

Check Your Enrollment Path: New York Enacts Comprehensive Automatic Renewal Law

By Andrew B. Lustigman and Morgan E. Spina

Businesses are increasingly offering products and services on continuous service models, known in Amazon parlance as “Subscribe and Save.” Once a consumer agrees to the subscription, the sales typically continue unless the consumer takes an affirmative act to cancel. Given their increased popularity, such programs have garnered increased scrutiny from



Andrew B. Lustigman

legislators and regulators. While there is federal legislation regarding subscriptions obtained online and by telemarketing, those laws do not preempt state law. As such, a growing number of states have enacted automatic renewal laws, or enhanced existing ones, to address aspects of these contracts, including how the terms must be disclosed to consumers, the type of consent that must be obtained from purchasers prior to signing them up to an automatic renewal program, and the ways in which cancellation of an automatically renewing contract may be effectuated. This has resulted in a patchwork system whereby the requirements placed on businesses may vary state to state, notwithstanding that such enrollment programs typically are offered nationally or at least regionally.

With the passage of Senate Bill 1475, New York has just joined the list of states with some of the most onerous automatic renewal laws. The law, which goes into effect on February 9, 2021, significantly expands the limited applicability of New York’s existing automatic renewal law, New York Gen. Oblig. Law § 5-903¹, which only applies to contracts “for service, maintenance or repair to or any real or personal property” that automatically renew for longer than one month.

The new law applies to virtually all automatic renewal programs, not just service contracts. The law applies to any “paid subscription or purchasing agreement” that is “automatically renewed at the end of a definite term for a subsequent term.” The new law² applies only to consumer contracts, meaning those contracts related to the purchase or lease of “any goods, services, money, or credit for personal, family, or household purposes.” It is important to note, however, that with the passage of this



Morgan E. Spina

new law, there does not appear to be any plan to repeal Section 5-903. As such, businesses must ensure they put policies and processes in place to comply with Senate Bill 1475, but they must also continue to comply with Section 5-903, if applicable.

I. Key Provisions of the New York Automatic Renewal Law

A. Disclosure of Automatic Renewal Offer Terms More Conspicuously Than Surrounding Text

The New York law states that the automatic renewal offer terms must be clearly and conspicuously presented in visual or temporal proximity to the request for consent to the offer, depending on whether such consent is requested in writing or verbally. “Clear and conspicuous” has a special definition, defined 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 the event that disclosure is made verbally, it must be “in a volume and cadence sufficient to be read-

Andrew B. Lustigman is partner at Olshan Frome Wolosky, LLP, where he is chair of Olshan’s Advertising, Marketing & Promotions department and co-chair of the firm’s Brand Management and Protection group. He is internationally recognized for his representation of marketers, advertisers, and agencies in connection with the legal aspects of their advertising and promotional marketing business, as well as the defense of investigations and litigation brought by regulatory agencies and competitors regarding national advertising campaigns. He can be reached at alustigman@olshanlaw.com.

Morgan E. Spina is an associate at Olshan Frome Wolosky, where she participates in all facets of the firm’s advertising and brand management practices including advertising, sweepstakes promotions, privacy, and intellectual property matters. She can be reached at mspina@olshanlaw.com.

ily audible and understandable.” The automatic renewal terms must include: a) a disclosure that the subscription or purchasing agreement will continue until the consumer cancels; b) a description of the cancellation policy that applies to the offer; c) 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; d) the length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer; and e) the minimum purchase obligation, if any.

B. Must Obtain Affirmative Consent

The New York law also states that prior to charging a consumer’s credit or debit card,³ the business must first obtain the consumer’s affirmative consent to the automatic renewal offer terms. Further, in the event that a business sends goods to a consumer pursuant to an automatic renewal agreement without first obtaining the consumer’s affirmative consent, then those goods shall be deemed an “unconditional gift” to the consumer, meaning that the consumer can do with the goods what he or she wishes, and that the consumer shall have no further responsibility to the business with respect to those goods. In designing the consent, thought must be given to how the business will be able to demonstrate that the consumer knowingly provided affirmative consent.

C. Sending an Enrollment Acknowledgement

The law requires businesses to send an acknowledgement to consumers after the consumer has agreed to the automatic renewal offer terms. The acknowledgement must include the automatic renewal terms, the cancellation policy, and information about how to cancel. Moreover, if the offer contains a free trial, the acknowledgement should also include information about how the consumer can cancel the automatic renewal contract prior to being charged for the applicable goods or services. Companies may choose to send the acknowledgement in email or hardcopy form.

D. Cancellation Options, Including Online

The requisite disclosures and processes related to cancellation of automatic renewal contracts have received significant attention from regulators and companies alike. The law requires businesses making an automatic renewal offer to provide a toll-free number, e-mail address, postal address (only if the seller directly bills the consumer), “or another cost-effective, timely, and easy-to-use” process for cancellation. Further, in the event that a consumer signs up to an automatically renewing contract online, then he or she must be allowed to cancel the contract exclusively online.

E. Disclosure of Material Changes

Businesses are permitted to make changes to the enrollment terms (typically price) assuming that they have made the affirmative disclosure in the offer terms of such a possibility. In the event of a material change, a business is required to “clearly and conspicuously” disclose any material changes to the automatic renewal contract, and must inform the consumer of the ways in which he or she may cancel.

F. Safe Harbor

It is critical for businesses to implement processes and procedures to comply with the new law. Notably, the law includes a “safe harbor” for businesses that can demonstrate “by a preponderance of the evidence that a violation of the law was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such error.”

G. Enforcement

The law specifically provides that the Attorney General is empowered to enforce the law, and makes no mention of a private right of action. The law specifies certain remedies and enforcement mechanisms. If there is a violation of this law, the New York Attorney General may seek an injunction and impose restitution. Further, courts may impose civil penalties of \$100 per violation, or up to \$500 per “knowing” violation. Notably, the statute does not specifically provide for a private right of action, but it remains to be seen if plaintiff’s attorneys will seek to bring claims under the law.

Importantly, Senate Bill 1475 is essentially a copy of California’s automatic renewal law,⁴ one of the most onerous automatic renewal laws on the books. The California law has been the subject of significant enforcement by regulators and plaintiff’s attorneys. Much of the California enforcement efforts have been led by a special task force comprised primarily of County District Attorneys, known as CART—California Auto-renewal Task Force. CART has brought actions against a broad array of companies utilizing subscription-based models and has been successful in obtaining settlements with such companies comprised of significant monetary components and compliance obligations.

In addition to enforcement actions brought by CART, California plaintiffs have brought class action lawsuits against companies claiming violation of the automatic renewal law, even in New York. Recently, a plaintiff brought a class action in the Southern District of New York against *The New York Times* in the name of California resident Maribel Moses. The plaintiff alleged that *The New York Times* fell short of the California automatic renewal law’s requirements to obtain affirmative consent to the automatic renewal terms prior to payment and to provide an easy and efficient online mechanism for consumers to cancel their subscription. Rather, according to plaintiff’s

amended complaint, the paper made it “exceedingly difficult and unnecessarily confusing for consumers to cancel their NYT Subscriptions.” On November 13, 2020, the parties filed a joint letter with the court stating that they have reached an agreement on all material terms of a class action settlement, and they are working to execute a class action settlement agreement.

Conclusion

Compliance with New York’s new automatic renewal law is critical for all businesses that utilize subscription-based or continuity business models. Businesses must take a holistic approach in examining their enrollment path and follow-up communications. In addition, cancellations must be easy to accomplish and be offered in the same channel in which the enrollment occurred. Moreover, to position themselves to take advantage of

the safe harbor, businesses should ensure that they have documented the appropriate processes and procedures. These processes and procedures can be time consuming to implement and may have an impact on conversions. As such, businesses should take steps now to address the requirements of this new law.

Endnotes

1. The existing law requires applicable businesses to send a written notice between 15 to 30 days before the contract is set to renew highlighting such automatic renewal provision.
2. The law will be codified at a new Article 29-BB of the New York General Business Law, Section 527.
3. Businesses offering subscription models for customers paying by debit card must also comply with the requirements of Federal Reserve Regulation E.
4. California Business and Professions Code § 17602.

Corporate Counsel Section Committee Chairs

CLE and Meetings

Howard S. Shafer
Shafer Partners LLP
125 Maiden Lane
Room 16AB
New York, NY 10038-4949
hshafer@shaferglazer.com

Sanoj Stephen
Sotheby’s International Realty
650 Madison Ave., 2nd floor
New York, NY 10022
sanoj.stephen@sothebyshomes.com

Diversity

Ingrid Tatiana Medina Rodriguez
NYS Unified Court System
821 Salina Street
Schenectady, NY 12308
it22mr@gmail.com

Diversity Internship

Yamicha Stephenson
Deloitte
30 Rockefeller Plaza
New York, NY 10112
ystephenson@deloitte.com

INSIDE/Publications

Elizabeth J. Champnoi
Champnoi Dispute Resolution
and Management Services, Inc.
elizabeth@champnoiadr.com

Membership

Joy D. Echer
Foot Locker, Inc.
Law Department, 4th floor
330 West 34th Street
New York, NY 10001
jecher@footlocker.com

Pro Bono

Barbara M. Levi
170 West 76th Street
New York, NY 10023
blevilankalis@gmail.com

Technology and New Media

Mark Belkin
29 Hillcrest Ave, 1st floor
Albany, NY 12203
markbelkin@gmail.com