



## **General Counsel Corner**

By Peter H. Gunst, Esquire

### ***The Danger of Hidden Fees***

Fees and surcharges as part of a sales transaction are nothing new. Everyone knows that the tardy return of a video to the rental store may result in a late fee, and that credit card statements often include a monthly service charge.

More and more, however, retailers are being accused of consumer fraud because of fees charged to customers. If you are not careful, what seemed like a good way to recoup costs and boost profits can result in a consumer fraud complaint and end up costing your business a lot more than you bargained for.

Every state has a statute prohibiting consumer fraud. Although the laws vary from state to state, most are based on the federal law which proscribes “unfair and deceptive trade practices.”

The federal statute is enforced by the Federal Trade Commission (FTC), while the attorney generals of each state are charged with enforcing the state statutes. These agencies have the power to bring civil actions against companies they believe are engaging in consumer fraud. In addition to enforcement by state and federal agencies, consumer fraud is growing in popularity among class action plaintiff’s attorneys.

You may be thinking, “But I am not trying to defraud my customers, so I have nothing to worry about, right?” Wrong. In most states you can be found to have engaged in unfair and deceptive

business practices even if you did not intend to mislead anyone. Moreover, because of the vague language of most statutes, anything that could be interpreted as “unfair and deceptive” can be grounds for a consumer fraud action.

The costs of these actions can be enormous. In 2004, a class action lawsuit was filed against a number of New Jersey car dealerships, alleging that the dealers charged consumers title and registration fees in excess of those charged by the state. The settlement reached in the case was valued by the court at \$14,000,000.

Eliminating service fees and similar charges is one way to prevent allegations of consumer fraud. But there is nothing inherently wrong with passing costs on to your customers, so long as you are clear, upfront and honest about the fees you are charging and what they are for.

For example, if you are charging a fee for a service the customer could perform him/herself for less money, disclose this fact upfront, explain why you are charging more and leave the choice to the consumer.

Earlier this year, a class action suit was filed against H&R Block for charging consumers a fee to electronically file their tax returns, a service provided free by the IRS. Although H&R Block claims the extra fee covers its costs associated with the electronic filing, the suit alleges the fee constitutes an unfair and deceptive trade

practice because H&R Block did not adequately disclose to consumers that they could file their returns for free using IRS software.

Make sure the fees you are charging represent actual expenses incurred. A few years ago a class action suit was filed against Roto-Rooter based on a “miscellaneous supply charge.” This supply charge of approximately ten dollars was pre-printed on the company’s invoices and was charged regardless of the supplies used. Because Roto-Rooter applied this charge indiscriminately, it was accused of consumer fraud by a class that contained over two million consumers.

Finally, make sure your customers are aware of and understand the fees you are charging. Allegations of “hidden fees” are perhaps the most common consumer fraud claim relating to customer charges.

In a widely publicized case, the Attorney General for New Jersey brought suit against Blockbuster earlier this year, claiming that Blockbuster committed consumer fraud when it failed to adequately disclose fees associated with its new return policy. While Blockbuster’s advertisements hailed “the end of late fees,” it did not tell customers that a restocking fee would apply to movies returned over a week past the due date and that customers who kept a movie for more than thirty days would be charged the full retail price of the movie.

In another case, a California court ordered Visa to reimburse eight hundred million dollars to customers for a “conversion fee” which the court found Visa had hidden from consumers.

While nothing is an ironclad guarantee against a lawsuit or a visit from the state attorney general, the best way to avoid trouble is to be open and upfront about the fees you charge. Make sure your customers are aware of the amount and basis for all fees charged, inform customers if a cheaper alternative exists, and make sure the fees you charge correlate with an actual expense incurred.

If you don’t, the fees you thought would increase your bottom line could end up costing you a pretty penny.

[pgunst@agtlawyers.com](mailto:pgunst@agtlawyers.com)

