Automatic Renewal Provisions in Consumer Contracts
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Consumer contracts today frequently include a provision stating that the contract shall automatically renew unless the consumer takes some affirmative, prescribed step to cancel. Unsurprisingly, these provisions – commonly referred to as automatic renewal provisions, and sometimes referred to as evergreen clauses – have drawn the attention of regulators and politicians alike. The purpose of this article is to explore the current regulatory landscape, and to encourage state attorneys general to protect consumers against unfair and deceptive auto-renewal practices.

I. Federal Law

Even the most experienced attorney may be forgiven for believing that federal law does not address the inclusion of automatic renewal provisions in consumer contracts. Indeed, no federal statute or regulation specifically address the practice. Nevertheless, state attorneys general should be aware that the inclusion of automatic renewal provisions in consumer contracts may run afoul of at least three sources of federal law.

First, section 5(a) of the Federal Trade Commission Act (“FTC Act”) broadly prohibits “unfair or deceptive acts or practices in or affecting commerce.” An act or practice is “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” An act or practice is “deceptive” if it “is likely to mislead consumers acting reasonably under the circumstances” and “is material.” Generally speaking, an argument may be made that the inclusion of an automatic renewal provision in a consumer contract is unfair or deceptive if the provision is not properly disclosed or if the provision is used to trap the unsuspecting consumer into paying for goods or services that the consumer does not want and never knowingly agreed to purchase. In addition, the specific terms of an automatic renewal provision may be unfair if the provision unreasonably limits the consumer’s right to cancel the contract. Finally, the operation of the automatic renewal provision may be unfair if the provision is relied upon to renew the contract of a consumer who is in default, or who has signaled, directly or indirectly, that the consumer is no longer interested in receiving the goods or services under the contract.

Second, the Federal Trade Commission’s Telemarketing Sales Rule (“TSR”) requires that, in a telemarketing transaction, “all material terms and conditions” of a “negative option

4 16 C.F.R. 310.
feature”⁵ must be disclosed “truthfully” and “in a clear and conspicuous manner.” Material terms and conditions include, but are not limited to, “the fact that the customer’s account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted to payment, and the specific steps the customer must take to avoid the charge(s).” Although the rule does not explicitly refer to automatic renewal provisions, the FTC has explained that an automatic renewal provision is a type of negative option feature, and thus the TSR requires that the materials terms of an automatic renewal provision in a telemarketing transaction be truthfully and clearly and conspicuously disclosed to the consumer.⁶

Third, in 2010, Congress passed the Restore Online Shoppers’ Confidence Act (“ROSCA”),⁷ a federal statute that makes it unlawful for a person to charge a consumer for “goods or services sold in a transaction effected on the Internet through a negative option feature” unless the person:

(1) provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer’s billing information;

(2) obtains the 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; and

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

Although historically enforced by the FTC, state attorneys general may enforce ROSCA by bringing actions to obtain “appropriate injunctive relief.”⁸

II. State Law

State law also restricts the use of automatic renewal provisions in consumer contracts. First, the proscription of unfair and deceptive acts or practices contained in most states’ general UDAAP laws is sufficiently broad to prohibit the inclusion of an automatic renewal provision in a consumer contract where the provision is buried in fine print, phrased in a manner unintelligible to the average reader, or employed to extract payments from the consumer for goods or services that the business reasonably should have known the consumer did not wish to receive.

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⁵ 16 C.F.R § 310.2(u) (“Negative option feature means, in 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.”).
Second, and perhaps less well known, many states in recent years have enacted some form of legislation specifically addressing the use of automatic renewal provisions in consumer contracts. In addition, at least eight states, including Minnesota, Kansas, and Wyoming, are currently debating whether to follow suit. Some states have targeted particular industries or practices; other states have passed legislation addressing the issue more broadly. As set forth below, the laws of Illinois and California contain two of the most comprehensive statutes in the country, and may serve as models for states considering whether to protect their residents against unfair or deceptive auto-renewal practices.

Illinois law provides that a contract’s “automatic renewal clause” and “cancellation procedure” must be “clearly and conspicuously in the contract.” Where the original contract term is for “12 months or more, and where such contract automatically renews for a specified term of more than one month unless the consumer cancels the contract,” the business is required to “notify the consumer in writing of the automatic renewal . . . no less than 30 days and no more than 60 days before the cancellation deadline pursuant to the automatic renewal clause.” The notice must “clearly and conspicuously” disclose that (1) the contract will automatically renew unless the consumer cancels the contract, and (2) inform the consumer “where the consumer can obtain details of the automatic renewal provision and cancellation procedure (for example, by contacting the business at a specified telephone number or address or by referring to the contract).”

California law requires a business to disclose the following terms in a “clear and conspicuous manner” when making an offer that includes an automatic renewal provision:

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.

The business may not charge the consumer “without first obtaining the consumer’s affirmative consent to the agreement containing” these terms. The business also must provide the consumer with an “acknowledgment” that includes the above terms, the terms of the business’s cancellation policy, and information about how the consumer may cancel the contract. The acknowledgment must include “a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and

9. 815 ILCS 601/1.
easy-to-use mechanism for cancellation.” If the business fails to obtain the consumer’s affirmative consent, the delivery of any 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.”

III. Conclusion

As discussed above, both federal and state law apply to the inclusion of automatic renewal provisions in consumer contracts to varying degrees. Although the scope and substance of these laws vary, they illustrate that state attorneys general have the power to protect consumers against unfair and deceptive auto-renewals practices.

Each month, the Center for Consumer Protection will provide an article written by an assistant attorney general. If you would like to provide an article, please email Blake Bee at bbee@naag.org.