

Automatic-Renewal Class Actions Are On the Rise



Law360, New York (June 09, 2014, 10:35 AM ET) -- The automatic renewal of subscription services has become commonplace. Typically, companies renew subscribed services and charge credit card numbers maintained on file until the customer cancels the service or either the card or service expires. Companies, customers and even the environment benefit from the ease and efficiency of the automatic-renewal process and the reduction of paper bills. Nonetheless, there has been a decided uptick in litigation and legislation relating to automatic-renewal services, primarily in response to consumers complaining that they were not properly informed about or did not agree to the automatic-renewal policies. Companies offering automatically renewed goods or services should pay close attention to this developing area of the law.

Illinois was one of the first states to regulate automatic renewal. The Automatic Contract Renewal Act, passed in 2000, imposed two primary requirements.[1] First, all contracts that automatically renew must disclose that fact clearly and conspicuously in the customer agreement and instruct the customer how to cancel the service. Second, if the term of the agreement is for more than one year, the customer must receive an additional written notice, including cancellation instructions, within 30 to 60 days of the cancellation deadline. Violations of the law constitute unlawful practices under the Illinois Consumer Fraud and Deceptive Practices Act, though the act contains a safe harbor for violations that result from errors in written compliance procedures provided the customer receives a prompt refund.

Following Illinois' lead, Georgia, Florida and Hawaii enacted similar statutes, though Georgia and Florida allow for electronic notice of precancellation instructions, and only Florida included a safe harbor similar to Illinois' law.[2] North Carolina and Louisiana enacted variations on the Illinois model, requiring clear and conspicuous disclosure of automatic renewal and cancellation instructions in the initial contract or offer, or on delivery, but not again before the cancellation deadline.[3] North Carolina and Louisiana also adopted a safe harbor for errors occurring after the adoption of written compliance policies. Several other states also have laws addressing automatic renewal, but only in specific contexts (e.g., New York [service, maintenance or repair of real or personal property]; Rhode Island [leases of personal property]; South Carolina [physical fitness centers]; and Tennessee [alarm services]).[4]

In 2007, Connecticut went a step further, requiring companies to give clear and conspicuous disclosure of cancellation procedures whenever a contract automatically renews after a term of six months or more and whenever a special trial rate changes at the end of an introductory period.[5] If a consumer cancels or does not renew, any additional products are deemed an “unconditional gift” to the consumer, who may dispose or make use of the product however she sees fit. Connecticut, like Colorado,[6] deems all unsolicited goods as unconditional gifts, but Connecticut was the first state to introduce the concept to the automatic-renewal context — where services are solicited by the consumer, at least initially and quite often continually. The unconditional-gift proviso has become an important feature of recent lawsuits, as discussed below in greater detail.

In 2010, Oregon and California entered the fray, enacting perhaps the strictest automatic-renewal statutes to date.[7] These laws require that businesses give clear and conspicuous disclosures of automatic renewal, provide cancellation instructions and obtain affirmative customer consent — all before automatically renewing a customer’s subscription.[8] Oregon and California also require that companies provide customers with easy-to-use mechanisms for cancellation, such as toll-free telephone numbers, email addresses and sometimes mailing addresses. The Oregon and California laws deem any automatically renewed product furnished without affirmative consent an “unconditional gift” to the consumer.

The combination of an affirmative-consent requirement and the unconditional-gift grant has certainly caught the eye of plaintiff class action lawyers.

The automatic-renewal laws to date typically do not provide for statutory damages, but instead invoke, consumer protection statutes that allow restitution. By declaring products renewed without notice or consent “unconditional gifts” the Oregon, California and Connecticut statutes at least imply — according to some plaintiffs’ lawyers — that any money received for those products was wrongfully withheld or obtained — though companies can certainly argue the value of the good should be offset from any recovery. The amount of subscription-service fees associated with even one customer — and certainly numerous customers — could be quite large. Unsurprisingly, plaintiffs’ attorneys also seem eager to test the theory whether that customers can recover any amounts paid pursuant to automatic renewal absent affirmative consent.

Not surprisingly, California has become an early testing ground for automatic-renewal class actions. Late last year, a Pasadena resident sued the music-streaming service Spotify USA Inc. under California’s Automatic Renewal Law, claiming she did not consent to automated renewal after an initial free trial. The court never reached the substance of the allegations, but instead compelled arbitration pursuant to Spotify’s terms of use.[9] Then, earlier this year, a San Francisco resident sued cloud-storage provider Dropbox Inc. claiming he did not consent to automatic renewal when upgrading his basic account to a “Pro” subscription.[10] More recently, a Beverly Hills plaintiff sued video-streaming service Hulu LLC after his one-week free trial elapsed, asserting he did not affirmatively consent.[11]

These cases seek restitution of all amounts obtained through nonconsensual automatic renewal,

theorizing that such products were unconditional gifts, as well as injunctive and declaratory relief under the ARL and California Consumer Legal Remedies Act. Hulu's response to the complaint is not yet due. Dropbox removed its case to federal court under the Class Action Fairness Act. The parties are currently litigating whether the case should be remanded.

The Hulu and Dropbox cases, as well as future cases, pose important questions regarding the scope of automatic-renewal laws, including: the scope and extent of available remedies, particularly restitution; whether offset of received goods or services is proper; whether cases qualify for removal to federal court; and what forms of disclosure and cancellation will satisfy the statutes.

Significant questions also await at the class-certification stage, including whether: individualized issues of proof predominate when determining consumer consent, aggregated restitutionary damages is proposed; and restitution raises individualized issues where consumers accepted products as "gifts" under the applicable statute.

Although thus far the thrust of litigation has occurred in California, litigation may soon spread to other states, even those that do not affirmatively deem automatically renewed products unconditional gifts. Such actions only become more likely if the California plaintiffs survive any motions to dismiss, avoid removal or are able to certify classes. And, of course, other states that do not currently have automatic-renewal laws may decide to pass their own. As a result, companies that offer automatic-renewal services, particularly in connection with free trials, should follow these cases closely, while confirming that their practices conform to any applicable state laws regarding disclosure, consent and cancellation.

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[1] 815 ILCS Section 601/10, 610/15, 610/20.

[2] Georgia Code Annual Subsection 13-12-2, 13-12-3; Florida Statute Annual Section 501.165; Hawaii Revenue Statute Section 481-9.5.

[3] North Carolina General Statute Annual Section 75-41; Louisiana Revenue Statute Section 9:2716.

[4] New York General Obligation Law Section 5-903; Rhode Island General Laws Annual Section 6-13-14; South Carolina Code Annual Section 44-76-60; Tennessee Code Annual Section 62-32-325.

[5] Connecticut General Statute Annual Section 42-126b.

[6] Colorado Revenue Statute Annual Subsection 6-6-102, 6-6-103.

[7] Oregon Revenue Statute Annual Section 646A.295; California Business & Professional Code Section 17600 et seq.

[8] Oregon Revenue Statute Annual Section 646A.295; California Business & Professional Code Section 17600 et seq.

[9] Bleak v. Spotify USA Inc.

[10] Goldman v. Dropbox Inc.

[11] Kruger v. Hulu LLC.

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