
***CRYPTO EXCHANGE, S02 EP06, AUTORENEWALS
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Carlin McCrory: Welcome to another episode of the Crypto Exchange, a Troutman Pepper podcast, focusing on the world of digital assets and payments. I'm your host, Carlin McCrory, an associate at Troutman Pepper, and I'm happy that you have joined us for our episode today. Before we dive into today's episode, I'd like to remind our subscribers to visit and subscribe to our blog at www.consumerfinancialserviceslawmonitor.com. While you're at it, please head over to troutman.com/podcasts and take a listen to other podcasts that are currently being offered by our colleagues, each of whom are subject matter experts in their respective practices. These podcasts are insightful, entertaining, and are dedicated to interesting areas of the law. Each of our podcasts are also available for download on popular streaming platforms like Spotify, Apple Podcasts, and more.

Today I'm pleased to be joined by my Troutman Pepper colleagues, Mark Furletti and Jill Dolan. Again, I'm Carlin McCrory and we're going to be talking about autorenewals today. First, as a little bit of background here, autorenewals are sometimes called negative option offers, which are generally an offer in which the seller interprets the customer's silence or failure to take an affirmative action to reject goods or services as an assent to being charged for those goods or services. In other words, what we're trying to say here is that silence equals assent and silence equals acceptance.

The first type is a pre-notification plan where a seller sends periodic notices offering goods, and if the consumer takes no action, the seller sends the goods and charges the consumer. Pre-notification plans are regularly used for books or wine clubs or any product in which a periodic offer of different but related goods would make sense. The offers here are periodic and the acceptance via silence is also periodic.

The second type of plan we see is a continuity plan where a consumer agrees in advance to receive shipments of goods or services on a periodic basis and is charged periodically until he or she cancels that plan. Continuity plans are used for products like bottled water, office supplies and other goods that are needed on an ongoing basis. Here, the agreement is to receive a product or service on an ongoing basis unless until the plan is canceled.

What we're really going to focus on today are automatic renewals where a customer subscribes to receive a good or service for a specific period of time. Unless the consumer cancels the subscription, the seller automatically renews the subscription at the end of the term. In other words, the seller automatically renews the subscription unless and until the consumer affirmatively cancels it. Here the agreement is to receive a product or service for a fixed period of time, but then the term is automatically renewed unless the customer affirmatively cancels that subscription.

Oftentimes with these types of plans, what we see is in everyday life we've subscribed to so many different types of products, whether it's a streaming service or something else, and as a customer, we're getting charged monthly and you may forget about that automatic renewal plan.

The last plan I want to talk about is a free trial conversion, which is sometimes called a free to pay or fee to pay conversion, where a customer agrees to receive a good or service for a period of time without charge, but is then subsequently charged for that product or service if they don't cancel the subscription before the free trial ends. As a consumer, this is a favorite type of negative option offer. So many people love a free trial plan, but again, there's that hitch there and when it switches on that, you have to remember to cancel the plan.

Although many of the rules don't distinguish between the different types of plans that I've just mentioned, some do. In any event, the different types of negative option offers produce different benefits for sellers and different risks for customers. It's important that we distinguish between these different types of offers.

Important here are state laws that generally focus on automatic renewals, which are subscription services, and Jill's going to talk about those types of plans a little bit later. There are four laws, or really two statutes and two regulations that receive the most attention. The first being Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, and is the core consumer protection statute enforced by the Commission and therefore has traditionally served as the primary mechanism for addressing deceptive negative option offer claims.

In its guidance and cases, the FTC has highlighted four basic Section 5 requirements that negative option marketing must follow to comply with Section 5, the first being that marketers must clearly and conspicuously disclose the material terms of a negative option offer, including the minimum key terms such as the existence of the negative option offer, the total cost, and how to cancel. Second, sellers must disclose these material terms before consumers agree to the purchase. The third thing here is that marketers must obtain the consumer's express informed consent to such offers, so no check boxes. Lastly, marketers must not make unreasonable barriers to cancellation or impede the effective operation of a promised cancellation procedure. We don't want customers waiting on hold for unreasonable amount of time or otherwise making it hard for a customer to cancel. Mark, do you want to talk about some of the actions that we've seen out of the FTC?

Mark Furletti: Sure. Carlin, there's some key things that the law focuses on, and regulators have similarly been focused on these. I want to highlight a few recent actions. If you just do some Google searches on recent enforcement actions in the area of an autorenewal, you don't have to go very far back to find a number of actions. The other day I did some research in preparing for this podcast and I found like 15 different actions including federal actions and state actions. There's a lot of recent stuff.

At the federal level, the FTC has been really active, and most recently on January 13th of this year, 2023, the FTC fined a company called WealthPress \$1.7 million. WealthPress basically was using a negative option marketing technique on the internet, and it was auto-enrolling people into a recurring subscription that cost nearly one hundred dollars a month depending on the plan that they purchased for a membership in their service.

The FTC said that, look, consumers were not informed, that WealthPress did not get informed consent from consumers. As evidence of this, and I think this is the important takeaway from the case, evidence of the fact that they weren't getting informed consent was that the company was getting in trouble with its merchant processor for high chargeback volume. If you're

operating one of these programs and you see that there's high chargeback volume, that is a pretty good indicator that the consent that you obtained at the outset may not have been sufficient and that consumers are surprised. I think this is something that regulators will be looking out for as indicia of potential problems.

The other action I wanted to highlight from the FTC is from this past December 2022, and it's not technically an autorenewal case, it was a settlement with Epic Games, the maker of Fortnite, a popular video game. It involved claims under COPA and UDAP, but the thing that I thought was interesting is the FTC alleges that Epic made it difficult for consumers to cancel. So I think in addition to informed consent, which is really important, and then of course disclosing material terms, which is really important, you can't make it hard to cancel. At least, the FTC alleges that Epic over time modified the process by which consumers could cancel purposely to make it really hard. The settlement and the complaint actually show exactly how these screens were modified from the screen where it was easy to do, and then comparing it to the screen where the ability to do it was made less clear and kind of much more difficult to see. Again, if you're in this area and you are kind of reviewing these, we want to make sure that it is not too difficult to cancel.

Before I send it back to Carlin, just two other things to note at the federal level, the CFPB recently issued guidance on what they call dark patterns and negative option marketing. They reiterated the importance of disclosing material offers, obtaining informed consent and making it easy to cancel. CFPB also filed an action, a complaint, late last year in October, 2022 against a company called ACTIVE Network, and they described a process by which consumers were enrolled in a \$89-95 fee program if they clicked accept on a particular page where it wasn't totally clear whether – as alleged by the CFPB – they accept related to what the consumer was seeking to do, which was sign up for a fundraising event, or whether instead they were actually enrolling in this Active Advantage trial membership. Again, a fair amount going on here at the federal level, even if you just look back a few months.

Carlin McCrory: Thanks Mark, and I'll go ahead and round out some of the other federal laws that we see on this topic.

Next, I want to talk about the Restore Online Shopper's Confidence Act or ROSCA, which prohibits charging or attempting to charge customers for goods and services sold on the internet through negative options features, unless the marketer does three things, one, clearly and conspicuously discloses all material terms of the transaction before obtaining the customer's billing information. Two, obtains a customer's express informed consent before charging the account of the customer, and three, provides simple mechanisms for the customer to stop the recurring charges.

A few things that are important here. The first being that ROSCA only applies to negative option offers made on the internet. The second thing here is that this is very similar to all of the other requirements that we're talking about. Nothing novel here.

Even in a UDAP perspective, we want to make sure that we're getting the customer's informed consent before they pay for the good, and we also want to make sure that the customer has an easy way to get out of these recurring offers. The next rule I want to talk about is the telemarketing sales rule or the TSR, which prohibits deceptive telemarketing acts or practices,

including those involving these negative option offers and certain types of payment methods common in deceptive negative option marketing. Specifically, the TSR requires telemarketers to disclose all material terms and conditions of the negative option feature, including the need for affirmative customer action to avoid the charges, the date or dates the charges will be submitted for payment and the specific steps the customer must take to avoid the charges. The TSR also prohibits telemarketers from misrepresenting this information and contains specific requirements related to payment authorizations as well.

Lastly, the TSR prohibits the use of payment methods often used in deceptive marketing practices, including negative option offers such as RCCs, which are remotely created checks. It's important to note that the TSR only applies to negative option offers made over the phone, though.

The last rule I want to discuss is the pre-notification negative option plans rule, which is sometimes called the negative option rule, or more appropriately the pre-notification plans rule. This rule requires sellers of the plans to clearly and conspicuously disclose their plan's material terms before consumers subscribe. Again, we keep seeing this common theme here, right? We want to be upfront with our customers in the disclosures we give them and make sure that we have their consent.

Specifically, though, this rule enumerates seven material terms that I'll run through very briefly. The first being how subscribers must notify the seller if they don't wish to purchase the selection. Two, any minimum purchase obligations. Three, the subscriber's right to cancel. Four, whether billing charges include postage and handling. Five, that subscribers have at least 10 days to reject a selection. Six, that if any subscriber is not given 10 days to reject the selection that the seller will credit the return of the selection and postage to return the selection along with any shipping and handling. Lastly, the frequency with which the announcements and forms will be sent. It's important to note that this rule only applies to offerings where sellers provide periodic notices offering goods to participating customers and then send and charge for those goods only if the consumers decide to take no action to decline the offer.

All these laws are really quite similar, and I think we can garner the same approach under many of these laws in just being conspicuous and providing an easy way to cancel and ensuring that you have the informed consent from a customer. That's all on the federal side. Jill, do you want to discuss some of the state laws in this area?

Jill Dolan: Yeah, thanks Carlin. There's an ever-growing number of states that have enacted laws about automatic renewals. Most states refer to them as automatic renewals. Some also refer to them as continuous service contracts. Just over 20 states have broad automatic renewal laws on the books. A few others have laws that are limited to certain types of transactions such as service contracts only, health or exercise clubs, residential alarm systems, telecommunications contracts, or other specific types of contracts.

Carlin McCrory: The state legislatures have seemingly been interested in this topic. Has there been a lot of recent activity, Jill?

Jill Dolan: There has. State legislators have been active in 2021 and 2022 passing either completely new laws or adding or modifying to their existing laws. Last year, California added to their already robust law, Colorado, Idaho, Florida, Tennessee, and Virginia also implemented

either new laws or modifications to their existing law. New Jersey recently passed a law that will become effective later in 2023. Additionally, I've seen about six states introduce bills so far in January of this year. To keep track of this state law activity, we did complete a 50-state survey that we update periodically, and this survey can be adapted to particular products or offers that may invoke different parts of the state's automatic renewal laws.

Carlin McCrory: Jill, it's my understanding that many of these state laws are very similar. What do these state laws typically look like or what are features that are common for the state laws?

Jill Dolan: Yeah, there are a lot of similarities and the states vary in the amount of requirements. Some states have more robust requirements from start to finish of the entire transaction. That's California, for example. While other states just focus on certain parts of the transaction that they consider most important, most state requirements can be put in the categories of disclosures prior to the transaction, consent to the renewal agreement, acknowledgement of the initial agreement, notice of an upcoming automatic renewal, cancellation policy, cancellation methods and notification of material changes. With pre-transaction disclosures, and similar to federal law, these disclosures are required prior to acceptance of the offer. Typically, they must include all the material terms of the offer. Most states require that disclosure be clear and conspicuous like we've heard with federal law. States vary in their definition of what they consider clear and conspicuous, and some states don't define it at all.

The disclosures are often required to be in close proximity to where the customer would accept the offer, and some states require disclosures to be in a format that the consumer can keep for future reference, such as an email or other way to easily print the disclosures. As far as consent, as we've heard with federal law, the states require consumers' affirmative consent to the renewal and some states require that this be obtained prior to charging the consumer's payment method initially, and some states require express written consent or other affirmative acceptance of the terms. Some states don't specifically require consent, however they may prohibit sending of merchandise that wasn't actually ordered or requested by the recipient either orally or in writing, and then acknowledgement of the initial transaction, some states require that the business provide a written acknowledgement after acceptance of the automatic renewal agreement, and there's specific requirements for that acknowledgement, including a summary of the terms of the offer pricing, when it will renew, the cancellation policy and how to cancel if the customer would like to do so.

Then, notice of an upcoming autorenewal. Some states have specific timeframes for letting the customer know that their agreement will autorenew and they will be charged again. For example, the states vary in their requirements for timing of these notices, but some say at least 15 days prior to the automatic renewal, but no more than 60 days prior. They want it to be kind of in proximity to when it will renew, but enough time to give the customer cancel if they would like to do so. Requirements of the renewal notice could include agreement terms as well as how to cancel and the date the cancellation must occur to avoid the automatic renewal. Some states specify how the notice should be sent, and it may depend on how the initial transaction was entered into, for example, it could be mailed, but if the original transaction was online, then some states require that the notice be sent online as well.

As far as cancellation, many states provide for disclosure and use of cancellation methods that again are simple, cost effective, timely, readily accessible, easy to use, and of the things we've heard before with federal law, making it easy for customers to cancel if they wish to do so. Again, how the agreement was entered into may play a role in the cancellation methods. Many states require that if agreement was entered into online, it must also be able to be canceled online. Some states even specify what they consider as online, whether it be the sending them an email or a live link for cancellation. Most states require that multiple options be available for cancellation such as a toll-free number or an email address or postal address, or another method of cancellation. At any rate, these methods must be easily accessible by the customer, not hard to find.

Another requirement that some states have is notification of a material change after a customer has accepted an offer. If a material change occurs, such as pricing is going to change or an automatic renewal date is going to change, some states require clear and conspicuous notice of the material change as well as information on how to cancel with that notice. Some states require that notice of material change must be received prior to implementation of the material change. I should also mention that some states either have separate or additional rules if there is a free trial or a promotional period prior to the automatic renewal. We continue to monitor both existing state law and bills currently in progress as well as enforcement of the laws. I think Mark's going to talk about some activity in Washington and some class actions.

Mark Furletti: Thank you, Jill. There's a number of these state laws that are popping up and increasingly either have kind of broad coverage out of the gate or they're expanding the scope of coverage of the laws. Once these laws are enacted, they can become a source of liability for entities that are engaged in renewing programs. Just recently, there have been three class actions that have been filed alleging violations of the California law and the New York law. There was a class action filed against Athletic Media in January of 2023, just last month, in which it was alleged that Athletic Media did not give the disclosures that were required under the law and also made it difficult to cancel the plan once the consumer entered into it. Similarly, the company called Hungryroot, a class action was filed against them in January of 2023, again for alleged violations of California's autorenew law and again, alleging failure to provide disclosures that were required and difficulty in canceling.

Then finally November of 2022, there was a class action filed against a company called FloSports, and it's alleged that they deceived consumers by charging them an annual fee for a service that the consumers expected to be charged monthly for, and that the disclosures around that program were not sufficiently clear and in violation of New York law. Also, just want to highlight that the Attorney General of the State of Washington in October put out a consumer alert. The Attorney General had engaged a consulting firm to survey people in Washington about their experiences with autorenewing plans, and the survey showed that a high percentage of Washington consumers had unintentionally enrolled in subscription plans. In addition to kind of having that survey and putting out an alert, Washington has taken action against some subscription services, again alleging that the provider's disclosures and enrollment process was not sufficiently clear and in violation of Washington law, there was a class action settlement last year in a case against Noom, which is a weight loss website, and it related to their autorenewal and cancellation practices.

What I thought was interesting about the case was it was a nationwide class action, and if you look at the complaint, it had counts under each state that had a law like the ones Jill was describing, and a lot of them have them as Jill mentioned. On top of that, in order to get it to be a 50 state class, because not all 50 states have these laws, the autorenew laws, they alleged these claims of common law fraud, unjust enrichment and conversion. I thought that was of note because this was a way that the plaintiffs were able to try to get a nationwide class alleging these common law claims in states that did not have them. It just goes to this kind of concept that the issues around this go to general unfair, deceptive actor practice concepts and under common law.

The final thing that I'll mention relates to Blue Apron. Blue Apron made some claims in connection with the marketing of its meal delivery program. The claim was 'canceling meals is easy' and one of Blue Apron's competitors must have taken issue with that claim and brought it before the National Advertising Division of the Better Business Bureau. Ultimately, the National Advertising Division ruled in favor of Blue Apron and said that the 'canceling meals is easy' claim was supported, but in finding that Blue Apron did change the process it had in place for allowing consumers to cancel. Specifically, they had previously required consumers to send an email in order to obtain instructions on how to cancel, and they switched to a method by which consumers could cancel through their website. Again, fair amount of activity under state law and then even in this private realm with respect to the NAD. A lot going on just like at the federal level and very recent.

Carlin McCrory: Well, it seems like this certainly is a hot topic and not something that's expected to die down anytime soon. I want to thank Mark and Jill for joining the podcast today and providing their expertise with our listeners. To our subscribers, as always, thank you for listening.

Don't forget to visit us at our blog, consumerfinancialserviceslawmonitor.com and hit the subscribe button so you can get all of our daily updates and what's going on in the world of consumer finance. Thank you.

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