

Dark Patterns: Are They as Shady as Everyone Claims?

[Ari N. Rothman](#)

Partner | 310.229.9909 | ANRothman@Venable.com

[Ellen T. Berge](#)

Partner | 202.344.4704 | ETBerge@Venable.com

[Shahin O. Rothermel](#)

Partner | 202.344.4550 | SORothermel@Venable.com

VENABLE LLP

Agenda

- What are “Dark Patterns”?
- Regulators’ Position on “Dark Patterns”
- Regulators’ Enforcement Actions against “Dark Patterns”
- Class Actions and Private Enforcement of “Dark Patterns”
- State Laws Addressing “Dark Patterns”



What Are Dark Patterns?

Definition of “Dark Patterns”

- Subset of “deceptive marketing.”
- The term “dark patterns” was first coined by Harry Brignull, a UX specialist, in 2010.
- Also known as “deceptive design pattern”
 - Harry Brignull: “a user interface carefully crafted to trick users into doing things they might not otherwise do, such as buying insurance with their purchase or signing up for recurring bills . . . [they] are not mistakes. They're carefully crafted with a solid understanding of human psychology, and they do not have the user’s interests in mind.”
 - “deceptive system designs on websites and apps that prey on human cognitive processing frailties.” *Nichols v. Noom* (S.D.N.Y. 2021)
 - “Dark patterns are deceptive design choices that take advantage of behavioral tendencies to manipulate users to make choices for the designer's benefit and to the user's detriment. Examples of “dark patterns” include complicated navigation menus, visual misdirection, confusing wording (such as double negatives), and repeated nudging.”

Types of “Dark Patterns”

- Dark patterns are described as “deceptive,” “information hiding,” “asymmetric,” “covert,” using “differential treatment,” and “restrictive.”
- Examples of “dark patterns” :
 - Trick Questions
 - “While filling in a form you respond to a question that tricks you into giving an answer you didn't intend. When glanced upon quickly the question appears to ask one thing, but when read carefully it asks another thing entirely.”
 - Sneak into Basket
 - “You attempt to purchase something, but somewhere in the purchasing journey the site sneaks an additional item into your basket, often through the use of an opt-out radio button or checkbox on a prior page.”
 - Roach Motel
 - “You get into a situation very easily, but then you find it is hard to get out of it (e.g. a premium subscription).”

Types of “Dark Patterns”

- Privacy
 - “You are tricked into publicly sharing more information about yourself than you really intended to.”
- Price Comparison Prevention
 - “The retailer makes it hard for you to compare the price of an item with another item, so you cannot make an informed decision.”
- Misdirection
 - “The design purposefully focuses your attention on one thing in order to distract your attention from another.”
- Hidden Costs
 - “You get to the last step of the checkout process, only to discover some unexpected charges have appeared, e.g., delivery charges, tax, etc.”
- Bait and Switch
 - “You set out to do one thing, but a different, undesirable thing happens instead.”

Types of “Dark Patterns”

- Confirmshaming
 - “The act of guiltting the user into opting into something. The option to decline is worded in such a way as to shame the user into compliance.”
- Disguised Ads
 - “Adverts that are disguised as other kinds of content or navigation, in order to get you to click on them.”
- Forced Continuity
 - “When your free trial with a service comes to an end and your credit card silently starts getting charged without any warning. In some cases this is made even worse by making it difficult to cancel the membership.”
- Friend Spam
 - “The product asks for your email or social media permissions under the pretense it will be used for a desirable outcome (e.g. finding friends), but then spams all your contacts in a message that claims to be from you.”
- False sense of urgency / scarcity
 - Urges consumers to act quickly for fear of missing out on a price or offer.

Trick Questions

- A series of checkboxes are shown
- The meaning of the checkboxes is alternated, so that ticking the first one means "opt out" and the second means "opt in."

Please enter your details to reserve your item(s)

Title :

First name * :

Last name * :

Email * :

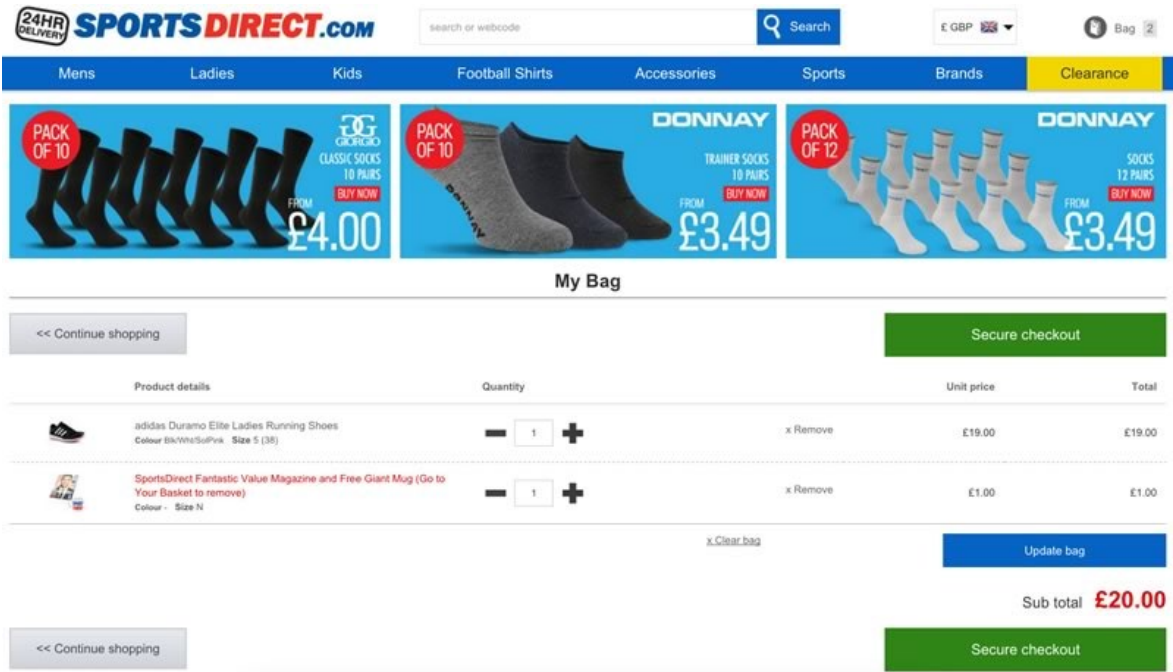
Phone number * :

Please do not send me details of products and offers from Currys.co.uk

Please send me details of products and offers from third party organisations recommended by Currys.co.uk

Sneak into Basket (aka “Inertia Selling” or Negative Option)

- An extra item is added to the cart automatically when online shopping.
- The site may “trick” users into adding an extra item themselves by defaulting a choice.



What will you do with your domain name?

We've added privacy. Here's why.

When you register a domain, your name, address, email address and phone number are automatically published for the world to see. Protect yourself from spam and scams with GoDaddy Privacy Protection, which replaces your personal information with ours. [See Example](#)

We highly recommend domain privacy, but it is an optional feature.

Select plan

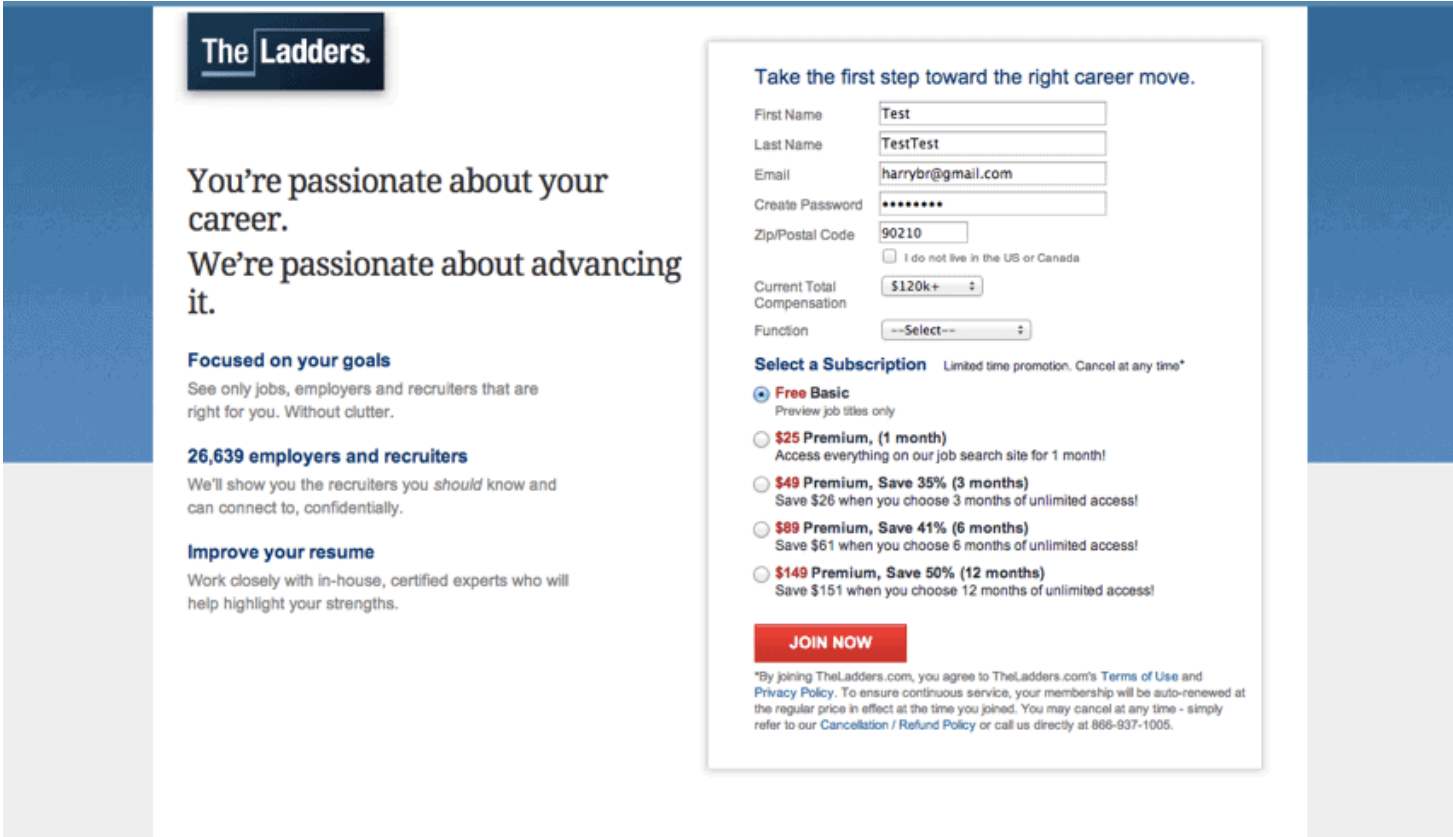
- Privacy Protection** \$9.99/domain per year
[View Details](#)
- Ultimate Protection & Security** \$14.99/domain per year
\$27.98
[View Details](#)
- No Thanks**

Price Comparison Prevention

- A website makes it challenging for users to compare the prices of items and determine what options are the most cost-effective.

PRICE COMPARISON PREVENTION

 Granny Smith apples loose €2/kg Add to cart	 Jonagold apples (6 pack) €1,7/pack Add to cart	 Conference pears loose €2/kg Add to cart
---	--	--



The Ladders.

You're passionate about your career.
We're passionate about advancing it.

Focused on your goals
See only jobs, employers and recruiters that are right for you. Without clutter.

26,639 employers and recruiters
We'll show you the recruiters you *should* know and can connect to, confidentially.

Improve your resume
Work closely with in-house, certified experts who will help highlight your strengths.

Take the first step toward the right career move.

First Name:
Last Name:
Email:
Create Password:
Zip/Postal Code:
 I do not live in the US or Canada
Current Total Compensation:
Function:

Select a Subscription Limited time promotion. Cancel at any time*

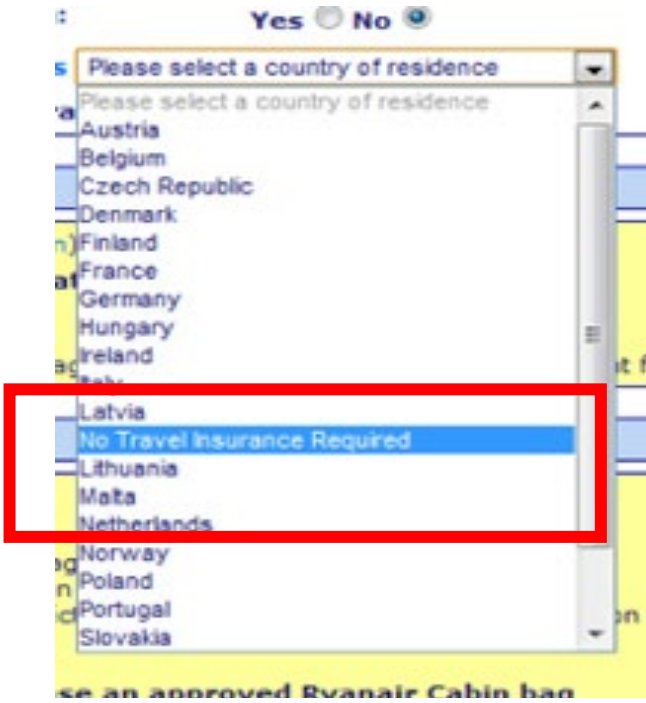
- Free Basic**
Preview job titles only
- \$25 Premium, (1 month)**
Access everything on our job search site for 1 month!
- \$49 Premium, Save 35% (3 months)**
Save \$26 when you choose 3 months of unlimited access!
- \$89 Premium, Save 41% (6 months)**
Save \$61 when you choose 6 months of unlimited access!
- \$149 Premium, Save 50% (12 months)**
Save \$151 when you choose 12 months of unlimited access!

[JOIN NOW](#)

*By joining TheLadders.com, you agree to TheLadders.com's [Terms of Use](#) and [Privacy Policy](#). To ensure continuous service, your membership will be auto-renewed at the regular price in effect at the time you joined. You may cancel at any time - simply refer to our [Cancellation / Refund Policy](#) or call us directly at 866-937-1005.

Intentional Misdirection

- Designs focus consumers' attention on one thing to distract from something else.
- When purchasing a flight, users are asked to select their country of residence—a mandatory question. Most users select their country of residence. However, the question is actually related to buying travel insurance—in the list of countries, 'No travel insurance required' is an option listed between Latvia and Lithuania.



Hidden Costs

- Unexpected costs appear late in the check out process.
- For example, additional costs are disclosed and added only after credit card details are filled out.

The image shows a listing for an apartment. The top part shows a photo of the apartment and the text: "Entire apartment in Quận 8", "Cheap Mini Serviced Duplex near District 1, HCMC", "2 guests - 1 bedroom - 1 bed - 1 bath", "Kitchen - Wifi - Air conditioning". The price is listed as "\$310 ~~\$310~~ \$257 / month". A red circle highlights the \$257 price, with the text "Displayed Price" next to it. An arrow points down to a reservation form. The form shows the same price "\$310 ~~\$310~~ \$257 / month" and a "Reserve" button. Below the button, it says "You won't be charged yet". A breakdown of costs is shown: "Accommodation \$310", "17% monthly price discount -\$53", "Cleaning fee \$5", "Service fee \$28", and "Total \$290". A red circle highlights the \$290 total, with the text "Actual Price" next to it.

Order Subtotal	\$50.98
Standard Delivery	\$14.99
Care & Handling	\$2.99
Tax	\$4.56
Total	\$73.52
Savings Today ⓘ	\$9.00

Privacy

- The user is put in a position where they are tricked into publicly sharing more information than they otherwise intended.
- Many websites and mobile apps require consumers to share their personal information to use the websites and apps, and the data is subsequently shared or sold in a way the user did not intend or want.
- Websites, apps, and social media platforms that make it difficult for users to exercise choice over the collection, use, and sale of their data.
- Websites and mobile apps may access a user's contacts as a way to identify and contact those individuals.
- Using, sharing, or selling location data without a user's knowledge.

Roach Motel

- A website makes it hard to cancel recurring charges, delete an account, unsubscribe from a mailing list, or otherwise opt out of payments or communications.



How do I close my Stamps.com account?

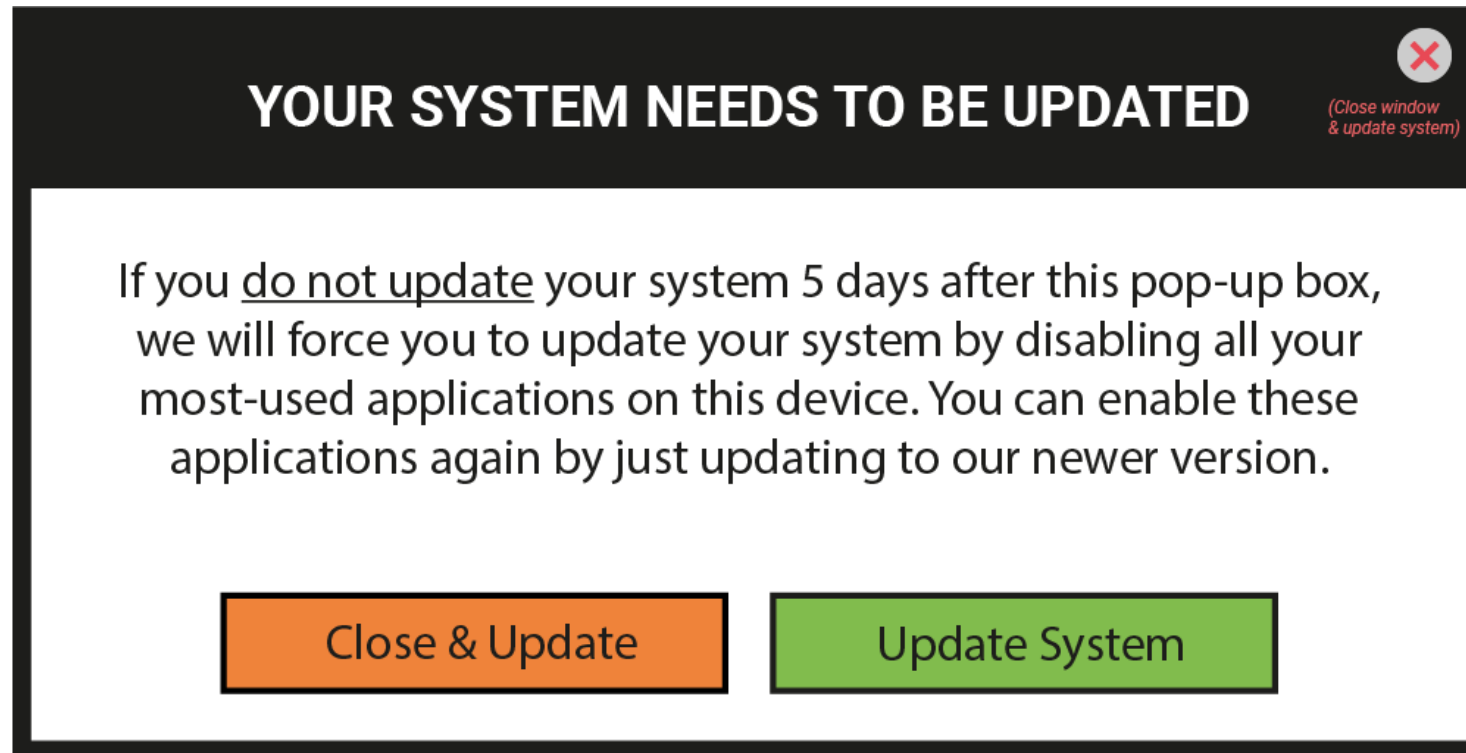
We are sorry to hear that you want to discontinue your Stamps.com service. In order to *cancel*, please go to the Manage Account section or simply call us at our toll-free number 1-855-608-2677 Monday through Friday, 6 a.m. to 6 p.m. and Saturday, 6 a.m. to 3 p.m. Pacific Time. One of our Customer Care Representatives will be happy to assist you.

Was this answer helpful?

- Answers others found helpful
- [How to Change Service Plans](#)
 - [Managing Payment Methods](#)
 - [How does my billing cycle work?](#)
 - [Account Fee Payment history](#)
 - [Stamps.com PC Postage Terms and Conditions](#)

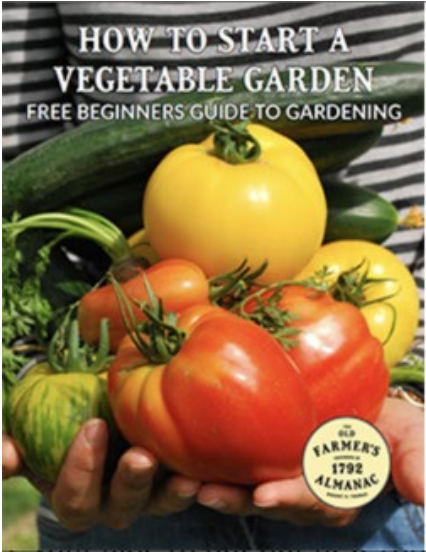
Bait and Switch

- The user thinks their action will have one outcome but instead a different, unwanted outcome occurs.
- Ex: In this update prompt, clicking on “X” resulted in the update occurring



Confirmshaming

- The site tries to pressure individuals to sign up for something by guilt or shaming them.
- The declining option is phrased in a way that shames people into opting in.



FREE BEGINNERS GARDEN GUIDE


STARTING A VEGETABLE GARDEN

Your complete guide on how to grow a vegetable garden.

Email Address **GET YOUR FREE GUIDE**

You will also be subscribed to our Almanac Companion Newsletter. We will never share your information without your permission.

No thanks, I know everything about gardening.



Do you want to be notified when some of your favorite products go on sale?

NOPE, I'M RICH **HECK YEA**

WE'RE GIVING YOU

30% OFF*

YOUR FULL-PRICE PURCHASE

Enter Your Email Here

GET MY 30% OFF

NO THANKS, I PREFER TO PAY FULL PRICE

Disguised Ads

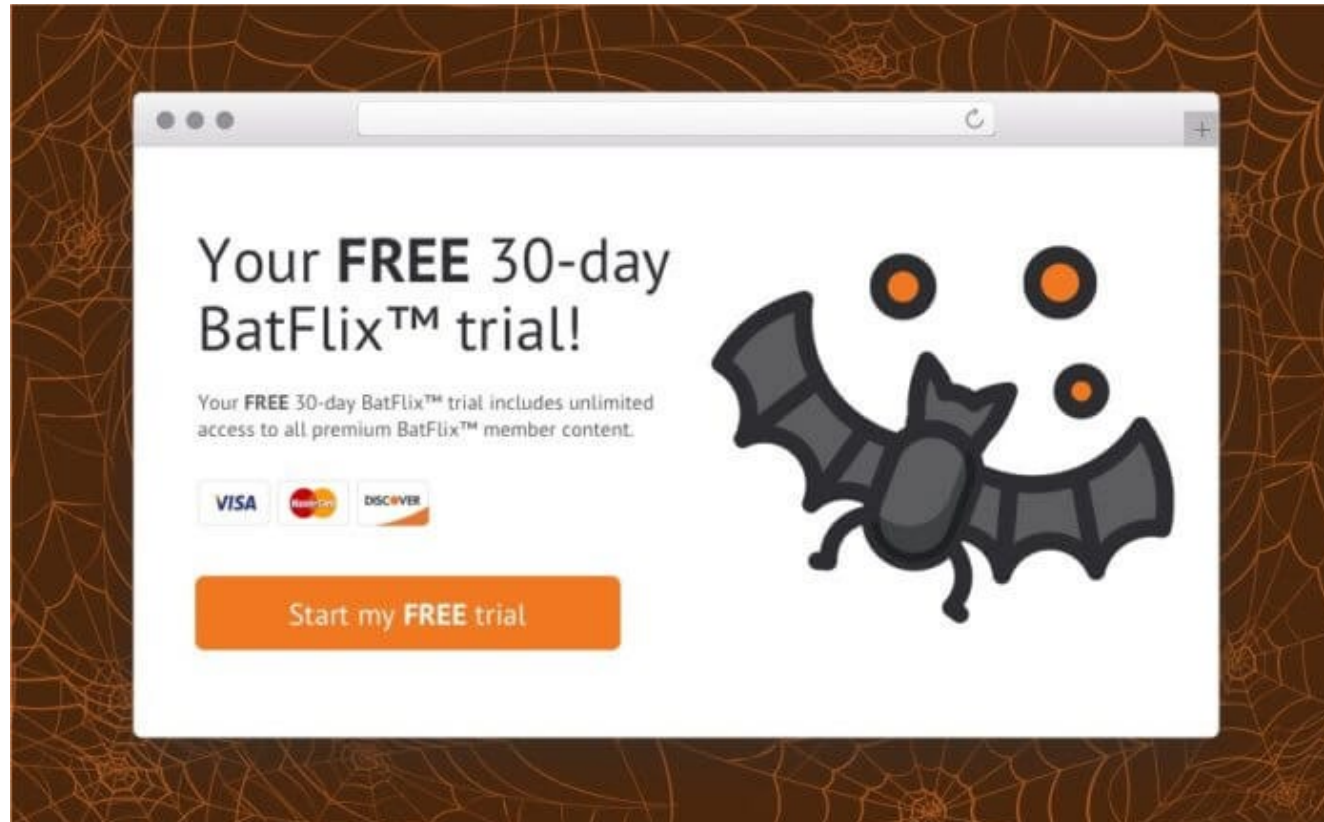
- Disguised ads look like they are relevant to the website where they are placed but instead cause a user to go to another location that is undesirable or unwanted.

The screenshot shows the Softpedia website for 'OnyX for Mac'. The page features a navigation bar with 'SOFTPEDIA', 'DESKTOP', 'MOBILE', 'WEB', and 'NEWS'. Below the navigation, there's a 'DOWNLOAD' button and a 'Start Download' section highlighted with a pink box. This section contains a 'DOWNLOAD NOW' button and a 'Download Cleaner' link. The page also includes a description of the software, user reviews, and a sidebar with 'IN-DEPTH REVIEW' and 'FILE SIZE'.

The screenshot shows a restaurant review page. A green button labeled 'See all photos' is highlighted. Below it, there are two restaurant listings: Parkway Pizza & Subs and Parkside Seafood House. Parkway Pizza & Subs has 9 reviews and a price range of \$\$. Parkside Seafood House has 45 reviews and a price range of \$\$.

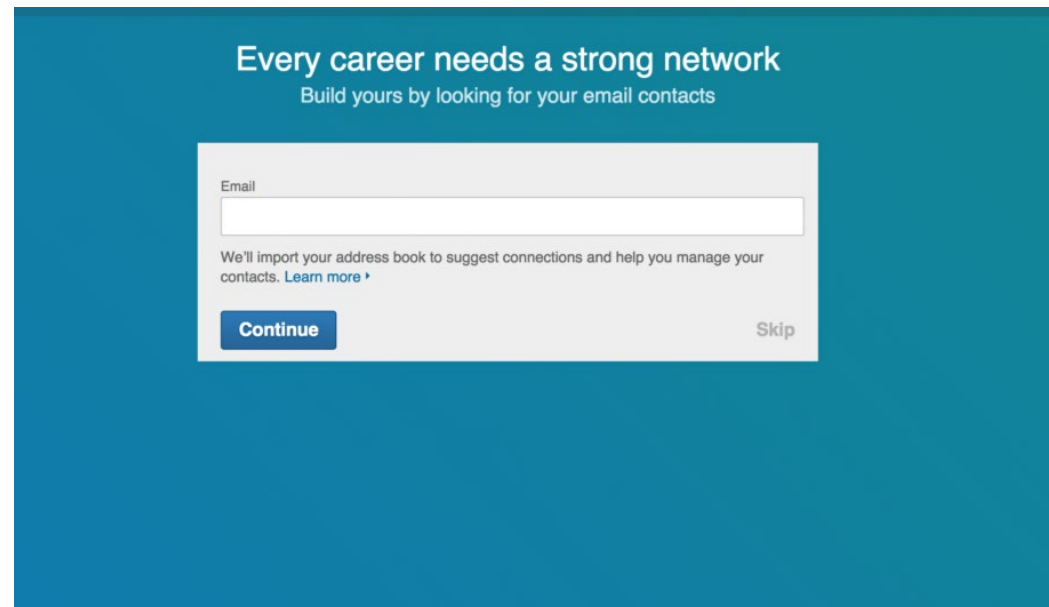
Forced Continuity

- A user is asked to enter their credit card or other financial information for a free trial, forgets to cancel, and continues to be charged.



Friend Spam

- A product asks for permission to access online accounts (like email or social media accounts) yet, instead of using the service for a desirable outcome (like finding contacts), the product spams your contacts.



What should companies do?

- Don't panic.
- Monitor complaint volume and type. If many consumers are complaining about your practices, it might be time to re-evaluate.
- Consider implementing carefully crafted dispute resolution provisions, such as class action waivers.
- Keep an eye on regulatory guidance and class action lawsuits to see what regulators are saying and how courts are interpreting challenges of “dark patterns.”
- Payment processors should continue underwriting and monitoring merchants with these principles in mind.

Regulators' Position on Dark Patterns

“Bringing Dark Patterns to Light: An FTC Workshop”

- “Bringing Dark Patterns to Light: An FTC Workshop”
 - The FTC hosted a virtual workshop on April 29, 2021, to examine digital “dark patterns.”
 - The workshop explored the ways in which user interfaces can have the effect, intentionally or unintentionally, of obscuring, subverting, or impairing consumer autonomy, decision-making, or choice. For example, some sites sneak extra items into a consumer’s online shopping cart, or require users to navigate a maze of screens and confusing questions to avoid being charged for unwanted products or services.
- Some of the topics the workshop examined included:
 - How dark patterns differ from sales tactics employed by brick-and-mortar stores;
 - how they affect consumer behavior, including potential harms;
 - whether some groups of consumers are unfairly targeted or are especially vulnerable;
 - what laws, rules, and norms regulate the use of dark patterns; and
 - whether additional rules, standards, or enforcement efforts are needed to protect consumers.

“Bringing Dark Patterns to Light: An FTC Workshop”

- Panelists noted:

- Consumers face a variety of harms from dark patterns including financial harm, disclosure of private or personal information, and harms to personal integrity like freedom of choice or freedom of thought.
- Some groups are targeted by companies using dark patterns, including communities of color that are targeted by companies under the guise of zip codes, and private information from these communities is sold to others further endangering the community.
- Children and teens are targeted by companies, especially through gaming apps that mislead children into spending money.
- Many dark patterns are undetectable to the average consumer.

Commissioner Chopra Statement regarding ABCMouse

- In ABCMouse, the FTC challenged ABCMouse’s automatic renewal program under the Restore Online Shoppers’ Confidence Act (“ROSCA”)
- “...we need to methodically use all of our tools to shine a light on unlawful digital dark patterns, and we need to contain the spread of this popular, profitable, and problematic business practice”
 - “...we’ve all been subject to companies deploying dark patterns to dupe us. From making ads look like organic search results to creating a maze of ‘privacy’ settings so complex that their own engineers and employees can’t crack the code, these companies know that dark patterns can drive profit. In a culture that responds to systemic failures with ‘buyer beware,’ it’s no surprise that searches for ‘accidental sign up; uncover scores of people asking for help after being forced into a premium product they did not want.”
 - “We must change this calculation. The Federal Trade Commission has numerous tools to root out the kinds of tricks and traps we saw in this matter. For example, the Restore Online Shoppers’ Confidence Act requires clear and conspicuous disclosures of key terms and “simple mechanisms” to stop recurring charges . . . Similarly, the CAN-SPAM Act prohibits deceptive header information, and requires marketers to provide email recipients a simple way to opt out of future emails.”
 - Additionally, the FTC Act itself prohibits unfair and deceptive practices, and vests the Commission with authority to analyze emerging practices and define which practices are unlawful. Digital deception should not be a viable American business model. If the Federal Trade Commission aspires to be a credible watchdog of digital markets, the agency must deploy these tools to go after large firms that make millions, or even billions, through tricking and trapping users through dark patterns. We cannot replicate the whack-a-mole strategy that we have pursued on pressing issues like fake reviews, digital disinformation, and data protection.”

FTC Request for Input on Dot.Com Disclosures

- FTC requested public input about potential updates to its “Dot.Com Disclosures” on many issues, including:
 - How to address the use of so-called dark patterns, which the FTC uses to describe manipulative user interface designs used on websites and mobile apps
 - Guidance on the appropriate use of hyperlinks and how hyperlinks should be labeled
 - How to determine the adequacy of online disclosures when consumers must navigate multiple webpages
 - Whether the current guidance adequately addresses advertising on mobile devices
 - How to handle space-constrained ads, including whether to modify the guidance that “disclosures may sometimes be communicated effectively to consumers if they are made clearly and conspicuously on the website to which the ad links”
 - How to provide proper disclosures on mobile devices
 - What issues have arisen from multi-party selling arrangements online, such as online marketplaces, website operators being compensated for referring consumers to other internet sites that offer products and services, and other affiliate marketing arrangements
 - The use of sponsored and promoted advertising on social media
 - Whether issues raised by new laws or regulations should be addressed in a revised guidance document
- Commentors will also have the chance to provide research and analysis about consumer behavior, which the FTC will consider when determining how people understand and react to disclosures. Input due by **August 2, 2022**.

Recent Enforcement Trends: “Dark Patterns” and the FTC’s Enforcement Statement

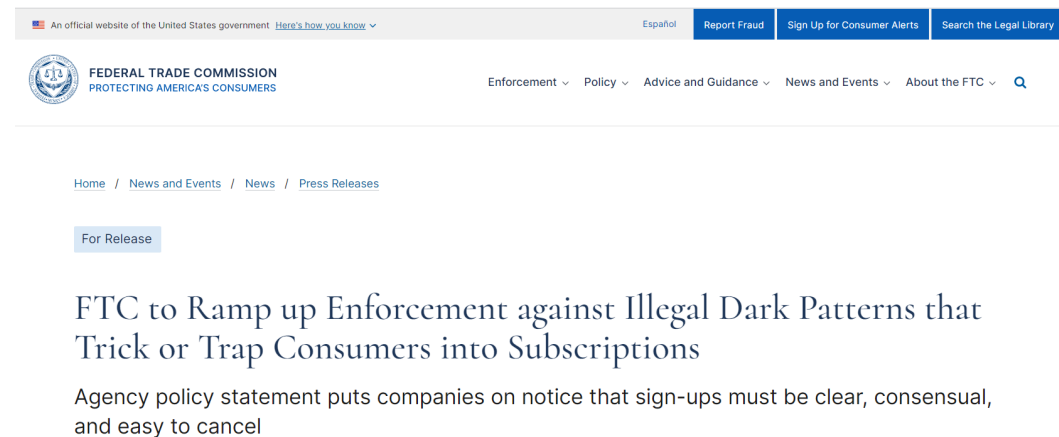
- The FTC set forth required disclosures:
 - Any material terms related to the underlying product or service that are necessary to prevent deception, regardless of whether that term directly relates to the terms of the negative option offer;
 - That consumers will be charged for the good or service, or that those charges will increase after any applicable trial period ends, and, if applicable, that the charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges;
 - Each deadline (by date or frequency) by which the consumer must act in order to stop the charges;
 - The amount (or range of costs) the consumer will be charged or billed for and, if applicable, the frequency of such charges a consumer will incur unless the consumer takes timely steps to prevent or stop those charges;
 - The date (or dates) each charge will be submitted for payment; and
 - All information necessary to cancel the contract
- “[T]he legality of a particular negative option depends on an individualized assessment of the advertisement’s net impression and the marketer’s business practices”

Recent Enforcement Trends: “Dark Patterns” and the FTC’s Enforcement Statement

- The FTC set forth required elements to obtain valid consent:
 - obtain the consumer’s acceptance of the negative option feature offer separately from any other portion of the entire transaction;
 - not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the negative option feature;
 - obtain the consumer’s unambiguously affirmative consent to the negative option feature;
 - obtain the consumer’s unambiguously affirmative consent to the entire transaction; and
 - be able to verify the consumer’s consent
 - A “pre-checked box” does not constitute affirmative consent. In addition, the seller should clearly disclose the name of the billing entity authorized by the consumer’s consent.

FTC Enforcement Policy Statement Regarding Negative Option Marketing

- The FTC announced that businesses must follow three requirements when offering products or services on a negative option:
 - Disclose clearly and conspicuously all material terms of the product or service, including how much it costs, deadlines by which the consumer must act to stop further charges, the amount and frequency of such charges, how to cancel, and information about the product or service itself that is needed to stop consumers from being deceived about the characteristics of the product or service.
 - Obtain the consumer's express informed consent before charging them for a product or services. Obtain acceptance of the negative option feature separately from other portions of the entire transaction, not including information that interferes with, detracts from, contradicts, or otherwise undermines the consumer's ability to provide their express informed consent.
 - Provide easy and simple cancellation to the consumer, which is at least as easy to use as the method the consumer used to buy the product or service in the first place.



An official website of the United States government [Here's how you know](#) ▼ Español Report Fraud Sign Up for Consumer Alerts Search the Legal Library

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Enforcement ▾ Policy ▾ Advice and Guidance ▾ News and Events ▾ About the FTC ▾ 🔍

Home / News and Events / News / Press Releases

For Release

FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions

Agency policy statement puts companies on notice that sign-ups must be clear, consensual, and easy to cancel



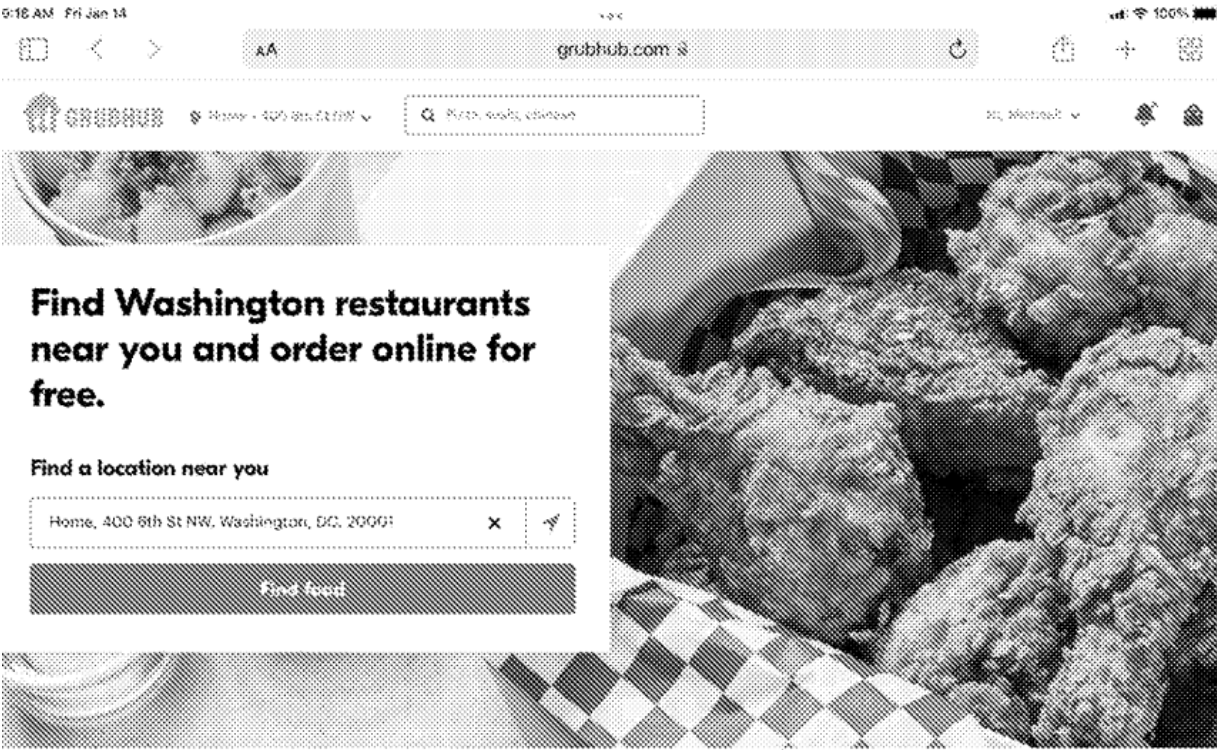
Regulators' Enforcement Actions against “Dark Patterns”

DC v. GrubHub (D.C. 2022)

- DC alleged:

- GrubHub inflated prices from restaurants and misrepresented to consumers that it did not inflate the prices
- Did not disclose the full service fee until checkout
- Advertised GrubHub+ as providing “free” delivery without disclosing the service fees
- Presented telephone numbers on its website, representing that the phone numbers were direct lines to the restaurant when in reality they were answered by GrubHub employees, and orders placed through the telephone number were subject to GrubHub fees and higher prices
- Bought domain names / microsities that appeared to be operated by the restaurants when they were actually operated by GrubHub

DC v. GrubHub (D.C. 2022)



So, what's it cost to use Grubhub?

Grubhub is free to use. You'll have to pay for the food and, if you opt for delivery, you may notice that the restaurant charges a fee for delivery. In that case, the fee is set by the restaurant or the delivery service the restaurant utilizes and would apply even if you placed your order by phone.

DC v. GrubHub (D.C. 2022)

- Consumers were not presented with additional fees until the checkout page and the fees were not clearly explained
 - Alleged this was “bait and switch”

Your order from Five Guys	
1 Kosher Style Hot Dog	\$8.51
Items subtotal: \$8.51	
Delivery fee:	\$0.99
Tax and fees:	\$4.56
Driver tip:	\$2.81
Total:	\$16.87

Review and place delivery order
Review address, payments, and tip to complete your purchase

Get your free Grubhub+ membership today!
Save when you crave with unlimited free delivery and a free meal each month!
Try 30 days free

Your order settings
Delivery: ASAP
Delivered in 30-40 mins
505 St. in New Washington, DC 20001 Change

Delivery instructions
Contact-free delivery: On
Drop-off location: Front door of my house/apartment unit
Notification: Text me Change

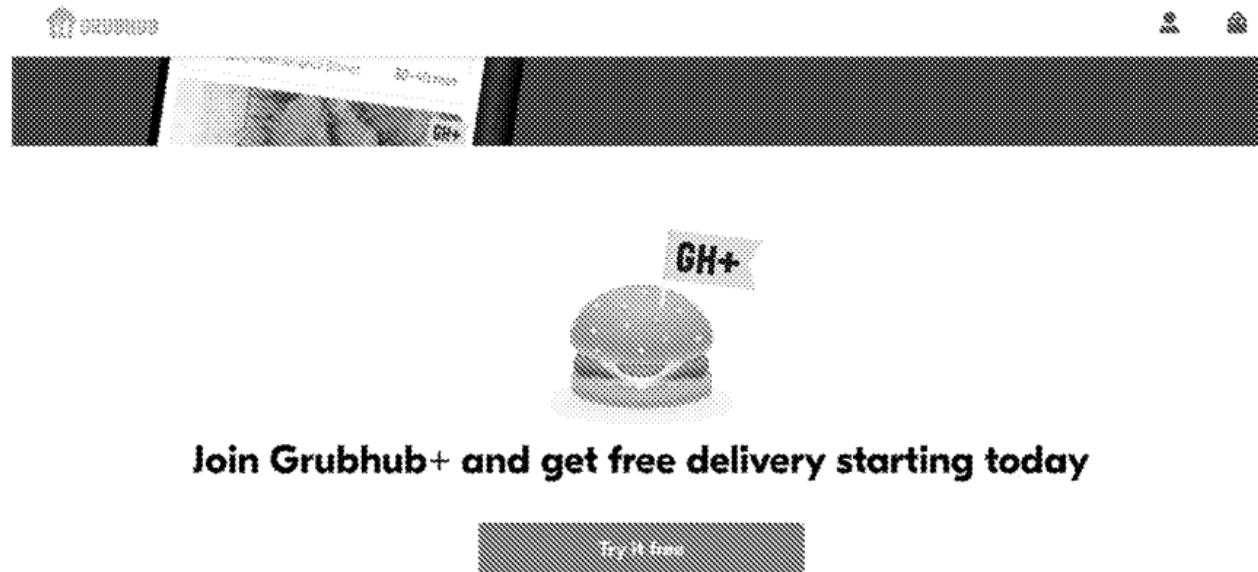
Notes for the driver

Your order from
Five Guys

1 Kosher Style Hot Dog	\$8.51
Items subtotal:	\$8.51
Delivery fee:	\$0.99
Tax and fees:	\$4.56
Driver tip:	\$2.81
Total:	\$16.87

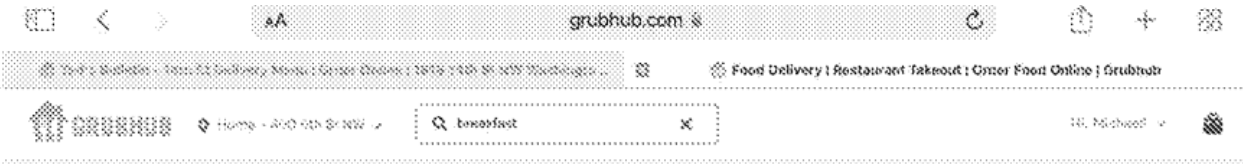
DC v. GrubHub (D.C. 2022)

- Challenged GrubHub+, a subscription service.
- Alleged that GrubHub+ was misrepresented as “free” despite the fact that it charged a service fee.
- The service fee was not disclosed prior to consumers inputting their payment information and enrolling.



DC v. GrubHub (D.C. 2022)

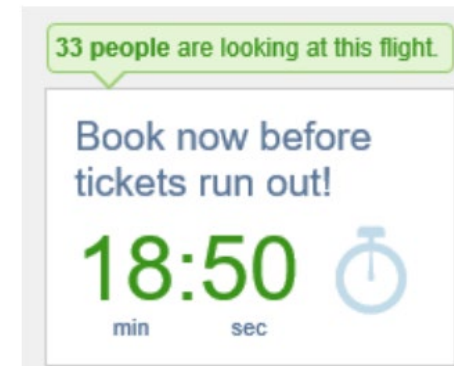
- Challenged GrubHub+, a subscription service.
- Alleged that GrubHub+ was misrepresented as “free” despite the fact that it charged a service fee.
- The service fee was not disclosed prior to consumers inputting their payment information and enrolling.



A screenshot of the GrubHub+ sign-up page. The main heading is 'GRUBHUB+'. Below it, a large offer states 'Try free for 30 days!'. A list of benefits includes: 'Enjoy free delivery on orders \$12+', 'Score a free meal every month', 'Average savings of \$4 per order', and 'Cancel anytime-it's quick, easy, and free!'. To the right, a 'Monthly membership' section shows '30 days free!' and a price of '\$9.99/month'. Below this, there are input fields for 'New credit card', 'Card number', 'Expires on' (set to 12/17), and 'Security code'. A 'Pay with card' field is also present. A 'Try for 30 days' button is at the bottom right. Small text at the bottom explains the terms of the free trial and automatic billing.

New York v. FarePortal (N.Y. 2022)

- Alleged that FarePortal violated New York law prohibiting unfair and deceptive practices
 - Fareportal displayed, next to the top two flight search results, a false and misleading message purporting to convey the number of tickets left for those flights at the offered price. This “tickets left” message created a false sense of urgency designed to prompt consumers to complete a purchase of airline tickets and thereby increase Fareportal’s revenue.
 - Fareportal added 1 to the number of tickets the consumer had searched for (“X”) and displayed a message indicating that were only X+1 tickets left at the offered price.
 - A consumer searching for one ticket would see a message stating “Only 2 tickets left” at the offered price, while a consumer searching for two tickets would see a message stating “Only 3 tickets left” at the offered price. The message was accompanied by a “Book Now” message — e.g., “Book Now: Only X tickets left at this price!”
- A countdown timer was also on the website.
 - New York AG alleged that this created a false sense of scarcity and urgency.



New York v. FarePortal (N.Y. 2022)

Only 2 tickets left at \$226.60
Final Total Price (incl. fees)
SELECT >

Only 2 tickets left at \$365.00
Final Total Price
SELECT >

1 Traveler

SEARCH NOW

Filter Your Results

- Nonstop \$226.00
- 1 stop \$365.00
- 2+ Stop \$369.00

Flight Times

Going to Ohio (TOL)
Depart: 5:00 AM - 10:00 PM

Return to New York (NYC)
Depart: 5:00 AM - 7:45 PM

New York All Airports (NYC) to Toledo Express (TOL)
Mon, Nov 18, 2019 -- Fri, Nov 22, 2019 | 1018 results found

Get Your Promo Code to Save up to **\$20 off** our fees. [Learn more](#) [Get Promo Code](#)

All Fares	[Redacted]			
Non-stop/ 1 Stop	\$226.00 ~	\$226.60 ~	--	\$289.60 ~
1+ stop	\$230.70 ~	\$236.50 ~	\$235.00 ~	\$1,190.80 ~

Fares for our partners are round trip, incl. all taxes and all fees. Airlines include applied Booking Bonus. Additional baggage fees may apply. ~Some flights displayed may be for alternate dates and/or airports. Certain results may be outside your search criteria.

Save \$147
Low Fare Calendar from **\$217.70**

Cheapest **\$226.60** Shortest **\$226.60** Alternate Dates **\$226.60** Nearby Airports **\$226.60** Recommended **\$289.60**

Save \$138.40 by selecting this alternate date and nearby airport.

[Redacted]	11:30a EWR	2h 01m Nonstop	01:31p DTW	Tue Nov 19	Select this Departure >	Only 2 tickets left at \$226.60 Final Total Price (incl. fees) SELECT >
[Redacted]	09:00a DTW	1h 47m Nonstop	10:47a EWR	Sat Nov 23	Select this Return >	

Flight Details > OUTBOUND Flight 3526 Operated By REPUBLIC AIRLINES DBA UNITED EXPRESS | INBOUND Flight 3526 Operated By REPUBLIC AIRLINES DBA UNITED EXPRESS Basic Economy ⓘ

[Redacted]	05:19p LGA	4h 52m 1 stop	10:11p TOL	Mon Nov 18	Select this Departure >	Only 2 tickets left at \$365.00 Final Total Price SELECT >
[Redacted]	05:00a TOL	6h 03m 1 stop	11:03a EWR	Fri Nov 22	Select this Return >	

Flight Details > OUTBOUND Flight 5443 Operated By PSA AIRLINES AS AMERICAN EAGLE | INBOUND Flight 5297 Operated By PSA AIRLINES AS AMERICAN EAGLE Fusion Fare ⓘ

[Redacted]	07:59a LGA	5h 28m 1 stop	01:27p TOL	Mon Nov 18	Select this Departure >	\$365.00 Final Total Price
------------	---------------	------------------	---------------	---------------	-------------------------	--------------------------------------


New York v. FarePortal (N.Y. 2022)

- New York AG challenged other allegedly misleading “nudges”:
 - FarePortal recommended that consumers booking flights also purchase a travel protection policy to “protect the cost of [their] trip” and required consumers to accept or decline such a policy before completing a purchase.

Flight Details


Travel Protection

Recommended

 Reasons you might need travel protection

- ✓ Trip cancellation
- ✓ Inclement weather
- ✓ Baggage delay
- ✓ Trip delay
- ✓ Trip interruption
- ✓ Mechanical issues

[View Plan Summary](#)

 Today, 3855 people protected their trip for this route!
We recommend you protect the cost of your trip.

Yes, I want travel protection for my trip

No, I am willing to risk my \$171.⁶⁰ trip

New York v. FarePortal (N.Y. 2022)

- New York AG challenged other allegedly misleading “nudges”:
 - Allegedly misleading slash-through prices
 - “Deal! \$[X] off!” or “\$[X] off!”, where [X] was the difference between the higher, slashed-through price and the actual ticket price.

The image shows a flight booking interface with a 'Deal! \$1247 off!' banner. Below the banner, the price breakdown is shown as $\$1,051.70$ (with a slash-through) minus $\$694.60 + \10.10 (taxes) equals $\$704.70$. The text 'Price per person (incl taxes & fees)' is visible below the price. A red arrow points from the 'Deal! \$1247 off!' banner to the final price of $\$704.70$. The interface also includes a 'Select >' button and a 'Super Saver Fare' label.

New York v. FarePortal (N.Y. 2022)

- New York AG challenged other allegedly misleading “nudges”:
 - Allegedly imposed an atypical policy of charging a fee for cancellations made within 24 hours of booking. Fareportal promoted “24 hour cancellation” as a feature of tickets purchased on its websites
 - FarePortal did not clearly and conspicuously disclose to consumers that a fee would be charged for cancellations made within 24 hours of booking. Instead, Fareportal disclosed this information through a pop-up window that was activated only if a consumer clicked the small “i” icon next to the “24 hour cancellation” and in the terms and conditions displayed in fine print during check-out:

The screenshot displays a flight booking interface. At the top, a yellow banner reads "Book Now: Only 2 tickets left at \$126⁰⁰ per person!". Below this is a blue header "Flight Details" and a green bar stating "You saved \$27⁰⁰ by selecting this alternate date ⓘ and nearby airport ⓘ". A red checkmark icon is next to the text "Good choice! This deal is backed by our Price Match Promise".

Two flight options are listed:

Flight Option	Origin	Destination	Class	Time	Duration	Stop	Time	Destination	Class
1	RDU	ISP	Coach	05:14p	1h 54m	Nonstop	07:08p	ISP	Coach
2	ISP	RDU	Coach	08:01p	2h 03m	Nonstop	10:04p	RDU	Coach

Both flight options include a "Change this flight" button. A red circle highlights the "24 hour cancellation ⓘ" text in the top left, and another red circle highlights the "24 hour cancellation ⓘ" text in the top right. A red arrow points from the top left circle to the top right circle.

At the bottom, there are links for "Flight Details", "Fare rules", and "Baggage fees".

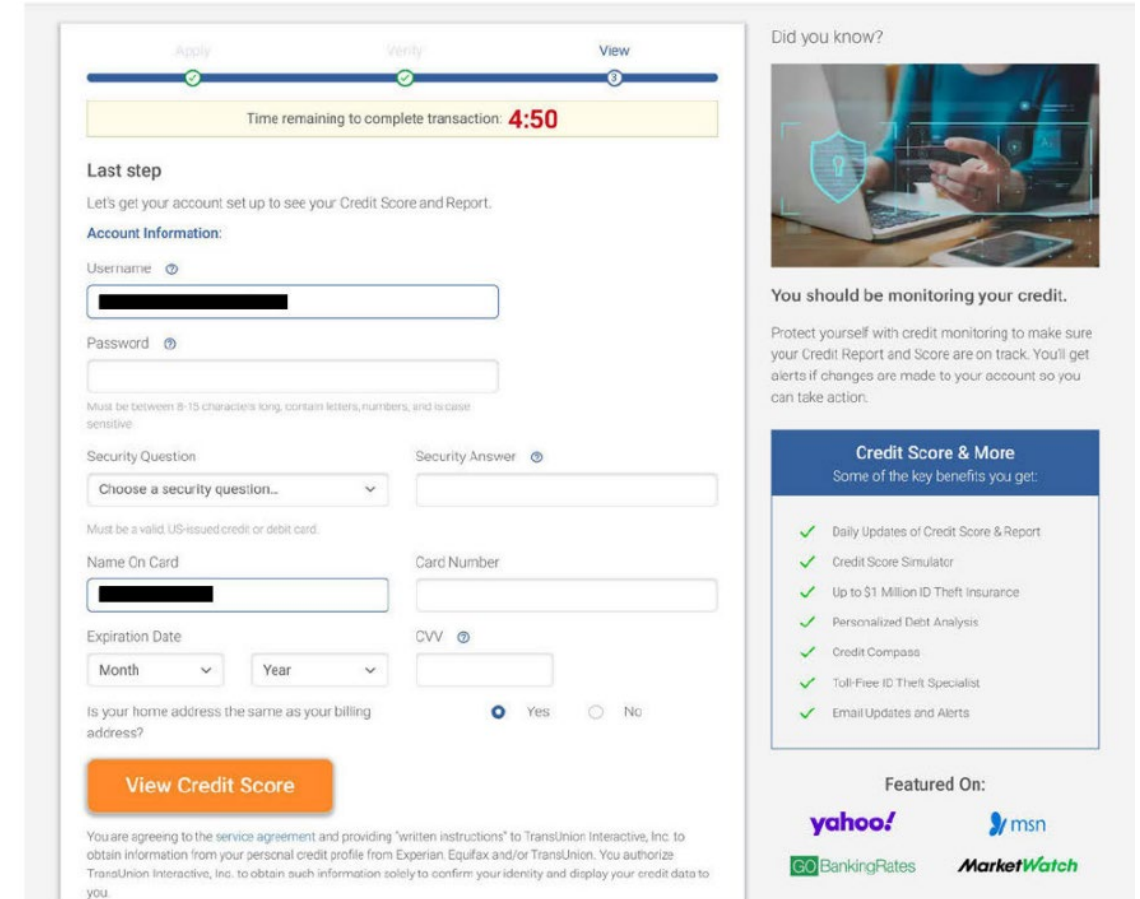
CFPB v. TransUnion (N.D. Illinois 2022)

- In a 2017 settlement, TransUnion agreed to pay \$13.9 million for alleged deceptive marketing practices, as well as \$3 million in civil penalties. The credit reporting agency also agreed to warn consumers that lenders are likely not using the exact scores TransUnion provided the consumers.
 - TransUnion agreed to get consumers' informed consent before they sign up for recurring payments for subscription services and provide them an easy way to opt out of such services.
- CFPB filed a lawsuit alleging that the company violated the order and “deceived customers through digital dark patterns.”
- CFPB challenged TransUnion with violating the Consumer Financial Protection Act, the Fair Credit Reporting Act, and the Electronic Fund Transfer Act.

CFPB v. TransUnion (N.D. Illinois 2022)

■ CFPB alleged:

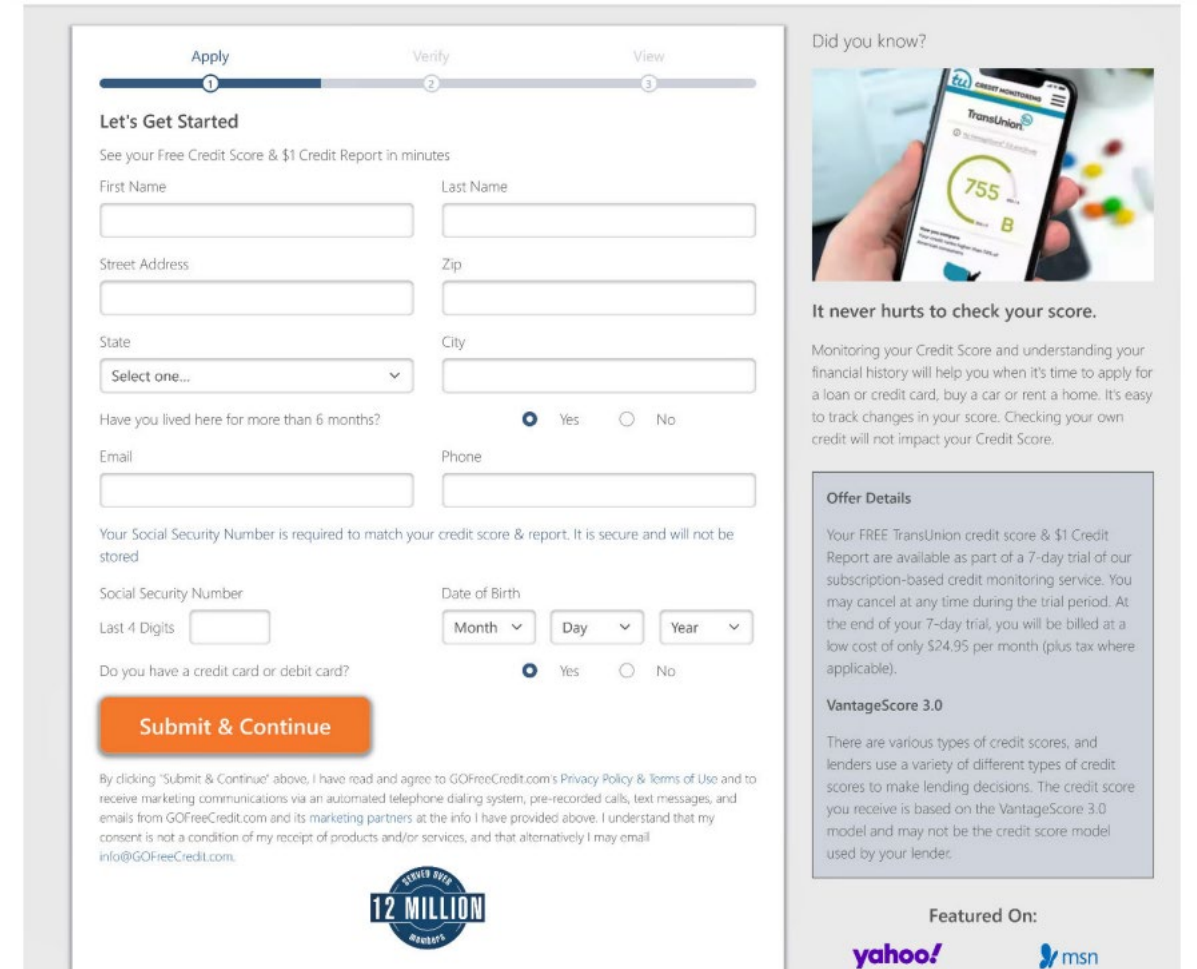
- When consumers applied for an annual free copy of their credit reports, TransUnion would ask for their credit card information for what appeared to be identity verification purposes. An online button appeared that seemed to offer a free credit score in addition to the credit report.
- Consumers who pressed the button were signed up for credit-monitoring services with recurring monthly charges using the card information they provided.
- Disclosures about this charge were made in fine print that was difficult to locate.



The screenshot shows a web interface for TransUnion. At the top, there is a progress bar with three steps: 'Apply', 'Verify', and 'View'. The 'View' step is currently active. Below the progress bar, a yellow banner indicates 'Time remaining to complete transaction: 4:50'. The main content area is titled 'Last step' and says 'Let's get your account set up to see your Credit Score and Report.' It includes a section for 'Account Information' with fields for 'Username' and 'Password'. Below that is a 'Security Question' dropdown menu and a 'Security Answer' field. Further down, there are fields for 'Name On Card', 'Card Number', 'Expiration Date' (with month and year dropdowns), and 'CVV'. A checkbox asks 'Is your home address the same as your billing address?' with 'Yes' and 'No' options. A prominent orange button labeled 'View Credit Score' is at the bottom. To the right of the form, there is a 'Did you know?' section with an image of a person at a computer and text about monitoring credit. Below that is a 'Credit Score & More' section listing benefits like 'Daily Updates of Credit Score & Report', 'Credit Score Simulator', 'Up to \$1 Million ID Theft Insurance', 'Personalized Debt Analysis', 'Credit Compass', 'Toll-Free ID Theft Specialist', and 'Email Updates and Alerts'. At the bottom right, it says 'Featured On:' and lists logos for Yahoo!, MSN, GOBankingRates, and MarketWatch.

CFPB v. TransUnion (N.D. Illinois 2022)

- The settlement required “express informed consent” in connection with a negative option feature, which requires “a check box on the final order page that consumers must affirmatively check to select the Negative Option feature (i.e., it cannot be pre-checked), and which clearly and conspicuously states that the consumer agrees to be billed for the product unless the consumer cancels before the trial period expires[.]”



The image shows a screenshot of a web form for TransUnion credit monitoring. The form is titled "Let's Get Started" and includes fields for First Name, Last Name, Street Address, Zip, State, City, Email, and Phone. It also has radio buttons for "Have you lived here for more than 6 months?" and "Do you have a credit card or debit card?". A "Submit & Continue" button is prominent. Below the form is a disclaimer and a "12 MILLION" badge. To the right, a sidebar titled "Did you know?" features an image of a hand holding a smartphone displaying a credit score of 755. Below this is the text "It never hurts to check your score." and "Offer Details" which describes a 7-day trial for a credit score and report. At the bottom of the sidebar, it says "Featured On:" with logos for Yahoo! and MSN.

CFPB v. TransUnion (N.D. Illinois 2022)

- Consumers who tried to cancel these recurring charges found there was no simple way to do so. For consumers looking for a way out of their subscriptions, TransUnion not only failed to offer a simple mechanism for cancellation, it made it arduous for consumers to cancel through uses of font and color on its website
- Consumers who attempted to cancel were presented with additional information about product benefits and what the consumer would “lose” by canceling credit monitoring.
- Alleged that at the bottom of the product benefits screen, defendants present the consumer with a confusing choice:

Continue & Cancel ↻

**BACK TO MY
DASHBOARD** ↻



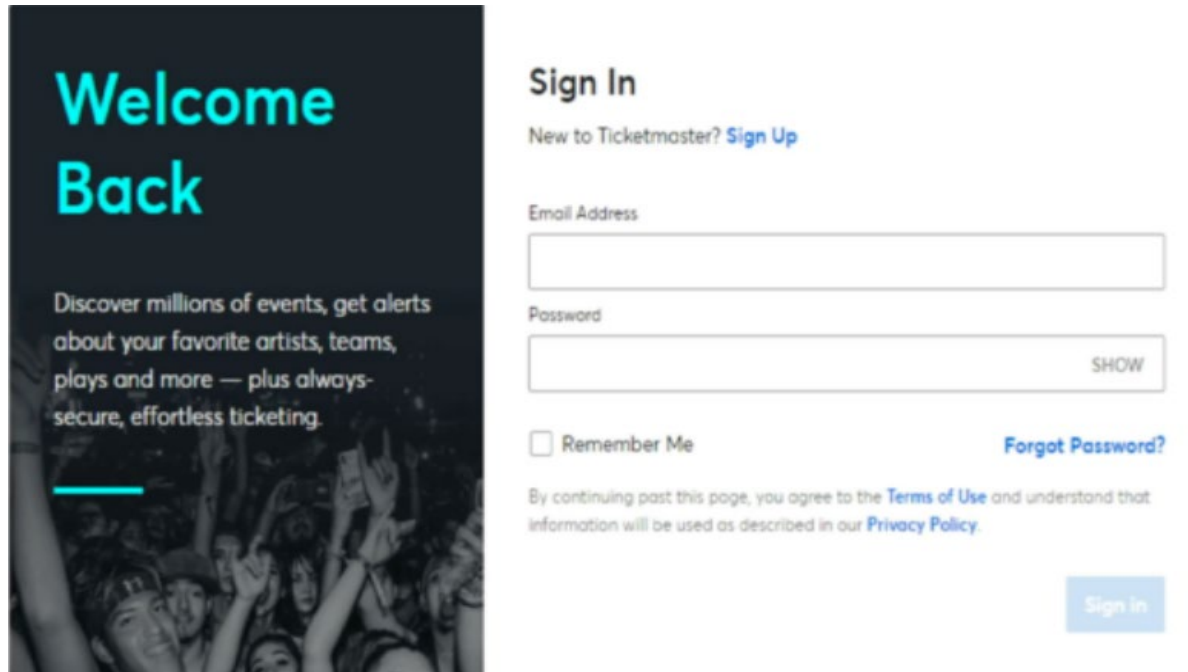
Class Actions and Private Enforcement of “Dark Patterns”

***MacQuaid v. New York Times* (D. Oregon 2022)**

- Putative class action challenging “automatic renewal” program for its subscription plans for the *New York Times*.
- Alleging violations of Oregon’s automatic renewal law. Alleged dark patterns include:
 - Dark patterns to prevent user unsubscription from the website “by adopting complex procedures to increase the friction in the subscription cancellation process and keep the user subscriber.”
 - For instance, although one page of the NYT Platform states that consumers can cancel their NYT subscription via chat, “the chat facility is only available in-office hours (07:00 AM-10:00 PM) on weekdays and 07:00 AM-03:00 PM on weekends, and most of the time and days, their chat facility is unavailable due to excessive chat from customers.”
- *Moses v. New York Times* challenged similar practices, resulting in settlement requiring NYT to provide \$3.9 million in access codes and pay \$1.25 million in attorneys’ fees.

Oberstein v. Live Nation Ent., Inc. (C.D. Cal. 2020)

- Putative class action challenging Ticketmaster for alleged anti-competitive practices and supracompetitive pricing for ticket prices.
- Defendant sought to compel arbitration, pointing to users' assent to its hyperlinked Terms of Use when they signed up:



Welcome Back

Discover millions of events, get alerts about your favorite artists, teams, plays and more — plus always-secure, effortless ticketing.

Sign In

New to Ticketmaster? [Sign Up](#)

Email Address

Password [SHOW](#)

Remember Me [Forgot Password?](#)

By continuing past this page, you agree to the [Terms of Use](#) and understand that information will be used as described in our [Privacy Policy](#).

[Sign in](#)

Oberstein v. Live Nation Ent., Inc. (C.D. Cal. 2020)

The image shows a checkout page for a ticket purchase. At the top, a blue bar contains the text: "Beyoncé - The Chromatica Ball Fri 08/14/20 7:30pm, Wrigley Field". Below this, the checkout summary is displayed in a white box with a green "Place Order" button. The summary includes the total amount of \$301.07 and a disclaimer: "All Sales Final - No Refunds or Exchanges. By continuing past this page and clicking 'Place Order', you agree to our Terms of Use." A red arrow points from the "Place Order" button to a duplicate of this summary box on the right side of the page. In the background, a payment form is visible, including a "Phone Number" field, a "Please enter your billing postal code" field, a "Please enter your phone numbers" field, a checkbox for "Save this card for future purchases", a "Set as a primary card for:" section with a checkbox for "Payment" (with the subtext "For when you are purchasing tickets"), and a "PayPal" button under the heading "Or, Check out with PayPal".

Oberstein v. Live Nation Ent., Inc. (C.D. Cal. 2020)

- Plaintiffs opposed and provided an expert declaration explaining that the Defendants purposefully employed “dark patterns” in designing their TOUs to make them less conspicuous.
- The expert listed several design flaws such as the lack of underlining for hyperlinks, the lack of dedicated real estate, the lack of a checkbox or other forcing feature, and the use of text with reduced “opacity” that ultimately makes the TOUs less conspicuous to users.
- The court disagreed:
 - While the expert presents several suggestions that are likely to improve visibility of the TOUs, the Court finds that the ' websites already provide adequate constructive notice as is. The text linking to the TOU is placed conspicuously close to the buttons that the users are required to press to sign up, sign in, or complete a purchase. The actual hyperlink that navigates to the TOU is conspicuously blue, while the surrounding text is black. The Court was unconvinced by the expert’s arguments regarding opacity because, in the Court's view, the added opacity sometimes serves to highlight the blue links as the added opacity turns the surrounding text more gray than black, creating more contrast and visibility for the blue links that navigate to the TOU and generally drawing attention to the language pointing to the TOU.



Nichols v. Noom (S.D.N.Y. 2021)

- Class action complaint challenged Noom’s subscription program, alleging violations of California’s automatic renewal law and state laws prohibiting unfair and deceptive acts.
- Plaintiffs alleged the following “dark patterns” in the sign-up flow and cancellation processes and submitted an expert opinion supporting the allegations:
 - Defendant’s business model is predicated upon the “Hidden Subscription Dark Pattern” – that is, it silently charges users a recurring fee under the pretense of a one-time fee or free trial. Defendants augment this overarching scheme with numerous other Dark Pattern design techniques:
 - Mental Fatigue: Users undergo a 58-step-sign up process with delay tactics built in, such as a faked period of connection to a database. These delays psychologically manipulate the user into experiencing mental fatigue, causing him or her to spend less time and effort critically evaluating the information about future charges presented on the very last step of the extensive sign-up process, the payment page.

Nichols v. Noom

PAYMENT METHOD WHY NOW? ⓘ

You will only be charged \$10 for your 14-day trial




PAYMENT INFORMATION 🔒


Secured by Braintree by PayPal

Card Number

Expires on (MM/YY) Security Code Billing Zip Code





Apple store
★★★★★
4.7 out of 5
10M+ downloads
65K reviews
50K 5-star reviews



Google play
★★★★★
4.2 out of 5
10M+ downloads
170K reviews
100K 5-star reviews

***Your 14-day trial will last until December 20th, 2019.** You can cancel anytime before then and will not be charged the full program amount. No questions asked, no small print. If you decide Noom is right for you, **on December 20th, 2019 you will be charged one payment of \$99** for your 2 month course (\$49.50/month). Noom will automatically charge your card \$99 every 2 months so you don't lose access to your account. No refunds or credits for partial months. To cancel, simply let your coach know.



[SAVE PROFILE](#)

✓ No commitment - cancel any time ✓ 14-day trial for \$10

220 W 23rd St, Floor 9, New York, NY 10011
Have a question? Call us at 1-800-800-1000

Custom plan reserved for: 09:10

Nichols v. Noom

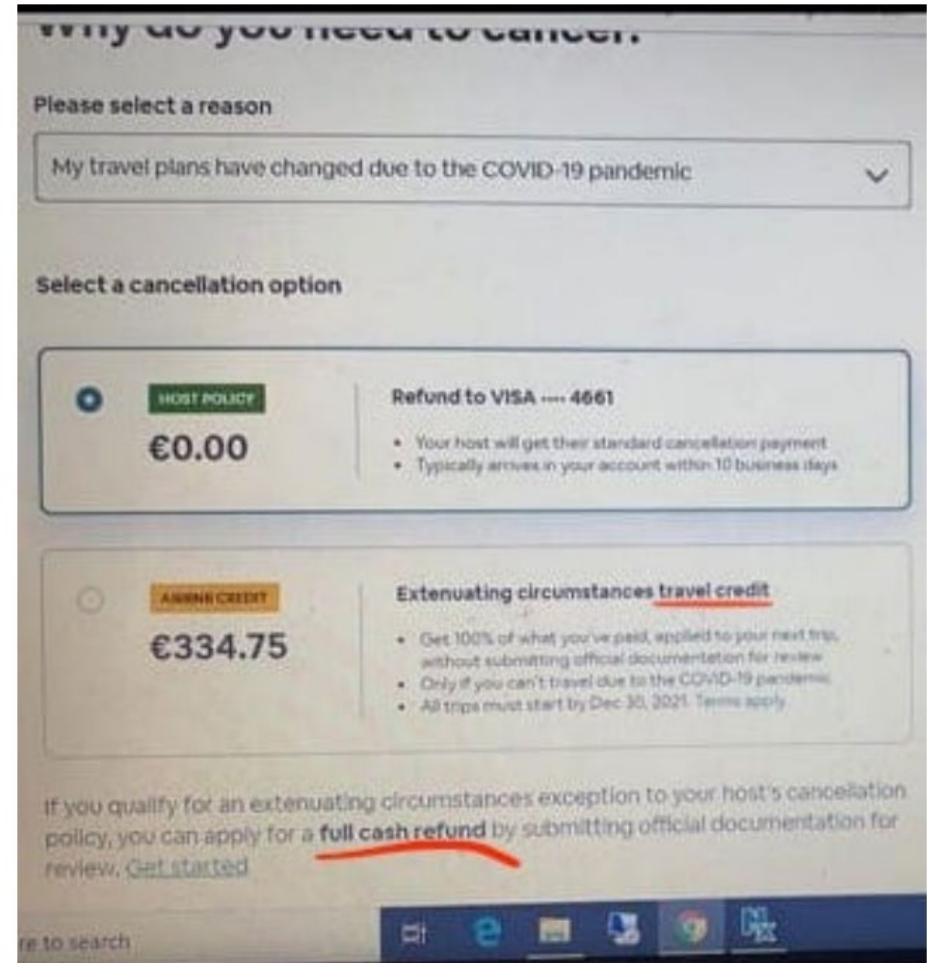
- Plaintiff alleges that defendant engaged in the following dark patterns:
 - **Trick Wording and Visual Interference:** Payment page includes untrue statements – such as “RISK FREE 100% GUARANTEED” – about the level of financial commitment and risk to which completing the transaction on that page will expose the user. It also uses the Visual Interference Dark Pattern, in the form of intentionally low-prominence text being the only mention of auto-enrollment, thus allowing defendant to direct the user's attention away from that critical information.
 - **Deceptive Countdown Timer:** Defendant's payment page includes a countdown timer that serves no technical purpose, but rather exists to create psychological pressure to complete the payment transaction and cause users to spend less time engaged in critical evaluation of the information presented on that page, where the automatic renewal is first mentioned.
 - **Hard to Cancel and Roach Motel:** Once its users are signed up for the automatically recurring premium subscription, defendant makes it incredibly difficult for them to cancel – and, indeed, to even know cancellation is necessary – by (1) “going quiet” about impending charges shortly after sign-up for the trial, and (2) foreclosing normal and expected avenues of cancellation and instead forcing users to cancel through the unorthodox manner of an in-app live chat feature.

Farmer v. Airbnb, Airbnb Payments **(N.D. Cal. 2020)**

- Plaintiff alleges that Airbnb is using “dark patterns” to withhold full refunds from guests and instead steer them toward a travel credit or other inferior options.
 - When the pandemic hit, Airbnb said it would offer full refunds to those guests who booked on or before March 14, but in many cases, the refunds that Airbnb promised came directly out of hosts' pockets.
 - The guests and hosts had previously agreed on a cancellation policy and Airbnb was allegedly overriding those terms with its pandemic promise. When hosts complained that they were being stiffed, Airbnb apologized and said it would set aside \$250 million to help pay hosts for canceled bookings, according to the suit.
 - Under the fund, hosts could receive up to 25% of what they would have made from a guest under the previous cancellation policy, but instead of issuing full refunds to guests who canceled bookings, Airbnb is giving guests travel credits, issuing partial refunds, or denying guests any compensation, according to the suit. Guests have been complaining about the refund process, Farmer said, which often requires making multiple calls to customer service, navigating a confusing web interface and uploading a variety of supporting documents to support their refund claim.
- If guests try to use the pandemic refund, Airbnb requires them to justify why they can't travel due to COVID-19, even though the company did not disclose any such limit. Airbnb made hosts accept just 25% of the amount called for by the previous cancellation policies or nothing at all.

Farmer v. Airbnb, Airbnb Payments

- Airbnb’s web interface appears to offer only two cancellation options:
 - The host’s cancellation policy (which in this case would provide the user with no refund)
 - A €334.75 option that is for a “travel credit” that must be used by the end of next year
- The option for a “full cash refund” appears only at the bottom of the webpage, without its own radio button, and is accompanied by a warning that it will “require submitting official documentation.”
- ***But***, court granted AirBNB’s motion to compel arbitration.





State Laws Addressing “Dark Patterns”

State Laws and Regulations Addressing “Dark Patterns”

- Proposed regulations promulgated under the California Consumer Privacy Act (CCPA) address “dark patterns” regarding consumers’ ability to exercise choice over the collection and use of their information:
- Except as expressly allowed by the CCPA and these regulations, businesses shall design and implement methods for submitting CCPA requests and obtaining consumer consent that incorporate the following principles.
 - **(1) Easy to understand.** The methods shall use language that is easy for consumers to read and understand.
 - **(2) Symmetry in choice.** The path for a consumer to exercise a more privacy-protective option shall not be longer than the path to exercise a less privacy-protective option. Illustrative examples follow.
 - (A) A business’s process for submitting a request to opt out of sale/sharing shall not require more steps than that business’s process for a consumer to opt in to the sale of personal information after having previously opted out. The number of steps for submitting a request to opt-out of sale/sharing is measured from when the consumer clicks on the “Do Not Sell or Share My Personal Information” link to completion of the request. The number of steps for submitting a request to opt in to the sale of personal information is measured from the first indication by the consumer to the business of their interest to opt in to completion of the request.
 - (B) A choice to opt in to the sale of personal information that only provides the two choices, “Yes” and “Ask me later,” is not equal or symmetrical because there is no option to decline the opt-in. “Ask me later” implies that the consumer has not declined but delayed the decision and that the business will continue to ask the consumer to opt in. An equal or symmetrical choice would be “Yes” and “No.”

State Laws and Regulations Addressing “Dark Patterns”

▪ (2) Symmetry in choice (continued)

- (C) A website banner that serves as a method for opting out of the sale of personal information that only provides the two choices, “Accept All” and “More Information,” or “Accept All” and “Preferences,” is not equal or symmetrical because the method allows the consumer to “Accept All” in one step, but requires the consumer to take additional steps to exercise their right to opt out of the sale or sharing of their personal information. An equal or symmetrical choice would be “Accept All” and “Decline All.”
- (D) A choice where the “yes” button is more prominent (i.e., larger in size or in a more eye-catching color) than the “no” button is not symmetrical.
- (E) A choice where the option to participate in a financial incentive program is selected by default or featured more prominently (i.e., larger in size or in a more eye-catching color) than the choice not to participate in the program is neither equal nor symmetrical.

▪ (3) Avoid language or interactive elements that are confusing to the consumer. The methods should not use double negatives. Toggles or buttons must clearly indicate the consumer’s choice. Illustrative examples follow.

- (A) Giving the choice of “Yes” or “No” next to the statement “Do Not Sell or Share My Personal Information” is a double negative and a confusing choice for a consumer.
- (B) Toggles or buttons that state “on” or “off” may be confusing to a consumer and may require further clarifying language.
- (C) Unintuitive placement of buttons to confirm a consumer’s choice may be confusing to the consumer. For example, it is confusing to the consumer when a business at first consistently offers choices in the order of Yes, then No, but then offers choices in the opposite order – No, then Yes – when asking the consumer something that would benefit the business and/or contravene the consumer’s expectation.

State Laws and Regulations Addressing “Dark Patterns”

- **(4) Avoid manipulative language or choice architecture.** The methods should not use language or wording that guilt or shames the consumer into making a particular choice or bundles consent so as to subvert the consumer’s choice. Illustrative examples follow.
 - (A) When offering a financial incentive, pairing choices such as, “Yes” (to accept the financial incentive) with “No, I like paying full price” or “No, I don’t want to save money,” is manipulative and shaming.
 - (B) Requiring the consumer to click through reasons why submitting a request to optout of sale/sharing is allegedly a bad choice before being able to execute their choice to opt-out is manipulative and shaming.
 - (C) It is manipulative to bundle choices so that the consumer is only offered the option to consent to using personal information for reasonably expected purposes together with purposes that are incompatible to the context in which the personal information was collected. For example, a business that provides a location-based service, such as a mobile application that posts gas prices within the consumer’s location, shall not require the consumer to consent to incompatible uses (e.g., sale of the consumer’s geolocation to data brokers) together with the expected use of providing the location-based services, which does not require consent. This type of choice architecture is manipulative because the consumer is forced to consent to incompatible uses in order to obtain the expected service. The business should provide the consumer a separate option to consent to the business’s use of personal information for unexpected or incompatible uses.

State Laws and Regulations Addressing “Dark Patterns”

- **(5) Easy to execute.** The business shall not add unnecessary burden or friction to the process by which the consumer submits a CCPA request. Methods should be tested to ensure that they are functional and do not undermine the consumer’s choice to submit the request. Illustrative examples follow.
 - (A) Upon clicking the “Do Not Sell or Share My Personal Information” link, the business shall not require the consumer to search or scroll through the text of a privacy policy or similar document or webpage to locate the mechanism for submitting a request to opt-out of sale/sharing.
 - (B) Circular or broken links, and nonfunctional email addresses, such as inboxes that are not monitored or have aggressive filters that screen emails from the public, may be in violation of this regulation.
 - (C) Businesses that require the consumer to unnecessarily wait on a webpage as the business processes the request may be in violation of this regulation.
- Any agreement obtained through the use of dark patterns shall not constitute consumer consent. For example, a business that uses dark patterns to obtain consent from a consumer to sell their personal information shall be in the position of never having obtained the consumer’s consent to do so.
- A user interface is a dark pattern if the interface has the effect of substantially subverting or impairing user autonomy, decisionmaking, or choice, regardless of a business’s intent.

State Laws and Regulations Addressing “Dark Patterns”

- Connecticut Data Privacy Act, Pub. Act No. 22-15
 - “Dark pattern” (A) means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making or choice, and (B) includes, but is not limited to, any practice the Federal Trade Commission refers to as a “dark pattern.”
 - “Consent” does not include . . . (C) agreement obtained through the use of dark patterns.”
- Colorado Privacy Act, Colo. Rev. Stat. Ann. § 6-1-1303
 - “[a]greement obtained through dark patterns” does not constitute “consent.”
 - “Dark pattern” means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.
- Oklahoma Computer Data Privacy Act of 2022, HB 2968
 - “[i]t shall be unlawful for any company to design, modify, or manipulate a user interface with the purpose or substantial effect of obscuring, subverting, or impairing user autonomy, decisionmaking, or choice, as further defined by regulation.”

Questions? Contact Us



Shahin O. Rothermel

Partner

+1 202.344.4550

SORothermel@Venable.com



Ari N. Rothman

Partner

+1 310.229.9909

ANRothman@Venable.com



Ellen T. Berge

Partner

+1 202.344.4704

ETBerge@Venable.com



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP