

SUBSCRIPTION SERVICES BEWARE! FAILURE TO FOLLOW AUTOMATIC RENEWAL LAWS MAY CONVERT YOUR SALES INTO UNCONDITIONAL GIFTS TO YOUR CUSTOMERS!

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INTRODUCTION

Over a dozen states have enacted “automatic renewal laws” that contain mandatory disclosure requirements before merchants can charge consumers for ongoing shipments of products or delivery of services.¹ While many of these statutes have been on the books for years, plaintiffs’ class action lawyers have only recently begun targeting businesses for failure to comply with these laws. Perhaps not surprisingly, California, which arguably has the most stringent disclosure requirements, is the forum of choice for these class actions. This alert discusses California’s Automatic Renewal Law (“ARL”), reviews the class actions filed to date, and ends with recommended actions businesses can take to shield themselves from the prying eyes of enterprising class action lawyers.

CALIFORNIA’S AUTOMATIC PURCHASE RENEWAL LAW

Under California’s ARL, effective December 1, 2010, it is unlawful for any business making an automatic renewal or continuous service offer to a consumer in California to (1) fail to present the terms of the offer in a “clear and conspicuous manner;” (2) charge the consumer without first obtaining the consumer’s affirmative consent to the agreement containing the automatic renewal offer; and (3) fail to provide the consumer with an acknowledgment that includes the offer’s terms, cancellation policy, and information about an easy-to-use means to cancel the plan or arrangement (e.g., a toll-free telephone number or e-mail address). California Business & Professions Code (Bus. & Prof. Code) § 17602.

“Clear and conspicuous” is defined in the statute to mean “in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.” Bus. & Prof. Code § 17601(c).

Failure to comply with the ARL renders the goods and services “unconditional gifts” to the consumer, who may use or dispose of the same without any obligation to the business. Bus. & Prof. Code § 17603. The statute also provides for civil remedies, although it expressly provides that “[i]f a business complies [with the ARL] in good faith, it shall not be subject to civil remedies.” Bus. & Prof. Code § 17604.

The civil remedy exemption for “good faith compliance” is somewhat ambiguous. Presumably, a business that complies with the ARL would be immune from *any* liability. Moreover, a business’ “good faith” is arguably not germane to whether its practices comply with the statute or not. What does appear clear, however, is that the legislature intended to bar recovery where a business establishes that it attempted in good faith to comply with the statute. In the wake of recent class action lawsuits, courts will be called upon to interpret the good faith exemption, as well as determine what constitutes “good faith” compliance and whether consumers can recover restitution or other relief under other consumer protection statutes if a business proves that it acted in “good faith.”

“AUTOMATIC RENEWAL” CLASS ACTIONS

The first ARL class action was filed in November 2013 against Spotify.² The plaintiff had agreed to be bound by Spotify’s Terms and Conditions of Use, however, which contained an arbitration provision and

¹ These states have enacted an automatic renewal law: California (Bus. & Prof. Code §§ 17600, *et seq.*); Colorado (C.R.S. §§ 6-6-102 & 6-6-103); Connecticut (C.G.S. § 42-126b); Florida (F.S.A. § 501.165); Georgia (G.C.A. §§ 13-12-2, 13-12-3); Hawaii (H.R.S. § 481-9.5); Illinois (815 ILCS §§ 601/10, 610/15, 610/20); Louisiana (L.R.S. § 9:2716); New York (Gen. Oblig. Law § 5-903); North Carolina (N.C.G.S.A. § 75-41); Oregon (O.R.S. § 646A.295); Rhode Island (Gen. Laws, 1956, § 6-13-14); South Carolina (Code 1976 § 44-79-60); Tennessee (T.C.A. § 62-32-325); and Utah (U.C.A. 1953 §§ 15-10-201, 15-10-202).

² *Melissa Bleak v. Spotify USA Inc.*, Northern District of California Case No. 3:13-cv-5653, removed from San Francisco County Superior Court, Civil Case No. CGC-13-535309).

class action waiver requiring her to arbitrate her claims against the company on an individual basis. The action was dismissed in July 2014 after the court granted Spotify's motion to compel arbitration.

Spotify was followed by class actions filed against Dropbox in February 2014³ and Hulu in March 2014.⁴ *Dropbox* was dismissed pursuant to stipulation in June 2014 and, as of early February 2015, a motion to compel arbitration is pending in *Hulu*.

Earlier this year, class actions were filed against Google, LifeLock, the Automobile Association of America, and Birchbox.⁵ In each case, plaintiffs seek to certify classes of California consumers who purchased goods or services as part of an automatic renewal plan or continuous service offer, and assert claims under the ARL, as well as other California consumer protection statutes, including the Unfair Competition Law (Bus. & Prof. Code §§ 17200, *et seq.*) and Consumer Legal Remedies Act (California Civil Code §§ 1750, *et seq.*), and seek recovery of damages and restitution, injunctive relief, attorneys' fees and costs.

PROTECTING YOUR BUSINESS AGAINST ARL CLAIMS

There are several proactive measures a business can take to ensure compliance with the ARL and, in so doing, hopefully avert the attention of plaintiffs' class action lawyers.

- Review your Terms & Conditions and make sure that it addresses all of the statute's requirements and is disclosed in a manner that is clear and conspicuous to the consumer.
- Provide consumers with a toll free telephone number, e-mail address, postal address (in those cases where consumers are directly billed), or another cost-effective and easy-to-use mechanism they can use to cancel the program.
- Make sure that every consumer who signs up for your auto renewal program receives an acknowledgment that includes the program's terms, cancellation policy, and information on how to cancel. If an acknowledgment was not sent out prior to completion of the consumer's initial order, send it out today.
- In order to invoke the "good faith" exemption to civil penalties, document efforts to comply with the statute and retain copies of acknowledgements sent to consumers.
- If the Terms & Conditions governing the automatic renewal program do not include an arbitration provision with a class action waiver, consider adding one, immediately.

ADDITIONAL INFORMATION

For additional information, please contact:

MATTHEW I. KAPLAN | 213.430.3309 | matthew.kaplan@tuckerellis.com

NATE NEWMAN | 213.430.3304 | nathan.newman@tuckerellis.com

RONIE M. SCHMELZ | 213.430.3375 | ronie.schmelz@tuckerellis.com

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³ *Etan Goldman v. Dropbox, Inc.*, Northern District of California Case No. 3:14-cv-01453, removed from San Francisco County Superior Court, Civil Case No. CGC-14-537731.

⁴ *Nathan Kruger v. Hulu LLC*, Los Angeles Superior Court Case BC 540053.

⁵ *Eric Mayron v. Google Inc.*, Santa Clara Superior Court Case No. 1:15-cv-275940; *Thomas A. Trax v. LifeLock*, Southern District of California Case No. 3:15-cv-00220; *Gee et al. v. American Automobile Association*, Southern District of California Case No. 3:15-cv-00246; *Tiffany Lapuebla v. Birchbox*, Southern District of California Case No. 3:15-cv-00214.