

Retail Practices Are In Vogue For Regulators, and Class Action Lawyers

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The Federal Trade Commission (FTC), state regulators, and plaintiffs' lawyers are focusing on retail and direct-to-consumer practices ranging from membership and subscription plans to discount pricing and other retail practices.

For example, last August, the FTC settled with I Works and various related individual and corporate defendants for over \$280 million in suspended judgments. The FTC alleged that the defendants had enrolled consumers in supposed "trial memberships" for bogus money-making and government grant opportunities, and then proceeded to charge them up to \$59.95 in recurring fees for additional programs that the consumers had not agreed to purchase.

The Washington Attorney General similarly settled with a cosmetics startup over allegations that the startup had offered consumers a "free" welcome box, but had not adequately disclosed that consumers would be enrolled in subscription plans for between \$19.99 and \$24.99 per month after enrollment. In December, the Los Angeles City Attorney's office filed lawsuits against four of the largest retailers in the United States over allegations that they were over-inflating their "original" and "regular" prices (also known as "reference" prices) and using deceptive "buy 1 get 1 free" offers. A class action suit against a software developer alleging claims of deceptive auto-renewal practices and pricing was settled for \$80 million. When consumers agreed to enroll, the developer allegedly promised that their subscriptions would auto-renew at the same prices that the developer was offering to the public. According to the plaintiffs, the developer would auto-renew at prices that were higher than both the prices offered to the public and the suggested retail prices set for retailers.

Some disputes involved more subtle retail practices. In April 2016, the New York Attorney General settled with a national pharmacy and convenience store chain over allegations that the chain mislabeled both its advertised and in-store prices, misrepresented that products were a "great buy," "last chance" or "clearance" and failed to provide consumers with clear and consistent information about its rewards program. The chain agreed to a \$500,000 monetary settlement and to amend its sales practices going forward.

Key Takeaways

- With false reference price class actions — some settling for as much as \$50 million — and related regulatory actions showing no signs of letting up, online and brick-and-mortar retailers must continue to ensure that their reference prices fairly and accurately represent the normal prices offered to consumers.
- As recurring subscriptions become more ubiquitous online, direct-to-consumer marketers must ensure that they clearly and conspicuously disclose, and obtain affirmative consent to, the terms of all auto-renewal and subscription plans.
- Because regulators will read the "fine print" even if consumers do not, retailers must ensure that they are clearly and conspicuously disclosing the material terms and limitations of their rewards programs and other promotions.

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