

## **TRAVEL LAW: PRICE GUARANTEES & PRICE MATCHING: MISLEADING & DECEPTIVE?**

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Online travel companies (OTCs), hotels and airlines have on occasion asserted that their prices for various travel services are the "best" or "lowest". In addition, the "best" or lowest" price may be "guaranteed". Often these promises are coupled with a promise to match a lower price for the same service or product offered by a competitor, if you can find it in a short period of time, and, even, a promise to throw in a 10% bonus for finding such a "price match". Are these common marketing promises misleading and deceptive and a violation of state consumer protection statutes, and if so, under what circumstances? The recent decision of federal Judge Robert H. Chatigny in *Chapman v. Priceline Group, Inc.*, Case No: 3:15-CV-1519 (RNC) (D. Conn. September 30, 2017) informs on these issues.

### **"Best Price Guaranteed"**

The Chapman complaint alleged that Priceline's "Best Price Guaranteed" policy promised that airfare purchased "through its website" would be the "lowest price on everything [they] book".

However, it was alleged that "Spirit Airlines flights are always cheaper when purchased through Spirit Airlines' website than when purchased through Priceline.com" because "Priceline secretly adds its own markup". In response to Priceline's motion to dismiss the consumer protection claims Judge Chatigny found this language to be unfair and deceptive and a violation of the Connecticut Unfair Trade Practices Act (CUTPA) in that "the overall impression is still that Priceline is not actively adding surcharges..I agree that this is a plausible interpretation of the Priceline Terms and Conditions. The allegations in the complaint are therefore sufficient to state a claim under CUPTA (regarding) Priceline's allegedly deceptive addition of a secret markup to the price of Spirit Airline tickets".

### **The Price Matching Scheme**

Regarding the breach of contract and beach of warranty claims Priceline asserted that its "Best Price Guaranteed" policy is really a "price matching scheme" and not a promise that the fares advertised on its website are "necessarily the lowest available" relying on an express disclaimer set forth in its online Terms and Conditions.

### **Priceline's Terms And Conditions**

In analyzing Priceline's "Terms and conditions of our Best Price Guarantee" and applying Connecticut law Judge Chatigny reviewed three

different versions of Priceline's "Best Price Guarantee" policy and Priceline's disclaimer. First, in July 2015 the policy was "We Guarantee The Lowest Price On Everything You Book. Find a lower price, we'll refund you 100% of the difference". The policy in March 2015 was "The Priceline Negotiator's Best Price Guarantee. Nobody out-deals the Negotiator. Nobody. If you find a lower price online for the same itinerary we'll refund 100% of the difference". And third in April 2014 the policy was "The Priceline Negotiator's Best Price Guarantee....I'm going to make this short and sweet...I'm going to make you a special promise and it applies to...airline tickets, hotel rooms, rental cars, cruises, vacation packages and activities. If you find a lower published price for the exact same itinerary, within 24 hours of booking, Priceline will: Refund you 100% of the difference...Plus we'll give you a \$50 Priceline Vacation Package Coupon for your next trip". In addition, the Court considered Priceline's "Disclaimers of Warranties" which provided "Without Limiting The Foregoing, No Warranty Or Guarantee Is Made...That A User Will Receive The Lowest Available Price For Goods And/Or Services Available Through This Site".

### **Promise Not To Add Surcharges**

Although Judge Chatigny agreed with Priceline's analysis that the quoted provisions made it clear "to a reasonable consumer" that the "Best Price Guaranteed" policy is a price-matching scheme as

opposed to a promise to provide the best price on every purchase, he nonetheless reiterated his finding of a CUTPA violation in that a reasonable consumer "would interpret the contract language to include a promise not to add hidden surcharges". The Court also sustained the claims of a breach of the duty of good faith and fair dealing ["plaintiff may be able to prove that Priceline's alleged practice of secretly adding surcharges to Spirit Airlines tickets was not motivated by an honest mistake about its duties"] and unjust enrichment.

### **Significance**

Judge Chatigny's decision is significant and precedential in that it found that "Best Price Guarantee" means what its says to a reasonable consumer notwithstanding disclaimers to the contrary and being coupled with a price matching scheme. Compare *Opper v. Delta Air Lines, Inc.*, Case No: 14-C-962 (E.D. Wis. May 22, 2015) ("The phrase 'best fare guarantee' is better understood as the promotional name Delta gave to the guarantee rather than the guarantee itself. Without more than those words, no consumer would have any clear idea what the guarantee meant...Without at least a few details such a guarantee is meaningless").

### **Different Consumer Expectations**

Price matching schemes should not be relied upon by the Courts as a justification for deceptive and false statements such as "Best Price Guaranteed". Low price guarantees are different from price matching guarantees (Verma, Swati, Are Low Price Guarantees And Price Matching Guarantees Created Equal: Examining The Effects Of Different Types Of Price Guarantees On Consumers' Evaluations (2017) Wayne State University Dissertations 1751

(<http://digitalcommons.wayne.edu/oa-dissertations/1751>) Abstract:

"Retailers offer one of Low Price Guarantees (LPGs) or Price Matching Guarantees (PMGs) to signal their price position in the marketplace. Past literature has assumed that both LPG and PMG work similarly as signals of low prices, and consequently, LPG and PMG have been used interchangeably in both research and practice. In my dissertation, I posit that LPG and PMG send out different price signals and therefore have different effects on consumers' evaluations. I show that LPGs signal lower prices than PMGs, and so LPGs lead to superior evaluation in pre-purchase scenarios, especially for promotion focused consumers actively seeking the lowest price...I show that purchase intentions are higher when LPGs (vs. PMGs) are used".

### **Trolling For The Lowest Price**

There have been other reported decisions involving alleged deceptive and misleading price matching schemes. In Online Travel

Company Hotel Booking Antitrust Litigation, 997 F. Supp. 2d 526 (N.D. Tex. 2014), plaintiff consumers alleged that defendant hotels and online travel companies (OTCs) conspired together to control prices while creating the illusion of vigorous price competition by relying on "best price" or "lowest price" guarantees coupled with price matching schemes. Although the Court dismissed the antitrust charges ("generally hotels across the industry may find that controlling minimum resale prices is the 'only feasible' way of effectuating 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'"), it also found that the price guarantees and price matching scheme may be misleading and unfair ["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'"...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, promoting that if it slips up, the consumer gets a refund and a \$50 travel coupon. In reality, Expedia's promise is illusory-it has entered into a contract...that ensures the rate offered is the same 'low' price offered everywhere else online...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".

### **Stonewalling Price Matching Claims**

It's one thing to solicit customers through a price matching policy and quite another to simultaneously institute a secret "Anti-Price Matching Policy". This is the scenario addressed in *DiSanto v. Best Buy Stores, L.P.*, Civil Action No. 09-4727 (PGS) (D.N.J. August 31, 2010); See also: *In Re: Best Buy Co., Inc., Price Match Marketing And Sales Practices Litigation*, 672 F.Supp. 2d 1375 (MDL 2010) (centralization denied)' *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418 (S.D.N.Y. 2009). In *DiSanto*, Best Buy promoted a price match guarantee that "'it will match any local competitor's lower price' and if a customer has already purchased that product, then Best Buy will refund the entire price of the product plus ten percent". The *DiSanto* complaint asserted that Best Buy "aggressively discourag[ed] and den[ied] customers' proper price match requests" relying upon the remarks of a former Best Buy supervisor that "Best Buy has an undisclosed Anti-Price Matching Policy; The Anti-Price Matching Policy is disseminated from corporate headquarters; Barriers and techniques to proper price match requests are taught at Best Buy facilities; Best Buy provides financial bonuses based, in part, on denying proper price match requests; and Best Buy denied more than 100 proper price match requests per store per week". In

denying Best Buy's motion to dismiss the Court found that plaintiff stated a viable claim [with respect to one of three price matching claims] for a violation of the New Jersey Consumer Fraud Act.

"Plaintiff sufficiently alleges unlawful conduct. He alleges that Best Buy had in place an undisclosed policy that was intended to subvert customers' attempts to comply with the price guarantee".

[See also: Dank v. Sears Holding Management Corporation, 59 A.D. 3d 582 (2d Dept. 2009) (alleged refusal to honor price matching claim states a claim under New York's General Business Law (GBL) Section 349); Dank v. Sears Holding Management Corp., 93 A.D. 3d 627 (2d Dept. 2012) (GBL 349, 350 and fraud claims dismissed after trial)].

## **Conclusion**

Best price, lowest price and price matching schemes have been and continue to be used to solicit retail business. Judge Chatigny's decision is helpful for consumers and their attorneys since it clarifies that notwithstanding the existence of a price matching scheme, the phrase "Best Price Guarantee" has a meaning in and of itself and a failure to deliver the "Best Price" for a product or service may be misleading and deceptive and violative of a state's consumer protection statutes.

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