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ENFORCEMENT AND INTERPRETATION OF THE CALIFORNIA AUTOMATIC RENEWAL LAW

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As traditional retail business moves online, many online retailers have turned to a well-tested sales strategy—subscription plans. The concept is simple. The consumer receives ongoing services or recurring shipments of goods, and businesses charge the consumer's credit card or bank account on a recurring basis until the consumer cancels. The relationship is mutually beneficial. Consumers receive their essential goods and services without hassle, and businesses receive dependable revenue. Consumers enjoy subscriptions for such things as television and internet services, meal, wine, and craft coffee delivery, clothing, grooming products, dating apps, on-demand video and music, and countless other products and services. But the relationship also carries the potential for problems. Specifically, consumers at times have complained that they are charged without their knowledge and consent after agreeing to what they thought were one-time purchases or free trials. Consumers also complain that such subscriptions can be difficult to cancel. Recognizing these potential problems, many state legislatures passed laws to ensure that consumers enter subscription programs with full knowledge and affirmative consent.

California is one of those states. In 2009, the California legislature passed the Automatic Renewal Law, Business and Profession Code §§ 17600, et seq. ("ARL"), with the stated intent to "end the practice of ongoing charging of consumer credit or debit cards . . . without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." The law became operative in December 2010. Though it has garnered attention from legal commentators, private plaintiffs, and public prosecutors, the courts have not had many opportunities to interpret its provisions. This article discusses the state of the law and an enforcement trend to watch.

A. Basic Protections Under the ARL

Under the ARL, any business making an automatic renewal or continuous service offer to a California consumer must disclose the terms of the offer, obtain the consumer's affirmative consent, provide the consumer an acknowledgement of the order, and provide simple cancellation mechanisms, along with other miscellaneous requirements. *See* Cal. Bus. & Prof. Code §§ 17600 *et seq*. Whether offered orally or in writing, the offer terms must be disclosed in temporal or visual proximity to "the request for consent to the offer." *Id*. § 17602(a)(1). Furthermore, the disclosures must be "clear and conspicuous." *Id*. A visual disclosure is considered to be clear and conspicuous if it is "in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size . . . in a manner that clearly calls attention to the language." *Id*. § 17601(c). An audio disclosure is clear and conspicuous if it is "in a volume and cadence sufficient to be readily audible and understandable." *Id*.

Goods sent without affirmative consent are deemed to be an "unconditional gift" to the consumer. *Id*. § 17603. A business is liable for "all civil remedies that apply to a violation," but only if the business fails to comply in good faith. *Id*. § 17604. Courts have interpreted the "unconditional gift" provision to entitle customers to the full

restitution of any amounts paid for goods delivered under continuous service or automatic renewal subscriptions that were not properly disclosed or for which the seller did not properly obtain affirmative consent. However, the statute has not been litigated extensively, so many of its contours—including its safe harbor provision—remain unclear. *See Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1073 (S.D. Cal. 2018) (interpreting the good faith "safe harbor provision" as "an absolute bar to Plaintiff's recovery").

There is no private right of action under the ARL, but a private plaintiff may bring an action under the state's Unfair Competition Law, Business & Professions Code §§ 17200 et seq. ("UCL"), for restitution and injunctive relief, so long as the plaintiff has suffered injury in fact and lost money or property. *Lopez*, 307 F. Supp. 3d at 1070; Cal. Bus. & Prof. Code § 17204. In addition, public prosecutors—the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor—may bring actions under the UCL to enforce the ARL. In addition to restitution and injunctive relief, public prosecutors can also obtain civil penalties of up to $2,500 per violation. *Id*. § 17206.

In September 2017, the California legislature passed, and Governor Brown signed into law, SB 313, which amended the ARL. The original draft of SB 313 contained strict new requirements, including that businesses: (a) obtain a consumer's consent to the automatic renewal offer by means of a consent mechanism, such as a checkbox, separate from the consent mechanism for any other terms and conditions; (b) provide an additional notice three-to-seven days before the consumer's first automatic renewal; and (c) allow consumers to cancel their plans "as easily as" the consumer accepted the offer. Those requirements were dropped from later drafts and, as enacted, the amendment adds only the following incremental requirements: (1) businesses must provide an online cancellation method when the consumer registered for the subscription online; and (2) businesses must clearly and conspicuously disclose (a) the price that will be charged when a free trial expires, and (b) how to cancel before being charged. *Id*. § 17602. The amendment took effect in July 2018.

B. Enforcement

Since its enactment, the ARL has spawned a steady stream of litigation from private plaintiffs, including class action lawsuits against, among others, Blue Apron, Dropbox, Blizzard Entertainment, Spotify, Google, Hulu, and Apple. The complaints tend to turn on whether the required disclosures were "clear and conspicuous" or provided in "visual proximity" to the "request for consent to the offer," such that the business obtained the consumer's "affirmative consent." Yet the litigation so far has resulted in minimal written orders and opinions (whether published or unpublished). These cases tend to settle, and some of them are ordered into arbitration.

Aside from private class actions, in recent years, district attorneys and other local prosecutors from multiple jurisdictions have worked together to pursue stipulated judgments with various businesses. These local prosecutors recover restitution, civil penalties, investigative costs, and injunctive relief on behalf of the "People of the State of California." The cases typically involve no active litigation—the dockets comprise pre-packaged complaints with stipulated judgments, often filed on the same day, which are typically signed by the court within days or weeks of filing. Litigants have commented that the pre-packaged settlements are the result of years of negotiation.

While these judgments are not binding on other businesses in California, they reflect the prosecutors' expansive interpretation of the ARL. Significantly, the terms of the stipulated injunctions we have reviewed regularly exceed the ARL's requirements. For example, past injunctions have required that:

- businesses obtain their consumers' assent to the automatic renewal offer using a checkbox (or other consent mechanism) that is separate from the checkbox used for any other terms and conditions (the "separate" or "double" checkbox requirement). An early draft of SB 313 included a similar requirement, but the legislature expressed workability concerns, and it was stricken from the final version.
- the automatic renewal offer terms be presented "immediately adjacent" to the checkbox, where the statute requires only "visual proximity."
- the post-sale acknowledgement conform to specific,

extra-statutory restrictions—for example, that the acknowledgement include a "clear and conspicuous" disclosure (where the statute requires only a disclosure in a manner capable of retention by the consumer) or that the acknowledgment take the form of an email sent immediately after the order with a subject line indicating that it is a confirmation.

- the business must provide a cancellation mechanism that is "as easy and simple as" the mechanism by which the consumer initiated the recurring charge. An early draft of SB 313 included a similar requirement, but, like the double checkbox, it was omitted from the final version.
- the cancellation must be effective within a certain time following the consumer's request—for example, within one business day.
- the business must send an additional notice to the consumer before the first recurring charge. A similar term was included in an early draft of SB 313, but not in the enacted version.

Aside from the terms themselves, these settlements push the boundaries of the ARL by purporting to seek restitution for consumers across the state, even though the prosecutors' authority ends at the geographical boundaries of their respective jurisdictions (e.g., city, county, etc.). Recently, the California Court of Appeal clarified, in *Abbott Laboratories v. Superior Court*, 233 Cal.Rptr.3d 730 (Cal. Ct. App. May 31, 2018), that district attorneys may not seek or obtain "monetary recovery" under the UCL, except for "violations occurring within the county he [or she] serves." *Id*. at 734. District attorneys can expand their reach on one condition only: with "written consent by the Attorney General and other [affected] county district attorneys." The California Supreme Court has agreed to hear the case, and briefing is scheduled to be complete in early 2019. In the meantime, prosecutors have continued to recover restitution on behalf of consumers across the state.

Finally, these settlements have pushed the boundaries of the law by indirectly enforcing a federal law—the Restore Online Shopper Confidence Act, 15 U.S.C. §§ 8401-8405 ("ROSCA"). ROSCA requires that a business charging a customer for goods sold over the Internet through a negative option feature—an offer in which the consumer's silence is interpreted by the seller as an acceptance of the offer—(a) clearly and conspicuously disclose all material terms of the transaction before obtaining the customer's billing information; (b) obtain the customer's express informed consent to the feature before charging the customer; and (c) provide a simple mechanism for a consumer to stop recurring charges. 15 U.S.C. § 8403. Local prosecutors indirectly enforce ROSCA in their ARL settlements in two ways: first, by pleading a violation of ROSCA, but declining to expressly state it as a cause of action; and, second, by including its terms (or terms modeled on the FTC's stipulation injunctions under ROSCA) in their stipulated injunctions. Unlike the ARL, the authority to enforce ROSCA rests with the FTC and the attorneys general of the states—not with local prosecutors. *Id*. §§ 8404(a), 8405. Accordingly, it is notable that these stipulated judgments invoke the federal statute.

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It remains to be seen precisely how courts will interpret the provisions of the California's Automatic Renewal Law, but we expect courts will continue to see an increasing number of private and public actions arising under the ARL.

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