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Automatic for the People

Beware regulations governing automatic renewal and continuous service offers.

By Matthew Savare

A little-known and less-litigated law has gotten increased exposure recently, and it should serve as a warning to all companies offering automatic renewal or continuous-service offers—better known as “continuity” programs—in consumer contracts. In October 2013, an individual plaintiff filed a class-action suit against Kiwi Crate, an online provider of kids’ arts and crafts.

The complaint claimed that Kiwi Crate violated automatic renewal and unfair competition provisions of the California Business and Professional Code when it allegedly failed to: (1) obtain affirmative consumer consent to the agreement containing the automatic renewal or continuous-service offer terms, and (2) provide an acknowledgment that included the offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer.

Ten other states—Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, New Mexico, North Carolina, Oregon, and Utah—have similar laws on their books. Companies that conduct business with individual consumers (as distinguished from other businesses) in any of these states need to be aware of these restrictions and obligations and adjust their agreements accordingly.

California’s Regulations

For anyone doing business in California, it should come as no surprise that the state regulates consumer contracts containing automatic renewal or continuous service (i.e., effective until canceled) offers. The law requires that businesses:

1. Present the automatic renewal or continuous service offer terms in a “clear and conspicuous manner” before the subscription or purchasing agreement is fulfilled. For written offers, such terms should be in visual proximity to the request for consent, and for any offers conveyed by voice, in temporal proximity. The statute defines “clear and conspicuous” as “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. In the case of an audio disclosure, ‘clear and conspicuous’ means in a volume and cadence sufficient to be readily audible and understandable.”

2. Obtain the consumer’s affirmative consent to the agreement containing the automatic renewal or continuous-service offer terms before charging the consumer’s credit card, debit card, or account.
3. Provide the consumer with an acknowledgment that includes the automatic renewal or continuous-service offer terms after the initial order, along with the company’s cancellation policy and information regarding how to cancel in a manner capable of being retained by the consumer. If the offer includes a free trial, the business must also disclose how to cancel and allow the consumer to cancel before the consumer pays for the goods or services. The law also requires that the cancellation mechanism be “cost-effective, timely, and easy-to-use,” such as a toll-free number or e-mail.
4. Provide the consumer with a clear and conspicuous notice of any material changes in the terms of the automatic renewal or continuous service offer and information regarding how to cancel, before making any such changes, in a manner that is capable of being retained by the consumer.

Best Practices

Although the laws of the other states have the same intent and impose similar requirements as California’s law, each has unique nuances. For example, the Connecticut law applies only to agreements lasting longer than 180 days that contain automatic renewal periods of more than 31 days and prohibits requiring customers to exercise their cancellation right more than 60 days prior to the end of the initial contract period. New Mexico’s statute requires that the disclosure be in at least a 10-point font. Accordingly, companies that conduct business in any of these 11 states should carefully review the laws and adjust their contracts and processes to ensure compliance.

At a minimum, businesses that offer automatic renewal or continuous service offers to individual consumers should:

- Clearly and conspicuously disclose the automatic renewal or continuous-service terms before the purchase and in close visual proximity to the purchasing agreement. Don’t bury the offer in the terms of use or terms of service; disclose the offer prominently in the agreement (whether it is a paper contract or electronic terms of use), at the point of purchase (e.g., at the checkout page), and where the consumer sees the different subscription options. For a good example of this, see Kiwi Crate’s current page, www.kiwicrate.com/join/.
- Require the consumer to sign, click through, or otherwise manifest his or her unambiguous, affirmative consent to any agreement that contains an automatic renewal or continuous service feature.
- Consider sending each consumer a reminder e-mail prior to the end of his or her subscription period, saying that the agreement is about to automatically renew and reminding them how to cancel.

Kiwi Crate does this in its FAQ, which states: “What happens at the end of my gift or auto-renewing subscription? At the end of a gift subscription, a note will be sent in the last crate as a reminder to renew the subscription. At the completion of an auto-renewing subscription term, we will send a reminder email about the subscription’s automatic renewal. If you do not cancel, then your subscription will renew for the same number of months as the term that was originally purchased.”

- Always provide consumers with a clear, easy, and free way to cancel their subscriptions, and don’t make any material changes to the automatic renewal or continuous service terms without first providing a clear, conspicuous notice of the proposed change and an easy, free way to cancel.

Plaintiffs and their counsel are always looking for the next consumer protection statute to litigate. Don’t provide them with the opportunity by failing to employ straightforward, common-sense processes.

Matthew Savare is a partner at Lowenstein Sandler, LLP, where he practices intellectual property, media, entertainment, technology, and privacy law with a focus on new media. E-mail him at msavare@lowenstein.com. Craig Dashiell, a Lowenstein associate contributed research for this article.

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