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eHarmony settlement illustrates changes required in e-commerce subscription programs

A number of actions have been brought under the auto-renewal laws in California by a task force comprised primarily of local district attorneys, targeting subscription based businesses. Known as CART - California Auto-renewal Task Force - the task force members have obtained settlements that contain significant monetary components, as well as enhanced compliance obligations. The most significant actions are examined here, which includes the recent settlement involving online dating company eHarmony.

With the increasing use of subscription based business models, particularly in the e-commerce channel, a rising number of US states have begun to either enact automatic renewal laws or to strengthen existing ones in an effort to protect consumers. California has been a leading agent of change, not only in terms of enacting enhanced legislation, but also in bringing enforcement actions against marketers in a wide array of sectors.

California has one of the most specific auto-renewal laws on the books - the California Business and Professions Code §§17601 and 17602. Collectively, these provisions require in relevant part that prior to enrolling in an automatic renewal arrangement, a consumer must affirmatively agree to a clear and conspicuous disclosure that provides that the subscription or purchasing agreement will continue until the consumer cancels the arrangement, and clearly outlines the cancellation process, the auto-renewal charges and timing, the length of the relevant term, and any minimum purchase obligations.

In addition, the law specifies that a consumer must receive an order acknowledgment clearly and conspicuously confirming these above mentioned terms. Significantly, 'clear

and conspicuous' is a term defined by the statute, and is more akin to 'more conspicuous' than the surrounding text. Effective 1 July 2018, California's auto-renewal laws become even more robust. In what appears to be the first regulation of its kind in the nation, this new California law requires that a consumer who makes an online order must in turn be given the opportunity to cancel online.

California has backed up its stringent legislation with a significant enforcement effort. Indeed, a string of actions have been brought under the auto-renewal laws in California by a task force comprised primarily of local district attorneys, targeting subscription based businesses. Known as CART - California Auto-renewal Task Force - the task force members have brought investigations against a number of marketers and obtained settlements that contain significant monetary components, as well as enhanced compliance obligations. We examine some of these recent actions below.

eHarmony, Inc. resolves allegations for up to \$2.2 million

On 8 January 2018, the online dating company, eHarmony, Inc. ('eHarmony') agreed to settle claims brought by several California district attorneys and

prosecutors on behalf of the People of the State of California, alleging that the dating website engaged in improper subscription practices, resulting in false advertising and violation of the state's automatic renewal laws. The Government alleged that eHarmony failed to sufficiently disclose its subscription fee policies and failed to sufficiently explain its cancellation procedures. The Government also alleged that eHarmony violated state laws regarding the operation of dating services.

eHarmony agreed to a stipulation regarding the general automatic renewal law, that it must clearly and conspicuously disclose (as defined under B&P §17601) its automatic renewal terms to consumers, and that it must obtain affirmative consent to those terms from consumers before charging their credit or debit card. eHarmony agreed to obtain the express consent of its consumers through "a check-box, signature, or other substantially similar mechanism," which must appear "in visual proximity" to the automatic renewal offer terms. Notably, the consumer's agreement to the terms must be limited to the auto-renewal terms set forth in B&P §17601. Further, eHarmony is required to provide an email confirmation of the transaction "immediately after the

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contract is made,” and it must provide a “cost-effective, timely, and easy-to-use mechanism for cancellation” of the automatic renewal. This cancellation method includes offering consumers the ability to cancel online.

The final judgment goes on to address California’s dating services contract law, requiring eHarmony to comply moving forward. Of particular relevance, this law outlines specific language to be included in a dating service provider’s agreements with consumers, stipulating that the consumer may cancel the agreement without penalty “at any time prior to midnight of the original contract seller’s third business day following the date of this contract, excluding Sundays and holidays.” Further, as a dating service, eHarmony is not permitted to require payments or financing by a consumer in excess of two years from the date that the contract is entered into, unless the initial term is one year or less and subsequent terms are for one year or less.

In addition to these injunctive measures, eHarmony agreed to pay \$1.205 million in civil penalties and \$75,000 in investigative costs. eHarmony will also pay up to \$1 million into a restitution fund that will be distributed directly to affected consumers. Specifically, eHarmony has agreed to pay an initial \$250,000 into the restitution fund. If after all members of the affected class have made a claim and funds remain, those remaining funds will be returned to eHarmony. If, however, that initial payment is insufficient, eHarmony has agreed to deposit additional funds to cover outstanding payments, but it will not be obligated to pay more than an additional \$750,000, making the maximum total restitution payment \$1 million.

Beachbody settlement

Perhaps one of the most pivotal recent settlements involving California’s auto-renewal laws came on 24 August 2017, when Beachbody, LLC (“Beachbody”), the well-known marketer of exercise videos (such as P90x), supplements, and weight-loss programs, settled claims brought by The City of Santa Monica, California. In this case, The City of Santa Monica alleged a wide array of claims, including that the company failed to obtain the appropriate consent prior to enrolling consumers into its subscription-

based programs. Beachbody agreed to amend its automatic renewal practices to be in compliance with the Government’s interpretation of California’s automatic renewal laws. Specifically, Beachbody agreed to clearly and conspicuously disclose its terms prior to obtaining consumer payment information, to provide at least one post-payment acknowledgement of the transaction, and to obtain the consumer’s affirmative consent to the terms of the automatic renewal prior to charging the consumer’s credit or debit account.

In addition, this settlement has been touted as one of the first where a subscription based product or service provider has been required to obtain express consent from consumers to be charged for recurring payments specifically via “a check-box, signature, express consent button, or other substantially similar mechanism.” Although the requirement of a check-box or similar mechanism extends beyond what appears to be required on the face of the automatic renewal laws, it has continued to be included in subsequent settlements.

As part of the settlement, Beachbody agreed to pay a total of almost \$3.6 million to the plaintiffs. The majority of the monetary settlement was paid to the District Attorney’s Offices of both Los Angeles County and Santa Monica City to cover civil penalties and investigative costs. The remainder of the settlement was payable to several healthy eating and lifestyle organisations under the doctrine of *Cy Pres*. In this case, the doctrine of *Cy Pres* was invoked as the parties and the Court agreed that it would be “impractical and impossible to identify or to provide direct restitution to consumers” affected by Beachbody’s practices as those consumers purchased different products at disparate price levels. As such, it would be difficult to create a reimbursement formula that could be applied in all cases.

Savvier, Inc.’s settlement

The end of 2017 saw another automatic renewal suit reach settlement. On 21 December 2017, Savvier, Inc. (“Savvier”) agreed to settle charges brought by a coalition of county district attorneys alleging that the advertiser and seller of exercise and body slimming products made fat reducing claims in relation

to its “Tummy Tick Slimming System” that were not supported by reliable scientific evidence. Further, the district attorneys asserted that Savvier failed to adequately disclose its automatic renewal terms to consumers. The settlement agreement included both monetary and injunctive relief. With regard to the monetary relief, Savvier agreed to pay restitution in the form of *Cy Pres*, in the amount of \$100,000 to the California District Attorney’s Consumer Protection Trust Fund. Further, Savvier agreed to pay \$848,113 in civil penalties, and \$120,000 in investigative costs.

The agreed to injunctive relief specifically addressed Savvier’s disclosure of its automatic renewal terms and required Savvier to bring its practices into compliance with California’s automatic renewal laws. The settlement stipulates that Savvier must clearly and conspicuously disclose the automatic renewal terms to consumers prior to obtaining their billing information. These terms must specifically state that Savvier will charge the consumer’s credit or debit account when the limited trial period expires, explain how consumers can cancel any free trial or promotion to prevent being charged, and disclose all material terms and conditions of its automatic renewal and cancellation policies.

Similar to the *Beachbody* case, Savvier agreed to amend its website to include a “check-box, signature, or other substantially similar method” as a means of obtaining the consumer’s express informed consent to the automatic renewal terms. Again, this check-box requirement extends beyond what is required under existing California law. However, the repeated inclusion in these suits suggests that this may be standard practice moving forward.

Conclusion

These CART settlements illustrate the importance that the task force is placing on auto-renewal arrangements. Indeed, CART is actively working on a number of additional investigations, reflecting the Government’s focus on automatic renewal compliance obligations. CART’s actions, coupled with the soon to be effective amended auto-renewal law, are a clear sign that marketers relying on subscription based/continuity enrollments need to re-examine their processes and procedures.

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