arsenal of a retailer executing an Everyday Low Price (“EDLP”) strategy: a product level pricing strategy by which a company endeavors to convey to consumers that prices across its product portfolio are

Jason Reed Struble
was formerly In-House Counsel / Senior Real Estate attorney for a privately held corporation headquartered in Miami, Florida. Mr. Struble provided legal counsel and risk management advice to senior management as the company opened a chain of small-format grocery markets throughout Florida. Struble received a Juris Doctor degree, Cum Laude, in addition to an International Law Certificate from The Florida State University College of Law; a Master of Business Administration degree, with Honors, in International Business and Management from The University of Toledo College of Business Administration where he was inducted into the International Honor Society Beta Gamma Sigma; and a Bachelor of Science degree, Magna Cum Laude, from Eastern Michigan University. Struble is a member of The Florida Bar and the United States District Court, Southern District Florida. He can be contacted via email at jasonstruble@gmail.com. Or connect with him on LinkedIn at www.linkedin.com/pub/jason-reed-struble/b/4a2/a21/. This article is intended for general informational purposes only and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. This article is not intended to address specific legal compliance issues that may arise in particular circumstances. Please consult counsel concerning your own situation and any specific legal questions you may have.
consistently the lowest available prices in the retail marketplace without coupon clipping, comparison shopping, discount promotions, or sale events.

The goal of this article is to orient junior in-house counsel and young corporate attorneys unfamiliar with comparative advertising generally, and comparative advertising campaigns based on price specifically, so that they may counsel clients regarding the risks incurred in a particular comparative price advertising campaign. In pursuit of this goal, this article provides an understanding of the legal framework used to evaluate the legality of comparative advertising campaigns, outlines different options available in addressing disputes should they arise, and offers general practical guidelines with respect to appropriate and inappropriate practices in order to assist attorneys when advising clients who are creating a comparative price advertising campaign.

**COMPARATIVE ADVERTISING** • Comparative advertising identifies and compares competing goods or services based on specific attributes such as performance, price, or features. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace, while unduly expansive principles of deception can impede the vigorous competition that comparative advertising usually provides. FTC Policy Statement in Regard to Comparative Advertising, 16 C.F.R. §14.15(b) (2003).

A comparative advertising campaign based on price is one that directly compares the advertiser’s product price with that of another competitor. Businesses that run comparative advertisements need to ensure that any comparative claims they make can stand up to scrutiny, because the advertising strategy that is most likely to generate disputes, and possibly federal litigation, is comparative advertising based upon price.

Specific legislation exists to protect consumers from deceptive advertisements. The FTC and the Lanham Act, 15 U.S.C. §§1015 et seq, govern comparative advertising in the United States, including the treatment of comparative advertising claims based on price. Inconsistent price comparison is the practice of listing some competitor prices for any given item, while not listing the price by those competitors that beat the company’s price, leaving the false impression that it has the best price of all competitors for a particular product. The FTC, competitors and, in most states the attorney general, have the power to bring suit to stop false advertising. In some states, an aggrieved consumer can sue under particular state laws. A consumer or company may also seek recourse through the National Advertising Division of the Council of Better Business Bureaus, Inc.

**FEDERAL TRADE COMMISSION** • The FTC — as a federal agency — has wide discretion and institutes actions in the name of the public, rather than in the name of a competitor. Because the FTC acts in the interest of the public, it typically pursues only those matters that have a significant and detrimental impact on the public, and does not pursue smaller matters that may only have a significant impact on the competitors themselves.

The power of the FTC to investigate and prosecute inappropriate comparative advertising is granted in the Federal Trade Commission Act, 15 U.S.C. §§41 et seq. The Federal Trade Commission Act declares unlawful “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,” and empowers the FTC to prevent persons, partnerships, or corporations “from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” According to the FTC, in order to be deceptive, the representation, omission, or practice must be likely to mislead reasonable consumers under the circumstances.
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THE LANHAM ACT • Litigation between competitors over comparative advertising arises primarily under the Lanham Act, commonly referred to as the “Trademark Act.” This federal law gives private individuals and companies the right to sue competitors for false and misleading advertising.

Section 43(a)(1)(A) of the Lanham Act is often used when false or misleading statements are alleged to have hurt a consumer or business. The claimant must prove that a false or misleading statement was made in commerce and that the statement creates a likelihood of harm to the plaintiff.

Section 43(a)(1)(B) of the Lanham Act is often used when false or misleading comparative advertising claims are alleged to have hurt a business. The typical allegation made under this section by claimant businesses is that a competitor has routinely and systematically made untrue and misleading comparative advertising claims about the prices of its products.

It is important to understand the following points about the Lanham Act. First, only competitors have standing to bring a Lanham Act suit in federal or state court. Hence, a potential plaintiff can only sue for the false advertising of its competitors; consumers do not have standing to sue under the Lanham Act. Second, to be actionable under section 43(a) of the Lanham Act, a communication must be made in commercial advertising or in the promotion of goods and services. Third, and this is critical, the communication must contain a false or misleading statement, description, or representation of fact which misrepresents the nature, characteristics, qualities or geographic origin of an advertiser’s or its competitor’s goods, services or commercial activities. Statements about a manufacturer’s ability or size can be considered false advertising, if they relate to its products or services or its ability to deliver products or services. Lastly, the false statement must be material to a consumer’s purchasing decision.

Evaluating The Legality Of A Claim Under the Lanham Act

A prima facie case of false advertising under section 43(a) of the Lanham Act requires the plaintiff to establish:

• A false or misleading statement of fact about a product;
• Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers;
• The deception is material, in that it is likely to influence the consumer’s purchasing decision;
• The product is in interstate commerce; and
• The plaintiff has been or is likely to be injured as a result of the statement at issue.

See Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1500 (5th Cir. 1990); Cook, Perkiss and Liehe, Inc. v. Northern Collection Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990).

The basic standards of what is and is not permissible in comparative advertising are similar regardless of whether an action is initiated under the Lanham Act by companies or by the FTC on behalf of the public. Generally speaking, in order for comparative advertising to be legal, it must not be “literally false” and cannot be misleading. Whether an advertisement is literally false, for purposes of a Lanham Act false advertising claim, presents an issue of fact that necessarily requires analyzing the advertisement’s message in context. Johnson & Johnson v. GAC Int’l. Inc., 862 F.2d 975, 979 (2nd Cir. 1988).

When representations or sales practices are targeted to a specific audience, the FTC determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the FTC considers the totality of the practice in determining how reasonable consumers are likely to respond. The test used — termed the “reasonable consumer” standard — is whether the consumer’s