

Management Alert



California's Auto Subscription Law Leads to Wave of California Consumer Class Actions

By Robert B. Milligan and D. Joshua Salinas

California's Auto-Renewal Law (Cal. Bus. & Prof. Code § 17600 *et seq.*) has given rise to a recent torrent of new lawsuits in California, many brought on a putative class action basis, targeting businesses that offer subscription based goods or services to California consumers. With few published decisions analyzing and interpreting the statute since its enactment in 2010, businesses often face a high degree of uncertainty and potential legal exposure when addressing demand letters threatening legal action or lawsuits seeking class certification. The following management alert serves to help navigate the requirements of and potential defenses to suits alleging violations of this statute.

Scope and Application

California's Auto-Renewal Law applies, with certain exceptions, to any arrangement where a paid subscription or purchasing agreement is automatically renewed until the consumer cancels. Simply put, the purpose of the statute is to require businesses to disclose their subscription terms in a clear and conspicuous manner, including cancellation information, and obtain affirmative consent before charging consumers debit or credit cards on a recurring basis. It is important to note that it applies to not only online subscriptions, but also those procured through hard copy (e.g. paper) and audio (e.g., telephone) methods. The statute arose from an effort to end the practice of charging consumers, without their explicit consent, for continuing products or services (e.g., magazine and music subscriptions).

A wide array of companies providing subscription-based services have already been hit with such lawsuits, including media and entertainment providers (e.g., SiriusXM, Hulu, Spotify), data storage providers (e.g., DropBox), monthly "box" and food delivery services (e.g., BirchBox, Blue Apron), theme parks (e.g., SeaWorld), and dating service providers (e.g., Tinder).

Several cases brought under this statute are currently being challenged at the pleading stage, some cases have been settled on a class-wide basis, and at least one case was granted class certification.

Compliance

The following terms must be disclosed in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity (or temporal proximity for voice/audio offers) to the request for consent to the offer:

1. That the subscription or purchasing agreement will continue until the consumer cancels;
2. The description of the cancellation policy that applies to the offer;

3. The recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan or arrangement, and that the amount of the charge may change, if that is the case, the amount to which the charge will change, if known;
4. The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer; and
5. The minimum purchase obligation, if any.

The business must also provide to the consumer an acknowledgement (which can be provided after the initial order is completed) that is capable of being retained and provides the following:

6. The automatic renewal of continuous service offer terms;
7. The cancellation policy; and
8. A cost-effective, timely, and easy-to-use mechanism for cancellation (e.g., toll free phone number, email address) and information regarding how to cancel.

The Meaning of Clear and Conspicuous

The statute details what constitutes clear and conspicuous written disclosures. Specifically, written disclosures must be "in a manner that clearly calls attention to the language" as follows:

- 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 the case of an audio disclosure, clear and conspicuous means "in a volume and cadence sufficient to be readily audible and understandable."

Affirmative Consent

The statute requires businesses to obtain affirmative consent before charging consumers debit or credit cards on a recurring basis. The statute does not, however, define or address what constitutes affirmative consent.

Free Trials and Material Changes to the Terms of the Auto-Renewal Offer

If the auto-renewal offer provided to the consumer contains a free trial, the business must disclose to the consumer how to cancel before he or she pays for the goods or services.

In the case of a material change to the auto-renewal or continuous service that has been accepted by a consumer, the business must provide the consumer with clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.

Remedies

The Auto-Renewal Law's available remedies have made it attractive for the plaintiffs bar. The statute provides that all civil remedies that apply to a violation of the statute are available. **Further, any goods or other products sold without the requisite disclosures are considered an unconditional gift.** In other words, consumers may be entitled to refunds

(including shipping and handling costs) without having to return their purchases. Many recent lawsuits have been brought as putative class actions under California's Unfair Competition Laws (Cal. Bus. & Prof. Code § 17200 et seq.), thus increasing the potential amount of exposure especially for businesses that have millions of California subscribers. Some litigants have challenged whether there is a stand-alone cause of action under California's Auto-Renewal Law. This issue is presently the subject of a demurrer in one closely watched case filed in Santa Clara County state court.

Defenses and Defensive Strategies:

- **Good Faith Exception:** The statute expressly provides in Section 17604 that a business will not be subject to civil remedies if it "complies with the provisions of this article in good faith." Unfortunately, there is currently no case law addressing what constitutes "good faith" under the statute. Nonetheless, businesses should seek the advice of competent counsel and take reasonable efforts to ensure compliance with the statute.
- **Enforceable Mandatory Arbitration Provisions and Class Action Waivers:** Enforceable mandatory arbitration provisions with class action waivers (such as in Terms of Conditions or Terms of Use policies) may provide an effective strategy to attempt to minimize exposure to class claims brought under the Auto-Renewal Law. See *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). Indeed, some notable auto-renewal cases have been compelled to arbitration. Plaintiffs' attorneys have also reported being discouraged from bringing such putative class actions when an applicable and enforceable arbitration provision exists.
- **Exemptions:** The statute identifies a limited set of businesses exempt from its requirements: (1) businesses with authorization issued by the California Public Utilities Commission ("CPUC"), (2) businesses regulated by the CPUC, Federal Communications Commission, or Federal Energy Regulatory Commission, (3) entities regulated by the Dept. of Insurance, (4) certain alarm company operators, (5) banks, bank holding companies, credit unions, and other financial institutions licensed under state or federal law, (6) service contractor sellers and service contract administrators regulated by the Bureau of Electronic and Appliance Repair.
- **California Resident:** At least two federal district courts have dismissed at the pleading stage claims brought by non-California residents under the Auto-Renewal Law. These courts have expressly held that the statute limits recovery to only California citizens.
- **No Actual Damages:** In *Robins v. Spokeo*, No. 13-1339, the United States Supreme Court is presently considering whether a plaintiff can maintain a class action suit seeking damages for technical legal violations in which there was no actual injury to the plaintiff, only statutory damages available. Similarly, suits alleging violations of Section 17600 are also susceptible to this argument asserting that plaintiffs lack standing to maintain such suits.

Companies that utilize auto-renewal services for sales of goods or services in California should scrutinize their disclosures provided both before and after transactions. The disclosure requirements are intricate, but good faith compliance and enforceable arbitration provisions may nonetheless minimize potential liability.

If you have any questions or would like to discuss compliance and/or defending lawsuits brought under California's Auto-Renewal Law, please reach out to Los Angeles partner Robert B. Milligan (rmilligan@seyfarth.com / (310) 201-1579) or Los Angeles associate D. Joshua Salinas (jsalinas@seyfarth.com / (310) 201-1514).

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