

Consumer Finance Monitor (Season 5, Episode 2): Pitfalls of Using Subscription Services in the Consumer Financial Services Industry

Speakers: Alan Kaplinsky, Jason Cover, Kim Phan and Jill Dolan

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments that are of interest to the consumer financial services industry. I'm Alan Kaplinsky, senior counsel at Ballard Spahr. I'm formally the chair of the Consumer Financial Services Group. And today we're going to be discussing a topic that is becoming of increasing importance in the consumer financial services industry. We're going to talk about subscription services in the consumer finance industry. I'm sure many of our listeners already subscribed to a variety of different publications and services where they pay usually a monthly fee, a fixed fee of some sort to receive online information. A lot of people subscribe to the electronic digital version of the New York Times. And that just gives you one example, not in the consumer financial services industry. Less known is the fact that there are increasing numbers of consumer financial services companies that operate online and that are using the subscription model. I have today put together a panel of three of our top lawyers in the consumer financial services group at Ballard Spahr that did a recent webcast on the subject.

Alan Kaplinsky:

And I thought it was of such importance that it ought to be shared with our podcast listeners. Let me first of all, give you just a little bit of background about what we're going to talk about today, then introduce our speakers to you, and we'll go from there. As consumers increasingly look for opportunities to avoid going back to brick and mortar stores, companies are exploring new mechanisms to generate revenue from the explosive growth in eCommerce. We're going to talk about the legal considerations that should be addressed when developing online subscriptions for consumer of financial products and services. We're going to cover federal and state laws relating to the implementation of automatic renewals for online subscriptions, such as upfront disclosures, notification, obligations that companies have, cancellation options. One of the issues that seems to always be of concern is whether or not a company can automatically renew a subscription. And before doing that to some kind of advanced notice that have to be given to the consumer and the consumer have to be given an opportunity opt out of the subscription.

Alan Kaplinsky:

So we're going to be going into all that. And there are a lot of federal and state laws that apply. On the federal level, we're going to be talking about the federal trade commission's negative option rule, the Restore Online Shoppers' Confidence Act, which sometimes is referred to as ROSCA, as well as relevant enforcement actions and litigation. Let me introduce our presenters today. First, is Kim Phan and you'll be hearing from Kim a little bit later, but she is a part partner at our DC office who counsels clients on federal and state privacy and data security laws and regulations. And among the many areas in which Kim is knowledgeable is the area of subscription services.

Alan Kaplinsky:

Then I want to introduce you now to Jason Cover. Jason is a partner in our Philadelphia office and he is involved in a wide range of consumer financial services topics. And then finally, Jill Dolan. Jill is an associate in our consumer financial service group. And Jill works out of our Wilmington Delaware office. And Jill also is very deeply immersed in the consumer finance area and has a lot of experience of with the use of subscription services in that area. The way we're going to proceed is I'm going to first turn our podcast show over to Jason. And then from Jason, we'll go on to hear from Jill and Kim. So with that, Jason, why don't you provide some more detail and background on this very interesting subject.

Jason Cover:

Thank you, Alan. So I guess just starting from scratch here, I mean, I think the first thing that many of our clients respond to when we inform them, you might need to be concerned with subscription services statutes is A, what the heck are these and B how is it possible that my consumer financial services product is subject to a subscription service statute? So just as a just to kind of lay the groundwork here, what are automatic renewal? What are automatic subscriptions statutes? Generally speaking and it varies from statute to statute, from state to state and on some level from regulator to regulator, but generally these are applicable to consumer contracts or service agreements with evergreen provisions. So generally speaking, you sign up for this service, you pay on a monthly basis or some other periodic basis and receive some sort of good product or services in return.

Jason Cover:

The triggers for what exactly the recurring service or automatic renewal service is, is defined different in each state. So you have to be very cognizant of that and make sure whether or not your product might fall into there. And then the state statutes at least have essentially six define things that they generally govern. And Jill's going to get into the specifics, but just to kind of give you some background as we go through these. There generally is going to be a requirement to give clear and suspicious disclosure terms, particularly with respect to the renewal terms themselves. So these statutes really want to emphasize, hey, this product is going to continue turnover. You're not going to get out of it unless you cancel. You're going to need to pay X amount so on and so forth. Very clear and conspicuous affirmative consent to that renewal term.

Jason Cover:

And then many of the statutes will require some sort of affirmative confirmation or acknowledgement from the company letting the consumer know that they have signed up for this, that the orders in effect. Billing's going to start on X and continue every month thereafter, so on and so forth. Then notice of renewals or material changes to terms of the renewal program. So many of these statutes will say, for example, you must give notice within 30 days of prior to the renewal starting, or if a major Netflix, for example, it used to be DVDs and streaming services, and then they decoupled it from one to the other. So something like that might be a trigger requiring notice of material change.

Jason Cover:

And then finally, many of these statutes are seeking to govern disclosure of the cancellation terms. So again, it needs to be very clear and conspicuous and then the ability and how to cancel those. So it needs to be clean, you can't set up unnecessary hurdles for consumer to cancel the product so on and so forth. So that's kind of the nuts and bolts and Jill will get into each a little bit more. And then when do these apply? So this is kind of the important term from our perspective is knowing when these triggers happen. There was a new statute in California, and there's a very new statute in Delaware that hasn't even become effective yet. But I thought these were kind of emblematic of how these can be structured. And these are kind of different things.

Jason Cover:

California's completely predicated on just having automatic renewal at the end of a definite term and then a subsequent term that renews. So it's just that self cycling nature of it. The Delaware one's a little bit more specific, specified period of more than one month if the renewal cost of the contract would be in effect for more than 12 months. So there's differences in gradations here, which may lead some room at least on a state to state basis to give you some product structure changes that might be able to avoid these from time to time. But again, it is just because of our federal layered system, it can be a bit overburdensome to analyze these on a state to state basis but it's important.

Jason Cover:

So then the second question I mentioned, why should anyone care about this? So as of right now, there's about half of the states that have enacted statutes with some type of governance over these types of programs. And there's many more. Again, I guess, exemplified by California and Delaware here that are under consideration or have something in process. So this is

something that is going to continue to evolve. It's not going away. These aren't being repealed, if anything, they're they're pressing for. And I thought some of the quotes that were from the Delaware bill legislation were just particularly notable, I thought, just because of the way we think of these things. So it's going to help level the playing field between consumers and businesses, going to help many people protect themselves. I mean, these are the common phrases we see in consumer financial services generally where we hear regulators talking about our products.

Jason Cover:

And then the drafter of the bill here in Delaware says, "You shouldn't have to look through the paperwork to see trying to print on how to cancel." And I imagine many of us have experiences. You sat on the phone for hours trying to get someone to cancel something for you, otherwise get in contact with services. So these are really pertinent things that I think everyone can appreciate regardless of how we feel about legislation and regulatory overreach. But it's something that I think comes up in everyone's life and just kind of proceeding from there, areas of impact. These are modern American life. It's almost everything we do on a daily basis anymore has kind of a subscription renewal feature for services and products.

Jason Cover:

So just think about the things that are just immediately necessary for us to do our jobs, even cellular services, internet services. I don't know what all of us would have done for the last year and a half if we didn't have just those two type of services. But generally speaking, month to month automatically renewing, you might have an initial term, and then it goes a month in a month basis. But just to think about those things, streaming services, again, things that everyone has just been glued to for the last year and a half, whether it's Netflix, Amazon, Apple, Disney, all of those things that we are constantly using in our day to day life, online media subscriptions. So if you subscribe to New York Times, the Washington Post, any type of newspaper, any type of magazine that's online. Software, I think many software services have moved to... You just don't buy word anymore. You buy a subscription to a type of service or software as a service.

Jason Cover:

Recurring purchase of consumer goods. So think like Harry's razors, particularly things like that kind of come and go, are disposable, where you get a new influx of them. I think Alan mentioned with like records and with BMG and things of that nature back in the day. Athletic memberships also on a recurring basis. And that isn't even something that's over the internet. So it's a wide variety of things from a non-consumer finance perspective that impact daily life, why in particular, should consumer financial services companies care about these things?

Jason Cover:

So it happens. So we see all the time now, whether it's in just kind of your standard banking services or in FinTech practices, recurring consumer financial products. So there is a plethora of companies out there offering checking and savings account services for \$5 a month. You can stop anytime you want, if you pay it \$5 this month, that's great but it automatically recurs until you cancel. Same with investment accounts and brokerage services. It's the same type of concept. FinTech companies are bringing these types of products and services to the masses on a... It's a subscription auto-renewing basis.

Jason Cover:

So it is frankly something we just see constantly these days. And then kind of related to that on ancillary products, same thing. Credit monitoring services are often offered in conjunction with the products we just mentioned. And then we often see different types of saving plans or memberships. So these could be anything from, you purchase this renewing product, it kind of gives you discounts in various different things. It could be vacations, food, anything where you're kind of tying yourself to some sort of plan to get kind of different deals and on different products and services. And then I think what we're really seeing pop up more and more, all of these products being bundled into a particular membership package that then also is bundled with a credit feature.

Jason Cover:

So for \$30 a month or something, I get a checking account, I get a brokerage account, I get credit monitoring services. Maybe I get some other discounts and materials with that. And then I can also access a \$200 line or something like that. So just to diverge slightly for those types of products, you have to be concerned with these automatic renewal statutes. But then the way these are all structured is an attempt to kind of avoid many of our federal and state credit statutes. So in theory, if we're charging for the membership and not access to the credit, we'll avoid truth in lending and regulation Z. And then many of our licensed lender and consumer finance statutes are structured the same way. So by charging a "membership fee," it's no longer a charge for an extension of credit or interest or something loans on it. So it's a super exciting area with a lot of interest and growth in it, particularly on a FinTech level, but lots and lots and lots of regulatory considerations in creating those types of products.

Jason Cover:

Then finally, and I think this is kind of a similar area. We're seeing folks that maybe consider are doing a retail installment contract for something that again, would kind of have that overlay of consumer finance, regulatory disclosures and things of that nature on top of it. And instead try to structure them as some sort of a membership plan. And I think where we've seen this in particular, our kind of dental or medical membership. So instead of seeing it's \$1,000 to pay for your dental procedure, we'll split that over 10 payments and so on and so forth, like you would with a Rick. Instead, there's a flat membership plan and you get access to different types of dental or medical plans with that.

Jason Cover:

And then I think we've seen that a lot with similar concepts. With seat licensing programs or other types of sporting events or entertainment events where it's structured so that it's renewing on a constant basis. And maybe you do that instead of a straight line one time financing. So this is just a small sliver of some of the ways this kind of creep into our world, but it's out there. And I think we see these more and more every day and we get more and more questions about it on a daily basis. So without further ado, I will let, Jill takeover.

Jill Dolan:

Thank you, Jason. Talk a little bit about origination and enrollment as we talked earlier about there's a few pieces of that. So with enrollment, we're going to talk about pre-enrollment disclosures. Talk a little bit about the requirements of consent. What are a lot of requirements of acknowledgement of the enrollment and then anything post enrollment prior to the renewal notice. So with pre-enrollment disclosures, many states want them to be clear and conspicuous. And for example, California has a fairly robust definition of clear and conspicuous. They want the disclosures to be in manner that calls attention to the language, and they define that as larger type or contrasting type, contrasting font and color to surrounding texts set off from the surrounding texts by symbols or other marks. And then for audio disclosures over the phone, for example, they require them to be in a volume and cadence sufficiently to be readily heard and understood. And other states have similar definitions of clear and conspicuous.

Jill Dolan:

The disclosures have to be close in proximity to the consent, both verbally and visually. And in prior to consent, the disclosures have to contain some specific things. The statement that the agreement will continue to automatically renew unless canceled. What the payment obligations are, the amount of payment, the frequency of the payment, the length of the subscription term, and the payments will be charged to the authorized payment method. The cancellation policy in particular instructions on how a customer can cancel, and then any other material terms that are important to whatever the subscription and automatic renewal is for.

Jill Dolan:

So then moving on to consent. Consents called different things with different types of under ROSCA, which is the Restore Online Shopper's Confidence Act, which is a federal law. They require express informed consent and many states require affirmative consent. Affirmative consent typically means that the customer must take action. They either need to check a box or they need to indicate, yes, I agree. And we've seen that the if check box cannot be prefilled, the customer actually has to take an action to indicate their consent. The state laws typically require that the consent be specific to the automatic renewal or the subscription terms. It can't be combined with other consents and agreements. And again, the consent must be in close proximity to disclosures.

Jill Dolan:

And then once consent is obtained, there's typically a confirmation or acknowledgement requirements, and they should be timely. State laws typically don't specify time periods, but typically within a few days, as we found as common industry practice. The acknowledgement can be electronic if the customer consents and there's specific content requirements for the acknowledgement. And they're typically much like the pre-enrollment disclosures terms and conditions, cancellation policy methods, and timing of that cancel. More importantly, simple instructions on how a customer can cancel. And the acknowledgement, many states require that the acknowledgement must be in a format capable of being re-obtained. Say there could be an email or a letter, something that the customer can save or print out and keep.

Jill Dolan:

And then post enrollment disclosures. Kim's going to talk a little bit more about renewal notices, but I just wanted to mention that many states require notification of any change in terms that may happen either prior to, or with an upcoming renewal. Again, they must be clear and conspicuous and contain cancellation information. And these also must be in a format capable, being retained by the consumer. I'm going to hand it over to Kim Phan to discuss renewal notices.

Kim Phan:

Great. Thank you, Jill. And so to talk about renewals, it's important to note that Jill has gone through all the types of disclosures that need to be provided upfront. But that's not the end of the story. So in order for the subscriptions to actually renew at the end of the term, companies are required to provide additional information, a lot of what was repeated in the initial disclosures. But a reminder, because again, keep in mind, this is a whole year has passed since someone has signed up for one of these subscription based services. And so they may have forgotten. And so the idea is to protect the consumer, to provide them with additional information, if they don't want to automatically renew, if they want to cancel, this is providing them the information that they need to make that decision at the time that it's most appropriate for them.

Kim Phan:

So it's very specific, the obligations on both the federal and state level that there must be a notice that is sent to the consumer prior to the actual automatic renewal. So otherwise the company's not allowed to engage that automatic renewal, but one thing to be very clear about this, there's an expectation that this notice of automatic renewal is not intended to be a bill. It's not intended to be an invoice. It should not be combined or otherwise inserted on the back page of a bill or an invoice. It to be a standalone notification. There should be no request for payment. There should be no request for payment information, credit card information, anything like that in this notice of automatic renewal. It should be a standalone communication to your subscriber so that they have the information they need to whether or not to continue to subscribe.

Kim Phan:

So just one thing to keep in mind, the FTC has flagged very clearly that if there's a communication that looks like a renewal notice, but asks for payment information, it might be a scam. So to avoid your communications being misinterpreted specifically because of the FTC guidance, caution you to separate this communication from those types of billing or other invoicing communications. Now, one of the most important things about this notice of upcoming automatic renewal is that

the timing is very important. So you could send an automatic renewal the month after they subscribe, but that wouldn't do anyone any good because the automatic renewal's not for another 10, 11, 12 months.

Kim Phan:

So there is some variation amongst the state as to when the specific timing of the notification should go out. It ranges anywhere from 30 days to 60 days before the end of the renewal period. There may be some additional variations on that timing based on whether or not the subscription included any sort of free trials or other types of promotional rate or other types of free gifts. So for example, in California, we've talked a lot about California, which I'm sure many of you are not shocked is a major player in setting the standards for auto renewals nationwide. In California, just a standard auto renewal notice. Should be sent out either at least 15 day. So again, consumers have time to cancel if they want, but no more than 45 days before the renewal period. So it's not being sent so far out that the consumer isn't ready to be thinking about that yet.

Kim Phan:

However, in California, if again, this subscription involves a free gift, a trial, some sort of promotional period, that information is supposed to go out at least three days before the end of that promotion, but no more than 21 days before the expiration of that time period. So that free gifts and trials and promotions and other discounted prices can continue to apply for the full subscription period. Again, a few little tweaks based on the nature of the subscription service and what is being offered. The other big thing to make sure is being covered in these renewal notices is the cost of the renewal. Regulators don't want consumers to ever be surprised or see an unexpected cost associated with this renewal.

Kim Phan:

Again, Jill talked about all those upfront disclosures that you're supposed to make, but cost is probably the most important. So when a renewal automatically happens, that charge at that point in time could be higher than what it was at the initial enrollment. That could be business, operational change changes, other things that are happening in the world. Netflix every couple of years will increase the cost of its service. And when that automatically renews you're charged the increased price. And also for things like cable companies, there may be a promotional rate. You're at a lower rate for your subscription service for the first year, but after that the amount will go up and that promotional period will end.

Kim Phan:

So again, you want to be absolutely clear about what the renewal costs are associated with the automatic renewal. So that again, if someone wants to ask questions, if someone wants to negotiate a new promotional offer, I've done that a lot with cable companies. If someone wants to cancel, they have the time, a reasonable amount of time before the end of the automatic renewal period so that they can make those decisions and take appropriate action. Some other things that get included in the renewal notice, and again, this depends on the state and other considerations is inclusion of information about the cancellation. And I'm going to hand it back to Jill in just a moment to talk more about cancellation mechanisms.

Kim Phan:

But in the automatic renewal notice again, you're trying to give folks a reasonable period of time to decide whether or not they want to cancel. And if they do want to cancel, you're supposed to provide them with the information they need in order to effectuate that cancellation. How, when, who do they call, email or otherwise click to make that happen? And especially in the world of eCommerce, if this notice is sent out electronically, whether by email or maybe a push notification in a mobile app, there should be, and this is considered what is reasonable, to make this an easy cancellation method. There has to be a link that takes you to a form, opens up an email address, takes you to a website that otherwise will allow you to effectuate your cancellation of the subscription. And all of that goes back to contact information.

Kim Phan:

Again, some of the states will vary about what type of contact information you need. Some of them want businesses to post the actual physical address where someone can send you mail, but in other states, maybe an email address or a telephone number or other reasonable communication, it may be sufficient. So again, a lot of variation amongst the states but definitely you want to make sure again, that you're being clear, conspicuous and transparent from a federal perspective. As Jill mentioned, there's ROSCA, there's also UDAAP, the federal trade commissions, unfair and unacceptable act practices authority. So with that, I am going to hand it back to Jill to talk about cancellations.

Jill Dolan:

Okay. So we've seen that both FTC and states are looking closely at pre-enrollment disclosures. The content of those they're looking at the type of consent they're looking at acknowledgement, disclosures and renewal notices. They're also looking very closely at methods of cancellation. They want easy ways for customers to cancel. And the FTC is stated of what they think is not simple and easy to use. And that would be hard to find links or labyrinth like cancellation plans, for example, having a customer call to cancel. But when they get someone on the phone, they're told they need to write a letter. They also mention long hold times or aggressive tactics to try to convince customers not to cancel or telling a customer that they can cancel on the website or can send an email, but not readily providing a link or an email address.

Jill Dolan:

And the FTC has also said to listen to customers on this, they stated in a press release that one company, and Kim's going to talk a little bit more about enforcement, but one company that was the subject of an enforcement action had tens and thousands of complaints on how to cancel and did not adjust their policies. So they think listening to customers complaints on this is important and taking action on it. For cancellation, a lot of states require if the subscription or the automatic renewal was accepted electronically, they must also be allowed to cancel electronically. And states have said that could be a link, or it could potentially be a pre formatted email that a customer can copy and send to the business without any other information. Again, the central theme is making it simple, making it easier for the customer to cancel if they wish to do so. And with that, I'm going to hand it back to Kim to talk about enforcement.

Kim Phan:

All right. So thank you, Jill. So it has been mentioned, a couple of times already today. From a federal perspective, the federal trade commission is probably the primary agency that you should be concerned about. And keep in mind, the federal trade commission's jurisdiction is all financial institutions that engage in interstate eCommerce except for banks. So while the federal trade commission is the primary federal regulator that enforces laws such as the Restore Online Shoppers Confidence Act, ROSCA, which again has been mentioned a couple times during this webinar. The FTC also brings enforcement actions under its UDAAPs authority and keep in mind for banks and other entities that fall outside of the FTCs jurisdiction, there's always the possibility that the CFPB decides to step in and bring its own UDA based enforcement actions. They have not done so as of yet, but it is not outside the realm of possibility that they do so.

Kim Phan:

But for the time being, and for purposes of this webinar, why don't we focus our discussion on the FTC from the federal perspective, then we'll talk about some of the state enforcement activity in this area. And we'll close out with the discussion of private rights of action and other consumer litigation and trends that we're seeing from that perspective. So again, returning to the FTC. This is an area where the FTC has been incredibly active over the years. They've brought enforcement actions across all different types of industries. They've brought subscription actions against weight loss products, against magazine publications, against food delivery services, mobile phone and telecommunication services. We're not going to talk about any specifically that address financial institutions. It's definitely an area where the FTC could bring its enforcement authority to bring actions, if they see that there's some sort of issue that could potentially result in consumer harm.

Kim Phan:

A couple of the cases that we are going to highlight are just very, very recent examples just in the last year or two, just to be more evidence, the FTC is very, very focused on this type of consumer based subscription service. And one of them, ABCmouse. For those of you who aren't familiar with this service, it's an educational platform. It is a learning subscription that parents can sign up so that their children can take advantage of educational information, educational tools, and games, and other learning functionality on their website. The FTC reached a settlement with ABCmouse late last year. And it's interesting, the FTC specifically cited the rise in eCommerce transactions in remote work and remote schooling because of COVID as one of the factors in driving its enforcement focus on this particular company, because they believed that this company was taking advantage of this such situation of parents being stuck at home with their kids and signing them up for these types of subscriptions.

Kim Phan:

Specifically, the FTC said that under ROSCA, the company allegedly, excuse me, charge customers for products using negative options. Negative option is another way of referring to automatic renewals. Negative option is a little bit further along the lines of unacceptable in the eyes of regulators. Everything we've talked about today is about transparency and about affirmative action. Negative options are types of subscription plans where if the consumer fails to take any action, the subscription and subscription automatically renews. So instead of affirmative action, this is a more passive consent mechanism. And that will almost always drive regulator interest in a company because of that.

Kim Phan:

So again, they brought the claim under ROSCA, under their UDAAP authority, under this particular case, the monthly membership cost was 9 95 a month. And that ABCmouse also offered a special offer for a 12 month membership for only 5995. So it is about half of what their listed price was for these promotional introduction to the subscription plan. But according to the FTC from 2015 to 2018, the FTC alleges the company failed to clearly disclose that the memberships would automatically renew, that they would charge consumer credit cards without express authorization, and they would make it difficult for consumers to stop any sort of recurring charges. And especially during the COVID period, they were signing up folks using 30 day free trial memberships. Again, not an annual subscription but a 30 day free trial.

Kim Phan:

And specifically the FTC took issue that it was not being clearly disclosed that folks who took advantage of this free trial would be charged automatically for the annual membership and subscription at the end of that initial trial period. The complaint also alleged that ABCmouse buried all of these important terms that Jill has described earlier today into the terms and conditions page, and that consumers, if they didn't know where to look would have to go burry deep into these terms and conditions, try to find the relevant text that was printed in very small font and single space within a much larger document, instead of pulling it out into a clear and conspicuous way.

Kim Phan:

And then furthermore the company expressly marketed, and this was where the FTCs UDAAP authority comes to play. They said for any, anyone who might be on the fence, that the process that ABCmouse had set up had a very easy cancellation process, the company's words. And the FTC said, "No. ABCmouse's cancellation process was a hide and seek maze." That's the FTCs terms. That it was difficult for a parents to try to navigate on the website how to actually cancel this, even though ABCmouse had promoted their product as being easy cancellation. So lots of tips there for where things can go wrong for you and things that you want to avoid. I should note that the settlement that the FTC entered into with ABCmouse was for \$10 million. So pretty large penalty for these subscription based issues.

Kim Phan:

The one last thing I want to flag for you all based on the ABC mouse is that the FTC staff often will blog, in addition to the formal press release about these types of consent orders and settlements with companies. And the FTC staff posted a blog about how consumer complaints played a role in the FTC's decision in pursuing this settlement and imposing such a large penalty amount. So the FTC noted that the company received over 100,000 different complaints from their customers about the inability to easily cancel their subscriptions, and that they kept getting charged, even though they didn't want to. And they couldn't figure out how to get the charges to stop.

Kim Phan:

The FTC also noted that in January, 2015, the company had even conducted an internal review of its customer support issues and noted that there were claims that the subscription page was misleading. The consumers were confused about the billing. That customers couldn't figure out how to stop the auto renewal but the company made no changes to their policy despite receiving all of these different complaints. And the FTC noted that at least one company employee in this internal review noted that a common consumer concern was the automatic renewal process. So the FTC very clearly said, "If you're getting a pretty clear number of consumer complaints about this, you have to consider what you might be doing wrong and make a pro create changes." Doing the review, finding their issue and making no changes was not acceptable for the FTC in this case. So just wanted to flag that for you all for this, as well as other areas of compliance.

Kim Phan:

The FTC also brought just in the past year an enforcement action in the form of a litigation filed in the FTC's behalf by the department of justice in a federal district court in California. California, pretty common theme today. Against the company, MyLife, which is a website that provides a subscription based service for individuals to check their own background reports. So this might be something you subscribe to if you're in transition and looking were a new job with the assumption that your future employers might be running background checks on you.

Kim Phan:

The website allows folks to have a trial search where you can just put your name in, see what comes up. And the FTC alleged that the returns from the free results would say that Kim Phan might have a criminal history record, or Jill Dolan might have been listed on the sex offender registry. Not that she is. But it was a teaser and the FTC that said that that was deceptive. And the only way that someone could actually check whether or not Kim Phan may or actually has a criminal history, or whether or not Jill may or does appear on the sex offender registry is to sign up for this subscription. So the FTC said that that was a deceptive method of getting folks to sign up for subscriptions.

Kim Phan:

I could go on all day with the FTC. The last FTC item that I want to flag, and the reason for this is because this will come up again, when I talk about the states. Is the FTC file lawsuit in federal district court against match.com for essentially letting folks have free trials of match.com. And allowing them to receive communications from accounts they knew to be either run by employees or altogether fraudulent, to try to show people that they were getting matches and to convince them to sign up for a fee based subscription to the service. The reason I want to flag that for you is because California is also taking a look at match.com.

Kim Phan:

But before I turn to that the states as Jason has already highlighted, very active in this area, California is only one state. There are actually more than two dozen states, almost half of the states in the nation already have some sort of auto renewal laws on the books. New York's auto renewal law went into effect earlier this year. Colorado's governor signed new auto renewal law, which will go into effect January 1st, 2022. As Jason had mentioned, Delaware and California have both enacted laws tweaking their existing auto renewal laws. But there have been bill introductions and at least five states that don't have an existing auto

renewal law. Kentucky, Indiana, West Virginia, Massachusetts, Alabama, just in the past year to try to get an auto renewal law on the books in those various states.

Kim Phan:

So keep an eye on this area. It is quickly evolving. There are evolving state laws. Again, new state laws changed state laws and updated state laws as well as stepped up state enforcement. And California is the prime example. California has created a California Auto Renewal Task Force or CART for short, everyone loves an acronym. And CART is a coalition of district attorneys, city attorneys, and others all within California to coordinate their efforts with regard to enforcing auto renewal laws. And specifically CART and the reason I mentioned match.com earlier is CART actually pursued an enforcement action against match.com at the same time as the FTC. Usually the federal and state try to coordinate a little better. I mean, the FTC investigation might have started or stopped on April 31st. And the state investigation start in June 1st, but they usually try to coordinate at least so.

Kim Phan:

Here, California couldn't wait. They said, "We can't wait for the FTC action to move forward. We're going to go ahead and pursue an auto renewal claim against this company." And they settled with match.com. They announced a 2 million settlement with Match. Now, while the FTC case is still pending, Match is having to face these types of enforcement actions from both the federal and state level. CART, California's Auto Renewal Task Force has also brought a number of other online base subscription service enforcement action, Home Chef, CheckPeople, care.com, all of those with civil penalties ranging anywhere from 150,000 to 400,000. These are not insignificant amounts of money, especially for startups and other small entities.

Kim Phan:

Other enforcement actions we're seeing and states say the district of Columbia, the attorney general there announced auto renewal enforcement action against a sports club. Jason flagged earlier that that gyms and other types of physical locations, not just eCommerce are impacted by these laws. And then some of the private litigation that we're seeing out in the world. The one example that we have listed here, but there's many more morale versus WW international, WW being Weight Watchers. This is a case that's pending in the Southern district of New York. It survived a motion to dismiss earlier this year. So this is a consumer class action. We're not talking about individuals here. We're talking about big money. If there are issues that are found to have occurred, and that these are violations of various consumer protection laws.

Kim Phan:

Weight Watchers subscribers that subscribe to their service, which helps you obviously lose weight and nutritional promotional information and other tips, as well as some food delivery services were alleged to not provide the appropriate pre-purchase disclosures that were needed as well as its not obtaining the post purchase acknowledgement, Jill described earlier. Specifically the court noted in denying the motion to dismiss that while the acknowledgement did not adequately describe the cancellation feature and a reference to a help page without a link was considered not sufficient to satisfy the state law with regard to how having easy cancellation methods made available, the court cited the fact that the information that was missing from the acknowledgement actually appeared in the initial disclosure.

Kim Phan:

It just they had varied the language in some way so that the post disclosure acknowledgement, it was considered insufficient even though would've been considered sufficient for the initial disclosure. So just something to keep in mind, even if you have everything right up front, every communication has to be compliant. What if, it's not a one and done. The initial disclosures, the enrollment information, the cancellation information, every communication has to provide all the information as required by the various federal and state laws.

Kim Phan:

Another private class actions that have been broad, and I just want to flag this in a different industry, the Washington Post and the New York Times we're not just talking about all entities, we're talking about the largest entities that are potential targets of this type of enforcement action. On July 7th, there was a hearing also in California where preliminary approval was given to a \$6.7 million settlement involving the Washington Posts, online subscription registration and cancellation procedures. The New York Times similarly had to reach a multimillion dollar settlement. This was March of 2021. Also in California there had been claims that customers weren't required to acknowledge the auto renewal offers after they had completed their subscription enrollments. And that once enrolled the New York Times, allegedly made canceling exceedingly difficult and unnecessarily confusing. Those are the language used from the complaint.

Kim Phan:

The one thing that I found really interesting in the New York Times complaint and in that particular litigation is that they picked up on a new term that has really been something the FTC has focused on in the last year, is dark patterns. Dark patterns are a way of hiding or otherwise of skewing information that consumers may find material when navigating a website or other online service. And it's something that has shown up pretty frequently in FTC hearings and other publications. And it was interesting that the plaintiff's attorneys had keyed into that particular issue and incorporated into this particular litigation.

Kim Phan:

So lots of activity with regard to auto renewals federal state, and in the courts. And so this is certainly an area that while none of the examples that we discussed today focused on financial based subscription services. You can see that all of this activity is happening right now, all in the past year, and to the extent that subscription based services become more prevalent. In the consumer financial services space, I think that there is additional risk that the FTC, one of the state AGS or a consumer plaintiff might turn their attention on you and your company. So with that, I will turn it over to Alan, to give a few closing remarks.

Alan Kaplinsky:

Well, that does it for our show today. I want to thank my colleagues, Kim Phan, Jason Cover and Jill Dolan for doing an excellent job in covering the waterfront in this thorny area, an area that I think there's going to be increasing interest in as the months and years go by. Also want to remind all of you about the other resources that we make available, make sure to regularly visit our blog, which also goes by the name of consumer finance monitor. And to remind you that our podcast show is generally a weekly show. We take two weeks off during the Thanksgiving holiday and the Christmas holiday. But other than that, we have a show every Thursday that gets released and we have a lot of exciting shows that are planned for 2022. So you'll definitely want to look for us every Thursday to see what we're going to be covering. With that, I want to thank all of you who took the time today to download our podcast. And many of you whom I know are regular listeners to our podcast show. Thank you, once again.