

ORANGE COUNTY BUSINESS JOURNAL

Stepped Up Enforcement Against Inadequate Negative Option/Automatic-Renewal Disclosures

by Ed Chansky and Irving Scher, Greenberg Traurig LLP

Negative options have been defined by the FTC as commercial transactions in which sellers interpret a customer's failure to take an affirmative action, either to reject an offer or cancel an agreement, as assent to be charged for goods or services. Common forms include continuity plans or the automatic renewal of subscription services pursuant to which a company extends on a payable basis a risk-free trial subscription, or renews a subscribed service by charging a consumer's credit card or telephone service unless the consumer has affirmatively cancelled the service or the continued delivery of products.

Consumer complaints to the FTC and state enforcement agencies have risen dramatically since the growth of the Internet. Consumers often claim that they are not adequately informed about, or have not agreed to, automatic renewals or the payable continuation of free trials, price increases on renewal, how to cancel, and/or have not received full refunds upon cancelling the service or delivery of further goods. This has led to increased federal and state enforcement agency actions, state legislation, and, more recently, consumer class actions. Accordingly, companies engaged in selling goods or services on a negative option or automatic-renewal basis should be careful to comply with applicable FTC and state statutory requirements.

The FTC issued a Trade Regulation Rule in 1973 establishing basic requirements for companies engaging in the practice. Over the years, the FTC has brought actions challenging companies alleged to have failed to comply with its Negative Option Rule or otherwise: (i) by not disclosing the material terms of an offer before consumers have incurred a financial obligation; (ii) by not making such disclosures clearly or conspicuously or in an understandable manner; (iii) by not obtaining a consumer's affirmative consent to the offer; and (iv) by impeding the effective operation of cancellation procedures.

A recent form of alleged abuse occurs when a company

sends text messages to consumers promising free gift cards or rewards upon entering personal information, such as a mobile phone number or PIN. According to the FTC, the consumer often is either given no notice or inadequate notice that confirming his or her number leads to continuous monthly charges for "Premium" text messaging services. But the risks can apply to any automatic-renewal offer when the full terms are not disclosed clearly and conspicuously.

Increasing the legal risks, a number of states have recently passed statutes addressing negative option/automatic renewal practices, and even adding further obligations beyond those imposed under the FTC Negative Option Rule. Such states include California, Connecticut, Colorado, Florida, Georgia, Hawaii, Illinois, Louisiana, and North Carolina.

The state statutes usually provide that a violation will also constitute an unfair or deceptive trade practice, thereby allowing for remedies such as restitution of payments made by consumers and recovery of attorneys' fees. Some states also provide—as does the FTC—that products delivered after notice of cancellation are to be considered free gifts to the consumer. As a result of these statutory developments, consumer class actions have started to be brought—particularly in California—claiming violations of the applicable state statutes and seeking restitution for members of the alleged classes.

In the current environment, companies offering goods or services with negative options or other forms of automatic renewals should review the federal and state obligations to help avoid consumer suits. A company generally can comply with the federal and state laws by doing the following:

- ▶ Provide clear and conspicuous disclosure of the full terms of the offer upfront.
- ▶ Obtain unambiguous, affirmative consent from the



About Greenberg Traurig LLP

Greenberg Traurig LLP is an international, multi-practice law firm with approximately 1750 attorneys serving clients from 36 offices in the United States, Latin America, Europe, Asia, and the Middle East. The firm is

among the "Power Elite" in the 2014 BTI Client Relationship Scorecard report, which assesses the nature and strength of law firms' client relationships. For additional information, please visit www.gtlaw.com.

ORANGE COUNTY BUSINESS JOURNAL

consumer for any automatic charge or renewal.

- ▶ Provide timely reminders to the consumer prior to charging for any auto renewal, including clear and conspicuous written notice of cancellation rights

prior to the end of a free or low-rate initial period.

- ▶ Provide an easy-to-use cancellation mechanism, such as a toll-free telephone number and/or email address for cancellation.

Ed Chansky

Ed Chansky focuses his practice in the areas of intellectual property (particularly development, selection, protection and licensing of trademarks worldwide) and advertising, sales promotion, and trade-regulation law, including charitable promotions, cause-related marketing, sweepstakes, contests, gift cards, eCommerce, substantiation of advertising claims, social gaming, social media, and all aspects of unfair or deceptive trade practices in a wide variety of industries.



A trusted advisor to many national companies, Ed is a frequent speaker at seminars and conferences on advertising and promotion law topics, including sweepstakes, premium production, coupon and rebate offers, charitable promotions, social gaming, and social media, and has helped shape state legislation affecting sales promotion matters. He also works with clients on a wide range of contract and licensing matters, including agency-client agreements in the advertising and sales

promotion industries, software and website development, privacy policies and terms of use, and other matters affecting intellectual property, marketing and electronic commerce. You can reach Ed at chanskye@gtlaw.com or 702.599.8016.

Irving Scher

Irving Scher focuses his practice on antitrust, marketing and unfair and deceptive trade practice litigation and counseling. He has wide-ranging experience in such matters across a broad spectrum of products and services. Irv counsels and represents clients in virtually all phases of government investigations and litigation, including national coordination of cases and trial and appellate work. He has served as lead defense counsel in a multitude of major antitrust, marketing, and unfair and deceptive trade practice cases. You can reach Irv at scheri@gtlaw.com or 212.801.9321.

