

FTC Must Act to Stop Mandatory Resort Fees
Misleading Hotel Prices Are Deceptive, Harmful to Consumers

July 1, 2015



Executive Summary

Hotel operators that do not include mandatory “resort fees” in the advertised room price misleadingly make the price of rooms appear less expensive than they actually are to consumers. This growing practice violates Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” Although the FTC has expressed concern over resort fees, and issued warning letters to hotel operators in 2012, it has not taken any significant enforcement action to halt to this practice. The FTC should exercise its authority under Section 5 of the FTC Act to eliminate this deceptive and unfair practice altogether.

The charging of mandatory “resort fees” by hotels results in a misrepresentation of the true price of the hotel room, a drip pricing practice that is harmful to consumers and undermines fair competition. The FTC should exercise its authority under Section 5 of the FTC Act to eliminate this deceptive and unfair practice and require hotels to include mandatory fees in the base price or room rate.

Introduction

Mandatory resort fees charged by hotels are widely condemned by travelers – and for good reason.¹ These fees are not included in the room rate advertised by the hotel. Even if hotels ultimately disclose the amount of such fees during the course of the booking process, consumers may nonetheless be surprised and disappointed to encounter such fees when they receive their hotel bills. Resort fees, according to hotels, are intended to cover the cost of services such as the hotel gym, swimming pool, in-room Wi-Fi, coffee, newspapers, gratuities, and other amenities. However, travelers who stay at these hotels are obligated to pay these fees – which often amount to \$25, or more, per night² – whether they actually use these amenities or not. This practice not only persists, it is becoming increasingly prevalent. In the two years from 2012 to 2014, the number of hotels in the U.S. charging a mandatory resort fee more than doubled.³

¹ See, e.g., Christopher Elliott, *Travelers Want ‘Resort’ Fees to Checkout – Permanently*, USATODAY.COM (Jan. 13, 2014), <http://www.usatoday.com/story/travel/hotels/2014/01/12/hotel-resort-fee-service-charge/4441287/>.

² Certain resorts in Miami Beach charge \$107 per night, and other hotel chains now charge between \$50 and \$90 per night. See, e.g., Ed Perkins, *Hotel Resort Fees: The Real Story*, SMARTERTRAVEL.COM (Feb. 10, 2015), http://www.smartertravel.com/blogs/today-in-travel/hotel-resort-fees-the-real-story.html?id=22016870&source=91&value=2015-02-11+00%3A00%3A00&u=AF15711F03&nl_cs=21871583%3A%3A7603555%3A%3A22016870%3A%3A.

³ Christopher Elliott, *Uh-Oh! Hotel Resort Fees Are On the Rise*, BOARDINGAREA.COM (Feb. 14, 2015), <http://elliott.org/blog/uh-oh-hotel-resort-fees-rise/>; see also Robert McGarvey, *Fighting Back Against Really High – and Greedy – Resort Fees*, MAINSTREET.COM (Oct. 20, 2014), <http://www.mainstreet.com/article/fighting-back-against-really-high--and-greedy--resort-fees>.

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These fees are artificially carved out from the true room rate and bear no relationship to the actual services the fees are supposed to cover. As a result, the imposition of these ancillary fees serves only to misrepresent the actual price of hotel rooms. If a hotel that once charged a room rate of \$100 per night now charges \$80 per night but tacks on a \$20 “resort fee,” it will appear to consumers that they are getting a far more attractive offer, a low room rate of \$80 per night. In order to compete with the “low” room rate of \$80, other hotels are forced to engage in the same practice.⁴ They will concoct fees to imply a cheaper room rate than that which consumers ultimately pay. This practice not only harms consumers, it hurts fair competition and undermines confidence in the marketplace. The solution to this growing problem is simple, practical, and can have a far-reaching effect: to avoid deception and to ensure that consumers understand the *real* cost of their hotel bookings, hotels should be required to fold “mandatory fees” into the actual prices of their rooms.

I. Charging Mandatory Resort Fees Violates Section 5 the FTC Act.

A. The Practice of Charging Resort Fees is Deceptive

Section 5 of the Federal Trade Commission Act (the “FTC Act”) prohibits “unfair or deceptive acts or practices in or affecting commerce.”⁵ In 1983, the Federal Trade Commission (“FTC”) issued its Policy Statement on Deception, in which it expanded upon the term “deceptive acts or practices” and provided a “concrete indication of the manner in which the Commission will enforce its deception mandate.”⁶ The FTC specified that it will find deception where there is “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances,” and that representation, omission or practice is “material” to the consumer.⁷

The FTC has already indicated that charging mandatory resort fees separate from the advertised room rate may constitute a misrepresentation that is likely to mislead the reasonable

⁴ See e.g., *Say It Ain't So: Caesars Adding Resort Fees*, VEGASCHATTER.COM (Feb. 20, 2013), available at <http://www.vegashatter.com/story/2013/2/20/171452/772/vegas-travel/Say+It+Ain't+So%3A+Caesars+Adding+Resort+Fees>; *They Said It Wouldn't Be Done: Cosmo To Get A Resort Fee*, VEGASCHATTER.COM (Dec. 3, 2012), available at <http://www.vegashatter.com/story/2012/12/3/195253/438/vegas-travel/They+Said+It+Wouldn%27t+Be+Done%3A+Cosmo+To+Get+A+Resort+Fee>. Before it implemented its own resort fees, Caesars Palace criticized competitor hotels for the practice. See <https://www.facebook.com/caesarspalace/posts/174627505882829>.

⁵ 15 U.S.C. § 45; see *Ramirez v. Dollar Phone Corp.*, 668 F. Supp. 2d 448, 472 (E.D.N.Y. 2009) (“[t]he FTC has independent litigating authority to initiate federal district court proceedings to enjoin violations of the FTC Act and to obtain other equitable relief, such as restitution and disgorgement of ill-gotten gains”).

⁶ Letter from James C. Miller, III, Chairman, Fed. Trade Comm’n, to Rep. John D. Dingell, Chairman, Comm. on Energy & Commerce, U.S. House of Representatives (Oct. 14, 1983), available at <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> [hereinafter “FTC Policy Statement on Deception”].

⁷ *Id.*

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consumer. Specifically, in May 2012, the FTC held a workshop regarding “drip pricing,” a technique by which companies advertise only part of product’s price and reveal other charges later in the purchasing process. The charging of resort fees by hotels was highlighted as a prominent example of drip pricing.⁸ Several months later, in November 2012, the FTC issued warning letters to 22 hotel operators indicating that the room rates quoted on their online reservation sites may be deceptive and in violation of federal regulations due to their listing of mandatory hotel fees separately in fine print, or not at all, during online booking.⁹ Those warning letters stated that an investigation by the FTC had revealed that:

consumers complained that they did not know that they would be required to pay resort fees in addition to the quoted hotel room rate. Several [consumers] stated that they only learned of the fees after they arrived at the hotel, long after making a reservation at what they believed to be the total room price. Others paid for the reservation in advance, and only found out after they arrived at the hotel that they would have to pay additional mandatory fees.¹⁰

The warning letters make clear that this practice falls squarely within the FTC Policy Statement on Deception, which provides as a chief example of misrepresentations likely to mislead “[m]arketing and point-of-sales practices . . . where inaccurate or incomplete information is provided.”¹¹

The November 2012 warning letters also indicate that the resort fee practice is “material” to reasonable consumers. As the FTC Policy Statement noted, practices are “material” where they are “likely to affect the consumer’s conduct or decision with regard to a product or service.”¹² And, “[i]f inaccurate or omitted information is material, injury is likely.”¹³ As the letters make clear, the substantial difference in the advertised room rate, in itself, satisfies the materiality standard: “mandatory fees can be as high as \$30 per night, *a sum that could certainly affect consumer purchasing decisions.*”¹⁴

⁸ See Fed. Trade Comm’n, Events Calendar: The Economics of Drip Pricing, <https://www.ftc.gov/news-events/events-calendar/2012/05/economics-drip-pricing> (last visited Mar. 23, 2015).

⁹ See Press Release, Fed. Trade Comm’n, FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and Other Mandatory Surcharges May Be Deceptive (Nov. 28, 2012), available at <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other>.

¹⁰ Form Warning Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices (Nov. 2012), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be/121128hoteloperatorsletter.pdf>.

¹¹ See FTC Policy Statement on Deception.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (emphasis added).

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Although the FTC's efforts in issuing warning letters to hotel operators were laudable, the agency did not sufficiently address the problem or cure the harm that such practices cause consumers. In response to the FTC's initiative, some hotel operators have improved the prominence of their online disclosures regarding resort fees, but there is little indication that these changes have cured the potential for deception. For example, a consumer class action complaint, recently filed in the U.S. District Court for the Central District of California, observed that certain Las Vegas hotels use an online reservation system that advertises a nightly room rate that is not a true and complete rate.¹⁵ According to that complaint, the Las Vegas hotels at issue advertise low nightly room rates on their online reservation systems and display in small-print text below the rates the words "Excluding Taxes and Fees" and "View Price Breakdown." If a consumer clicks on those words, he or she receives a pop-up notification displaying the additional taxes and fees, including resort fees, that are added to the advertised nightly rate. That text does not indicate, however, that the fees are mandatory. The fact that a "total price," including the resort fees, is eventually displayed during the course of the booking process and before payment is made does not change the fact that the booking process is confusing, and that the initial room rate quoted is not the true price of the room.¹⁶

As one travel writer has observed, "with hotels, the main change I've noticed so far is that some are displaying fees more prominently, but none are including fees in the initial price displays."¹⁷ Although providing more prominent disclosures always sounds like a good idea, the result is the bombarding of consumers with different fees and price totals through the course of the booking process. Rather than achieving greater transparency, this creates even greater confusion. Bjorn Hanson, clinical professor for NYU's Preston Richard Tisch Center for Hospitality, Tourism and Sports Management, has studied resort fees for years. Professor Hanson observed that "rate transparency is so important, but it's difficult to track because of how complicated it all is."¹⁸ As a result, it has become increasingly difficult for consumers to determine the true cost of their hotel stays in advance and to make accurate price comparisons.

To date, the FTC has attempted to address the issue of resort fees solely in the context of inadequate disclosure. It has not addressed the more fundamental problem: the deception inherent in the imposition of mandatory fees in the first place. In response to the FTC's warning letters, hotels have indeed made modest changes to their websites and booking pathways in an effort to provide "adequate" disclosures. But rather than cure the potential for harm by eliminating an unlawful drip pricing technique, the hotels have merely refined it.

¹⁵ See Class Action Compl., *Brin v. The Palazzo et al.*, No. 2:15-cv-1772-AB-PLA, (C.D. Cal. Mar. 11, 2015), Dkt. No. 1.

¹⁶ See *id.* ¶¶ 18–22. Unfortunately, not all hotels even take the step of adding resort fees into the "Grant Total" price. For example, the Venetian Hotel in Las Vegas displays a "grant total" without including resort fees, plus applicable taxes. So the grand total is, in fact, not really the grand total. See also <https://booking.venetian.com/Booking/FormDetails>.

¹⁷ Ed Perkins, *The Hidden Hotel Fee Scam – Getting Worse*, CHICAGOTRIBUNE.COM (Mar. 26, 2013), http://articles.chicagotribune.com/2013-03-26/lifestyle/sns-201303260000--tms--travelpkctnxf-b20130326-20130326_1_fee-scam-mandatory-fees-tripadvisor

¹⁸ *Hotel Fees and Surcharges on the Rise*, HOTELMANAGEMENT.NET (Oct. 10, 2014), <http://www.hotelmanagement.net/economic-trends/hotel-fees-and-surcharges-on-the-rise-29147>.

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B. The Practice of Charging Resort Fees is Unfair

The FTC has authority to bring enforcement activity not only when acts in commerce are “deceptive,” but also when they are “unfair.”¹⁹ Under Section 5 of the FTC Act, an act or practice is unfair where it: (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition.²⁰ The “unfairness” provisions of Section 5, “are flexible, to be defined with particularity by the myriad of cases from the field of business.”²¹ Federal courts have affirmed FTC unfairness actions in different contexts without pre-existing rules or regulations that specifically address the conduct determined to be “unfair.”²²

The imposition of resort fees is an unfair practice because its very purpose is to mislead consumers about the actual price of hotel room rates. Consumers who book at these hotels have no choice but to pay these fees, even for services they do not use. Because the fees are so prevalent, and the varied manners in which those fees are disclosed render it particularly difficult to compare prices, consumers cannot easily avoid them. Moreover, this practice provides no benefit to consumers and has an insalubrious effect on competition. As a result of this practice, hotels that display their rates in a clear and honest manner are the ones that suffer. If one hotel were to stop charging a resort fee and display a true price, it would lose business to competitors that lower their base rates and charge resort fees separately.²³ Further, the confusion created by resort fees pervades the travel industry ecosystem and makes it difficult for online travel agencies to provide consumers with accurate and meaningful price comparisons.

¹⁹ See 15 U.S.C. § 45.

²⁰ See Letter from Michael Pertschuk, Chairman, Fed. Trade Comm’n, et al., to Sen. Wendell H. Ford & Sen. John C. Danforth, Consumer Subcomm., Comm. on Commerce, Sci. & Tech., U.S. Senate (Dec. 17, 1980), available at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> [hereinafter “FTC Policy Statement on Unfairness”].

²¹ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (internal quotation marks omitted) (explaining that “[t]his statutory scheme necessarily gives the Commission an influential role in interpreting [Section] 5 and in applying it to the facts of particular cases arising out of unprecedented situations”).

²² See, e.g., *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1153, 1155-59 (9th Cir. 2010) (affirming summary judgment in favor of FTC for violation of Section 5’s unfairness prong where website “created and delivered unverified checks at the direction of registered users” and “fraudsters and con artists extensively abused the website”); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1191, 1193-95 (10th Cir. 2009) (affirming summary judgment in favor of the FTC for violation of Section 5’s unfairness prong where website sold personal data, explaining that “conduct may constitute an unfair practice under § 5(a) of the FTCA even if it is not otherwise unlawful”).

²³ Christopher Elliott, *Time to Include Mandatory Fees in Hotel Prices?*, BOARDINGAREA.COM (Sept. 1, 2012), <http://elliott.org/blog/time-to-include-mandatory-fees-in-hotel-prices/>.

Accordingly, the FTC should, under its enforcement authority, determine that the practice of mandatory resort fees, resulting in confusion and misrepresentation of room rates, is not only deceptive, but also unfair.

II. Any Mandatory Fees Should be Part of the Base Price or Room Rate Quoted

The FTC is authorized, under Section 5 of the FTC Act, to address the harm caused by mandatory resort fees. It can require and/or encourage hotels to eliminate mandatory resort fees by including the amount of those fees in the base price or room rate and has undertaken this approach with respect to other deceptive fees. For example, in amendments to the Telemarketing Sales Rule effective October 2010, the FTC implemented a ban on advance fees pursuant to which it prohibited companies that sell debt relief services over the telephone from charging fees to consumers before the companies are able to settle or reduce the customer debt.²⁴ Similarly, the FTC issued the Mortgage Assistance Relief Services Rule, effective January 2011, which implemented a ban on advance fees for mortgage assistance relief services.²⁵ Under that rule, mortgage relief companies are prohibited from collecting fees prior to their having obtained offers from lenders or servicers with respect to the consumer's mortgage.²⁶ In neither instance did the FTC solve the problem of advance fees by requiring the fee-collecting companies to disclose that fees were being collected with no guarantee of benefits obtained thereafter; instead, the FTC sought to eliminate fees altogether.

As courts considering deceptive practices challenged by the FTC have observed, “[d]isclaimers do not automatically exonerate deceptive activities.”²⁷ Indeed, an advertisement or solicitation “may be likely to mislead by virtue of the net impression it creates even though the solicitation contains truthful disclosures.”²⁸ Prompted by challenges by the FTC, courts have determined that advertisements and solicitations constituted deceptive and unfair practices under the FTC Act, notwithstanding the presence of disclosures or disclaimers. For example, a federal court agreed with the FTC's determination that the sale of “Online Auction Starter Kits” that purported to help consumers sell products on eBay was deceptive, despite Terms of Membership indicating that consumers would need to pay for the “kits,” because the sale site created the impression that the “kit” was being offered for free.²⁹ Similarly, the FTC prevailed before another federal court on its determination that mailings regarding offers for internet services

²⁴ See Press Release, Fed. Trade Comm'n, FTC Issues Final Rule to Protect Consumers in Credit Card Debt (July 29, 2010), available at <https://www.ftc.gov/news-events/press-releases/2010/07/ftc-issues-final-rule-protect-consumers-credit-card-debt>; Telemarketing Sales Rule; Final Rule, 75 Fed. Reg. 48458 (Aug. 10, 2010), codified at 16 C.F.R. pt. 310.

²⁵ See Press Release, Fed. Trade Comm'n, FTC Issues Final Rule to Protect Struggling Homeowners from Mortgage Relief Scams (Nov. 19, 2010), available at <https://www.ftc.gov/news-events/press-releases/2010/11/ftc-issues-final-rule-protect-struggling-homeowners-mortgage>; Mortgage Assistance Relief Services, 75 Fed. Reg. 75092 (Dec. 1, 2010), codified at 16 C.F.R. pt. 322.

²⁶ See *id.*

²⁷ *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1065 (C.D. Cal. 2012).

²⁸ *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).

²⁹ See *Commerce Planet*, 878 F. Supp. 2d at 1065–66.

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were deceptive, despite disclosures regarding monthly fees for the services, because the solicitation gave the overall impression that it was instead a mail rebate.³⁰

Other federal agencies that have similar consumer protection authority as the FTC have also banned deceptive practices that mask the true cost of a good or service, including recently in the airline industry.³¹ In recent years, airlines have engaged in drip pricing by imposing fuel surcharges and other mandatory fees that were excluded from the advertised fares. As a result, the fares advertised were not the “true” fares paid by consumers. In response to this practice, the Department of Transportation (“DOT”), in 2012, enacted the “Full-Fare Advertising Rule,” which requires that the first airfare price quoted on an air carrier or travel agent’s website must be the full price, including all taxes, fees, and mandatory carrier surcharges.³² Airlines can no longer advertise, for example, a fare of \$300 and then separately impose a mandatory \$150 fuel surcharge, making the total \$450, even if that total is displayed prior to checkout. While optional fees, such as baggage fees and upgrades, may still be separately charged by the airline, if the fee is mandatory, it must be folded into the fare quoted. Notably, the DOT did not solve the problem of deceptive fare advertisements by requiring additional disclosure – for example, by mandating that airlines indicate that additional surcharges might apply, or disclose the amount of those fees separately – but rather by eliminating the practice altogether. Here, too, the solution to the practice of charging mandatory resort fees is not additional disclosure, but rather an outright ban on such fees.

For similar reasons, disclosures on websites on which consumers may book hotels rooms stating that, for example, resort fees may apply, would not overcome the inherently deceptive nature of advertising lower room rates that exclude such fees, or otherwise cure this problem. Showing Consumers lower rates excluding mandatory fees creates the overall impression that consumers are receiving a “good deal” in booking hotel rooms – when, in fact, they are not.

To address the harm caused by resort fee drip pricing, hotels should instead be required to include any mandatory fees and charges in the base price (i.e., room rate) wherever that base price is advertised or displayed during the booking process. The FTC could initiate rulemaking, and enact a rule analogous to the DOT’s “Full Fare Rule.” However, rulemaking may be unnecessary, as Section 5 of the FTC Act already provides the FTC with enforcement authority

³⁰ See *Cyberspace.com*, 453 F.3d at 1200–01; see also *FTC v. Millennium Telecard, Inc.*, No. 11-cv-2479, 2011 U.S. Dist. LEXIS 74951, at *20–23 (D.N.J. July 11, 2011) (granting preliminary injunction based upon deceptive marketing of calling cards, despite disclaimers of how minutes were deducted); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) (advertisements for service that advertised it could remove “negative information” from credit reports deceptive, despite disclaimers in contract).

³¹ The Department of Transportation’s legal authority to protect consumers is “essentially a copy of Section 5 of the Federal Trade Commission Act.” *United Air Lines, Inc. v. Civil Aeronautics Board*, 766 F.2d 1107, 1111-12 (7th Cir. 1985).

³² See 49 U.S.C. § 41712; see also 14 C.F.R. pt. 399.84(a). Part 399.84(a) provides, in pertinent part: “The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, for passenger air transportation . . . that states a price for such air transportation . . . to be an unfair and deceptive practice in violation of 49 U.S.C. 41712, unless the price stated is the entire price to be paid by the customer”

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to prohibit deceptive and unfair practices. The resort fee practices are inherently deceptive and unfair. The FTC, by exercising the enforcement authority it possesses, should put a halt to this harmful drip pricing practice.

Conclusion

The charging of mandatory “resort fees” by hotels results in a misrepresentation of the true price of the hotel room, a drip pricing practice that is harmful to consumers and undermines fair competition. The FTC should exercise its authority under Section 5 of the FTC Act to eliminate this deceptive and unfair practice, and require hotels to include mandatory fees in the base price or room rate.