

## The Narrowing Of Damages Claims In Advertising Cases

By **Timothy Snail** (June 28, 2018, 12:10 PM EDT)

Over the past few years, alleged false advertising of consumer products has been one of the most active areas in class action litigation. Plaintiffs in these matters have asserted a wide range of damages theories, but since most of these matters have concluded before the courts could offer an opinion on damages it is often unclear which damages theories are viable. A recent Ninth Circuit decision, *Chowning et al. v. Kohl's Department Stores Inc. et al.*, clarifies the issue, which has previously split the California district courts: The available remedies are substantially narrower than those that are often asserted.[1][2]



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Most consumer products false advertising matters are filed in federal district courts of the Ninth Circuit and assert that the applicable laws are California's Unfair Competition Law, or UCL, California's False Advertising Law, or FAL, and California's Consumer Legal Remedies Act, or CLRA.[3] The remedies under the UCL and FAL are equitable in nature and are generally limited to injunctive relief and restitution; the restitution remedies under the CLRA are similar to those under the UCL and FAL.[4] The Ninth Circuit has confirmed that the proper measure of restitution under these California laws is the price paid less the value received.[5]

### Common Theories of Damages

Nonetheless, plaintiffs commonly assert nonrestitutionary theories of damages, for example a "full refund" model, disgorgement of profits and "actual discount" or "expected discount" models. In the *Chowning v. Kohl's* district court proceedings, the plaintiff alleged that class members reasonably believed that they were receiving a significant discount on clothing items when Kohl's displayed two prices for each item — the selling price and the "regular" or "original" price, but that the second price was false as it was not the prevailing market price within the immediate three preceding months, as required by California law.[6] The Ninth Circuit affirmed U.S. District Court Judge R. Gary Klausner's finding that the proposed nonrestitutionary theories of damages were inappropriate, as explained below.[7]

The court in *Chowning* found that a full refund or rescission theory is unavailable because the plaintiff did not prove that the product had no value to her,[8] and in fact the plaintiff admits that she received some value from the products purchased.[9][10] Awarding a full refund would not account for the benefit the item conferred notwithstanding the alleged false advertising.

Disgorgement of profits is unavailable where plaintiffs have not established that the profits earned were due to allegedly deceptively labeled merchandise.[11] Full disgorgement would not be restitutionary as it would not accurately represent the amount class members lost in Chowning since the plaintiff did not dispute that she gained some value from the allegedly mislabeled items.[12][13]

The plaintiff in Chowning also proposed an “actual discount” or “expected discount” model calculated as the allegedly false original price less the selling price. Judge Klausner rejected this theory as it focused on the bargain the plaintiff thought she was receiving rather than what the plaintiff actually received given the price she paid.[14] The Ninth Circuit explained that the plaintiff's proposed measure is inappropriate as it would effectively seek damages sounding in contract, not equity, whereas only equitable remedies are available.[15][16]

### **The Narrowing of Damages Claims**

The Ninth Circuit affirmed Judge Klausner’s opinion in Chowning v. Kohl’s that the proper measure of restitution under the California UCL, FAL and CLRA laws is the price paid less the value received.[17] This measure reflects the difference between what the plaintiff paid and the value of what the plaintiff received.[18] This Ninth Circuit opinion may narrow the range of viable restitutionary remedies to those that the district court referred to as a “price premium” model which isolates the amount of the price attributable to the false representation.[19]

The range of viable damages claims may be broader in the event that a falsely advertised product is found to be literally worthless or of no value to consumers. In one such case, the court accepted that a full refund was warranted for those consumers who proved that a multivitamin supplement did not provide the advertised health benefits to them because they did not suffer from any biochemical deficiencies that the supplement would address.[20] However, if prior case filings are indicative, the circumstances under which class members would receive no benefit from consumer product purchases are rare, and thus the full refund model is not generally available.

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[1] See Kohl’s Customer Can’t Get Refund in Discount Suit: 9th Circ., Law360, June 18, 2018.

[2] Chowning et al. v. Kohl's Department Stores Inc. et al., case number 16-56272 (9th Cir. June 18, 2018) (unpublished).

[3] Timothy Snail, “Advertising Bargains: Is the Price Right?,” panelist, American Bar Association Section of Antitrust Law Spring Meeting, 2017; Timothy Snail, “Class Actions Panel: Tales from the Food Court,” panelist, CLE International Food Law 3rd Annual Conference, 2018.

[4] Chowning et al. v. Kohl's Department Stores Inc. et al., case number 16-56272 (9th Cir. June 18, 2018) (unpublished).

[5] Ibid.

[6] Wendy Chowning and Lourdes Casas v. Kohl's Department Stores Inc. et al., No. 15-08673 (C.D. Cal. March 15, 2016).

[7] Chowning et al. v. Kohl's Department Stores Inc. et al., case number 16-56272 (9th Cir. June 18, 2018) (unpublished).

[8] In re Tobacco Cases II, 192 Cal. Rptr. 3d at 895; see also Cortez, 999 P.2d at 713.

[9] Chowning et al. v. Kohl's Department Stores Inc. et al., case number 16-56272 (9th Cir. June 18, 2018) (unpublished).

[10] Wendy Chowning and Lourdes Casas v. Kohl's Department Stores Inc. et al., No. 15-08673 (C.D. Cal. March 15, 2016).

[11] In re Tobacco Cases II, 192 Cal. Rptr. 3d at 899, quoting Meister v. Mensigner, 178 Cal. Rptr. 3d 604,618 (Cal. Ct. App. 2014).

[12] Chowning et al. v. Kohl's Department Stores Inc. et al., case number 16-56272 (9th Cir. June 18, 2018) (unpublished).

[13] Wendy Chowning and Lourdes Casas v. Kohl's Department Stores, Inc. et al., No. 15-08673 (C.D. Cal. March 15, 2016).

[14] Ibid.

[15] Chowning et al. v. Kohl's Department Stores Inc. et al., case number 16-56272 (9th Cir. June 18, 2018) (unpublished).

[16] Korea Supply, 63 P.3d at 943.

[17] Wendy Chowning and Lourdes Casas v. Kohl's Department Stores, Inc. et al., No. 15-08673 (C.D. Cal. March 15, 2016).

[18] In re Vioxx Class Cases, 103 Cal. Rptr. 3d 83, 96 (Cal. Ct. App. 2009).

[19] Wendy Chowning and Lourdes Casas v. Kohl's Department Stores Inc. et al., No. 15-08673 (C.D. Cal. March 15, 2016).

[20] Farar et al. v. Bayer AG et al., case no. 14-cv-04601 (N.D. Cal. Nov. 15, 2017).