

Blog Entry: Don't Wish Too Hard: Ohio Federal Court Tosses Class Claims in Consumer Case for Failure to Allege Actual Damages

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Wish.com is a website that sells, you guessed it, goods. Lots of them. Clothing, watches, smartphone cases, fishing lures, jewelry, handbags, Pokémon cards, electronics, shoes. Most are inexpensive and made in China, from where they are shipped directly from merchant to consumer. Tens of millions of different items from thousands of merchants. One of its senior executives referred to wish.com as “the leading mobile commerce platform in North America and Europe” whose “mission is to give everyone access to the most affordable, convenient, and effective shopping mall in the world.” Wish.com take a 15% cut on each sale. ContextLogic, Inc., a privately-held company in San Francisco, developed wish.com.

Max Gerboc sued ContextLogic in an Ohio state court, alleging that he bought portable bluetooth speakers from wish.com for \$27.00 “and that, in addition to listing that purchase price, ContextLogic falsely represented that those speakers were regularly priced \$300, showing ‘\$300,’ and represented a savings of 91% off the regular price, in an effort to induce customers to purchase products from its Website.” He claimed that this was an unfair and deceptive advertising practice designed “mislead” him “and other consumers by including bogus reference prices in its website advertising, in violation of” Ohio’s Consumer Sales Practices Act (“OCSPA”). He also sued for breach of contract, fraud, and unjust enrichment claims. And he sought to certify the following class:

Anyone who, during the statute of limitations period, purchased any product(s) through Defendant’s website and/or App, which Defendant’s records show were sold with an alleged advertised savings amount, but where the product(s) were not sold at the non-discount price for at least 28 of the last 90 days prior to purchase.

ContextLogic removed the case to the Northern District of Ohio, then moved to dismiss, alleging, among other things, that Gerboc’s “failure to allege actual damages defeats [his] class action claim.” Gerboc opposed, but the district court agreed with ContextLogic, and on November 4, 2016, dismissed his class action claim. Its logic?

Mr. Gerboc alleges that he, and the putative class members, are entitled to recover a partial refund of their purchase price in the amount of the fictitious “percentage off” displayed on the Website for the item purchased. In Mr. Gerboc’s case, ContextLogic sold him the Speakers for \$27.00. The Website displayed a \$300 price with a slash through it, as well as “91%.” Mr. Gerboc calculates that he should be refunded \$24.57 of the \$27.00 purchase price - not because ContextLogic promised a

91% discount off of \$27.00 and not because the Speakers are only worth \$2.43 - but because ContextLogic unlawfully made a fictitious price comparison to induce his purchase.

Let's sort this out. Gerboc bought the speakers for \$27, which was the purchase price listed on the website. But because the website represented - deceptively, per Gerboc - that the speakers were regularly priced \$300, and because Gerboc's \$27 payment amounted to savings of 91% off that amount, Gerboc claimed that he should have been charged only \$2.43 for the speakers, because they were actually worth only \$27, and 91% of that amount is \$2.43. And Gerboc sought analogous monetary relief for the putative class.

The court, however said no to his class claim: it found that Gerboc alleged "no actual damages and, in the absence of actual damages, a consumer cannot maintain a class action under the" OCSPA. (Emphasis added.) "Under Ohio law," it noted, "actual injury is independent of an OCSPA violation and both must be adequately alleged in a class action [brought] under" the private causes of action provision of the Ohio Consumer Sales Practices Act. "In order to maintain a class action ... a plaintiff must allege actual 'damages [that] were a proximate result of the defendant's deceptive act.'"

But all was not lost for Gerboc: the court allowed him to pursue his individual claim against ContextLogic on his allegation that ContextLogic represented that a specific price advantage existed for the speakers, when it did not.

The case is *Gerboc v. ContextLogic, Inc.*, United States District Court, Northern District of Ohio, case no. 1:16 CV 928.