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Publishers Clearing House: A Cautionary Tale on the Risks of ‘Dark Patterns’ Marketing

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Publishers Clearing House (PCH) is well known for surprising major sweepstakes winners with a Prize Patrol knock on their doors. But the recent lawsuit filed by the Federal Trade Commission (FTC) against the company was anything but surprising given the agency’s pursuit of alleged “dark patterns” marketing tactics.

Dark patterns are design practices in online marketing and advertising that trick or manipulate users into making choices they would not otherwise have made and that may cause harm. In 2022, the FTC published a report on dark patterns and vowed legal action against companies whose practices violated the FTC Act or other statutes and regulations enforced by the agency. A number of high-profile lawsuits have followed, including a pending case against Amazon, which we profiled in an earlier [Alert](#).

Now, Publishers Clearing House must change its online business practices and pay millions of dollars to comply with a proposed court order.

FTC Allegations Against PCH

In June 2023, the [FTC filed a complaint against PCH](#) in the United States District Court for the Eastern District of New York, alleging that PCH used purported dark patterns and other practices that violated the FTC Act and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act). According to the FTC, PCH engaged in deceptive dark patterns such as:

- using statements and user interface designs to deceive consumers into believing that they must order products before entering sweepstakes, or that ordering increased their odds of winning. (For example, an entry form on the website homepage told consumers who completed it to click “Submit Entry!,” “WIN IT!” or “Win for Life!,” however, doing so did not actually enter consumers in the sweepstakes. Instead, they were taken to the company’s e-commerce site, where they had to click through several webpages of product advertisements and sales pitches before submitting the sweepstakes entry);
- luring consumers into repeatedly visiting its e-commerce website and buying products by enticing them with the prospect of winning large prizes;

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- targeting older and lower-income consumers. According to the complaint, the average age of PCH’s core consumer on its e-commerce website is 66, and 54% of core consumers earn less than \$50,000;
- sending consumers who enter the sweepstakes follow up emails telling them to complete another step to claim a prize number or to be eligible to win the sweepstakes. However, the emails actually directed consumers to PCH’s e-commerce site where they again had to click through a series of webpages with product ads and sales pitches;
- employing “dark patterns throughout the consumer’s experience” by, among other things, using small and light font for disclosures and placing them where they were unlikely to be seen; bombarding consumers with emails that pressured them to take immediate action by clicking on the email or purportedly risk losing the opportunity to enter or win the sweepstakes; and making it difficult for consumers to enter the sweepstakes without placing an order.

Soon after filing the lawsuit, the FTC announced that PCH had agreed to a proposed court order requiring the company to pay the agency \$18.5 million for consumer refunds, and to make “substantial changes” to its online business practices. Among other things, PCH would be (i) prohibited from implying that a purchase is required to enter a sweepstakes and that a purchase will increase the chances of winning; (ii) required to clearly distinguish on its entry and order forms information related to entering and ordering (for example, by visually delineating between the two sections by using two parallel lines that extend across the webpage if the page offers both sweepstakes entries and product purchases; and (iii) required to make clear, conspicuous and unavoidable disclosures on every shopping page that a purchase is not required to enter a sweepstakes and that making a purchase will not increase chances of winning, in addition to including a link that takes consumers directly to a sweepstakes entry page without any sales messaging.

More ‘Dark Patterns’ to Avoid

The FTC case against PCH illustrates some but not all online design tactics that could fall under the “dark patterns” definition. Others mentioned in the FTC’s 2022 report included:

- pre-checked boxes, instead of having consumers purposely check desired boxes;
- confusing cancellation policies;
- ads formatted to look like independent news stories, or biased comparisons designed to look like unbiased reviews;
- website buttons labeled “next” that do not move customers to the next screen when clicked, as expected, but instead automatically process a transaction;
- “drip pricing” that shows only part of a product’s total price up front, with other charges mentioned later.

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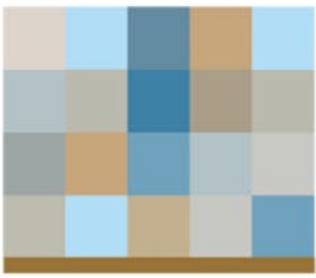
Sweepstakes Law Reminders

The PCH lawsuit not only serves as a cautionary tale on the legal risks of engaging in marketing practices flagged as “dark patterns” by the FTC, but is also a good reminder of a few basic sweepstakes law fundamentals.

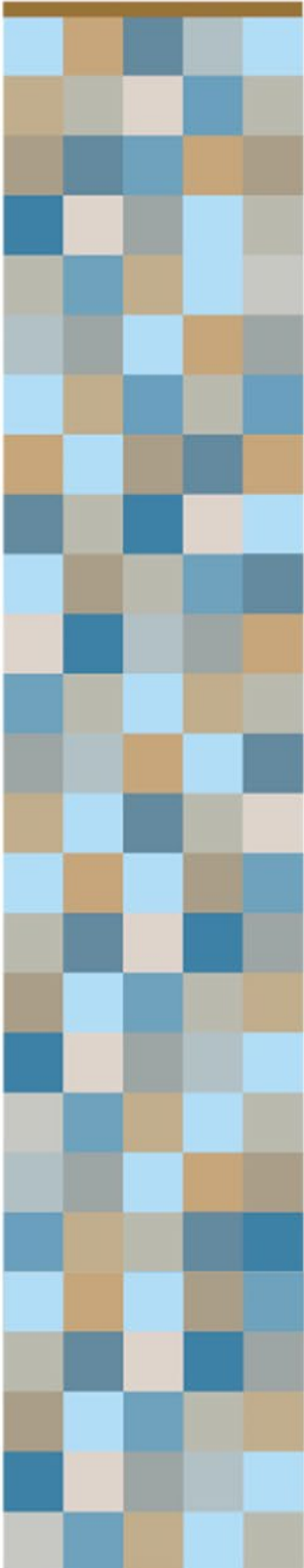
- It is illegal to require entrants to make a payment or purchase to enter a sweepstakes; it must be free to enter. A prize promotion is a “sweepstakes” when the winner(s) will be selected by a random process, such as a random drawing, an arbitrary distribution of winning game pieces, or randomly pre-selected winning numbers.
 - This includes “hidden” payment or purchase requirements. For example, requiring sweepstakes entrants to provide a product review or submit a photo of themselves with your product as a means of entry could constitute an inherent purchase requirement.
- There is one, limited exception in which companies are permitted to require a payment or purchase to enter their sweepstakes. That is when a free alternative method of entry (AMOE) is offered. This, for example, might be free entry via an online form, or a mailed postcard. To constitute a valid, viable AMOE,
 - the AMOE must be clearly and conspicuously disclosed and not buried in fine print or appear below the fold;
 - the AMOE must be universally available to all potential participants in the sweepstakes;
 - the AMOE and the payment/purchase method of entry must have parallel deadline dates. For example, if the AMOE is a mail-in entry, to qualify as a valid, viable AMOE, the mail-in entry postmark date (not the received by date) should parallel the last date of entry by payment/purchase method. It is also important to make sure that last date of entry does not fall on a federal holiday or Sunday when there is no postal service and the AMOE mail-in entry would otherwise be postmarked late;
 - all the entries in the sweepstakes (whether by payment/purchase or AMOE) must be treated equally and have the same chances of winning. For example, entries by payment/purchase cannot have better odds of winning or be favored over the AMOE entries, such as by giving them additional entries.

If you have any questions regarding the matter raised in this Alert, please feel free to contact Terese Arenth at tarenth@moritthock.com.

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