

HOSPITALITY LAW

Disclosing Resort Fees: Transparency Is Essential



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You are checking out of your hotel when you spot a new charge – “resort fee” – for \$25 per night on the itemized invoice. You loosely remember being told something about that “fee,” and with a shrug think, “I guess I have no choice but to pay it.”

The charging of resort fees—also known as facility fees, destination fees, amenity fees or urban fees—at hotels is becoming increasingly common. In exchange for paying this generally mandatory fee, assessed by hotels in addition to the cost of the hotel room, hotel guests are supposedly provided access to a variety of goods and services such as gym facilities and swimming pools, luggage storage, “complimentary” happy hours, parking and wireless Internet.

While costs for many of these amenities were traditionally built into the cost of a hotel room, many hotels are now separately charging resort fees as they search for new ways to increase revenue. In charging these fees, hotel owners, operators and brands face the dilemma of how and when to present the existence of a resort fee to travelers booking hotel stays, and the manner in which hotels choose to disclose such fees

varies widely. In some cases, resort fees are incorporated into the total per night price quoted to a prospective guest, enabling the consumer to easily compare prices across hotels. In other instances, resort fees are poorly disclosed or not revealed at all during the booking process, appearing only in the fine print of a reservation or on the final booking confirmation screen.

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The manner in which hotels disclose the existence of a resort fee is now being scrutinized by various federal and state regulators, as they assess whether the practice may run afoul of statutes intended to prevent deceptive trade practices and false advertising. Consumers and advocacy groups have also started to push for greater transparency, and private class action litigation is beginning to foment. This article explores the current legal landscape in New York and nationwide, and considers best

practices for hoteliers doing business in New York to protect against potential liability under New York’s statutory scheme.

Concerns at the State And Federal Level

The issue of deceptive practices relating to resort fees was recently the subject of a report released by the U.S. Federal Trade Commission (FTC), Bureau of Economics, entitled “Economic Issues: Economic Analysis of Resort Fees.” Mary W. Sullivan, Bureau of Economics Federal Trade Commission, *Economic Issues: Economic Analysis of Hotel Resort Fees*, at 4 (January 2017). This report, which examined the costs and benefits to consumers of listing resort fees separate from room rates, found that “separating mandatory resort fees from posted room rates without first disclosing the total price is likely to harm consumers by increasing the search costs and cognitive costs of finding and choosing hotel accommodations.” It also found that “separating resort fees from the room rate without first disclosing the total price is unlikely to result in benefits that offset the likely harm to consumers.” While the FTC has yet to implement regulations specific to resort fees, it may do so in the near future.

Additionally, amid a growing public concern and calls for action by consumers and advocacy groups, the Attorney General of the District of Columbia, along with at least 46 other attorneys general, has begun investigating the hotel industry’s practices

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of advertising and presenting resort fees to travelers. In June 2017, the District of Columbia, through the Office of its Attorney General, petitioned the U.S. Court of Appeals for the D.C. Circuit for an order enforcing a subpoena it had served on Marriott International in 2016. The subpoena “required Marriott to produce documents relevant to the Attorneys General’s investigation into whether Marriott’s practice of charging undisclosed or poorly disclosed resort fees in addition to the advertised daily rate for lodging at Marriott’s hotel properties...violated the District of Columbia’s Consumer Protection Procedures Act...and other state consumer protection laws.” *Petition for Enforcement of the Attorney General’s June 16, 2016 Subpoena to Marriott International, Inc., District of Columbia v. Marriott Int’l Inc.*, No. 17-0003900, at ¶ 2 (Super. Ct. Dist. Columbia, Civ. Div., June 6, 2017).

The issue of resort fees and the legality of how they are presented to consumers will unquestionably continue to gain traction.

New York’s General Business Law

As more consumers and advocacy groups begin to take notice of resort fees and how they are disclosed to travelers, owners, operators and brands need to be aware of the laws governing the disclosures when seeking to implement such a fee.

In New York, hoteliers that do not transparently disclose resort fees during the booking process may run the risk of facing private claims under New York State’s General Business Law. New York General Business Law § 349 provides that “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.” N.Y. Gen. Bus. Law (“GBL”) § 349(a). Section 349 of the GBL has been held to be “intentionally broad,” covering “virtually all economic activity...[in order to] provide[] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in [New York] State.” *Lonner v. Simon Prop. Group*, 57 A.D.3d 100, 109-110 (2d Dept. 2008) (citation & quotations omitted).

To prevail on a claim under GBL §349, a plaintiff must prove three elements: “[F]irst, that the challenged act or practice was consumer oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.” *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000); *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995). Hotels exist to serve consumers, and it follows that non-disclosure of resort fees or relegating resort fees to the fine print when a consumer is booking a hotel stay is “consumer oriented.” A consumer that books a hotel room, and ultimately pays resort fees that the consumer was unaware of at the time of booking (or which were not easily discoverable such that the consumer could make an informed booking decision), may suffer injury in the form of greater costs than they would have otherwise paid for their hotel stay.

Whether or not the imposition of a resort fee is “misleading in a material way” is a fact-intensive question, as “the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances.” *People v. GE*, 302 A.D.2d 314, 315 (1st Dept. 2003) (citation and quotations omitted). However, underscoring the breadth of potential liability under GBL §349, when evaluating whether the practice is deceptive, a court is to “tak[e] into account not only the impact on the average consumer but also on the vast multitude which the statutes were enacted to safeguard—including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions.” *Lonner*, 57 A.D.3d at 110 (citation & quotations omitted). Given the deliberately broad interpretations of GBL §349, hoteliers are advised to scrutinize the manner in which resort fees are disclosed to potential guests, ensuring that even the unthinking consumer is aware of the fee-inclusive per night rate early in the booking process.

Hotels that obscure or hide resort fee charges from the prospective traveler may also face a similar claim under New York’s GBL §350, which prohibits a party

from engaging in false advertising in the conduct of business or in the furnishing of services. A GBL § 350 claim, which is often plead alongside a GBL §349 claim, provides that “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.” As to proof of the false advertising, “the mere falsity of the advertising content is sufficient as a basis for the false advertising charge.” *People by Vacco v. Lipsitz*, 174 Misc. 2d 571, 582-83 (Sup. Ct., N.Y. Cnty. 1997). Like its companion statute, GBL § 350 “appl[ies] to virtually all economic activity” and its “application has been correspondingly broad.” *Karlin v. IVF Am.*, 93 N.Y.2d 282, 290 (1999). Given the low level of proof required, and the broad application of GBL §350, hoteliers that are not transparent about resort fees may also be susceptible to claims of false advertising.

Looking Forward

If the implementation of resort fees continues to accelerate, litigation over the disclosure of those fees appears inevitable. Given the courts’ broad interpretation of GBL §§349 and 350, the issue of transparency in disclosing resort fees needs to be taken seriously by hotel owners, operators and brands alike, as taking proactive steps now to make sure the hotel booking process is compliant with all applicable disclosure laws is a prudent safeguard against potential liability.

In addition, hotel owners would be wise to examine whether, under indemnification language likely drafted prior to the advent of resort fees, they are potentially liable for insufficient disclosures on websites managed and controlled by their hotel operator. The unsuspecting owner may be exposed to sizeable liability for acts of its operator, and owners should take action now to cut off this potential exposure, either by demanding better disclosure practices or revisions to the applicable indemnification language.