

Auto-Renewal Suits Rain Down on Consumer Tech Companies

Marisa Kendall

SAN FRANCISCO — Defense lawyers are warning clients to carefully vet their subscription renewal policies amid a flurry of consumer litigation under an untested state law.

Since late 2013, two Southern California plaintiffs lawyers have systematically targeted Google, Apple, Spotify, Lifelock, Blue Apron and other companies with subscription-based services under a 2010 California statute that prohibits automatic renewal charges without affirmative consent.

The suits seek restitution for unauthorized charges, some as low as \$1.99 per customer. Though most cases are still in early stages or have been driven into arbitration, defense lawyers warn that the new brand of litigation could become more than a nuisance if it succeeds on a classwide basis.

“You take a big company that’s got millions of subscriptions and you find out that they’ve been violating one of these laws—the potential liability is enormous,” said David Fuad, a lawyer in Orrick, Herrington & Sutcliffe’s Los Angeles office who is following the litigation.

The lawyers behind the wave, Julian Hammond of HammondLaw P.C. and Abbas Kazerounian of Kazerouni Law Group, said the litigation is already having an affect on corporate behavior.

“These companies are starting to actually make the terms clear and conspicuous,” said Hammond, who has filed



Joseph Addiego, Davis Wright Tremaine partner in charge San Francisco
Jason Doiy

nearly a dozen automatic-renewal suits against companies including Apple Inc., Google, Spotify, Hulu, Dropbox and SeaWorld Entertainment Inc.

The biggest challenge faced by lawyers on both sides of the bar is the new-

ness of the law. There have been few decisions out of any court, said Davis Wright Tremaine partner Joseph Addiego III, who represents Spotify, Hulu and Microsoft Corp. in automatic-renewal cases.

“You have no judicial guidance on the interpretation of the language of the statute,” said Addiego, who spoke on the topic last year during a firm-sponsored class action panel in New York. “It’s exciting in a way because you have an opportunity ... to be part of that process.”

In many cases, defendants may be shielded by arbitration agreements and class action waivers. A 2013 Northern District of California case against Spotify was moved into arbitration last year, as was a case brought against Hulu in Los Angeles Superior Court.

Cotchett, Pitre & McCarthy principal Justin Berger said he’s considered filing suits under the automatic-renewal law, but in “most of them, we take a pass because of the arbitration issues.

“The California law, which lawyers say is one of the strictest in the country, requires companies to present their subscription terms in a clear and conspicuous manner, and to obtain affirmative consent before charging a customer’s credit card on a recurring basis.

It mandates that customers be reimbursed for any services or products they paid for in violation of the law, but doesn’t provide for additional damages. Most often the claims are brought in conjunction with California’s Unfair Competition Law, which also only allows for restitution. Kazerounian said he suspects plaintiffs lawyers are waiting to see what the early suits recover before they jump on board.

Kazerounian has reached several preliminary settlements in automatic-renewal cases, including a deal struck in July with Blizzard Entertainment Inc., maker of the “World of Warcraft” video game. While the amounts remain confidential and he’s waiting for his fees to be approved, Kazerounian said he’s satisfied with the results.

“I haven’t actually seen a penny in return yet,” he said, “but in principal, yes I’m happy.”

Hammond, who founded Hammond-Law in 2010, has a background in wage-and-hour litigation. He’s also branched

out into privacy and consumer law, and is currently litigating a “no-poach” suit against California animation studios, a suit targeting the security protections in Intuit Inc.’s TurboTax software, and a privacy suit over a recent security breach at AshleyMadison.com. The Sydney native joked it’s his “Australian spirit” that prompted him to jump into the untested field of automatic-renewal litigation.

Lawyers on the other side of the bar say that instead of upholding the purpose of the consumer-protection law, Hammond is suing over minor technicalities. Lawyers with Wilson Sonsini Goodrich & Rosati, representing Google in a suit over recurring Google Drive charges, say customers were warned multiple times that their credit card would be charged every month if they upgraded their cloud storage plan.

“It simply would not be plausible for plaintiff to claim that he was confused or misled about what he was purchasing or how he would be billed for it,” partners David Kramer and Brian Willen wrote in their demurrer, set to be argued later this month in Santa Clara County Superior Court.

The Google lawyers also say that the automatic-renewal law doesn’t create a private right of action, and therefore it must be tied to a claim brought under another law. Hammond, who has teamed up with Berman DeValerio partner Todd Seaver on the case, attached his automatic-renewal claims to an unfair-competition claim, which Google also is trying to get thrown out.

Mark Ankcorn, a San Diego-based consumer law attorney, said defendants, such as Google, could have a decent case.

“There seems to be a pretty good defense,” he said. “As I recall, as long as they don’t check the box for you, I think they’re OK. And as long as they give you ample warning, then they’re OK with it.”

Michael Sobol, chair of Lief Cabraser Heimann & Bernstein’s consumer-protection practice group, sued McAfee Inc.

in the Northern District of California last year. The scope of the suit extended beyond the company’s basic compliance with the automatic-renewal law—plaintiffs lawyers said McAfee misled customers by claiming it charged the same price for its antivirus software if shoppers signed up for automatic renewal or bought a new copy in the store. In reality, the lawyers wrote, McAfee consistently charged automatic-renewal customers more. McAfee is represented by Williams & Connolly and Lubin Olson & Niewiadomski. The parties reached a settlement this summer.

In July, U.S. District Judge Margaret Morrow of the Central District of California dismissed an automatic-renewal claim against Tinder. Plaintiffs lawyers had argued the dating app misled customers by imposing a recurring charge without warning, and by making users above the age of 30 pay more. Morrow ruled the claim couldn’t proceed because the named plaintiff isn’t a citizen of California.

Still, Orrick’s Fuad said companies that do business nationwide ignore California’s law at their own risk.

“I see no reason why these cases would go away,” he said. “Plaintiffs lawyers are going to latch onto these rules and try to find a company that is not in compliance, and try to make an example out of them.”