

## Updates

October 19, 2017

### California Updates Its Auto-Renewal Law



From fashion clothing in the mail to gym memberships to monthly mobile app subscriptions, the subscription-based business model is everywhere and here to stay. As more companies adopt this model, states around the country have enacted laws requiring detailed disclosures that businesses must follow. The California Automatic Renewal Law (ARL)[1] is one example—and it just got a makeover. Recently, California enacted Senate Bill No. 313,[2] effective July 1, 2018, which further clarifies the disclosure requirements for free gift or trial offers and promotional price subscriptions, and also requires online cancellation mechanisms for online subscription services.

#### Lawsuit Themes

In recent years, several lawsuits have been filed in California under the ARL. A frequent allegation in these complaints is that a business failed to provide automatic renewal or continuous service terms in a **clear and conspicuous manner**. Other allegations include the failure to provide the terms in visual proximity to the request for consent, failure to provide acknowledgement of the terms and failure to provide an easy mechanism for the consumer to cancel the subscription. While there are often significant defenses to such claims, exposure can also be significant--settlements can be in the tens of millions of dollars.[3] To minimize risk of claims, companies with subscription-based business models should carefully reassess their subscription disclosures and procedures.

#### Requirements

To avoid potential claims under the ARL, companies should consider the following:

- Ensure the initial offer terms are **clear and conspicuous**. Companies should disclose the material terms of the automatic renewal or continuous service in a "clear and conspicuous"[4] manner. If there is a material change to the terms, this change should also be made clear to consumers prior to implementation.
- Acquire the consumer's **consent** before charging the consumer.
- Make the terms **comprehensive**. Companies should inform consumers of everything they need to know: what they are being charged for, how much they will be charged, how often they will be charged, how long the automatic renewal term will last (or that the term will continue until the consumer cancels), the minimum purchase obligation (if any), and how and when they can cancel.
- Place the terms **close by**. Automatic renewal terms should also be displayed to consumers before a subscription or purchase agreement is fulfilled, and the language must be near the request for consent to the offer.

- Provide a mechanism that allows a consumer to **cancel online** if your company makes the offer online.
- **Confirm** the terms with the consumer by providing an acknowledgment; for example, an email receipt with all the relevant terms[5]. Companies should give the consumer a copy of the automatic renewal terms, a copy of the cancellation policy and instructions for how to cancel, all in a manner that consumers can retain for their records.
- All the above should also be followed for offers of a **free trial or gift**, or a **promotional or discounted price offer**. For example, the initial offer should **clearly and conspicuously** state when and how consumers can cancel prior to getting charged and how much they will be charged after the promotional rate is over.

## Potential Defenses

When litigation is filed, there are a number of defenses companies may rely on under the ARL. Further, while a number of cases have been filed under the ARL, only a few have discussed the substance of the statute, and these recent decisions[6] have limited plaintiffs' request for relief on the grounds that the ARL does not provide a private cause of action.[7]

Should a company be targeted in an ARL case, there are several defenses[8] that may be asserted, including but not limited to:

- **Good Faith:** The statute provides that a business that complies with the statutory provisions in good faith will "not be subject to civil remedies."
- **Extraterritoriality:** The statute is limited to California consumers only.
- **Statutory Standing:** If a plaintiff is suing under the Unfair Competition Law, he or she must show an actual loss of money or property.
- **Misinterpretation of the "Gift" Aspect of the Statute:** The "gift" provision does not allow restitution of all money paid as part of an automatic renewal claim. Additionally, in *Johnson v. Pluralsight*, a district court in California declared that the gift provision did not apply to intangible services, such as website subscriptions.[9]
- **Contractual Provisions:** Arbitration clauses, limitations of liability, choice of law and other contractual provisions can limit a company's exposure to liability.

## Conclusion

As the number of cases under the ARL (and similar statutes in other states) rises, companies with a subscription-based business model should be vigilant in ensuring that the disclosure of their automatic renewal terms complies with the law to reduce their vulnerability to a claim. Recent cases indicate that the most common allegation is failure to clearly and conspicuously disclose the automatic renewal offer terms. Should a company be targeted under the ARL, a number of potentially broad defenses exist. If you have questions about this statute and its implications for your clients, please contact experienced counsel.

## Endnotes

[1] Cal. Bus. & Prof. Code § 17600 et seq.

[2] Senate Bill No. 313 goes into effect July 1, 2018. *See* S.B. 313, 2017-18 Leg., Reg. Sess. (Cal. 2017), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB313](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB313).

[3] *See Williamson v. McAfee, Inc.*, No. 5:14-cv-00158-EJD, 2016 WL 4524307, at \*6 (N.D. Cal. Aug. 30, 2016) (approving the motion to settle at \$11.50 per class member, where the class size is between 7.53 and 8.85 million members).

[4] "Clear and conspicuous" means 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.

[5] This confirmation must also include a toll-free telephone number, email address, a postal address (only if companies directly bill the consumer) or another cost-effective, timely and easy-to-use mechanism for cancellation.

[6] See, e.g., *Johnson v. Pluralsight, LLC*, 236 F. Supp. 3d 1176 (E.D. Cal. 2017); *Roz v. Nestle Waters N. Am., Inc.*, No. 2:16-cv-04418-SVW-JEM, 2017 WL 132853 (C.D. Cal. Jan. 11, 2017); *Mayron v. Google*, No. 1-15-CV-275940, 2016 WL 1059373 (Cal. Super. Ct. Feb. 26, 2016).

[7] The issue of whether a private right of action exists under the ARL is currently on appeal at the Ninth Circuit. See *Pluralsight*, 236 F. Supp. 3d 1176.

[8] See James G. Snell and Marina Gatto, *Avoiding And Defending Automatic-Renewal Claims In Calif.*, Law360 (Sept. 21, 2016, 11:55 AM), <https://www.law360.com/articles/841388/>.

[9] *Pluralsight*, 236 F. Supp. 3d at 1183.

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