

Communication

SERVICES-MARKETERS BEWARE CPA IS HERE !

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MARKETERS of goods and services need to develop effective marketing strategies to win the buyers' attention and loyalty. When their products are tangible (like refrigerator, computer, water-purifiers and pressure cookers), they need to create necessary product-support services. However, when the product is intangible (like insurance, electricity supply, entertainment, education and banking), the marketer needs to identify with the consumers' expectation and satisfaction. And it is these intangible products that account for almost half of the consumer expenditure. This share is expected to further rise in the coming years. In fact, services like the ATM, telephone, bank account, IPO, have become necessities and are no longer luxuries.

Even though, according to Abraham Maslow's need-hierarchy theory, the basic needs are food and shelter, in the present scenario even the security needs, such as life and property insurance, help lines for examination tension, autos in place of uncomfortable buses, crèches for children of working couples, a regular health check-up with the doctor once regarded as luxuries, have almost become primary needs.

At the same time, many service-providers indulge in various types of unscrupulous and exploitative practices. These practices include: issuing of inflated bills, repudiation of insurance claims, negligence in medical service, non-refunding of the caution money by schools, and deceptive and misleading advertising.

Keywords: Services Marketers, Consumer Rights, Deficiency in Service.

Legal Regulation of Services Marketing

In order to protect the aggrieved consumers against the malpractices of service-providers and to provide an effective mechanism to regulate marketing policies and practices of business firms and service organizations, a number of laws have been enacted. A list of the major laws regulating the service marketing and protecting the consumers is given in Table 1.

This paper seeks to analyse the provisions of the Consumer Protection Act 1986 (CPA), which relate to the marketing of services.

Concept of Service

Under the Consumer Protection Act, the term 'service' has been given a very broad meaning. It means service of any description, which is made available to potential users. It includes, but is not limited to, the provision of facilities in connection with banking, financing, insurance, transport processing, supply

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Table 1: Major Laws affecting Services Marketing in India

1.	The Consumer Protection Act, 1986.
2.	The Competition Act, 2002.
3.	The Environment (Protection) Act, 1986.
4.	The Motor Vehicles Act, 1988.
5.	The Railways Act, 1989.
6.	The Railways Claims Tribunal Act, 1987.
7.	The Essential Services Maintenance Act, 1968.
8.	The Securities and Exchange Board of India Act, 1992.
9.	The Cable Television Networks (Regulation) Act, 1995.
10.	The Electricity Act, 2003.
11.	The Information Technology Act, 2000.
12.	The Trade Marks Act, 1999.

of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement, or the purveying of news or other information. Thus, all kinds of services are included in the scope of service except the following two:

- (1) services provided free of charge; and
- (2) services provided by an employee to his employer [Sec. 2(1)(0)].

The expression “not limited to” has been inserted by the latest amendment (2002) to prevent the contention of any firm or organisation that their service or activity is not covered by the definition of the term.

Complaint against Services-Marketers

A complaint against any service-marketer can be filed by any one of the following:

- a) any consumer;
- b) any registered consumers’ association;
- c) the Central Government or any State Government;
- d) one or more consumers, where there are numerous consumers having the same interest (“class-action”); and
- e) any legal heir or representative of a deceased consumer.

Concept of Consumer: In relation to services, a consumer means any person who hires or avails of any service, for any consideration which has been paid or promised (partly or fully or as deferred payment). It includes any beneficiary of services with the approval of the person who had hired it. The term, however, does not include a person who avails such service for any commercial purpose. It has been clarified under the Act that commercial purpose does not include the services availed by the consumer exclusively for earning his livelihood by means of self-employment.

A complaint can be made on any one of the following grounds:

- 1) Where the service hired, or availed of, by him suffers from any deficiency;
- 2) Where any unfair trade practice or restrictive trade practice is adopted by any service-provider;
- 3) Where a trader has charged a price in excess of the stipulated price;
- 4) Where any hazardous service is being provided, if the service-provider could have known, with due diligence, that the service could be injurious to life or safety.

Deficiency in Service

This term has also got a very broad meaning under the CPA. As defined under section 2(1)(g) of the Act, any 'deficiency in service' means any fault, imperfection, shortcoming or inadequacy, in the quality, nature and manner of performance, which is required to be maintained under any law for the time being in force, or has been undertaken to be performed by a person in pursuance of a contract or otherwise, in relation to any service.

The terms 'unfair trade practice' and 'restrictive trade practice' have been comprehensively defined under section 2(1)(r) and 2(1)(nn) of the CPA.

In a study conducted by this author, it was revealed that at the selected District Forum, an overwhelming majority (92 percent) of consumer grievances pertained to "deficiency in service". Almost the same pattern was noticed in the case of the Delhi State Commission (84.14 percent) and the National Commission (85.57 percent).

As revealed by an analysis of decided cases, the major types of consumer complaints pertained to the following services:

- 1) **Telephone Service:** Non-functional telephone, unauthorised disconnection, delay in transfer or installation, and excessive billing. These were found to be the most popular causes of consumer complaints.
- 2) **Electricity Supply:** Raising of FAE (Fraudulent Abstraction of Electricity) bills, without issuing a show-cause notice, incorrect meter-reading, and issuing of inflated bills of electricity.
- 3) **Financial Services:** Non-payment of FDR (Fixed Deposit Receipt) amount on maturity and delay in the transfer of shares
- 4) **Housing Construction:** Delay in handing over of the possession of flat and incomplete construction of house.
- 5) **Insurance:** Repudiation of insurance claims.
- 6) **Medical Service:** Negligence in surgical operations.

In this connection, it is noteworthy that a large majority of cases of the above-mentioned services belonged to public-sector undertakings, which are generally perceived to be insensitive to the consumers' needs. Moreover, the deficiency in these services had shown an upward trend.

Recently, in a case reported in *The Times of India*, dated October 5, 2004, a district forum of Delhi ordered the postal department to pay Rs. 15,000 to a student (S.P. Ramesh), pursuing a correspondence course, for the late delivery of a parcel (held as deficiency in service), containing his examination fees sent to a London-based institute, by speed post.

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Appropriate Redressal Agencies

A complaint is to be made to the appropriate redressal agency, set up at the district, State, or the National level:

1. The District Forum, in cases where the value of the services, in question, along with the compensation claimed, does not exceed Rs. 20 lacs;
 - b) The State Commission (between Rs. 20 lacs and Rs. 1 crore); or
 - c) The National Commission (above Rs. 1 crore).

Apart from the pecuniary limits, the complaint has to be filed in the District Forum / State Commission within whose territorial jurisdiction the cause of action has arisen, or where the opposite party can present its case through its branch office or representative.

Consequences of Objectionable Practices

After hearing the case, if the consumer court is satisfied about the genuineness of the complaint, it can provide appropriate relief in the form of one or more of the following directions to the opposite party (service provider):

- 1) to remove the deficiency in the service;
- 2) to refund the service charges paid;
- 3) to pay a suitable compensation for the loss or injury suffered by the complainant;
- 4) to pay punitive damages in appropriate circumstances (in addition to the above-mentioned compensation);
- 5) a cease-and-desist order against the impugned practice;
- 6) to pay compensation for unidentifiable consumers (not less than 5% of the value of the deficient services provided, to be credited to the Consumer Welfare Fund);
- 7) to issue a corrective advertisement stating the true position; and
- 8) to pay the costs of litigation incurred by the winning party.

In case any party feels aggrieved by the order of the District Forum, or the State or the National Commission, he can appeal to the next higher court, within 30 days of the passing of the order. However, an order passed by the National Commission, in a matter of its original jurisdiction only, can be appealed against before the Supreme Court.

Through the latest amendment (2002), consumer courts have been vested with additional powers for effective discharge of their functions. These powers include the power to pass any interim order, an ex parte order, to dismiss a complaint, bar on transfer of any case after its admission.

Non-compliance of any order passed by any consumer court shall be an offence, punishable with imprisonment for a term ranging from one month to three years, or with fine ranging from Rs. 2,000 to Rs. 10,000, or with both.

Selected Cases of Service-Marketers

Medical Service

Indian Medical Association vs. V. P. Santha, IMA (1995)

The husband of Mrs. V.P. Santha of Kerala died in a hospital owned by the Cosmopolitan Hospitals of Kerala, a privately-managed chain of hospitals. She filed a complaint before the Kerala State Commission, alleging negligence on the part of the hospital, leading to the death of her husband. She claimed a compensation for the loss suffered by her.

The hospital raised objections, contending that:

- (1) The woman was not a 'consumer' under the CPA as her husband only had availed of the medical services of the hospital; and
- (2) The service provided by the medical professionals and health-care organisations, was not a commercial service and was exempt under the last category of the definition of service given in the Act, namely, service provided under the personal contract of service. The Kerala State Commission rejected the contentions of the opposite party, ruling that the complainant being a legal heir to the deceased husband was a consumer and fully entitled to claim any compensation for the death of her husband.

The Commission ruled that the medical service was not exempt under the category of "service provided under personal contract of service" and was very much a service as defined under the CPA. The Commission also ruled that the negligence on the part of the hospital amounted to deficiency in service and that it was within the jurisdiction of the consumer courts to entertain and adjudicate on complaints of deficiency in medical service.

The Cosmopolitan Hospital of Kerala, supported by Indian Medical Association and the Qualified Medical Practitioners' Association of Kerala, filed an appeal against the Kerala Commission's order before the National Commission. The appeal was heard by the National Commission together with another appeal filed by the Cosmopolitan Hospitals against Mrs. Vasantha P. Nair, involving certain common issues.

In the two appeals, decided on April 21, 1992, the National Commission rejected the contention of the Indian Medical Association (IMA) that the medical service was a personal service exempt under the CPA. In a judgment that set the future course of medical service in the country, the National Commission upheld the right of the consumer to seek redressal before the consumer courts for any negligence or deficiency in the service rendered by the medical professionals or hospitals for a fee.

The Commission also turned down the plea of the IMA and the Qualified Medical Practitioners' Association of Kerala that the CPA did not apply to the medical profession because it was governed by the Indian Medical Council Act, 1956. The Commission upheld the *locus standi* of the nearest relation to seek compensation in the event of the death of a patient.

The Indian Medical Association challenged the order of the National Commission before the Supreme Court. The Supreme Court, in its historic judgment held that the medical practitioners were not immune from the claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of the Indian Medical Council is no solace to the person who has suffered due to their negligence and the right of such sufferer to redress under the Act was not affected.

The Supreme Court observed that the service rendered at the Government hospital, health centre, dispensary, where services are rendered on payment of charges and also received free of charges to other persons availing such services would fall within the ambit of the expression 'service', as defined in the Act, irrespective of the fact that the service is rendered 'free of charge' to persons who do not pay for such service'. Free service would also be a service and the recipient a 'consumer'. The same principle will also be applicable to the non-government hospitals, nursing homes, and dispensaries. The Supreme

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Court further observed that the relationship between a professional man and a consumer carries within it a certain degree of mutual confidence and trust, and, therefore, the services rendered by a professional can be regarded as services of personal nature. But since there is no relationship of 'master' and 'servant' between the professional man and the consumer, the contract between them cannot be treated as a 'contract of personal service' but as a 'contract for service' and the services rendered by a professional man to his customer or client under such a contract, is not covered by the exclusionary part of the definition of 'service'. Hence, all professionals are answerable and covered under the CPA.

Spring Meadows Hospital vs. Harjot Ahluwalia (Ahluwalia, 1997)

Harjot Singh, a minor child was admitted to Spring Meadows Hospital, East of Kailash, New Delhi, for fever. It was assessed by a doctor of this hospital as a case of typhoid, who directed the nurse to administer an injection. The nurse injected a wrong medicine and that too in the absence of the doctor. The child suffered cardiac arrest and collapsed and, due to the non-availability of the oxygen cylinder, even oxygen could not be available to him. The parents were informed of the irreparable damage caused to the brain of the child. The father of the child filed a complaint before the National Commission for medical negligence on the part of the doctor, the nurse, and the hospital.

The National Commission accepted the complaint and awarded a compensation of Rs. 12.25 lakhs. The Supreme Court dismissed the appeal made by the Hospital and upheld the NC's order that the parents of the child who had suffered complete brain damage were also entitled to separate compensation as they were also 'consumers' under the Act. It awarded additional compensation of Rs. 5 lacs in favour of his parents (beneficiary of services) for the acute mental agony and life-long care and attention needed by the child.

Housing Construction

Lucknow Development Authority vs. M.K. Gupta (LDA 1994)

In this case, the appeal had its genesis in the complaint filed by Mr. M.K. Gupta against the Lucknow Development Authority (LDA), a premier housing construction organisation, set up by the U.P. Government, for undue delay in the delivery of the possession of the flat booked by him. The National Commission held the LDA guilty of providing deficient service and awarded compensation to Mr. Gupta. The LDA filed an appeal against this order before the Supreme Court.

The LDA was directed by the Supreme Court to fix the responsibility of the officers responsible for causing harassment and agony to the respondent within six months of the order. The LDA was also directed to pay compensation of Rs. 10,000 and the amount to be recovered proportionately from the concerned officers' salary.

Insurance Service

LIC of India vs. Smt. Kaloo Begum (LIC of India 2002)

The issue involved for adjudication before the District Forum, Bulandshahr was that Kaloo Begum's husband had taken a life insurance policy of Rs. 50,000 on 27.04.95 and on that date, he was in good health and it was confirmed by the LIC's doctor. After four months of the issue of the policy, the complainant's husband was admitted to the GTB Hospital, Shahdara, Delhi, with a complaint of stomach pain. It was diagnosed as intestinal cancer for which a minor operation was performed on 06.09.1995. He was again admitted to the Hospital on 29.11.1996, discharged on 25.12.96 and died on 04.01.97, at his village. Soon after, the wife and the nominee submitted a claim for the amount of insurance policy which was repudiated by the opposite party, claiming non-disclosure of true facts of his death.

The District Forum concluded that the repudiation of claim amounted to 'deficiency in service'. The Forum upheld the claim of the complainant for Rs. 50,000, along with interest @ 12 percent per annum and costs Rs. 500. Aggrieved by the order of the Forum, the opposite party challenged the correctness of their order. However, the UP State Commission observed that there was no concealment of the facts as from the report of the hospital, it appeared that the pain was due to gas-ball formation in the policy-holder's abdomen which used to settle itself giving no indication of cancer, which could not be detected earlier.

Moreover, it was duty of the Medical Officer of the Insurance Company to give due effect to the case, to arrive at the conclusion. The State Commission held that the repudiation of claim under the given circumstances made by the LIC was unjustified. Finding no force in their appeal the UP State Commission upheld the order of the District Forum.

Telephone Service

Satnam Kaur vs. Mahanagar Telephone Nigam Ltd. (Kaur 2001)

On the basis of an advertisement offering immediate installation of telephone by the MTNL on depositing Rs. 3,000 before the specified date, Satnam Kaur deposited the requisite amount on that date. However, the MTNL failed to provide the telephone connection. Alleging the MTNL's claim amounting to unfair trade practice, the woman filed the complaint at the District Forum (Northwest Delhi), claiming a compensation of Rs. 200 per day for the loss suffered and the litigation expenses.

The District Forum held the opposite party guilty of indulging in unfair trade practice and directed the MTNL to provide the telephone connection immediately and to pay to the complainant a compensation of Rs. 3,000 and litigation expenses amounting to Rs. 1,000.

Aggrieved by the order of the Forum in respect of the compensation awarded, the complainant filed an appeal before the Delhi State Commission, for modifying the order to the extent of compensation amounting to Rs. 3,000 to Rs. 200 per day.

The State Commission found no valid reason for inadequacy of the compensation and basis for claiming Rs. 200 per day, and dismissed the appeal, with no order as to costs.

Electricity Supply

P.H. Sehgal and Subhash Gaggal Vs. Delhi Vidyut Board (DVB) (Sehgal and Gaggal 2002)

The complainant, in this case, stated that an inspection was carried out by the opposite party, (i.e., the DVB officials), in which the latter claimed to have found the connected load more than the sanctioned load and both the seals tampered with Fraudulent Abstraction of Electricity (FAE).

A FAE bill of Rs. 12,801 was raised against the user, Subhash Gaggal, on 06.08.2000, with last date of deposit as 09.08.2000.

The complainant argued that the DVB had neither provided any show-cause notice nor given them any opportunity of personal hearing. Moreover, the previous consumption pattern was also not considered. Only on the threat of disconnection and lodging of FIR, were they forced to deposit the said amount of the FAE bill and, therefore, they filed this complaint at the Shalimar Bagh District Forum in Delhi.

The Forum held that no presumption of theft could be raised by the opposite party simply on the basis of tampered seals. If the connected load was more than the sanctioned load, it could be due to overloading,

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not necessarily due to theft. Moreover, no evidence was available that the meter was defective, as contended by the DVB.

The District Forum held the DVB liable for deficiency in service and was directed to quash the FAE bill and refund the amount deposited by the complainant with interest and compensation amounting to Rs. 2,000.

Educational Service

Administrator, Sardar Patel Vidyalaya Vs. Dr. Anurag Rohtagi (Sardar Patel Vidyalaya 2004)

The complainant, Dr. Anurag Rohtagi had to withdraw his son from the opposite party institution due to transfer from Delhi to Pondicherry. He applied for refund of fees (Rs. 11,455). However, he was refunded only Rs. 2,250 and the balance amount was denied. Delhi's District Forum-II (Mehrauli) held it as a case of deficiency in service on the part of the school and therefore, directed the Opposite Party to pay Rs. 9,205 being the balance amount of fees, with interest @ 10% p.a.

An appeal against this order was preferred by the opposite party before the Delhi State Commission. Since it was barred by limitation, the appeal stood dismissed.

Conclusion

It appears that consumers in India are well-protected against the exploitative practices of the service marketers by a comprehensive law. Apart from the legal framework numerous judgments have been handed down by the consumer courts and the apex court of the country to serve as precedents and guidelines. As the awareness of consumers about their rights is rapidly increasing, service marketers need beware and mend their ways.

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