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Recent Developments in California's Automatic Renewal Law

California's Automatic Renewal Law, which targets unclear or inaccurate automatic service renewal offers, is one of the most stringent in the country and has generated a wave of class actions targeting companies that offer popular subscription products and services, attorney Stephanie A. Jones says. The author explores recent rulings applying ARL, as well as legislative efforts to revise the law.

BY STEPHANIE JONES

In 2010, California enacted its Automatic Renewal Law (ARL) in response to growing complaints by consumers that they were being misled by inaccurate automatic service renewal offers and were not being provided information on how to cancel ongoing subscriptions. Consumers commonly complained that they were unaware of and had not requested auto-renewing subscriptions until they either received a bill or a charge to their credit or debit card.

The ARL is set forth in California Business and Professions Code Section 17600, et seq., and requires businesses selling goods, products, and services on a recurring or subscription basis to clearly and conspicuously disclose their terms of service and cancellation policy, as well as obtain affirmative consent before making recurring charges on a consumer's debit or credit card. The ARL statue does not, however, define what constitutes affirmative consent, which has left the plaintiff's bar free to argue that any disclosures made are insufficient to establish consent and do not comply with the law.

Sellers of subscription-based products and services commonly offer a brief, free ''trial period'' after which the company starts to charge subscribers on a recurring basis. Under the ARL, if the business offers a free trial, it must also disclose to the consumer how to cancel before the paid portion of the subscription starts. The ARL further requires that businesses provide a follow-up acknowledgment after a customer signs up that contains the required disclosures, easily understandable instructions on how to cancel the subscription, and an easy-to-use mechanism for canceling, such as a toll-free customer service line or mailing address to which requests for cancellation may be sent. Finally, the ARL requires that a business give ''clear and conspicuous'' notice if it implements material changes to the automatic-renewal terms after a customer has signed up for a subscription.

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Over 20 states have laws regulating auto-renewing contracts, but California's ARL is one of the most stringent in the country. It applies to both consumer-facing online contracts and services or products offered via traditional written contracts or recurring service agreements. The statute provides that all civil remedies that would otherwise apply to a violation of the ARL are available, which has been interpreted to mean that no private right of action exists. However, alleged violations may serve as the basis for claims under other statutes like the Unfair Competition and False Advertising laws. The ARL additionally contains a ''gift'' provision. Section 17603 provides that any goods or other products that were sold without first obtaining affirmative consent are ''unconditional gifts'' for which consumers have no payment obligation and may dispose of as they see fit. While the gift provision excludes on its face intangible services, it has become an enticement to the plaintiff's bar and spawned a host of class action litigation in California over alleged violations of the ARL's disclosure requirements.

The ARL Continues to Generate Class Claims Given the ever-increasing popularity of recurring service arrangements, for everything from online dating to meal delivery to cloud storage services, the ARL has generated a

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wave of class actions targeting companies that offer popular subscription products and services. In these cases, plaintiffs advance the theory that the class is entitled to directly recover under the gift provision all money paid for services, goods, and products that were allegedly delivered in contravention of the ARL. Direct ARL claims are typically brought in conjunction with unfair business practices claims under the unlawful prong of Cal. Bus. & Prof. Code Section 17200, the unfair competition law (UCL). UCL claims are coupled with requests for restitution and public injunctive relief but seek essentially the same economic remedy—a full refund of all money paid by the class for the services, goods. or products allegedly provided in violation of the ARL. Companies with large subscriber bases in California face significant exposure from ARL class claims; a court could theoretically award a class restitution of the entire amount paid for goods or services over the four-year statute of limitations period applicable to UCL claims.

A primary line of defense against ARL class claims is a well-crafted, enforceable arbitration provision with a class action waiver in the relevant terms of service. (*Lopez v. Study.com LLC,* 37-2017-6162-CU-MT-CTL (Cal. Super. Ct. June 30, 2017).) Generally, arbitration clauses are enforceable, even for online contracts, if the consumer is provided notice of the terms, has an opportunity to review them before completing the transaction, and manifests an intent to be bound by them when completing the transaction. For online contracts, ''clickwrap'' agreements that provide clearly visible hyperlinks to a full text copy of the terms of service that contain the arbitration provision and require a customer to click on an ''I accept'' box before completing a transaction have been upheld as enforceable, provided the terms of the arbitration provision are not unconscionable. (*Swift v. Zynga Game Network, Inc.,* 805 F. Supp. 2d 904, 911-12 (N.D. Cal. 2011).)

The California Supreme Court recently held that arbitration provisions that purport to waive a plaintiff''s right to request public injunctive relief under consumer protection statutes like the UCL, in any forum or any capacity, are contrary to California public policy and thus unenforceable under California law. (*McGill v. Citibank,* 2 Cal. 5th 945 (2017).) In light of the *McGill* decision, companies should review their terms of service to ensure that they at least contain severability clauses that would allow a court to sever out the waiver of a right to bring public injunctive relief claims from the rest of the arbitration provision. Plaintiffs' primary target in UCL actions is classwide restitution, not the right to prosecute public injunctive relief, so allowing a plaintiff the theoretical right to prosecute an individual claim for public injunctive relief is unlikely to materially encourage a plaintiff to continue to prosecute ARL claims if compelled to an arbitration where the plaintiff may only seek a refund or restitution for her own payments.

Many early cases filed under the ARL that are not subject to arbitration have been quickly resolved over exposure concerns, so the substantive case law is not yet well developed. However, courts are determining that the gift provision, by its own terms, does not apply to subscriptions for intangible online services like cloud storage or training videos. (*Johnson v. Pluralsight, LLC.* No. 2:16-cv-01148-MCE-CKD (E.D. Cal. Feb. 17, 2017, and cases cited therein).) Additionally, courts are declining to find that a private right of action exists under the ARL itself. (*Id.)*

The developing case law favors the defense bar but in no way forecloses ARL claims. Alleged violations of the ARL may serve as the foundation unlawful act for a UCL claim seeking classwide restitution. Claims relating to tangible goods and services are more likely to survive the pleading stage than claims related to online services because goods and products are expressly covered by the gift provision. In contrast, courts have dismissed UCL claims seeking restitution of payments for online services allegedly provided without the required disclosures at the pleading stage, finding that the plaintiff realized the benefit of the bargain by having access to the service and therefore could not establish injury-in-fact. Notably, in each of the online service cases where the court dismissed the claims for lack of injury, the plaintiff only alleged that he signed up for the service but was not provided the disclosures required by the ARL. Those cases did not involve allegations that the plaintiff did not want the service in question, did not understand he would be charged for it, or was unable to cancel after subscribing.

A recent decision by the first court to rule on a summary judgment motion directed toward ARL claims illustrates how a plaintiff may establish UCL injury-in-fact by relying on a more robust set of allegations and facts. In *Ingalls (Gregory Ingalls, et al. v. Spotify USA, Inc.* No. 3:16-cv-03533 (N.D. Cal. July 17, 2017)), the plaintiffs alleged that Spotify did not provide them with the required disclosures under the ARL before they signed up for a free trial of Spotify's premium online streaming music service, resulting in multiple monthly charges for the service appearing on their credit cards before they canceled their subscriptions. The plaintiffs further alleged that they did not intend to keep the service or want to use it after the end of the free trial period and did not expect to be charged for the service.

Judge William Alsup in the Northern District of California granted summary judgment to Spotify on the plaintiffs' direct claims brought under the ARL, but denied summary judgment on the UCL claim because one plaintiff offered deposition testimony in support of and consistent with the allegations in his complaint: that he did not expect to be charged for the service, did not want to keep the service, and did not use it after the free trial period expired. The court found these facts sufficient to establish injury-in-fact under the UCL.

Future plaintiffs are likely to add similar allegations to their ARL complaints, and if additional courts adopt Judge Alsup's analysis, the settlement value of these claims will increase because the veracity of the claims will turn on credibility determinations that cannot be made on summary judgment. Until the law becomes more settled, we will also likely continue to see an uptick in the number of ARL class actions filed in California courts.

Despite the uptick in ARL class actions, companies can mitigate the risk of being targeted by remaining vigilant and maintaining effective compliance programs. The program should include a regular and careful review of terms of service disclosures, service acknowledgments, cancellation policies, and arbitration provisions for all auto-renewal or recurring service programs offered by the company. The review should confirm: (1) all required disclosures are made during the sign-up process and are sufficiently clear and conspicu-

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ous to establish affirmative consent; (2) an acknowledgment is sent that contains all required disclosures; (3) the disclosures in the acknowledgment are sufficient, including a clear explanation of the terms of service, easily understandable instructions on how consumers may cancel subscriptions, and the identification of an easy and inexpensive method by which customers can actually cancel their subscriptions; and (4) the arbitration provision complies with California law and is not unconscionable.

Current California Legislative Reform Efforts Companies that sell subscription-based products, goods, and services to California consumers also need to keep an eye on reform efforts currently underway in the California legislature to amend the ARL. The sale of goods, products, and services under a subscription model has proliferated since the ARL was enacted in 2010, and the number of consumer complaints has correspondingly increased. Complaints have especially increased over offers that start with a brief, free trial period or a free gift and then convert to a paid, recurring subscription that is charged to a consumer's debit or credit card. This area has come under increased scrutiny by legislatures and district attorneys in California and elsewhere.

In February 2017, the California Senate introduced SB 313 to amend the ARL and rein in the perceived practice of using free trials to obscure the actual terms of ongoing subscription service offers. SB 313 provides consumers with additional protections concerning notice, affirmative consent, and cancellation mechanisms. The current draft of SB 313 requires that free gift or trial offers be presented via initial disclosures and follow-up acknowledgments that contain clear and conspicuous explanations of the price that will be charged after the trial ends. SB 313 further requires companies selling online subscriptions to allow consumers to terminate their subscriptions online. While SB 313 could undergo further revisions before the final bill is put to vote in the Senate and Assembly, it is widely expected to pass both and be signed into law by Governor Jerry Brown, with an effective date of late 2018. Business are advised to monitor its progress and make any necessary updates to their websites and disclosures once the bill is finalized and signed into law. We anticipate the plaintiff's bar is also tracking this legislation and will file a second wave of ARL class actions against companies that do not timely update their disclosures and websites to reflect the changes to the ARL's disclosure requirements.