FTC SETTLES WITH MOBILE APP DEVELOPER OVER UNAUTHORIZED CHARGES

The Federal Trade Commission (FTC) has settled with Pact, Inc. (Pact) over allegations that Pact's mobile app, which allows users to set fitness goals and creates financial penalties for not meeting them, failed to adequately disclose its cancellation policy and continued to charge users even after they met their goals or cancelled the service. Pact agreed to a $1.5 million monetary settlement, including over $900,000 that will be returned to injured consumers.

THE BOTTOM LINE

The Pact case demonstrates that marketers can incur liability even when consumers affirmatively agree to be charged on a recurring basis. Unlike other negative option cases, there is no allegation here that consumers did not knowingly enter into a continuity plan – on the contrary, the whole purpose of the app is to be charged for failing to meet one's goals. Rather, the FTC's concern was that Pact failed to adequately explain how to stop recurring charges, and continued to charge users even after they fulfilled their pacts or asked to stop being charged. Online marketers should ensure that they are adequately disclosing all material terms of their continuity plans and strictly abiding by any promises or disclosures that they make to consumers.

THE PACT APP

The Pact app is a self-help mobile application designed to help users meet their fitness goals. Users make "pacts" within the app to meet certain goals, including "GymPacts" to exercise a certain number of times per week, "FoodLoggingPacts" to log their meals every day and "VeggiePacts" to eat a certain number of fruits and vegetables per week. Users agree to be charged between $5 and $50 whenever they fail to meet their goal, but receive a certain amount of the money collected from other users if they succeed. Importantly, when collecting payment information, Pact promised users that "[y]ou'll never be charged for pacts you complete." For example, a user can set a pact to exercise three times per week and to pay $10 for each day the user misses. The user can then "verify" that he or she met that goal, either by checking into a gym or using the device's GPS or accelerometer to track his or her movement. The user is charged $10 each day he or she misses, but receives a portion of the money collected from other users if he or she meets the goal.

THE FTC'S ALLEGATIONS

According to the FTC, Pact violated Section 5 of the FTC Act by breaking its promise to never charge users for pacts they complete. In particular, the FTC alleged that Pact charged users even when those users fulfilled their pacts, and cited tens of thousands of user complaints to that effect. For example, certain users complained that Pact did not recognize the gyms that they visited, or did not acknowledge when they exercised outside of gyms. Others complained that they were charged, rather than paid, after completing their pacts.

In addition, Pact violated Section 4 of the Restore Online Confidence Act (ROSCA) by failing to adequately disclose how to stop recurring charges and for continuing to charge users

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after they cancelled their pacts. In particular, the FTC alleged that the only information that Pact made available on how to stop recurring charges was buried beneath 4,400 words (or 43 screens on an iPhone 5S) in Pact's terms of service. The FTC also alleged that Pact continued to charge users even after they completed the steps necessary to stop recurring charges or contacted Pact to freeze their accounts.

THE SETTLEMENT

The FTC reached a settlement with Pact, which includes a $1.5 million monetary judgment; Pact is required to return $948,788 to consumers, with the remainder of the judgment being suspended based on Pact's financial condition. The settlement also requires Pact to clearly disclose its cancellation practices and obtain users' express informed consent to all material terms prior to collecting billing information.

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