

Recent FTC Suit Highlights Alleged Deceptive Practices in Negative Option Plans

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The FTC recently sued a long series of companies involved in advertising and selling "risk-free trials" of teeth whitening products. The FTC's complaint in this case should be informative for any company offering trials of goods or services.

According to the FTC's complaint, the companies sued offered what they called "risk-free trials" of teeth whitening products. They advertised and sold these products not through "front-end" web pages but through "back-end" sites, meaning that the pages were not accessible through public web search access or published URLs. Consumers were directed to the landing page from another website, often as a "reward" for completing a survey.

Once on the page, a consumer was offered what the FTC termed a "low cost trial" of small sample teeth whitening products by paying \$1.03 plus shipping. If the consumer did not cancel within 8 days, the consumer was charged \$94.31 for the first month's product. To accept this trial plan, the consumer scrolled down and clicked on a "Complete Checkout" button. In some instances, though, the FTC alleged, the site directed the consumer to a very similar looking page, with another "Complete Checkout" button. This page was allegedly not repetitive of the first offer page, but a second offer, meaning that consumers may have agreed not only to one *but two* separate low cost trials, each with a monthly price of \$94.31.

The consumer then waited to receive their sample product in the mail, but according to the FTC, the trial product often did not arrive until after the 8-day cancellation period had elapsed. Furthermore, when it arrived, the package allegedly contained not only the trial product but the regular monthly product. The FTC said that even if the consumer did act to cancel the product within 8 days—even before receiving the sample product—that the consumer had to return the first month's product in order to receive a refund.

The FTC sued the companies involved in the plan for violating the Restore Online Shoppers' Confidence Act (ROSCA) as well as Section 5(a) of the FTC Act.

ROSCA provides that sellers may not charge consumers for goods or services sold in Internet transactions through a negative option feature unless the seller:

- Clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information;

- Obtains the consumer's express informed consent before making the charge; and
- Provides a mechanism to stop recurring charges.

15 U.S.C. § 8403.

ROSCA looks to the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 *et seq.*, in defining the term "negative option": a negative option is one in which consumer's silence or failure to take an affirmative action to reject goods or services or to cancel is interpreted as acceptance of an offer. 16 C.F.R. § 310.2(w).

The FTC said that the plan was a negative option plan because the companies "charg[ed] consumers monthly for auto-shipments unless consumers take action to cancel." Because a negative option plan is one that is accepted by silence or failure to take affirmative action, the FTC seems to have taken the position that the consumer accepted the offer by declining to cancel, not by clicking "Complete Checkout" on the website.

In addition to ROSCA, the FTC alleged that the companies violated the FTC Act by engaging in "unfair or deceptive acts or practices in or affecting commerce." The FTC alleged that the companies misrepresented that consumers would only be charged a nominal fee plus shipping for the trial product and that they were only purchasing a single product.

If you offer trials of goods and services, you should consider whether your trial offer might be a negative option and whether you are complying with ROSCA. It might also be a good time to walk through the steps a consumer takes in signing up for your product or services, considering whether anything you say or don't say might be deceptive under the FTC Act. If you violate ROSCA or the FTC Act, you could be subject to penalties of more than \$40,000 per violation. Think about whether a consumer might easily misunderstand the process for cancellation, refund, or returning any goods received to be eligible for a refund. But also think about the process itself: make sure your cancellation and refund process are easy to complete and fair. And if you aren't sure about any of it, it might be time to pick up the phone and talk to your lawyer.

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