

Orbitz Told To Pay Entire \$18M Due To Embattled Marketer

By **Andrew Westney**

Law360, New York (August 25, 2014, 3:16 PM ET) -- A New York state judge has ordered Orbitz LLC to complete \$18 million in contract termination payments to marketer Trilegiant Corp., saying Orbitz still owed the money even though the marketing services covered in the contract are no longer allowed under federal consumer protection law.

New York Supreme Court Judge Charles E. Ramos threw out Orbitz's last three affirmative defenses and ordered the company to pay about \$12 million still owed to Trilegiant following the termination of a contract between the companies for a post-transaction marketing program called DataPass, despite the fact that the marketing practices under that program were outlawed under the federal Restore Online Shoppers Confidence Act, according to a memorandum decision filed Thursday.

Under the terms of the master service agreement between the companies, Trilegiant gave Orbitz sufficient consideration for the termination payments, the judge found, rejecting Orbitz's argument that Trilegiant's consideration for the payments were forfeited earnings that Trilegiant could no longer claim once it stopped using DataPass.

"This court finds that Orbitz's promise to pay all quarterly termination payments is supported by the same bargained-for consideration given by Trilegiant in exchange for Orbitz's various promises in the MSA as a whole," according to the opinion.

The DataPass program presented consumers who booked flight or hotel reservations through Orbitz with an option for a second transaction after checkout, offering subscriptions to travel and other services that consumers could enroll in without re-entering their payment information.

Several consumers subsequently complained about the practice, claiming they did not know they were participating in a separate second transaction because they were not required to re-enter that information. Those complaints prompted a federal investigation that led to the enactment of ROSCA.

In originally contracting with Trilegiant, Orbitz purportedly agreed to pay the company for expected future losses should it terminate that contract, which it provided notice of its intention to do in June 2007.

Although the company was obligated under the agreement to pay \$18.4 million in early termination fees, it cut off payments in March 2010 after paying only about one-third of that amount, according to the decision.

Orbitz argued that once Trilegiant cut off its DataPass involvement earlier in 2010, there was a lack of consideration given to Orbitz, because Trilegiant no longer forfeited potential future earnings in consideration for Orbitz's payments.

The judge ruled that Trilegiant had provided Orbitz with enough consideration under the contract, and that the companies were sophisticated enough that if they had wanted to condition the termination payments on the legality of DataPass or related services, they could have done so, as noted in a ruling in October.

Orbitz also alleged that Trilegiant hadn't shown it was ready, willing and able to perform services under the contract after Orbitz had terminated it.

The judge stated the claim essentially alleged that Orbitz didn't cause Trilegiant's damages because Trilegiant was no longer able to perform under the contract after it stopped participating in DataPass. But because Trilegiant was only seeking general damages for the specific amount of money Orbitz agreed to pay in the contract, Trilegiant didn't need to show it was ready to perform contract services through the date of the final termination payment on Sept. 30, 2016, the judge ruled.

The judge also found Orbitz's breach of warranty claim against Trilegiant failed, because the court had already found that ROSCA doesn't make any contracts that violate it unenforceable, according to the decision.

In October, Trilegiant and parent company Affinion Group Inc. agreed in a settlement to pay \$30 million to 47 states and the District of Columbia as well as consumers over allegations that the company misled consumers into signing up for its services through post-transaction marketing and then hit them with unauthorized charges while making it unreasonably difficult to cancel those services or obtain a refund.

The DataPass program is one of two practices highlighted in the settlement agreements, under which Affinion has agreed to establish a \$19 million fund to provide consumer restitution and pay an additional \$11 million to those states.

Counsel for the parties were not immediately available for comment Monday.

Trilegiant is represented by Kenneth Kliebard and Brian Herman of Morgan Lewis & Bockius LLP.

Orbitz is represented by Edwards Wildman Palmer LLP.

The case is Trilegiant Corp. v. Orbitz LLC, case number 651850/2011, in the Supreme Court of the State of New York.

--Additional reporting by Gavin Broady. Editing by Patricia K. Cole.