



Because pricing discount and sales class actions are likely to continue and retailers, especially brick-and-mortar ones, may have difficulty enforcing arbitration agreements and class action waivers, companies will want to not only check the ways in which they draft and enforce arbitration agreements, but carefully monitor compliance with pricing laws.

The Tenth Circuit recently affirmed a district court's denial of J.C. Penney's bid to compel arbitration in a putative class action challenging J.C. Penney's pricing discounts and sales in *Cavlovic v. J.C. Penney Corp., Inc.*, No. 2:17-CV-02042-JAR-TJJ (10th Cir. March 7, 2018). The case involved an in-store transaction. The Court of Appeals rejected J.C. Penney's attempt to enforce (1) an arbitration clause contained in a credit card agreement; and (2) an arbitration clause contained in the agreement governing J.C. Penney's rewards program.



Plaintiff purchased a pair of earrings at a J.C. Penney retail

location with an advertised price of \$209.99. The earrings were marked with a previous price of \$524.98, and Plaintiff also received 25% off due to an additional sale. After purchasing the earrings and returning home, Plaintiff claimed that she noticed an original price tag of 225, which was blacked out. Alleging the former price of \$524.98 was fraudulently inflated and that she should have been given a discount off the \$225 price, she sued J.C. Penney. She alleged false advertising under the Kansas Consumer Protection Act and asserted that she suffered emotional distress. In response, J.C. Penney tried to enforce two different arbitration clauses--one from a J.C. Penney's branded credit card (used to purchase the earrings) and the other from a rewards program (of which Plaintiff was a member). J.C. Penney lost on both arguments. The Tenth Circuit held that J.C. Penney was not a party to the credit card agreement formed between the issuing bank and the Plaintiff, and could not enforce the contract as a third party under Utah law, which governed the agreement. As for the rewards program, while J.C. Penney was a party to that agreement, the Court determined Plaintiff's complaint was outside the scope of the arbitration clause, which governed disputes only "arising from or relating to" the rewards program itself.

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