

Pennsylvania Settles with Mail Order Subscription Business – Again

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On the heels of the TFG Holdings multistate settlement last month, Pennsylvania Attorney General Dave Sunday announced a \$750,000 settlement with collectibles company American Mint LLC regarding its subscription practices. This settlement follows a 2005 Assurance of Voluntary Compliance (AVC) pursuant to alleged violations of the state UDAP, FTC Mail Order Rule, and Pennsylvania Unsolicited Merchandise violations, among others that required ongoing compliance with those laws and FTC Guidance concerning Continuity Plans. Pennsylvania filed suit against American Mint in May 2021 alleging the company violated the AVC and the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

The settlement describes in its background section a list of allegations. It describes American Mint's practice of sending print advertisements with return slips containing a box with a "Satisfaction Guarantee" heading below the signature line with the terms and conditions of a negative option plan, smaller than the remainder of the text and in 5.5-7 point font. The terms stated in part:

[B]y ordering a product at the discounted price, you will have the privilege of receiving future issues in the collection through our free in home approval service. No further action is required on your part. If you do not wish to preview future issues in the collection, please X-out this paragraph.

The state says that "mere acquiescence, or consumers' failure to X-out the 'Satisfaction Guarantee' box does not constitute express informed consent," and the heading itself was misleading given the actual terms that followed.

The AG also alleged that American Mint's website similarly failed to clearly and conspicuously disclose the material terms of the subscription plan by defaulting to an option for recurring shipments (referred to as "Collect and Save") instead of an individual item option and not providing information regarding the frequency and cost of future items in the "collection."

Once consumers were defaulted into the negative option plan, the state explained they would receive the discounted or free ordered item in their shipment and a more expensive preview item, along with other ads and offers, a returns form, and an invoice, which did not fully disclose how to return the "preview" product without further cost. The AG alleged that customers who did not pay for or return the "preview" item were referred to debt collection agencies.

The Consent Decree requires American Mint:

- Clearly and conspicuously disclose material terms of its mail and online ads,
- Obtain express and informed consent prior to enrolling consumers in a negative option plan,
- Clearly and conspicuously disclose in close proximity to the negative option terms that charges will increase after the offer, the preview item will arrive in the same shipment, the cost of each item in the plan, charges will continue unless the consumer cancels, the deadline to cancel to stop recurring charges, and the means to cancel,
- Clearly and conspicuously disclose whether billing charges include postage and handling,
- Allow cancellation by the same method as enrollment,
- Abide by the 2005 AVC, and
- Pay \$750,000 (primarily for restitution), cease previous collection efforts, and discharge outstanding debts.

It prohibits American Mint from:

- Requiring consumers to affirmatively “opt out” of a Negative Option Feature including by crossing out terms,
- Enrolling consumers in a different negative option plan once the consumer has collected all the items in a collection,
- Using misleading headings to “conceal” terms, and
- Transferring consumers’ accounts to debt collection agencies.

Many of Pennsylvania’s injunctive terms bear striking similarity to existing state autorenewal laws — though Pennsylvania itself does not have one. For example, the list of material terms required to be clearly and conspicuously disclosed upfront closely matches the list required in many state autorenewal laws, and the requirement to permit cancellation by the same method of enrollment is becoming more common especially in recently enacted autorenewal laws and amendments. But most states would argue the concept of upfront disclosure of material terms and obtaining express informed consent to agreements are core consumer protection principles that apply to their UDAP laws, and states are increasingly relying on their general UDAP authority to obtain relief for subscription practices even without a specific state law. And remember, many times state AG settlements last forever — so don’t lose sight of agreements just because they are 20 years old (or more).