

TRAVEL LAW: "BEST PRICE" OR "LOWEST PRICE"

GUARANTEES: WHAT DO THESE WORDS MEAN?

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This week we will examine the relationship between some "major U.S. hotel chains and online travel agencies (OTAs) in the United States" and the meaning and reality of promises made to consumers online such as "OTA Defendant Expedia's best price guarantee: 'Find a cheaper trip within 24 hours of booking and we'll refund the difference-and give you a travel coupon worth \$50'". What do these words mean?

The Antitrust Lawsuit

In Online Travel Company Hotel Booking Antitrust Litigation, 997 F. Supp. 2d 526 (2014) plaintiff consumers set forth "three antitrust claims which charge Defendants (hotel chains and OTAs) with engaging in an industry-wide conspiracy to uniformly adopt resale price maintenance agreements, containing most favored nation clauses, in an effort to eliminate price competition among

hotel room booking websites". In addition "the Complaint (set forth a consumer protection law claim) which alleges that Defendants deceptively published 'best price' or 'lowest price' guarantees on their website while knowing that 'best' price was the same fixed rate offered across all hotel booking websites".

The Relevant Market

"The relevant conduct at issue...took place in the U.S. market for 'direct online sale of hotel room reservations'... Hotels have long sold rooms to consumers through various channels of distribution, including 'telephone or walk up reservations'. With the rise of the internet, an important new channel presented itself: the online booking market. In this market, a hotel can offer a single room to consumers through multiple online outlets, including its own website or any of the websites operated by OTAs (which) have 'seen explosive growth'...attributable to the value OTAs offer consumers; they 'allow consumers to rent hotel rooms in many different hotels throughout the country and the world' and 'easily search many different hotel types and locations in their desired areas' and 'many...have reviews provided by consumers with which to evaluate different properties'".

Rate Parity

The Defendants include "twelve 'collectively...dominant hotel chains in the United States (Hotel Defendants) (and) nine OTAs (OTA Defendants) four of which-Expedia, Orbitz, Priceline and Travelocity-'accounted for 94% of 'all OTA-hotel bookings in 2011...Collectively, Defendants are charged with entering into an industry-wide conspiracy to impose 'rate parity' across hotel room booking websites. Put differently, Defendants allegedly conspired to eliminate, on an industry-wide basis, intra-brand competition-that is, competition among each hotel's online distribution channels, including its own website and OTA-run websites. Here are just two examples set out in the Complaint illustrating the rate parity Defendants' conspiracy allegedly created: Dallas Marriott, 1 King Bed or 2 Double Beds, June 1-2, 2013 (posted 4/25/13): Expedia \$159, Hotels.com \$159, Orbitz \$159, Priceline \$159, Travelocity \$159, Booking.com \$159, Marriott's website \$159; Hilton Dallas/Park Cities, 1 King Bed, June 1-2, 2013 (posted 4/25/13): Expedia \$139, Hotels.com \$139, Orbitz \$139, Priceline \$139, Booking.com \$139, Hilton's website \$139.

The RPM Agreements

At the heart of the alleged conspiracy were written contracts "known as resale price maintenance (RPM) agreements

(between the Hotel Defendants and) each OTA Defendant (which) 'provided at least two restrictive terms'. The first term mandated that the hotel 'would establish' and publish 'the Best Available Rate' or "Lowest Rate' for a non-packaged room... [and][t]hat published rate was the price the [OTA] could use when selling rooms to consumers'. The second relevant term-known as the most favored nation (MFN) clause-'provided that the published rates offered by the [OTA] would be as favorable as the published rate offered to (a) any [OTA] competitor and (b) the rates published on the internet site operated by the hotel itself'... Thus each RPM agreement ensured first, that each OTA would not discount below each hotel website's published rate, and second, that each hotel was providing each OTA with its lowest online rate".

The Illusory "Best Price" Guarantees

"With the 'RPM scheme' ensuring rate parity remained intact, the OTA Defendants began to 'offer a near identical 'best price' guarantee-knowing that it is the only price available even among competitors'. A couple examples include Travelocity's advertisement guaranteeing the 'Best Price: If you find a lower rate, we'll pay the difference and send you \$50' and Orbitz's 'Low Price Guarantee: If you book a qualifying prepaid hotel rate

on the Orbitz Web site, and then find the same room, in the same hotel, for the same dates, at a lower price online...we'll refund the difference and give a \$50 discount on future hotel booking'. The Hotel Defendants made 'similar promises', for example, Marriott's 'Best Rate Guarantee: Book a Marriott room using any Marriott reservation channel', online or otherwise, and '[i]f within 24 hours of making your reservation, you find a lower hotel rate for the same hotel, room type and reservation dates...we'll match the rate + give you an extra 25% discount of the room'".

Parallel Business Behavior

In dismissing the antitrust claims the Court held that "the real 'nub' of the Complaint in this case is Defendants' parallel business behavior-the adoption of similar RPM agreements seen across pairs of OTA and Hotel Defendants (and) Defendants' adoption of similar business strategies is not suspicious or suggestive of an agreement...More, generally, hotels across the industry may find that controlling minimum resale prices is the 'only feasible' way to effectuate a profitable price discrimination strategy-that is, a strategy to 'sell the same product [i.e., hotel room], costing the same to make and sell, at different prices to different consumers'...This all points to a

self-interested explanation for why each Hotel Defendant entered into RPM agreements with a provision allowing them to 'establish' a 'Lowest Rate' at which each OTA offered their rooms to consumers: this contractual term gave hotels a right they highly value, the right to control online pricing for their rooms".

Misleading

While the Court dismissed Counts 1-4 of the Complaint it did so without prejudice. As for Defendants' alleged price guarantees [e.g., "OTA Defendant Expedia's best price guarantee: 'Find a cheaper trip within 24 hours of booking and we'll refund the difference-and give you a travel coupon worth \$50'"] the Court held that they may have been both misleading and unfair. "It seems plausible that an ordinary consumer would reasonably infer from this advertisement that Expedia is trolling the online market, looking for the lowest price for a particular room in the 24-hour period and publishing that rate for the consumer. Expedia even implies that it is putting in its best effort to find the consumer the best price, promising that if it slips up, that consumer gets a refund and a \$50 travel coupon. In reality, Expedia's promise is illusory-it has entered into a contract (the RPM (Retail Price Maintenance) agreement) that ensures the rate offered in the same 'low' price being offered everywhere else

online. Absent a breach of the RPM agreement, Expedia will never have to pay the consumer that refund and a \$50 coupon. These allegations, therefore, plausibly show that a reasonable consumer may be misled to believe she was receiving the lowest price available in a competitive market.

Unfair

“Similarly, Plaintiffs have plausibly alleged that the rate guarantees qualify as ‘unfair’ under the consumer protection statutes. The rate guarantees unscrupulously promises the best rate without any indication that the particular rate is actually the same as all other rates offered online. And the purpose of the guarantee was primarily, if not purely, commercial. While Defendants posit that the rate guarantees had the laudable goal of assuring consumers they would not have to go searching elsewhere for a better online rate, if this was truly the desired effect, the advertisement would not likely induce consumers to go search elsewhere with the illusory promise of an award if a lower rate is found. Instead the guarantees were intended to attract more consumers to book at that particular defendant’s website, with the promise that the consumer will not find a better price than the ‘best’ being offered on that website. In short, it is not in the public’s best interest to allow unscrupulously

misleading advertisements for commercial gain. According, the Court finds (the) Complaint's allegations of unfair and/or deceptive conduct on the part of Defendant to be plausible".

Justice Dickerson been writing about *Travel Law* for 38 years including his annually updated law books, *Travel Law*, Law Journal Press (2014) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2014), and over 300 legal articles many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml.

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