Automatic Renewals of Consumer Contracts: Everything You Ever Wanted to Know But Were Afraid to Ask

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Automatic renewals of consumer contracts are governed by overlapping federal and state laws. Such renewals should be used with care, particularly in light of recent changes to state automatic renewal laws (ARLs) and increased scrutiny from government officials and class action lawyers. In this Q&A, members of Drinker Biddle’s Class Actions Team and Consumer Contracts Team provide an overview of the laws governing automatic renewals, with a particular focus on California’s ARL, which is broad in scope, strict in application, and invoked with increasing frequency in class action litigation. See, e.g., Siciliano v. Apple Inc., No. 2013-1-CV-257676 (Cal. Super Ct.) ($16.5 million settlement); Habelito v. Guthy-Renker LLC, No. BC499558 (Cal. Super. Ct.) ($15.2 million settlement). Of course, no alert can capture every nuance of even one ARL, let alone every ARL. Businesses that use automatic renewals would therefore be well-advised to consult counsel and review the statutes directly.

Automatic Renewals Generally

How Are Automatic Renewals Regulated?

Automatic renewals are regulated at both the state and federal levels. At the state level, they are governed by a growing number of ARLs. At the federal level, they implicate Section 5 of the FTC Act, 15 U.S.C. § 45(a), which regulates unfair or deceptive practices, and the Restore Online Shopper’s Confidence Act (ROSCA), 15 U.S.C. § 8403 et seq., which prohibits charging customers unless there has been clear disclosure of, and express consent to, the material terms.

What Does the FTC Act Require?

Federal regulations define a “negative option feature” as “an offer or agreement to sell or provide any goods or services, a provision under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.” 16 C.F.R. § 310.2(w). The FTC considers automatic renewals to be a type of negative option feature. See, e.g., Negative Options: A Report by the Staff of the FTC’s Division of Enforcement, 2009 WL 356592, at *1. It has also outlined five “principles . . . to guide marketers in complying with Section 5 of the FTC Act when marketing online negative option offers.” Id. at *4. Specifically, it has instructed marketers to:

1. “[D]isclose the material terms of the offer,” which include the “existence of the offer,” the “offer’s total cost,” the “transfer of a consumer’s billing information to a third party (if applicable),” and “how to cancel the offer.”

2. “[M]ake the appearance of disclosures clear and conspicuous,” which means that they should “place them in locations on webpages where they are likely to be seen, label the disclosures (and any links to them) to indicate the importance and relevance of the information, and use text that is easy to read on the screen.”

3. “[D]isclose the offer’s material terms before consumers pay or incur a financial obligation,” for example before consumers “agree to an offer by clicking a ‘submit’ button.”

4. “[O]btain consumers’ affirmative consent to the offer” rather than “rely on a pre-checked box as evidence of consent.”

5. “[N]ot impede the effective operation of promised cancellation procedures” by “mak[ing] cancellation burdensome for consumers, such as requiring consumers to wait on hold for unreasonably long periods of time.”

Id. The FTC has filed suit in related contexts to enforce these guidelines. See FTC v. DirecTV, No. 15-1129 (N.D. Cal.) (alleging violations of Section 5 of the FTC Act and ROSCA).

What Does ROSCA Require?

ROSCA contains requirements for negative option features in online transactions. Specifically, it prohibits charging or trying to charge a consumer unless the business:

1. Provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer’s billing information.

2. Obtains a consumer’s express informed consent before charging the consumer’s credit card, debit card, bank account, or other financial account for products or services through such transaction.

3. Provides simple mechanisms for a consumer to stop recurring charges from being placed on the consumer’s credit card, debit card, bank account, or other financial account.

Id. at §§ 8403(1)-(3).
What Do State ARLs Require?

While their specific requirements vary, ARLs often require: (1) “clear and conspicuous” disclosure of certain terms before the agreement is fulfilled; (2) consent—which in some states must be affirmative and in other states may be passive—to the agreement containing those terms; (3) retainable acknowledgments of those terms; (4) notice of “material” changes to the automatic renewal; and/or (5) reminders in advance of certain renewals.

How Many States Have ARLs?

Twenty-five states have ARLs that are currently in effect: Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maryland, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah and Wisconsin. Three of those—Connecticut, New York, and Pennsylvania—are considering amending their ARLs. Vermont has recently enacted an ARL that goes into effect on July 1, 2019. In addition to requiring clear and conspicuous terms in unambiguous language, the ARL requires that the automatic renewal terms appear in boldface type and that consumers affirmatively accept the automatic renewal terms in addition to the consumers’ acceptance of the contract itself. Seven other states—Alabama, Massachusetts, Minnesota, New Jersey, Virginia, West Virginia and Wyoming—are considering enacting ARLs.

Are All ARLs Generally the Same?

ARLs differ not only in terms of what they cover (with some applying to virtually any consumer contract and others applying only to certain categories of contracts) but also in what they require (with, for example, some requiring clear and conspicuous disclosures before a contract is accepted and others requiring an additional reminder before it renews).

What States Have Narrow ARLs?

Fifteen states—Arkansas, Colorado, Iowa, Maryland, Missouri, Nevada, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah and Wisconsin—have narrow ARLs. These focus on professional home security contracts; health club or dance studio contracts; service contracts for repair of real or personal property; leases of personal property or business equipment; certain telecommunications contracts; and/or buyers’ clubs.

What States Have Broad ARLs?

Ten states—California, Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, New Mexico, North Carolina, and Oregon—have broad ARLs that apply more generally to consumer and/or service contracts.

How Can Businesses Comply With Every ARL?

Some businesses tailor their practices to what is (and is not) required in a given state. Others use the strictest requirements from each ARL as the highest common denominators for their entire footprints. Although California’s ARL is generally regarded as one of the broadest and strictest, other ARLs have requirements that California’s does not. In light of the substantial volume of litigation in California, however, we will focus on its requirements for the remainder of this alert.

Automatic Renewals in California

What Does California’s ARL Require?

California’s ARL requires (1) “clear and conspicuous” disclosure, before an agreement is fulfilled, of “automatic renewal offer terms” or “continuous service offer terms”; (2) “affirmative consent” to “the agreement containing” those terms; (3) a retainable acknowledgment of those terms and any cancellation policy; and (4) a retainable notice of any “material changes” to those terms. See Cal. Bus. & Prof. Code § 17600 et seq. Recent amendments also added requirements regarding free gifts and trials and the ability to cancel agreements that are accepted online. See infra.

What Terms Must Be Disclosed?

California’s ARL requires that “automatic renewal offer terms” and “continuous service offer terms” be disclosed in a “clear and conspicuous manner.” Id. § 17602(a)(1). “Automatic renewal” is defined as “a paid subscription or purchasing agreement [that] is automatically renewed at the end of a definite term for a subsequent term,” and “continuous service” is defined as “a subscription or purchasing agreement [that] continues until the consumer cancels the service.” Id. §§ 17601(a), (e).

The “terms” of an “automatic renewal offer”—i.e., the terms that must be disclosed in a “clear and conspicuous manner”—are defined as follows:

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, and 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.
5. The minimum purchase obligation, if any.

Id. §§ 17601(b)(1)–(5). Although there is no corresponding definition for the “terms” of a “continuous service offer,” it would be prudent to disclose, in a “clear and conspicuous manner,” the fact that the “subscription or purchasing agreement . . . continues until the consumer cancels the service.” Id. § 17601(e).
In addition, effective July 1, 2018, “[i]f the offer also includes a free gift or trial, the offer shall include a clear and conspicuous explanation of the price that will be charged after the trial ends or the manner in which the subscription or purchasing agreement pricing will change upon conclusion of the trial.” Id. § 17602(a)(1).

When Must Those Terms Be Disclosed?
The terms must be disclosed “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.” Id. § 17602(a)(1).

How Must Those Terms Be Disclosed?
Whether terms are disclosed in writing or orally, the disclosure must be “clear and conspicuous.” Id. § 17601(b). In the case of written disclosures, “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.” Id. § 17601(c). And in the case of audio disclosures, “clear and conspicuous” means “in a volume and cadence sufficient to be readily audible and understandable.” Id.

What Kind of Consent Must Be Obtained?
California requires that consumers give “affirmative consent” to “the agreement containing” the automatic renewal or continuous service terms. As of July 1, 2018, that requirement was amended to make clear that it extends to “terms of an automatic renewal offer or continuous service offer that is made at a promotional or discounted price for a limited period of time.” Id. § 17602(a)(2). It should be noted that some states’ ARLs require disclosure but do not require an affirmative act of consent.

What Qualifies as “Affirmative Consent”?
Although California’s ARL does not define “affirmative consent,” the legislative history and recent enforcement actions are instructive. As can be seen in the California Senate’s Bill Analysis, two avenues for securing affirmative consent for purposes of California’s ARL were contemplated:

[I]n any automatic renewal offer made on an Internet Web page, the business [must] clearly and conspicuously disclose the automatic renewal offer terms prior to the button or icon on which the customer must click to submit the order. In any automatic renewal offer made on an Internet Web page where the automatic renewal terms do not appear immediately above the submit button, the customer must be required to affirmatively consent to the automatic renewal offer terms.


Two recent cases filed by the City of Santa Monica are also noteworthy. See People v. Beachbody, LLC, No. 55029222 (Cal. Super. Ct.); People v. eHarmony, No. 17-cv-03314 (Cal. Super. Ct.). These cases resulted in consent decrees that require changes to the companies’ website disclosures, which are now required to include

“check-boxes” to enable consumers to affirmatively consent to the automatic renewal terms. In this way, the consent decrees appear to reach even further than the California Bill Analysis requires, as the Bill Analysis suggests that placing the terms “above the submit button” would suffice. See S.B. 340 Sen., 4/14/2009.

A recent FTC action also bears mention. See FTC v. AdoreMe, Inc., No. 1:17-ev-09083-ALC, Dkt. No. 4 (S.D.N.Y. Nov. 30, 2017). Like California’s ARL, ROSCA is silent on what constitutes “express” consent. Nevertheless, in settling the action, AdoreMe agreed to obtain consent to any negative option feature “through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the Negative Option Feature, and no other portion of the offer.”

Must an Acknowledgement Be Sent to Consumers?
California’s ARL requires that consumers receive acknowledgments of automatic renewal or continuous service terms. See id. § 17602(a)(3). The acknowledgment may be sent “after completion of the initial order.” Id. § 17602(e)(1).

What Must That Acknowledgement Look Like?
The acknowledgment must be in a format that is “capable of being retained by the consumer” and must include “the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel.” Id. § 17602(a)(3). With respect to the cancellation policy, the acknowledgment must also “provide a toll-free telephone number, electronic mail address, a postal address if the seller directly bills the consumer, or it shall provide another cost-effective, timely, and easy-to-use mechanism for cancellation. . .” Id. § 17602(b). Finally, as of July 1, 2018, “[i]f the automatic renewal offer or continuous service offer includes a free gift or trial, the business shall also disclose in the acknowledgment how to cancel, and allow the consumer to cancel, the automatic renewal or continuous service before the consumer pays for the goods or services.” Id. § 17602(a)(3).

Do Customers Have Specific Cancellation Rights?
As of July 1, 2018, where a consumer accepts an automatic renewal or continuous service offer online, that consumer “shall be allowed to terminate the automatic renewal or continuous service exclusively online, which may include a termination email formatted and provided by the business that a consumer can send to the business without additional information.” Id. § 17602(c) (emphasis added).

Do Customers Need to Receive Renewal Reminders?
California’s ARL does not require that businesses remind customers that contracts are about to renew. It should be noted, however, that several of the other broad ARLs do require renewal reminders in certain circumstances.
Can Businesses Change the Terms of the Agreement?

California’s ARL does not prohibit businesses from changing the terms of covered agreements, but it does require that businesses provide notice of any “material change in the terms of the automatic renewal or continuous service that has been accepted by a consumer in [California].” Id. § 17602(d). Notably, the plain language of the statute does not purport to require notice of changes—even material changes—to the agreement generally. Rather, it appears to require notice only of material changes to “the terms of the automatic renewal or continuous service.” Id. Where such a change is made, the statute requires that businesses “provide the consumer with a 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.” Id. Importantly, that notice must be “clear and conspicuous,” id., which as noted above is defined in a way that imposes specific requirements for the presentation of the changed terms.

Is There a Safe Harbor Under the California ARL?

There is a safe harbor from the ARL’s civil remedies for “good faith” compliance with the ARL’s provisions. See id. § 17604(b). Courts have yet to address what does (or does not) constitute “good faith” compliance under the statute, and at least one court has held that the issue presents a question of fact not amenable to dismissal at summary judgment. See Roz v. Nestlé Waters N. Am., Inc., No. 16-4418, 2017 WL 6942661, at *3 (C.D. Cal. Dec. 6, 2017).

Are Any Contracts Excluded from California’s ARL?

California’s ARL has several exemptions, including ones for services that are provided by businesses that are (a) “doing business pursuant to a franchise issued by a political subdivision of the state or a license, franchise, certificate, or other authorization issued by the California Public Utilities Commission”; (b) “regulated by the CPUC, the Federal Communications Commission, or the Federal Energy Regulatory Commission”; (c) “regulated by the Department of Insurance”; (d) certain regulated “[a]larm company operators”; (e) “[a] bank, bank holding company, or the subsidiary or affiliate of either, or a credit union or other financial institution, licensed under state or federal law”; and (f) certain regulated “[s]ervice contract sellers and service contract administrators[].” Cal. Bus. & Prof. Code §§ 17605(a)–(f).

Is There a Private Right of Action under California’s ARL?

Strictly speaking, there is no private right of action under California’s ARL. See Johnson v. Pluralsight, LLC, 728 F. App’x 674, 677 (9th Cir. Mar. 29, 2018) (“Because there is no private cause of action under the ARL, the district court properly dismissed Johnson’s ARL claim.”). However, private litigants can sue under California’s other consumer protection statutes for conduct that violates the ARL. See id. (“Permitting consumers to sue under the [Unfair Competition Law] for ARL violations fulfills [the ARL’s] objective.”).

What Remedies Are Available under California’s ARL?

Goods sent to consumers in violation of the ARL’s affirmative consent requirements are deemed “unconditional gifts.” Specifically, the statute provides:

In any case in which a business sends any goods, wares, merchandise, or products to a consumer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the consumer’s affirmative consent as described in Section 17602, the goods, wares, merchandise, or products shall for all purposes be deemed an unconditional gift to the consumer, who may use or dispose of the same in any manner he or she sees fit without any obligation whatsoever on the consumer’s part to the business, including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise, or products to the business.


As the language of Section 17603 suggests, the “unconditional gift” remedy appears limited on its face to instances where fungible “goods, wares, merchandise, or products” are sent to customers. Id. As one court observed, “a consumer could keep a good or product that is sent in violation of the Automatic Renewal Law, but there is nothing to keep when it is only a service that is provided.” Mayron v. Google, Inc., No. 1-15-CV-275940, 2016 WL 1059373, at *3 (Cal. Super. Ct. 2016). Drawing the line between tangible goods and intangible services will be a point of contention in automatic renewal cases going forward. See, e.g., Johnson, 728 F. App’x at 677 (“Assuming arguendo that section 17603 is limited to tangible products, [defendant]’s course slides and sample codes amply qualify as tangible products.”).

Has There Been Litigation under the California ARL?

California’s ARL has been a significant source of class action litigation that has targeted a broad range of industries, including retailers, food distributors, technology companies, and entertainment enterprises. New cases are threatened or filed regularly, including by federal and state regulators. In light of the recent statutory amendments and several seven-figure class action settlements, we expect to see continued interest in these archetypal “gotcha” class actions.
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