

Click-to-Cancel is (Mostly*) Dead, But Amazon Settlement Proves Enforcement Lives On

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The Federal Trade Commission yesterday announced a bombshell \$2.5 billion settlement in its lawsuit with Amazon regarding what the FTC alleged were unfair practices relating to Amazon's Prime subscription product; this settlement occurred less than a week into a trial that was expected to last for at least a month. The settlement includes \$1.5B in refunds to around 35 million customers, as well as an unprecedented \$1B civil penalty. Looking at some other actions on the docket now, combined with what transpired in the few days of the Amazon trial and the parties' Stipulated Order, a few principles seem clear.

Enforcement is Happening

Despite the Eighth Circuit's decision this past July vacating the Federal Trade Commission's hotly-anticipated Click-to-Cancel Rule less than a week before its effective date, the FTC has and continues to rely on Section 5 of the FTC Act generally as well as the Restore Online Shoppers' Confidence Act (ROSCA) to challenge unfair subscription practices; in fact, this case against Amazon was filed in June of 2023, well before the Click-to-Cancel Rule could have been used as a weapon by the Commission. We've seen a recent \$7.5MM settlement with Chegg, cases filed against Uber One and LA Fitness, the ongoing case against Adobe, and this now-settled case against Amazon. And it's not just the FTC that's watching for potentially deceptive subscription programs; state-level regulators are equally as busy, as evidenced by the California Automatic Renewal Task Force's recent \$7.5MM settlement with HelloFresh, and we have seen a host of class action lawsuits filed in California alleging that failures to comply with California's automatic renewal statute constitute violations of its Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law.

Do You Have the Receipts?

As the trial in the Amazon lawsuit began this past Monday, the FTC began highlighting a host of "smoking guns" obtained during discovery that did not bode well for Amazon's defense of the case, and lawyers for the FTC began using that evidence to paint a picture of Amazon as a greedy merchant that knowingly put profits ahead of compliance in its efforts to lure unwitting customers into subscriptions for Amazon Prime and then making it difficult if not impossible to cancel them.

It is likely that many businesses who operate in this space may have documents, emails, and other discoverable records – including potential employee testimony – that could be weaponized the same

way. These materials will reflect a business's thought process and decision making, and whenever any of them appear to demonstrate an awareness of potential confusion on the part of consumers but a decision by the business to not take corrective action, you can chalk one up for the prosecution. Of course, this does not mean that you should undertake to hide or destroy any of these materials, but rather that you should look closely at what your records show that your practices have been and change course if needed.

Compliance Shouldn't Be That Difficult

A common theme in the investigations and lawsuits we're seeing seems to be businesses – whether purposely or out of a lack of understanding of legal requirements – structuring their autorenewal subscription programs either too close to or over the line of what's fair and acceptable for consumers. As I looked into my crystal ball when I wrote this article this past June, the fundamental core characteristics that should be reflected in your autorenewal subscription program remain the same despite continued evolution of the legal and regulatory landscape:

Clear and Conspicuous Disclosures: Be clear when describing the program upfront so that customers realize they are signing up for automatically recurring charges; do this before the customer agrees to the transaction.

Affirmative Consent: Obtain the customer's express affirmative consent to that framework – separately from everything else – as well as to the actual amounts and frequency of the charges before you collect their billing information or charge them.

Simple Cancellation: Be clear about how customers can cancel and make it simple and straightforward, mimicking the method for sign-up.

Of course, there are other elements that should be examined for compliance, but aiming for those three will go a long way toward keeping customers and regulators happy and keeping the class action bar out of your hair.

What it All Means

Be careful about developing a false sense of security because you've been running an automatically renewing subscription program for some time but have not been sued. While it may be easy to think that your program must be compliant or else surely you would have been challenged by now, or alternatively to think that it's only the big guys that are getting sued, don't be too confident in either of those assumptions. If your program is not compliant, it may only be a matter of time until it lands on someone's radar to challenge.

I will repeat what I said in an article from last July: If you had been updating your subscription model in anticipation of the Click-to-Cancel Rule, your best course of action is to complete the play; doing so will

not only help future-proof you if the Rule is resurrected, but will also aid you in complying with the myriad of state laws that are currently on the books.

We at Nelson Mullins have helped countless clients navigate these waters, and we're happy to answer any questions you may have.

***BONUS:** You've found the asterisk buried at the bottom of this article. When I say in the headline that the Click-to-Cancel Rule may be "Mostly" dead, I'd call your attention to a specific provision in the Stipulated Order with Amazon. After outlining all of the things that Amazon must do to comply with the Order, the FTC included an entire section entitled "VI. NEGATIVE OPTION RULE", which says that:

IT IS FURTHER ORDERED that, to the extent the Commission promulgates an amended rule or regulation governing negative options or subscriptions, the requirements of that rule (as long as it remain applicable, binding, and in effect) will supersede the requirements I Sections I through V of this Order.

This opens the door to the Commission possibly attempting to revive the Click-to-Cancel Rule at some point – we'll have to wait and see.