

Date of Hearing: April 8, 2021

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1221 (Flora) – As Amended April 5, 2021

SUBJECT: Consumer warranties: service contracts: cancellation: disclosures

SUMMARY: This bill would clarify that service contracts can cover a single product or a class of products, and would provide explicit authorization for a service contractor to enter into automatically renewing month-to-month service contracts with consumers, subject to certain requirements. Specifically, **this bill would:**

- 1) Require that a service contract that covers a class of products include a description of the class of products covered by the contract that is sufficiently clear so the buyer is able to discern the products covered.
- 2) Permit service contracts to be offered on a month-to-month or other periodic basis and to continue until cancelled by the buyer or service provider.
- 3) Specify that an automatically renewing service contract pursuant to 2), above, must disclose to the buyer in a clear and conspicuous manner, as defined, that the service contract shall continue until cancelled by the buyer.
- 4) Provide that the buyer's purchase of the service contract after receiving the disclosure pursuant to 3), above, shall be deemed affirmative consent to that provision of the contract.
- 5) Require the service contract to provide, at a minimum, a toll-free number, email address, postal address, and, if one exists, internet website the buyer can use to cancel the service contract.
- 6) Specify that cancellation shall not require the use of more than one of the methods provided in 5), above, to be completed, and shall be effective immediately upon completion of the current period.
- 7) Require that, if a service contract pursuant to 2), above, was entered into online, the buyer has the option to cancel the service contract exclusively online, without engaging in any unnecessary steps that obstruct or delay the buyer's ability to cancel the continuation of the service contract.
- 8) Require that a service contract pursuant to 2), above, provide for a refund to the buyer of any unearned amounts in accordance with existing law.
- 9) Define "clear and conspicuous" to mean a larger type than the surrounding text, or in a 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; and, for an audio disclosure, to mean in a volume and cadence sufficient to be readily audible and understandable.

EXISTING LAW:

- 1) Pursuant to the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, requires a person offering a service contract, as defined, to clearly and conspicuously list all terms and conditions of the contract in simple and readily understood language (15 U.S.C. Sec. 2306(b)), and prohibits sellers of consumer products who make service contracts on their products from disclaiming or limiting implied warranties, i.e. assurances that a product is fit for its intended purpose. (15 U.S.C. Sec. 2308(a).)
- 2) Requires service contractors, as defined, to register with the Bureau of Household Goods and Services and maintain valid registration, and provides that except as otherwise provided, registered service contractors are exempt from all provisions of the Insurance Code. (Bus. & Prof. Code Sec. 9855.1.)
- 3) Prohibits the issuing, sale, or offer for sale of a service contract, as defined, unless the obligor under the service contract maintains a reimbursement insurance policy meeting certain specifications, and certain documents are filed with the Director of Consumer Affairs, including the actual service contract form to be used for the agreement. (Bus. & Prof. Code Secs. 9855.2 and 9855.3.)
- 4) Authorizes the Director of Consumer Affairs to issue citations, and accompanying fines, to service contractors for violations of requirements under the article, or for making or authorizing untrue or misleading statements or false promises; and to deny, suspend, revoke, or place on probation the registration of a service contractor for fraud or dishonest dealing, conviction of a crime with a substantial relationship to the qualifications, functions, and duties of a registrant, or violating, or conspiring to violate, any provisions of the article or regulations adopted under the article. (Bus. & Prof. Code Secs. 9855.7 and 9855.8.)
- 5) Requires a seller of a service contract to fully and conspicuously disclose in simple and readily understood language the terms, conditions, and exclusions of that contract. (Civ. Code Sec. 1794.4(a).)
- 6) Specifies that every service contract, as defined, obligates the service contractor to provide the buyer of the product all the services and parts necessary to maintain proper operation of the entire product for the duration of the service contract and without additional charge, unless the contract specifies otherwise. (Civ. Code Sec. 1794.4(b).)
- 7) Requires all service contracts to contain specified information, including, of relevance to this bill, “a clear description and identification of the covered product,” and “the point in time or event when the term of the service contract commences, and its duration measured by elapsed time or an objective measure of use,” along with any exclusions from the scope of the service contract, a step-by-step explanation of the procedure the buyer should follow to obtain performance of an obligation under the service contract, and a description of any right to cancel the contract under exigent circumstances, or, if there is no such right, a statement of that fact. (Civ. Code Sec. 1794.4(c).)
- 8) Guarantees a buyer of a service contract certain cancellation and refund rights, as well as the opportunity to inspect the contract itself prior to purchase and to obtain a copy of the contract within a specified amount of time. (Civ. Code Secs. 1794.41 and 1794.45.)

- 9) Expresses 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. (Bus. & Prof. Code Sec. 17600.)
- 10) Prohibits a business making an automatic renewal offer or continuous service offer to a consumer from failing to present the 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. (Bus. & Prof. Code Sec. 17602(a)(1).)
- 11) Prohibits a business from charging 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 offer terms, including the terms of an offer that is made at a promotional or discounted price for a limited period of time. (Bus. & Prof. Code Sec. 17602(a)(2).)
- 12) Prohibits a business from failing to provide an acknowledgement that includes the automatic renewal offer 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. (Bus. & Prof. Code Sec. 17602(a)(3).)
- 13) Requires a business that makes an automatic renewal offer or continuous service offer to provide a toll-free telephone number, email address, postal address if the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that is described in the acknowledgement (Bus. & Prof. Code Sec. 17602(b)); and requires that a consumer who accepts an automatic renewal offer or continuous service offer online be allowed to terminate the service exclusively online. (Bus. & Prof. Code Sec. 17602(c).)
- 14) Exempts from the provisions described in 10) through 13), above, certain services, including service contract sellers and administrators regulated by the Bureau of Electronic and Appliance Repair. (Bus. & Prof. Code Sec. 17605.)

FISCAL EFFECT: None. This bill has been keyed non-fiscal by the Legislative Counsel.

COMMENTS:

1) **Purpose of this bill:** This bill seeks to protect service contractors and consumers by updating and clarifying existing laws to permit service contracts that cover a class of products rather than a single product, permit automatically renewing service contracts, and provide certain explicit protections to consumers in the event a service contract will renew automatically. This bill is sponsored by the Service Contract Industry Council.

2) **Author's statement:** According to the author:

Over time, programs offered by the service contract industry have evolved to bring programs to consumers that ensure that a consumer's investment in products purchased are covered, and that a consumer is not forced to remember to purchase a service contract every single time the consumer purchases a new product. These programs are structured in such a way that a consumer could purchase a service contract today that would cover,

for example, all flat screen TVs in the consumer's home, even those TVs that may be purchased by the consumer subsequent to the purchase of the service contract.

These programs are offered in every state in the country with the exception of California due to outdated language contained in California's laws governing service contracts that requires the specific identification of each individual product covered by a service contract. Because of this language, a service contract is not able to cover a class of products but must issue one contract per covered product. Such a scenario is not helpful to consumers and is inconsistent with the treatment of the service contract industry in the rest of the country.

In addition, many consumers purchase service contracts in connection with services provided on a month-to-month or continuous until cancelled basis. [...] While these programs have been offered in California for years under existing state law, the industry would like to see more clarity in the service contract laws providing clear authorization of these service contract programs.

AB 1221 would allow service contracts or consumer warranties to cover a class of products as well as explicitly allowing these contracts to be offered month-to-month and/or "continuous until cancelled" subject to the specific disclosure requirement.

- 3) **Service contracts, generally:** Service contracts, sometimes referred to as extended warranties, extended service plans, or maintenance agreements, are generally agreements that give purchasers of consumer electronics, appliances, motor vehicles, and homes some assurance of protection for their purchase in the event something goes wrong. Though similar to warranties, service contracts differ in that while warranties are product protections that are included in the price of the item, service contracts are an additional purchase on top of the item, and accordingly incur an extra cost. Per the Service Contract Industry Council, the sponsors of this bill, benefits of service contracts can include discounted product repair, product replacement, access to pre-qualified technicians, in-home repair service, 24-hour technical assistance, routine maintenance, major component coverage, comprehensive coverage, or accidental damage protection, depending on the terms of the contract.¹ However, the terms of service contracts can vary dramatically, and while some can provide extremely valuable service guarantees that can offer significant savings relative to the cost of out-of-pocket repair work, others may include terms that make them far less practical and cost-effective.

In order to reduce the occurrence of predatory service contracts, both the federal government and California regulate the service contracting industry. Federal law, pursuant to the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975 (P.L. 93-637, 88 Stat. 2183), defines a "service contract" to mean a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product (15 U.S.C. Sec. 2301(8)) and specifies in associated regulations that "[a]n agreement which would meet the definition of written warranty [...] but for its failure to satisfy the basis of the bargain test is a service contract." (16 C.F.R. Sec. 700.11(c).) The "basis of the bargain test" is satisfied only if the agreement was conveyed at

¹ Service Contract Industry Council, "Consumer Goods Service Contracts," <https://go-scic.com/service-contracts/consumer-goods/>, [as of Apr. 1, 2021].

the time of sale of the consumer product and the consumer did not give any consideration beyond the purchase price of the product in order to benefit from the agreement. (*See* 16 C.F.R. Sec. 700.11(b).) While this Act provides prescriptive regulations regarding the offering and fulfillment of written warranties, its provisions relating to service contracts are fairly broad, requiring only that the person offering the service contract clearly and conspicuously list all terms and conditions of the contract in simple and readily understood language (15 U.S.C. Sec. 2306(b)), and prohibiting sellers of consumer products who make service contracts from disclaiming or limiting implied warranties, i.e. assurances that a product is fit for its intended purpose. (15 U.S.C. Sec. 2308(a).)

In contrast, California regulates service contracts and service contractors far more extensively, in both the Business and Professions Code and in the Civil Code. Section 9855, et seq., of the Business and Professions Code (henceforth, “the article”) specifies the regulatory requirements with which a service contractor must comply to continue to offer service contracts in this State. The article requires service contractors to register with the Bureau of Household Goods and Services and maintain valid registration, and provides that except as otherwise provided, registered service contractors are exempt from all provisions of the Insurance Code. (Bus. & Prof. Code Sec. 9855.1.) The article also prohibits the issuing, sale, or offer for sale of a service contract unless the obligor under the service contract maintains a reimbursement insurance policy meeting certain specifications, and certain documents are filed with the Director of Consumer Affairs, including the actual service contract form to be used for the agreement. (Bus. & Prof. Code Secs. 9855.2; 9855.3.) Finally, the article authorizes the Director of Consumer Affairs to issue citations, and accompanying fines, to service contractors for violations of requirements under the article, or for making or authorizing untrue or misleading statements or false promises, and to deny, suspend, revoke, or place on probation the registration of a service contractor for fraud or dishonest dealing, conviction of a crime with a substantial relationship to the qualifications, functions, and duties of a registrant, or violating, or conspiring to violate, any provisions of the article or regulations adopted under the article. (Bus. & Prof. Code Secs. 9855.7; 9855.8.)

In the Civil Code, the Song-Beverly Consumer Warranty Act (Ch. 1333, Stats. 1970; henceforth, “Song-Beverly”), which this bill amends, defines “service contract” to mean a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair of a consumer product, not including a policy of automobile insurance, as specified. (Civ. Code Sec. 1791(o).) Like federal law, Song-Beverly requires a seller of a service contract to fully and conspicuously disclose in simple and readily understood language the terms, conditions, and exclusions of that contract. (Civ. Code Sec. 1794.4(a).) However, Song-Beverly extends far beyond the protections provided by federal law, by, among other things, specifying that every service contract obligates the service contractor to provide the buyer of the product all the services and parts necessary to maintain proper operation of the entire product for the duration of the service contract and without additional charge, unless the contract specifies otherwise.

Song-Beverly further requires all service contracts to contain specified information, including, of relevance to this bill, “a clear description and identification of the covered product,” and “the point in time or event when the term of the service contract commences, and its duration measured by elapsed time or an objective measure of use,” along with any exclusions from the scope of the service contract, a step-by-step explanation of the procedure

the buyer should follow to obtain performance of an obligation under the service contract, and a description of any right to cancel the contract under exigent circumstances, or, if there is no such right, a statement of that fact. (Civ. Code Sec. 1794.4(c).) In addition, Song-Beverly guarantees a buyer of a service contract certain cancellation and refund rights, as well as the opportunity to inspect the contract itself prior to purchase and to obtain a copy of the contract within a specified amount of time. (Civ. Code Secs. 1794.41; 1794.45.)

Despite the extensiveness of California statutes regulating service contracts, however, certain aspects of the law are not entirely clear. For instance, because the definition of “service contract” in Song-Beverly indicates that it is a contract “relating to the maintenance or repair of a consumer product” and requires the contract to provide a “a clear description and identification of the covered product,” singular, some confusion has resulted as to whether a service contract in this state can cover multiple products. Additionally, though the definition specifies a service contract to apply “over a fixed period of time or for a specified duration,” and requires the contract to indicate the contracts “duration measured by elapsed time or an objective measure of use,” it is not clear whether a month-to-month contract that automatically renews, or a contract that continues until it is cancelled, is permissible. This bill seeks to clarify such ambiguities by adding explicit language to permit these practices.

- 4) **Auto-renewing contracts, generally:** Automatic renewal service agreements and continuous service agreements are two forms of contracts for the provision of services that continue indefinitely unless the one of the parties intervenes to terminate the agreement. In the case of automatic renewal agreements, the service is provided, and remuneration is garnished, for a definite term, but a new term begins automatically following one’s expiration unless renewal is actively declined. Continuous service agreements, on the other hand, lack a definite term, and instead continue indefinitely until a party actively terminates the agreement. In practice, these agreements often involve regular charges on a monthly or even yearly basis (e.g., media streaming services, health clubs, magazines), though other models exist where a fixed quantity of a good or service dictates the regularity of charges (e.g., FasTrak for toll booths).

With the potential the internet and improved logistics technology have provided for remote services and regular shipment, these types of agreements (henceforth referred to collectively as “auto-renewals”) have increasingly pervaded most aspects of daily life. Many mobile applications are subscription-based, ranging from health and fitness apps to geographic information systems apps. Put simply, Californians have come to rely on subscription services for a plethora of goods and services, including meal/ingredient delivery, entertainment, clothing selection and procurement, and even the regular replenishment of household goods. A significant portion of these subscription services employ an auto-renewal model.

Auto-renewal is viewed by businesses as a valuable tool for both the business and the consumer, as it allows the consumer to maintain uninterrupted, and often highly convenient access to a good or service that they want or need, without the hassle of repeatedly submitting payment information. For businesses, auto-renewal facilitates the practicalities of customer retention. However, many consumer advocates contend that auto-renewals place a burden on consumers and are prone to abuse, both because consumers are often uninformed as to, or fail to fully comprehend, the nature of the agreement, and because the process for cancelling these agreements can be confusing, needlessly complex, or otherwise onerous.

- 5) **SB 340 (Yee, 2009) and SB 313 (Hertzberg, 2017) expanded consumer protections relating to auto-renewal, but exempted service contractors:** In 2009, Governor Schwarzenegger signed into law SB 340 (Yee, Ch. 350, Stats. 2009), which established the intent of the Legislature to “end the practice of ongoing charging of consumer credit and debit cards or third party payment accounts without the consumers’ explicit consent for ongoing shipments of a product or ongoing deliveries of service.” SB 340 defined several terms relating to automatic purchase renewals for the first time in California law, including the terms “automatic renewal” and “continuous service,” and prohibited a wide array of exploitative practices relating to these agreements. Specifically, SB 340, among other things, rendered it unlawful for businesses making automatic renewal or continuous service offers to consumers in this State to do any of the following:
- Fail to present the offer terms in a *clear and conspicuous* manner, as defined, before the agreement is fulfilled and in close visual or temporal proximity to the request for consent to the offer. (Bus. & Prof. Code Sec. 17602(a)(1).)
 - Charge the consumer’s method of payment for an auto-renewal service without first obtaining the customer’s affirmative consent to the terms of the agreement. (Bus. & Prof. Code Sec. 17602(a)(2).)
 - Fail to provide an acknowledgement that includes the offer terms, cancellation policy, and information regarding how to cancel *in a manner that is capable of being retained by the consumer*. (Bus. & Prof. Code Sec. 17602(a)(3).)
 - If the offer includes a free trial, fail to disclose in the acknowledgement how to cancel the service or fail to allow the consumer to cancel before the consumer pays for the goods or services. (*Ibid.*)
 - Fail to provide a toll-free telephone number, email address, postal address (if the seller directly bills the consumer), or another cost-effective, timely, and easy-to-use mechanism for cancellation. (Bus. & Prof. Code Sec. 17602(b).)
 - Fail to provide the consumer with clear and conspicuous notice of any material change in the terms of the offer that has been accepted by the consumer. (Bus. & Prof. Code Sec. 17602(c).)

Though SB 340 provided broad protections pertaining to auto-renewal agreements, some problematic practices, many of which are associated with free trials and promotional rates, remain in this space. Businesses often provide free gifts, trials, promotions, or discounts in order to entice consumers to become fully paying customers, but many have apparently also exploited this practice to lull consumers into incidental charges as the trial transitions without notice into a paid subscription. SB 340 required that a business provide an acknowledgement to the consumer disclosing how to cancel the subscription with any free trial, and required that the consumer has an opportunity to cancel before paying for the goods or services. (Bus. & Prof. Code Sec. 17602(a)(3).) However, SB 340 did not specify the nature of the cancellation process. Following the passage of SB 340, several California court cases highlighted abuse of this omission. In 2014, the Santa Cruz and Santa Clara Counties’ District Attorneys’ Offices reached a \$1.8 million settlement with an online fashion retailer that imposed monthly fees on users of their website along with an extraordinarily difficult-to-

use cancellation process, leading many to incur charges following free trial periods. In 2015, a \$2.5 million settlement was reached against LifeLock for failing to provide proper acknowledgement of the terms of their trial and the cancellation process alongside the offer, and the same year, an \$80 million class action against security software company McAfee contended that the company used auto-renewal to improperly increase subscription prices.

In response to these ongoing issues, in 2017, Sen. Hertzberg introduced SB 313 (Ch. 356, Stats. 2017), which aimed to further protect consumers from harmful practices associated with auto-renewal. The bill provided that if an automatic renewal offer or continuous service offer includes a free gift or trial, the offer must include a clear and conspicuous explanation of the price that will be charged after the trial ends or the manner in which the pricing of the agreement will change upon conclusion of the trial. The bill also required that a consumer who accepts an auto-renewal offer online must be permitted to terminate the service exclusively online.

Importantly, these requirements pertaining to auto-renewal explicitly exempt “service contract sellers and service contract administrators regulated by the Bureau of Electronic and Appliance Repair pursuant to” Section 9855, et seq., of the Business and Professions Code. (Bus. & Prof. Code Sec. 17605(f).) Presumably this exemption was an acknowledgement of the reasonably comprehensive regulatory scheme already applicable to service contractors provided by both state and federal law. However, the cross-referenced Article (i.e., Sec. 9855, et seq.) defines “service contract” to mean “a contract in writing to perform, *over a fixed period of time or for a specified duration*, services relating to the maintenance, replacement, or repair of consumer goods [...]” (Bus. & Prof. Code Sec. 9855(a); emphasis added), creating ambiguity as to whether a service contract can permissibly renew automatically or continue indefinitely until canceled under existing law.

This bill seeks, among other things, to clarify that “a service contract may be offered on a month-to-month or other periodic basis and continue until canceled by the buyer or the service contractor” in accordance with existing laws relating to service contracts, and would provide certain explicit consumer protections related to auto-renewal that parallel some, but not all, provisions applicable to auto-renewal agreements in other contexts.

- 6) **AB 1221 would clarify existing law pertaining to service contracts, and provide some additional protections for consumers entering into auto-renewing service contracts:** AB 1221 would make two significant clarifications to existing law relating to service contracts in order to permit the coverage of a class of products in a single service contract and to permit periodic contracts that automatically renew. As the Service Contract Industry Council, the sponsors of this bill, explain:

AB 1221 is focused on the outdated language in California’s laws governing service contracts that requires the specific identification of each individual product covered by a service contract. Because of this language, a service contract is not able to cover a class of products but must issue one contract per covered product. Such a scenario is not helpful to consumers and is inconsistent with the treatment of the service contract industry in the rest of the country.

In addition, AB 1221 provides clarity as to the permissibility of month-to-month and/or continuous until cancelled service contracts in California. Many consumers purchase service contracts in connection with services provided on a month-to-month or

continuous until cancelled basis. For example, cell phones are often purchased through a monthly pay option and it is convenient for a consumer to be able to include service coverage on their cell phone and have the cost for that coverage billed on the consumer's monthly cell phone bill along with the wireless minutes and cell phone purchase price.

As the sponsors point out, service contracts pertaining to a class of products are permissible in every state except California, wherein, as an artifact of statutory interpretation, the use of singular articles to refer to the product covered make the permissibility unclear. In other words, because a service contract is defined as a contract for services relating to the maintenance or repair of "a consumer product," and must include a clear description and identification of "the covered product," a service contract may or may not be able to cover a class of products, such as all televisions in a person's home or all of the cellular devices on a family wireless plan. To clarify California law as consistent with laws in other states without compromising the intent of the consumer protections provided, this bill would add "if the service contract covers a single product," to the requirement that the covered product is clearly described, and then explicitly provide that if a service contract covers a class of products, the class of products covered must be described in a manner sufficiently clear so that the buyer can discern the products covered. This would seemingly accomplish the intent of the existing provision by ensuring that the consumer understands the scope of the contract into which they are entering, even if that scope includes multiple products.

Additionally, while the existing definition of service contract specifies that the contract applies "over a fixed period of time or for a specified duration," and a service contract is required to indicate "[the service contract's] duration measured by elapsed time or an objective measure of use," existing law is not clear on whether it is permissible for such a contract to automatically renew for additional fixed terms. According to the Service Contract Industry Council, "these programs have been offered in California for years under existing state law," but that "the industry would like to see more clarity in the service contract laws providing clear authorization of these service contract programs." Though it appears the law has been interpreted in practice to permit auto-renewal, this bill would explicitly indicate that "a service contract may be offered on a month-to-month or other periodic basis and continue until canceled by the buyer," provided certain conditions are met.

Acknowledging the potential for exploitation of consumers through auto-renewal and the inapplicability of existing auto-renewal laws to service contracts, the author has prudently provided several explicit requirements on behalf of consumers to mitigate the risk of unanticipated or unwanted charges. In addition to requiring clear and conspicuous disclosure that the terms of the service contract shall continue until cancelled, under AB 1221, any service contract must also disclose to the buyer if there is an alternative to enter into a fixed-term service contract or another service contract basis that does not continue until it is cancelled, so the buyer can opt for that if they prefer. The bill would also require the contract to provide, at a minimum, a toll-free number, email address, postal address, and, if one exists, internet website the buyer can use to cancel the service contract, and specifies that cancellation shall not require use of more than one of those methods (e.g., telephone and postal submission), and is effective immediately upon completion of the current term. In recognizing the increasing role the internet plays in commerce, the bill would require that if a service contract was entered into online, the buyer must have the option to cancel the service contract exclusively online, and without engaging in any unnecessary steps that obstruct or delay cancellation.

These requirements in many ways mirror the existing laws governing other automatic purchase renewals from which service contracts are exempt, and, in conjunction with the existing regulatory framework applying to service contracts, seem to provide reasonable consumer protections. Because under current law the permissibility of auto-renewal for service contracts is unclear but these contracts are nonetheless commonplace, no explicit protections are currently in place to apply to this context when it arises. These additions to the bill should strengthen the protections available to consumers in practice.

- 7) **Provision implying affirmative consent by completing the purchase is problematic:** AB 1221 provides that, in the event a service contract will automatically renew or otherwise continue until cancelled by the buyer or service contractor, the service contract must disclose this fact. With respect to this provision, the bill also specifies that “[t]he buyer’s purchase of the service contract after receiving this disclosure shall be deemed affirmative consent to this provision.” While specific definitions of “consent” vary, “affirmative consent” invariably includes some intentional act on the part of the person to demonstrate consent. As a result, the precedent of permitting an act, i.e. completion of the purchase following disclosure, to imply affirmative consent is seemingly a dangerous one. Furthermore, this provision puts consumers at considerable risk of economic harm from entering into a contract with lasting financial implications without verifying that they understand these terms. Because an individual who enters into a continuous service contract without fully understanding this fact could be financially burdened by that decision *ad infinitum*, it seems critical, in order to appropriately protect the consumer, that true affirmative consent to an auto-renewal or continuous service provision of a service contract should be obtained to demonstrate this understanding, rather than implied. The bill’s sponsors contend that requiring independent affirmative consent to auto-renewal beyond the completion of the transaction places an undue burden on service contract sellers, since such contracts are generally offered at the point of sale, and acquiring such consent materially lengthens that transaction. However, considering a check box, signature, or initial on an online or written agreement, or verbal confirmation that the buyer understands and agrees to that term, would be sufficient to fulfill an affirmative consent requirement, the burden imposed on sellers seems to be outweighed by the protection the need for such consent affords the consumer.

This bill is double-referred to the Assembly Committee on the Judiciary. While issues of consent, depending on the context, fall within both the jurisdiction of this Committee and of the Judiciary Committee, defining what constitutes consent in the context of a contract arguably is a matter better addressed by the Judiciary Committee. Nonetheless, based on the substantial risk of economic harm this could pose to consumers, should this bill continue through the legislative process, the author may wish to consider adopting an amendment to strike the implication of affirmative consent upon completion of purchase, and to instead explicitly require affirmative consent beyond the act of completing the purchase for an auto-renewal provision.

- 8) **Related legislation:** AB 390 (Berman) would require a business that makes an automatic renewal or continuous service offer to a consumer to provide the consumer with notice before the expiration of a free gift or trial, or temporary or promotional price, included with the offer, and would require these businesses to streamline the cancellation process in accordance with specified criteria.
- 9) **Prior legislation:** AB 2811 (Berman, 2020) was substantially similar to AB 390 (Berman).

SB 313 (Hertzberg, Ch. 356, Stats. 2017) *See* Comment 5.

SB 1428 (Hernández, 2016) would have required a business to honor a consumer's request to cancel an automatic renewal or continuous service offer within 24 hours of receipt. The bill was referred to the Assembly Privacy and Consumer Protection Committee but was not taken up for a hearing.

AB 2867 (Gatto, 2016) would have required a cable, satellite or internet service provider that enables an individual to subscribe to its services online to cancel a subscription online as well. The bill reached the Assembly Floor but was not voted upon.

SB 340 (Yee) Ch. 350, Stats. 2009), *See* Comment 5.

REGISTERED SUPPORT / OPPOSITION:

Support

Service Contract Industry Council (sponsor)

Opposition

None on file

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