The Battle Over Mandatory Resort Fees

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More hotels are imposing mandatory "resort fees" on their guests for amenities, and the amount of those fees is increasing at many of those hotels. Many consumers dislike these fees, even when they appreciate the value of the included amenities.

A legal battle is underway over mandatory resort fees. Back in November 2012, the Federal Trade Commission ("FTC") sent letters to 22 hotel chains warning that the practice of disclosing mandatory resort fees only in fine print prior to the completion of the reservation process, or not at all, could be found to be unfair or deceptive and thus unlawful. The FTC reasoned that such practices misrepresent "the price consumers can expect to pay for their hotel rooms." The FTC stated that the "most prominent figure" for prices on a hotel reservation site should "be the total inclusive estimate" which includes "all mandatory charges." In response, many hotels changed their disclosure practices.

Since then, the FTC has not publicly taken any enforcement action against hotels alleging an inadequate disclosure of mandatory resort fees. In January 2017, the FTC's Bureau of Economics issued a report which concluded that a hotel's failure to disclose mandatory fees with the initial advertised base rate harms consumers, because (a) that practice increases consumers' search time when comparing prices, and (b) consumers base their purchasing choices on a perception that the total price of the hotel stay is lower than the combined base rate and resort fee. However, the prospect of FTC enforcement action has likely faded with changes in the FTC's leadership following the election of President Trump.

The cause has been taken up by the Attorneys General of 46 states and the District of Columbia ("State AGs"), who in 2016 began an investigation of resort-fee practices. This investigation is led by the District of Columbia Attorney General's office, which has taken the position that mandatory resort fees must be disclosed at the beginning, not at the end, of the reservation process. The D.C. Attorney General has also stated its view that it is unlawful for a hotel to describe a resort fee during the reservation process as "mandatory" if the hotel has a secret internal policy of waiving those fees for objecting customers.

The State AGs have issued numerous subpoenas. So far, no charges have been brought against any hotels or chains, but the investigation has likely not matured to that stage yet. The State AGs may find instances where hotels have failed to disclose mandatory resort fees at all before a reservation is finalized (or even later), or have disclosed them only in fine print. Any enforcement actions challenging such practices would proceed under a conventional application of consumer-protection laws barring "unfair" or "deceptive" practices.

The State AGs will have a more difficult time establishing that hotels must disclose mandatory resort fees at the beginning of a reservation transaction and that it is unfair or deceptive for them to prominently disclose such fees only at a later stage of the transaction before the reservation is finalized.

Under FTC guidelines, a practice is not considered to be "unfair" if consumers themselves could "reasonably have avoided" any injury. Hotels will argue that consumers can "reasonably avoid" the mandatory resort fees by terminating the booking process once the fees are disclosed before completing a reservation. The State AGs are not required to follow the FTC guidelines in enforcing state consumer-protection statutes, but the FTC guidelines have traditionally been influential.

There is also a court precedent against the State AGs' position. In 2013, a federal court ruled that a Las Vegas hotel did not violate California consumer-protection laws when its reservation system did not disclose a resort fee with the initially quoted base rate. Later in the reservation process, the hotel disclosed a "grand total" price, followed in slightly smaller print with a statement that the quoted grand total "does not include applicable daily resort fee of $20 plus tax." The court found that this disclosure, provided before the reservation was finalized, was not "inconspicuous" and was thus sufficient to prevent consumers from being misled.

Several lawsuits have been filed to challenge mandatory resort fees under consumer-protection laws. One suit is currently pending in Pennsylvania federal court, which the plaintiffs seek to bring as a consumer class action. None of the court lawsuits, however, have reached a final outcome that adopts the State AGs' position that a resort-fee must always be quoted upfront.

The State AGs should consider whether their aggressive position is good policy. They should consider the extent to which consumers will become acclimated to resort fees as an expected part of the reservation process. Consumers have grown accustomed to such fees in many other contexts, such as in the sale of tickets to sporting or entertainment events where ticket prices are advertised initially and delivery or service fees are added later in the ticketing process. An expected fee is hard to characterize as "unfair" or "deceptive."

More fundamentally, the State AGs' position may be counterproductive. The practice of quoting resort fees prominently before a reservation is completed, but not in the advertised base rate, may provide greater pre-purchase disclosure to consumers of their total cost than often occurs today when individual charges for commonly-used amenities are not disclosed prominently (or even at all) during the reservation process. It would be difficult to treat a pricing practice that generally provides greater disclosure as "unfair" or "deceptive."

The resort-fee battle will likely intensify over the coming year. Hotels should evaluate their practices to weigh the benefits and risks of charging mandatory resort fees and the ways in which they are disclosed to consumers.

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