S T A T E O F N E W Y O R K

40--A

2015-2016 Regular Sessions

I N S E N A T E

(PREFILED)

January 7, 2015

Introduced by Sen. HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to prohibiting certain practices by businesses making an automatic renewal or continuous service offer to consumers in the state

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative intent. It is the intent of the legislature to end the practice of ongoing charging of consumer credit or debit cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service.

S 2. The general business law is amended by adding a new article 29-BB to read as follows:

ARTICLE 29-BB

PROHIBITED SERVICE OFFER PRACTICES

SECTION 527. DEFINITIONS.

527-A. UNLAWFUL PRACTICES.

S 527. DEFINITIONS. FOR THE PURPOSES OF THIS ARTICLE, THE FOLLOWING DEFINITIONS SHALL APPLY:

1. "AUTOMATIC RENEWAL" MEANS A PLAN OR ARRANGEMENT IN WHICH A PAID SUBSCRIPTION OR PURCHASING AGREEMENT IS AUTOMATICALLY RENEWED AT THE END OF A DEFINITE TERM FOR A SUBSEQUENT TERM.

2. "AUTOMATIC RENEWAL OFFER TERMS" MEANS THE FOLLOWING CLEAR AND CONSPICUOUS DISCLOSURES:

A. THAT THE SUBSCRIPTION OR PURCHASING AGREEMENT WILL CONTINUE UNTIL THE CONSUMER CANCELS;

B. THE DESCRIPTION OF THE CANCELLATION POLICY THAT APPLIES TO THE OFFER;

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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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.

3. "CONSUMER" MEANS ANY INDIVIDUAL WHO SEEKS OR ACQUIRES, BY PURCHASE OR LEASE, ANY GOODS, SERVICES, MONEY, OR CREDIT FOR PERSONAL, FAMILY, OR HOUSEHOLD PURPOSES.

4. "CONTINUOUS SERVICE" MEANS A PLAN OR ARRANGEMENT IN WHICH A SUBSCRIPTION OR PURCHASING AGREEMENT CONTINUES UNTIL THE CONSUMER CANCELS THE SERVICE.

S 527-A. UNLAWFUL PRACTICES. 1. IT SHALL BE UNLAWFUL FOR ANY BUSINESS MAKING AN AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER TO A CONSUMER IN THIS STATE TO DO ANY OF THE FOLLOWING:

A. FAIL TO PRESENT THE AUTOMATIC RENEWAL OFFER TERMS OR CONTINUOUS SERVICE OFFER TERMS IN A CLEAR AND CONSPICUOUS MANNER BEFORE THE SUBSCRIPTION OR PURCHASING AGREEMENT IS FULFILLED AND IN VISUAL PROXIMITY, OR IN THE CASE OF AN OFFER CONVEYED BY VOICE, IN TEMPORAL PROXIMITY, TO THE REQUEST FOR CONSENT TO THE OFFER;

B. CHARGE THE CONSUMER'S CREDIT OR DEBIT CARD OR THE CONSUMER'S ACCOUNT WITH A THIRD PARTY FOR AN AUTOMATIC RENEWAL OR CONTINUOUS SERVICE WITHOUT FIRST OBTAINING THE CONSUMER'S AFFIRMATIVE CONSENT TO THE AGREEMENT CONTAINING THE AUTOMATIC RENEWAL OFFER TERMS OR CONTINUOUS SERVICE OFFER TERMS; OR

C. FAIL TO PROVIDE AN ACKNOWLEDGMENT THAT INCLUDES THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER TERMS, CANCELLATION POLICY, AND INFORMATION REGARDING HOW TO CANCEL IN A MANNER THAT IS CAPABLE OF BEING RETAINED BY THE CONSUMER. IF THE OFFER INCLUDES A FREE TRIAL, THE BUSINESS SHALL ALSO DISCLOSE IN THE ACKNOWLEDGMENT HOW TO CANCEL AND ALLOW THE CONSUMER TO CANCEL BEFORE THE CONSUMER PAYS FOR THE GOODS OR SERVICES.

2. A BUSINESS MAKING AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFERS SHALL PROVIDE 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 EASY-TO-USE MECHANISM FOR CANCELLATION THAT SHALL BE DESCRIBED IN THE ACKNOWLEDGMENT SPECIFIED IN PARAGRAPH C OF SUBDIVISION ONE OF THIS SECTION.

3. IN THE CASE OF A MATERIAL CHANGE IN THE TERMS OF THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE OFFER THAT HAS BEEN ACCEPTED BY A CONSUMER IN THIS STATE, THE BUSINESS SHALL PROVIDE THE CONSUMER WITH A CLEAR AND CONSPICUOUS NOTICE OF THE MATERIAL CHANGE AND PROVIDE INFORMATION REGARDING HOW TO CANCEL IN A MANNER THAT IS CAPABLE OF BEING RETAINED BY THE CONSUMER.

4. THE REQUIREMENTS OF THIS ARTICLE SHALL APPLY ONLY PRIOR TO THE COMPLETION OF THE INITIAL ORDER FOR THE AUTOMATIC RENEWAL OR CONTINUOUS SERVICE, EXCEPT AS FOLLOWS:

A. THE REQUIREMENT IN PARAGRAPH C OF SUBDIVISION ONE OF THIS SECTION MAY BE FULFILLED AFTER COMPLETION OF THE INITIAL ORDER.

B. THE REQUIREMENT IN SUBDIVISION THREE OF THIS SECTION SHALL BE FULFILLED PRIOR TO IMPLEMENTATION OF THE MATERIAL CHANGE.

5. IN ANY CASE IN WHICH A BUSINESS SENDS ANY GOODS, WARES, MERCHANDISE, OR PRODUCTS TO A CONSUMER, UNDER A CONTINUOUS SERVICE AGREEMENT OR AUTOMATIC RENEWAL OF A PURCHASE, WITHOUT FIRST OBTAINING THE CONSUMER'S

AFFIRMATIVE CONSENT, THE 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, INCLUDING, BUT NOT LIMITED TO, BEARING THE COST OF, OR RESPONSIBILITY FOR, SHIPPING ANY GOODS, WARES, MERCHANDISE, OR PRODUCTS TO THE BUSINESS.

6. WHENEVER THERE SHALL BE A VIOLATION OF THIS SECTION, AN APPLICATION MAY BE MADE BY THE ATTORNEY GENERAL IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO A COURT OR JUSTICE HAVING JURISDICTION TO ISSUE AN INJUNCTION, AND UPON NOTICE TO THE DEFENDANT OF NOT LESS THAN FIVE DAYS, TO ENJOIN AND RESTRAIN THE CONTINUANCE OF SUCH VIOLATIONS; AND IF IT SHALL APPEAR TO THE SATISFACTION OF THE COURT OR JUSTICE THAT THE DEFENDANT HAS IN FACT, VIOLATED THIS SECTION, AN INJUNCTION MAY BE ISSUED BY SUCH COURT OR JUSTICE, ENJOINING AND RESTRAINING ANY FURTHER VIOLATION, WITHOUT REQUIRING PROOF THAT ANY PERSON HAS, IN FACT, BEEN INJURED OR DAMAGED THEREBY. IN ANY SUCH PROCEEDING THE COURT MAY MAKE ALLOWANCES TO THE ATTORNEY GENERAL AS PROVIDED IN SECTION EIGHTY-THREE HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES, AND DIRECT RESTITUTION. IN CONNECTION WITH ANY SUCH PROPOSED APPLICATION, THE ATTORNEY GENERAL IS AUTHORIZED TO TAKE PROOF AND MAKE A DETERMINATION OF THE RELEVANT FACTS AND TO ISSUE SUBPOENAS IN ACCORDANCE WITH THE CIVIL PRACTICE LAW AND RULES. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION OF THIS SECTION HAS OCCURRED, THE COURT MAY IMPOSE A CIVIL PENALTY OF NOT MORE THAN ONE HUNDRED DOLLARS FOR A SINGLE VIOLATION AND NOT MORE THAN FIVE HUNDRED DOLLARS FOR MULTIPLE VIOLATIONS RESULTING FROM A SINGLE ACT OR INCIDENT. A KNOWING VIOLATION OF THIS SECTION SHALL BE PUNISHABLE BY A CIVIL PENALTY OF NOT MORE THAN FIVE HUNDRED DOLLARS FOR A SINGLE VIOLATION AND NOT MORE THAN ONE THOUSAND DOLLARS FOR MULTIPLE VIOLATIONS RESULTING FROM A SINGLE ACT OR INCIDENT. NO BUSINESS SHALL BE DEEMED TO HAVE VIOLATED THE PROVISIONS OF THIS SECTION IF SUCH BUSINESS SHOWS, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE VIOLATION WAS NOT INTENTIONAL AND RESULTED FROM A BONA FIDE ERROR MADE NOTWITHSTANDING THE MAINTENANCE OF PROCEDURES REASONABLY ADOPTED TO AVOID SUCH ERROR.

7. THE FOLLOWING ARE EXEMPT FROM THE REQUIREMENTS OF THIS ARTICLE:

A. ANY SERVICE PROVIDED BY A BUSINESS OR ITS AFFILIATE WHERE EITHER THE BUSINESS OR ITS AFFILIATE IS DOING BUSINESS PURSUANT TO A FRANCHISE ISSUED BY A POLITICAL SUBDIVISION OF THE STATE;

B. ANY ENTITY REGULATED BY THE DEPARTMENT OF FINANCIAL SERVICES;

C. SECURITY SYSTEM ALARM OPERATORS;

D. BANKS, BANK HOLDING COMPANIES, OR THE SUBSIDIARY OR AFFILIATE OF EITHER, OR CREDIT UNIONS OR OTHER FINANCIAL INSTITUTIONS, LICENSED UNDER STATE OR FEDERAL LAW; AND

E. SERVICE CONTRACT SELLERS AND SERVICE CONTRACT ADMINISTRATORS.

S 3. This act shall take effect on the ninetieth day after it shall have become a law.