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California's Automatic Subscription Renewal Law Poised To Fuel Class Action Lawsuits

By Richard B. Lapp and Joseph V. Marra, III

Effective December 2010, California enacted its Auto-Renewal Law ("ARL"), Business & Professions Code sections 17600-17606, in an effort to end the practice of ongoing charging of consumers, without their *explicit consent*, for continuing services or products—such as online music and paper magazine subscriptions. As business models increasingly rely on automatic renewals, streaming content, perpetual subscriptions, and electronic billing, the ARL will be at the forefront of the traps businesses must navigate if they are to construct a California-compliant subscription plan. And, although the ARL's stated purpose is straightforward, applying its mandates to myriad varied business transactions requires both business acumen and legal finesse.

The ARL at a Glance

The thrust of the ARL is codified in section 17602, which makes it unlawful to: [1] fail to present automatic renewal terms in a "clear and conspicuous manner" before the subscription is fulfilled, and in close proximity to the request for consumer consent; [2] charge the consumer's credit card, debit card, or third-party (e.g., Paypal™) account without first obtaining the consumer's affirmative consent to the agreement containing the auto-renewal provisions; or [3] fail to provide the consumer with a retainable acknowledgement containing the automatic renewal terms and cancellation information. The ARL also requires that businesses provide a toll-free telephone number, email address, "or another cost-effective, timely, and easy-to-use mechanism for cancellation" and clear and conspicuous notices of any material changes in the automatic renewal agreement. Failure to comply with the ARL means that the consumer keeps whatever the business sent her as an unconditional gift, and subjects the business to civil liability.

Picking Up Steam

The stringent technical nature of the ARL makes it an attractive avenue for the plaintiff's bar, and, while the relatively new ARL has seen little action in the courts to date, it will likely become far more prevalent in California litigation soon. As business models increasingly focus on automatic renewals and consumers subscribe to them, substantial litigation seems inevitable, and early compliance audits are prudent.

In one recently filed California class action case, *Bleak v. Spotify USA, Inc.,* (N. D. Cal. Case No. CV-13-5653), streaming music provider Spotify has been sued for allegedly "charg[ing] the Class Members' credit or debit card or the Class Members' account with a third party for an automatic renewal or continuous service without first obtaining the Class Members' affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms." Spotify noted in its Notice of Removal that in the month preceding the filing of the lawsuit alone, it had "substantially more

than 35,000 Californians" who subscribed to the service at issue, so the number of potential class members is huge. Further, in February and March of this year, the same attorneys who filed the *Bleak* case filed two more class actions: *Goldman v. Dropbox, Inc.* (S.F. Superior Court Case No. CGC-14-537731), and *Kruger v. Hulu, LLC* (Los Angeles Superior Court Case No. BC540053), respectively, with allegations very similar to those in *Bleak*. The damages sought in these cases focus on restitution in the amount of the subscription payments made by each class member over the class period. Plaintiffs' theory of damages is apparently that, once the ARL has been violated, the services defendants rendered become "unconditional gifts," and the subscription payments must therefore be refunded. For example, Spotify's Notice of Removal states "California subscribers who upgraded to Spotify Premium on a desktop computer spent more than $9.75 million via automatically renewing payment methods for Spotify Premium in 2013 alone"—and Plaintiffs are seeking restitution from December 1, 2010 through the trial date—thus the claim for damages theoretically exceeds $40 million on just the ARL claim. But Plaintiffs also couple their ARL claims with unfair competition (Cal. Bus. & Prof. Code §§ 17200 et seq.) and Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750 et seq.) claims, which expose defendants to additional liability for injunctive relief, punitive damages, costs of suit and attorney's fees, and civil penalties in government actions. More lawsuits are sure to follow.

What Can Be Done to Help Ensure Compliance?

The contours of any compliant auto-renewal process will reflect a business's unique product, clientele, and sphere of operations, to name just a few of the factors that will inform a reasoned approach. However, a few pointers apply across the board:

- The ARL states that "if a business complies with the provisions of this article in good faith, it shall not be subject to civil remedies" and thus a *good faith*, reasonable effort to comply should undergird any business's efforts.
- Err on the side of conspicuousness. A common theme throughout the ARL is a requirement of *clear and conspicuous* communication of policies to customers, affirmative consent, and user-friendly lines of open communication—when in doubt, spell it out for customers.
- Get ahead of the risk: take the time *now* to conduct an audit of your business's auto-renewal procedures in California, before the business is confronted with a lawsuit.
- Continue to monitor your business's autorenewal protocols to ensure ongoing compliance. Given the nanosecond-paced nature of online commerce, small oversights can compound rapidly.

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