Contract Auto-Renewals Not Necessarily So "Automatic" as Recent NY Case Demonstrates

An "auto-renewal" clause in a contract provides that the term of the contract will automatically renew at the end of the specified term, unless a party provides advance notice of its intent to cancel (which typically must be given by a designated deadline). Also known as "evergreen" provisions, they are commonly used in a wide variety of contracts, including in many technology-related agreements, such as agreements for software support/maintenance, software-as-a-service, co-location services and data feeds. But as Bloomberg, L.P. ("Bloomberg") recently discovered, if you are a service provider with a contract governed by New York law, you should be careful in relying on an auto-renewal clause, since it may not be so "automatic." And it's not just those conducting business in New York who should take note. Other states have similar provisions that can affect the validity of auto-renewal clauses.

New York Law Particularly Broad in Scope: Bloomberg's Cautionary Tale

Bloomberg, a leading provider of real-time financial data, entered into a data subscription contract with Bruce Ovitz in June 2000. The contract had a two-year initial term and contained an auto-renewal provision that provided for automatic two-year renewals of the contract term. In September 2008, well after the cancelation deadline, Ovitz notified Bloomberg of his wish to terminate the contract, and Bloomberg informed him that the contract had renewed and would not expire until June 2010. Ovitz sued, alleging (among other things) that Bloomberg failed to notify Ovitz of the renewal, as required by New York's General Obligations Law § 5-903. This statute requires that a vendor in any "service, maintenance or repair contract" with an auto-renewal clause give its customer written notice of an auto-renewal at least 15 days, but not more than 30 days, before the cancelation deadline; otherwise, the auto-renewal provision is deemed unenforceable.[1] Indeed, at some point during the litigation, Bloomberg was forced to concede that its auto-renewal provision was unenforceable and, therefore, had to waive its claim to the early termination fees specified in the contract.[2]

New York is not alone in enacting legislation aimed at regulating auto-renewal clauses. Many states have similar laws that generally fall into three categories:

1. Auto-renewal laws that apply to contracts with individual consumers, not companies, that require only clear and conspicuous disclosure of auto-renewal terms (California, North Carolina, Louisiana and Oregon fall in this category);

2. Auto-renewal laws that apply to contracts with individual consumers, not companies, that require clear and conspicuous disclosure of auto-renewal terms and require a service provider to notify its customer of the auto-renewal within a certain period of time before the cancelation deadline (Connecticut, Florida, Illinois, Hawaii and Utah fall in this category); and

3. Auto-renewal laws that impose similar requirements as those described above, but only with respect to very specific types of contracts, such as (for example) contracts for health club memberships, home security services, leases of certain types of personal property or retail telecommunications service subscriptions. (Arkansas, Maryland, South Carolina, South Dakota, Tennessee and Wisconsin[3] fall in this category).

New York's statute, however, is unique in its breadth. It applies to any contract for "service, maintenance or repair" – a description that, as mentioned above,

encompasses many different types of technology-related agreements. It also explicitly applies to any type of customer, whether it be an individual consumer or a company.

Implications for Service Providers

As a result of New York's relatively heavy-handed regulation of auto-renewal clauses, service providers (and any lessor of personal property) should *not* rely on a contract when it comes to renewal mechanics. Instead, they should implement a notification process to ensure that the customer is alerted to any renewal of the contract between 15 and 30 days before the cancelation deadline. Absent such a notice, the auto-renewal clause would be unenforceable. This, in turn, jeopardizes any contractual remedy a service provider may have with respect to a customer's early termination of a contract.

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[1] New York has enacted an analogous statute, General Obligations Law § 5-901, which applies to any lease of personal property.

[2] *Ovitz v. Bloomberg L.P.*, No. 38, slip op. at 7 (N.Y. March 7, 2012).

[3] In this category, Wisconsin's statute is the most broad and deserves special notice. It applies to any lease of "business equipment," and to individual consumers and companies alike. Wis. Stat. § 134.49.

Should you have any questions concerning this or any other issue concerning technology-related contracts, do not hesitate to contact **Amir Azaran** (312-269-5683), **Robert Weiss** (312-269-8455), **Emily Zachar** (312-269-5377), or any other attorney in Neal Gerber Eisenberg's Technology Transactions & Services Practice Group.

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