

# Courts Express Reluctance to Regulate Market Prices Via Consumer Protection Claims

## Publications

June 10, 2021

By: Lindsey A. Lusk

Consumers seeking to hold companies accountable for differential pricing of allegedly materially identical products have recently faced push-back from several federal courts. In May 2021, two federal courts dismissed consumer-protection claims based on price differentials between such products.

In *Schulte v. Conopco, et al.*, the Eighth Circuit affirmed the Missouri district court's dismissal of a Missouri Merchandising Practices Act (MMPA) claim premised on allegedly discriminatory price differentials between women's and men's deodorant products (a so-called "pink tax" claim). 2021 WL1971957 at \*1 (8th Cir. May 18, 2021). The appellate court held that the plaintiff failed to meet the plausibility pleading standard and was mistaking "gender-based marketing for gender discrimination." *Id.* The court also noted that the plaintiff was "conflate[ing] marketing targeted to women with *enforced* point-of-sale pricing by gender," and that the plaintiff's choice not to purchase men's antiperspirant "illustrates a difference in demand based on product preferences." *Id.* Because "preference-based pricing is not necessarily an unfair practice," the court held that the MMPA did not prohibit the defendants' differential pricing.

Similarly, the Northern District of Illinois recently dismissed a claim based on the price differential between infant and children's acetaminophen. In *Harris v. Topco Associates, LLC*, the plaintiff brought a putative class action alleging that the defendant "designed its [Infants' Pain & Fever Acetaminophen and Children's Pain & Fever Acetaminophen] to mislead parents into purchasing the infant medication at a higher cost," despite the pharmacological identity of the two products. 2021 WL 1885981 (N.D. Ill. May 22, 2021). The court dismissed the plaintiff's claim, finding that it was preempted by the federal Food, Drug, and Cosmetic Act (FDCA) because the plaintiff's request for a disclosure on the label of the infant medication would impose an additional obligation not required by the FDCA. *Id.* \*1.

Although decided on different grounds, the courts' rejections of these types of claims suggest that courts may be hesitant to use consumer protection statutes to "regulate" pricing of materially similar yet differently-marketed products when those prices are otherwise set by consumer demand.

## Related Attorneys



### **Lindsey A. Lusk**

Partner

llusk@jenner.com

+1 312 840 7367

© 2026 Jenner & Block LLP. Attorney Advertising. Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication, presentation, or event is not intended to provide legal advice but to provide information on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact [dataprotection@jenner.com](mailto:dataprotection@jenner.com).

**Stay Informed**

