California’s Automatic Renewal Law: are you giving your customers an unintended gift? Action step

Class Action Alert
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What if you had to return all the revenue you received from every customer in California for the last several years? The California Automatic Renewal Law, California Business and Professions Code §17600, et seq. (the Automatic Renewal Law) purports to provide this draconian remedy: in the event of non-compliance with the law, all services rendered by a merchant to an individual California consumer “shall for all purposes be deemed an unconditional gift to the consumer.”

The Automatic Renewal Law applies to most individual consumer contracts that include an automatic renewal feature and for which the consumer authorizes a recurring automatic charge to the consumer’s credit card or bank account for the purchase of services, memberships, subscriptions or other products. The law creates a higher legal standard that the automatic renewal terms and cancellation rights be disclosed in a more conspicuous manner than the rest of the contract. The law applies to contracts entered into by any consumer in California regardless of the location of the company. Recent class action lawsuits allege that several national companies with consumer-interfacing websites are not in compliance with the enhanced disclosure requirements of the Automatic Renewal Law.

Prior jurisprudence under the California Unfair Competition Law, Business & Professions Code §17200, et seq., or the Federal Trade Commission Act, 15 U.S.C § 41, et seq., simply required honest and clear disclosure and the avoidance of deceptive “fine print.” In contrast, the Automatic Renewal Law requires disclosures that automatically renewing charges for subscription services be disclosed in a “clear and conspicuous” manner, which it defines as more conspicuous than surrounding text, and that such disclosure be before and in immediate proximity to the consumer signature or online purchase authorization button.

Non-compliance may result in restitution of all the renewal revenues collected from California customers – a possible outcome that creates substantial economic, regulatory and reputational risk.

The Automatic Renewal Law attracted little attention when it became effective in December 2010. But in recent months it has become an emerging focus of litigation, triggering a new wave of class action cases in California.

Specifically targeted: merchants offering automatically renewing subscription services. Six class action lawsuits and one business-to-business case have been brought in California against prominent companies that offer online consumer contract formation.

Plaintiffs’ lawyers claim the remedy is restitution to the consumer of 100 percent of gross revenues received pursuant to a non-compliant automatic renewal, whether or not the consumer actually wanted and used the service, and even if the consumer was not actually deceived and otherwise lacks damages.

More about the Automatic Renewal Law

The Automatic Renewal Law requirements are different and require more conspicuous disclosure than traditional state and federal unfair competition and false advertising statutes.

In addition to the “clear and conspicuous” requirement, the law requires that a company must provide a consumer with a written acknowledgement, in a manner that is capable of being retained by the consumer.
acknowledgment must include the following: the automatic renewal offer terms, a description of the cancellation policy, information on how to cancel and, if the offer includes a free trial, the fact that the consumer may cancel before being charged. If there is a material change to the terms of the automatic renewal offer, the company must provide the consumer with “clear and conspicuous” notice of the change and information about how to cancel prior to implementation of the change in a manner that is capable of being retained by the consumer. Finally, companies must provide an easy-to-use mechanism for cancelling the offer, such as a toll-free number, email address, or a postal address (if the consumer is directly billed).

The key language from the Automatic Renewal Law is set forth below:

Section 17601(c) defines “clear and conspicuous” as “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.” (emphasis added) The “clear and conspicuous” requirement is repeated in section 17602, which also requires:

(a)(1) [disclosure] of the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer

(a)(2) obtaining the consumer’s affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms and

(a)(3) an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the offer contains a free trial, the business shall also disclose in the acknowledgement how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.

Section 17602(b) also states that a “business making automatic renewal or continuous service offers shall provide a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment specified in paragraph (3) of subdivision (a).”

The Automatic Renewal Law applies to individual consumer contracts, not to business-to-business contracts. Section 17601(d) provides that: “Consumer’ means any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes.”

The law also covers hard-copy contracts, but to date the litigation emanating from it has concerned contracts entered into online.

The Automatic Renewal Law does not apply to a business operating under a local, state, California Public Utilities Commission or Federal Communications Commission certificate or franchise, or its affiliates, nor to insurance companies, banks, alarm company operators and service contract sellers and service contract administrators regulated by the Bureau of Electronic and Appliance Repair. However, most Internet merchants are subject to the law.

To be in compliance, that is, merchants entering into contracts with California consumer must ensure that the contracts comply in terms of language, physical design and format. This affects contracts on consumer-facing websites and it affects hard-copy contracts.

Many merchants have not updated their procedures to comply: action step

Many merchants (particularly those offering online consumer contracts) remain unaware of the requirements of this law and the risks it may pose for the way they conduct business. Notably, many national companies doing business online with California consumers have not changed their contracts and websites in response to the Automatic Renewal Law.

Any merchant doing business in California should conduct a prompt review of its disclosures and the design of its Internet and hard-copy consumer contracts for compliance with the Automatic Renewal Law.

To avoid creating a unprivileged litigation roadmap for plaintiffs’ lawyers or regulators, it is crucial this review should be conducted by legal counsel and subject to attorney work product and attorney-client privilege.

Find out more about California’s Automatic Renewal Law and its potential impact on your business by contacting...
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