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BLOG

Will New "Pink Tax" Legislation Green Light Class Actions Alleging Gender-Based Pricing Discrimination?

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Key Takeaway

New and proposed legislation prohibiting gender-based pricing discrimination potentially triggers class action lawsuits based on similar allegations.

Recent legislative activity suggests that class litigation may soon redress what some have described as a "Pink Tax"—a concept that has allegedly resulted in women, on average, each paying an estimated $1,350 more annually than men do for substantially similar goods and services.[1] Alleged examples of such goods and services include deodorant, razors, shaving cream, walking canes, pens, dry cleaning, and haircuts.[2]

Although there is disagreement regarding the existence of a Pink Tax,[3] state legislatures around the country have recently enacted or proposed legislation to prohibit discriminatory gender pricing. In 2020, New York enacted the first comprehensive Pink Tax ban,[4] which creates an exception for when firms incur greater costs caused by differentiating their products or services based on gender.[5] Moreover, California, Connecticut, New Jersey, and Minnesota have proposed similar laws in the past year.[6] Federally, the Pink Tax Repeal Act was introduced in Congress in June 2021.[7] And in December 2021, President Biden signed into law the National Defense Authorization Act, which is intended to address an identified $5,500 price disparity between women's and men's military uniforms.[8]

This wave of legislation comes on the heels of unsuccessful attempts to litigate "Pink Tax" claims under existing law. In 2021, two putative class actions in Missouri and California were dismissed under existing consumer statutes.[9] One appeals court suggested that if women's "primary concern is price," they should purchase products marketed to men.[10] And while one lower court acknowledged allegations of "a pervasive issue of women being subjected to questionable pricing practices," it concluded that the "remedy lies with legislation not litigation."[11] Lawmakers appear to be responding accordingly, which history suggests will trigger a new genre of consumer class claims.

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[1] Meredith Hoffman, "The Pink Tax: How women pay more for pink," Bankrate (Jan. 11, 2021), https://www.bankrate.com/finance/credit-cards/pink-tax-how-women-pay-more/.

[2] U.S. Senate. Joint Economic Committee. *The Pink Tax: How Gender-Based Pricing Hurts Women's Buying Power*, Democratic Staff of the Joint Economic Committee, 3-4 (Dec. 2016), https://www.jec.senate.gov/public/_cache/files/8a42df04-8b6d-4949-b20b-6f40a326db9e/the-pink-tax---how-gender-based-pricing-hurts-women-s-buying-power.pdf.

[3] Sarah Moshary, *et al.*, *Investigating the Pink Tax: Evidence against a Systematic Price Premium for Women*, Federal Trade Commission (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_events/1588356/mosharybhatiatuchman_updated2.pdf.

[4] N.Y. Gen. Bus. Law § 391-u. California already prohibited gender-based pricing discrimination for *services* only. Jennifer Warren, "State Bans Gender Bias in Service Pricing," Los Angeles Times (Oct. 14, 1995), https://www.latimes.com/archives/la-xpm-1995-10-14-mn-56735-story.html.

[5] N.Y. Gen. Bus. Law § 391-u(4).

[6] ECT, "Assemblymember Bauer-Kahan's Bill to Eliminate the 'Pink Tax' Passes off Assembly Floor," East County Today (Jan. 27, 2022), https://eastcountytoday.net/assemblymember-bauer-kahans-bill-to-eliminate-the-pink-tax-passes-off-assembly-floor/; Katie Cerulle, "Connecticut Committee Considers 'Pink Tax,'" CT News Junkie (Mar. 2, 2022), https://ctnewsjunkie.com/2022/03/02/connecticut-committee-considers-pink-tax/; Samantha Marcus, "Why do women pay more than men for similar products such as razors? N.J. may ban this 'pink tax,'" NJ (Mar. 12, 2021), https://www.nj.com/politics/2021/03/nj-considering-ban-on-pink-tax-that-finds-women-paying-more-than-men-for-similar-products-and-services.html; *see* "Consumer Justice Agenda," Minnesota Attorney General's Office CLE (June 28, 2021), https://www.ag.state.mn.us/Office/CLE/20210628/CLE_FullMaterials.pdf.

[7] Pink Tax Repeal Act, H.R. 3853, 117 Cong. § 1 (2021).

[8] Mariel Padilla, "Congress votes to eliminate 'pink tax' on military uniforms," The 19th News(letter) (Dec. 15, 2021), https://19thnews.org/2021/12/congress-eliminates-pink-tax-military-uniforms/.

[9] *Schulte v. Conopco, Inc.*, 2020 WL 4039221, at *6 (E.D. Mo. July 17, 2020), *aff'd*, 997 F.3d 823 (8th Cir. 2021); *Lowe v. Walgreens Boots Alliance, Inc.*, 2021 WL 4772293, at *4 (N.D. Cal. Sept. 23, 2021).

[10] *Schulte v. Conopco, Inc.*, 997 F.3d 823, 826 (8th Cir. 2021).

[11] *Schulte*, 2020 WL 4039221, at *6.

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