WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701–2536
Telephone (608) 266–1304
Fax (608) 266–3830

DATE: November 10, 1997

TO: REPRESENTATIVE CLIFFORD OTTE AND INTERESTED LEGISLATORS

FROM: Russ Whitesel, Senior Staff Attorney

SUBJECT: 1997 Assembly Bill 169 and Assembly Substitute Amendment 1 to 1997 Assembly Bill 169, Relating to the Prohibition of Certain Billing Practices for Goods and Certain Services

This memorandum describes the provisions of 1997 Assembly Bill 169 and also Assembly Substitute Amendment 1 to Assembly Bill 169, relating to the prohibition of certain billing practices for goods and certain services and providing a penalty. The memorandum also provides a brief legislative history of the proposal.

A. LEGISLATIVE HISTORY

Assembly Bill 169 was introduced on March 11, 1997 by Representative Otte and others; cosponsored by Senator Clausing and referred to the Assembly Committee on Consumer Affairs. A public hearing was held on the Bill on August 14, 1997. At an executive session held on October 23, 1997, the Committee voted to introduce and adopt Assembly Substitute Amendment 1 on a vote of Ayes, 7; Noes, 0. The Committee recommended passage of the Bill as amended on a vote of Ayes, 7; Noes, 0.

B. PROVISIONS OF ORIGINAL LEGISLATION

Assembly Bill 169, as originally introduced, specifically prohibited certain billing practices. Those prohibited practices included the following:

1. Billing a person for goods or services that the person did not order, unless the billing company complied with federal law that regulates negative option plans (a negative option plan is defined as one in which the buyer did not affirmatively order the product or service by name).

2. Failing to provide a buyer with whom a seller has made an auxiliary agreement for additional goods and services by oral solicitation with the right to cancel the auxiliary agreement without charge or penalty.

3. Failing to provide a buyer with whom a seller has made an auxiliary agreement for additional goods and services by oral solicitation with written confirmation of the terms and conditions of the auxiliary agreement.

4. Billing a person for postage and handling or similar charges without stating in the agreement that the person will pay for such charges.

The Bill expressly states that the provisions of the Bill do not apply to cable television or other telecommunications services. Billing practices for these services are regulated by the Department of Agriculture, Trade and Consumer Protection (DATCP) by administrative rule.

Under the Bill, a seller who engages in these practices is subject to a forfeiture. Further, the Bill authorizes DATCP and district attorneys to file suit to enforce this prohibition. The Bill also imposes an additional forfeiture on a seller if the buyer is elderly or disabled. The Act contains a delayed effective date, providing that the Act takes effect on the first day of the fourth month beginning after publication.

C. PROVISIONS OF ASSEMBLY SUBSTITUTE AMENDMENT 1

1. Unfair Billing Practices

The Substitute Amendment prohibits certain billing practices. Specifically, the prohibited practices include:

a. Billing a consumer for consumer goods or services that the consumer has not agreed to purchase. It should be noted that the definition of "consumer goods" contained in the Substitute Amendment is defined to mean goods or services that are used or intended for use for personal, family or household purposes. However, all of the following items are ***excluded*** from the term consumer goods or services:

(1) The treatment of disease by a health care provider or any provision of emergency medical care.

(2) Telecommunications or cable television services.

(3) Goods or services whose delivery is required by law even though the consumer has not agreed to purchase or lease those goods or services.

(4) The sale or lease of a motor vehicle by a licensed motor vehicle dealer.

b. Billing a consumer for consumer goods or services at a price that is higher than a price previously agreed upon between the seller and consumer, unless the consumer agrees to the higher price before the consumer is billed.

c. Billing a consumer for a delivery of consumer goods or services that the seller initiates under an agreement that is no longer in effect when the seller initiates the delivery.

d. Offering a consumer any prize or prize opportunity or free or reduced-price goods or services, the acceptance of which commits the consumer to receive or pay for other consumer goods or services, unless the seller clearly and conspicuously discloses that commitment in connection with every announcement or advertisement of the prize, prize opportunity or free or reduced-price goods or services.

e. Misrepresenting to a consumer, directly or by implication, that the consumer's failure to reject or return a delivery of consumer goods or services that was not authorized by the consumer constitutes an acceptance that obligates the consumer to pay for those goods or services.

2. Trial Delivery Plans

The Bill also contains specific regulations regarding trial delivery sales plans. A "trial delivery sales plan" is defined to mean an agreement between a seller and a consumer in which the consumer authorizes the seller to make one or more trial deliveries to the consumer, and to bill the consumer for a trial delivery if the consumer does not reject or return it in conformance with the terms of the agreement. It is important to note that the term trial delivery sales plan, as used in the legislation, does not include any of the following:

a. A negative option plan that is subject to and complies with 16 C.F.R. Part 425, a federal trade rule dealing with negative options;

b. An agreement to purchase or lease goods or services without any trial delivery, but subject to a right of cancellation or return; or

c. Consumer goods or services delivered to a consumer in person at the seller's regular place of business. Under this section of the Substitute Amendment, a specified disclosure is required of trial delivery plans. Specifically, before a consumer enters into any trial delivery sales plan, the seller must make a disclosure to the consumer of all the material terms of the trial delivery sales plan, including a series of required terms set forth in the Bill. The Bill requires that the disclosure must be made in a meaningful sequence and shall not be separated by promotional information.

The terms of the trial delivery plan must include all of the following:

a. The nature of the consumer goods or services offered.

b. The consumer's obligations, including all of the following:

(1) Any minimum purchase price or minimum lease requirements.

(2) The maximum price of the consumer goods or services included in any trial delivery. This maximum price must include all postage, shipping, handling or other costs charged to the consumer, unless certain conditions are met.

(3) Any obligation incurred by the consumer if the consumer fails to reject or return any trial delivery under the trial delivery sales plan.

(4) Any obligation by the consumer to pay return shipping or other costs associated with the rejection or return of a trial delivery.

c. All of the following information must also be enclosed ***if*** the trial delivery sales plan may result in more than one trial delivery:

(1) The duration of the trial delivery sales plan.

(2) Whether the trial delivery sales plan remains in effect until canceled by the consumer or seller.

(3) The frequency of trial deliveries under the trial delivery sales plan.

(4) Clear and conspicuous instructions explaining a reasonable method by which a consumer may reject or return a trial delivery to avoid being billed for that trial delivery and in order to avoid any other consequences that may result from a failure to reject or return the trial delivery. The instructions must also include the 10-day return or rejection requirement set forth in the Bill (described below) and any applicable restrictions on the manner in which the trial delivery may be rejected or returned.

(5) The right of the consumer to cancel the trial delivery plan at any time, subject to any minimum purchase or lease requirements.

(6) Clear and conspicuous instructions stating a reasonable method by which the consumer may exercise his or her right to cancel the trial delivery sales plan without charge to the consumer.

The Substitute Amendment also provides that if a trial delivery sales plan is for a definite period of time, neither the seller nor the consumer may extend the period by means of an automatic renewal or automatic extension provision. The Substitute Amendment also requires that the information that must be provided to a consumer relating to plans that may entail more than one trial delivery must be stated in a manner so that the consumer can easily determine the maximum number of trial deliveries that may incur in any 12-month period.

The Substitute Amendment specifically provides that the maximum price disclosure need not include postage or shipping costs if all of the following conditions apply:

a. The seller makes a disclosure that the consumer must pay postage or shipping costs.

b. The postage or shipping costs do not exceed those that are charged or would be charged by the U.S. Postal Service or common carrier for the same trial delivery.

The Substitute Amendment also contains specific requirements relating to the disclosures that must accompany each trial delivery. With each trial delivery, under a trial delivery sales plan, the seller must include a written disclosure that states all of the following:

a. The total price that the consumer must pay for the trial delivery if the consumer accepts the trial delivery.

b. Every other obligation the consumer incurs by accepting the trial delivery.

c. Clear and conspicuous instructions stating a reasonable method by which the consumer may reject or return a trial delivery to avoid being billed for that trial delivery and to avoid any other consequences that may result from a failure to reject or return that trial delivery. These instructions must include the 10-day return or reject requirement and any other applicable restrictions on the manner in which the trial delivery may be rejected or returned.

d. Clear and conspicuous instructions stating a reasonable method by which the consumer may avoid receiving the next trial delivery. The instructions must include the 10-day return or reject requirement.

The Substitute Amendment requires a seller to allow the consumer at least ***10 days*** after the consumer receives a trial delivery to initiate the rejection or return of that trial delivery or to avoid receiving the next trial delivery. Further, the seller may not represent that the consumer may return a trial delivery at the seller's expense unless the seller includes with the trial delivery a prepaid return mailer that includes the address to which the consumer shall return the goods or services; adequate prepayment of any postage, shipping, handling, repackaging or other costs that are necessary to accomplish the return of the trial delivery and clear and conspicuous instructions on how the consumer may use the prepaid return mailer to accomplish the return of the goods or services included in a trial delivery.

The Substitute Amendment also contains specific prohibitions regarding trial delivery sales plans. Specifically, no seller may do any of the following:

a. Misrepresent the terms of a trial delivery sales plan.

b. Misrepresent to any consumer that the consumer has agreed to a trial delivery sales plan.

c. Make any false, deceptive or misleading representation in the solicitation or implementation of a trial delivery sales plan.

d. Make any trial delivery, or bill any consumer for a trial delivery, contrary to the terms of the trial delivery sales plan.

e. Initiate a trial delivery under a trial delivery sales plan that is no longer in effect.

3. Lawn Service Contracts

The Bill also specifically regulates lawn care service contracts. "Lawn care services" is defined in the Substitute Amendment to mean any of the following services provided in or around a consumer's personal residence for nonagricultural purposes:

a. Application of a fertilizer, pesticide or a soil or plant additive intended to promote plant growth or health.

b. A plant mowing or trimming service.

The Substitute Amendment provides that no contract for lawn care services may be in effect for more than one year unless, in the second and any subsequent year, the provider makes a written disclosure at least 30 days before providing lawn care services under the contract in that year. The written disclosure must include information relating to the lawn care services included in the contract and the price and frequencies of those lawn care services. Also, the disclosure must include a provision permitting the contract for lawn care services that may be in effect for more than one year that allows the consumer the right to cancel the contract at no cost to the consumer, if the consumer cancels within 30 days after receiving a written disclosure from the provider.

4. Penalties and Remedies

The Substitute Amendment contains a series of penalties and remedies relating to unfair billing, trial deliveries and lawn care services. Specifically, the Substitute Amendment authorizes the department to utilize its existing authority to investigate violations of the provisions relating to unfair billing, trial deliveries and lawn care services. In addition, the Substitute Amendment authorizes any person suffering pecuniary loss because of a violation of these provisions to commence an action for the pecuniary loss and if the person prevails, the person shall recover twice the amount of pecuniary loss or $200 for each violation, whichever is greater, together with costs, including reasonable attorney fees.

The Substitute Amendment also authorizes the department to commence an action in the name of the state to restrain by temporary or permanent injunction any violation of the provisions of the Act. Before entry of final judgment under this section, the court may make any necessary orders to restore to any person any pecuniary loss suffered by the person because of the violation.

In addition, the department or any district attorney is authorized to commence an action in the name of the state to recover a forfeiture to the state of not less than $100, nor more than $10,000, for each violation.

A criminal penalty is also provided for any person that violates the provisions of the unfair billing trial delivery sales plan and lawn care services. Violators are subject to a fine of not less than $25, nor more than $5,000, or imprisonment not to exceed one year, or both, for each violation.

Finally, the Substitute Amendment specifically provides that the provisions of the Bill do not preempt the administration or enforcement of either s. 100.18 or 100.20, Stats.; practices in violation of the provisions in the Bill may also constitute unfair methods of competition or unfair trade practices under s. 100.20, Stats., or fraudulent representations under s. 100.18, Stats. The Substitute Amendment also provides that the Department of Justice shall furnish all legal services required by the DATCP relating to the enforcement of the statutes created by the Bill.

5. Effective Date and Initial Applicability

The Substitute Amendment also contains an initial applicability section. With respect to unfair billing, the legislation first applies to violations committed on the effective date of the legislation. With respect to trial delivery sales plans, the statutes first would apply to trial delivery sales plans entered into on the effective date of the law of the legislation. With respect to lawn care service contracts, the statutes would first apply to contracts entered into on the effective date of the legislation.

The Substitute Amendment contains an effective date which provides that the Act takes effect on the first day of the 10th month beginning after publication.

If you have any questions regarding this legislation, please feel free to contact me directly at the Legislative Council Staff offices.

RW:rv:jt;wu

James E. Lake
738 Western Avenue
Madison, WI 53711

Representative Clifford Otte, Chair
Assembly Committee on Consumer Affairs
109 West, State Capitol
Madison, WI 53702

Dear Representative Clifford Otte:

On behalf of the Wisconsin State Legislative Committee of the American Association of Retired Persons, I urge the passage of Assembly Bill 169. Passage of this legislation dealing with billing practices would be a significant step in providing consumer protection, which is an important priority of our state and national organizations.

AARP is the nation's leading organization for people age 50 and older, with 676,034 members in Wisconsin. It serves their needs and interests by providing information and education, advocacy, and community services through a network of 87 chapters and experienced volunteers in the state.

Sincerely,

James E. Lake
Wisconsin Capital City Task Force
American Association of Retired Persons

Wisconsin Automobile & Truck Dealers Association

150 E. Gilman Street—Suite A
Madison, WI 53703
(608) 251-5577 FAX: 251-4379

Mailing Address:
P.O. Box 5345, Madison,WI 53705-0345

GARY D. WILLIAMS
President

October 23, 1997

Representative Cliff Otte, Chair
Wisconsin State Assembly
Consumer Affairs Committee
PO Box 8953
Madison, WI 53708

Dear Representative Otte:

We have reviewed the LRBs 0173/9 version of AB169, and wish to extend our support for the bill.

Your cooperation in adhering our concerns regarding the bill was greatly appreciated. We look forward to working with you in the future.

Sincerely,

Gary

Gary D. Williams
President

10/24/97

Mary,

The Assembly Committee on Consumer Affairs voted (7-8) to recommend passage of LRBs0173/9 (ASA to AB 169), but did so with a verbal amendment to be incorporated into the ASA. That being that it have a delayed effective date of 9 months and that it apply to action taken after its effective date. Thus, I need a /10 reflecting this change in order to report the bill out of committee.

Also, please check with Russ Whitesel, as he found a typo that needs correction. (6-0922).

Thank you.

Dan Young
6-8530

the "the" on p. 3, line 10.

cc: Russ Whitesel

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
V/TTY 608/267-8902

June 18, 1997

Mr. Robert Pitofsky, Chairman
Federal Trade Commission
Sixth Street and Pennsylvania Avenue, N.W.
Room H-159
Washington, DC 20580

Re: Comments - Negative Option Rule, 16 CFR Part 425

Dear Chairman Pitofsky:

Enclosed are the comments of the Wisconsin Attorney General regarding the Negative Option Rule, 16 CFR Part 425.

Thank you.

Sincerely,

James E. Doyle

James E. Doyle
Attorney General

JED:js
Enclosure

COMMENTS
NEGATIVE OPTION RULE, 16 CFR PART 425

SUBMITTED BY
THE HONORABLE JAMES E. DOYLE, ATTORNEY GENERAL, ON BEHALF OF THE DEPARTMENT OF JUSTICE, STATE OF WISCONSIN

June 18, 1997

INTRODUCTORY STATEMENT

I have served as Attorney General for the State of Wisconsin since January 7, 1991. I was Chair of the Consumer Protection Committee of the National Association of Attorneys General (N.A.A.G.) from July 1994 until July 1996 and will serve as President of N.A.A.G. effective July 1, 1997.

Over the past several years, the Wisconsin Attorney General's Office of Consumer Protection has been extensively involved in responding to billing abuses in the cable television and telecommunications industries as well as in areas of general commerce. This includes litigation concerning the negative option billing practices of cable television providers Tele-Communications, Inc. (TCI) and Time-Warner, Inc. and participation in state administrative proceedings dealing with billing and related abuses in the telecommunications industry.[1]

---

[1] A member of my staff has written on this subject in the *Loyola Consumer Law Reporter*. It is comprehensive in scope and deals with the questions raised by the Commission in its Request for Comments. The article is attached hereto and I ask that it be incorporated as part of this submission and included in the Commission record.

STATEMENT OF POSITION

The use of negative option billing[2] procedures in connection with consumer transactions has grown considerably since the promulgation of the Commission's rule in 1974. Corporate consolidation and technological developments have isolated consumers from the businesses they deal with and created customer databases of exceptional size and sophistication. Customer contacts, both during and after ordering, are frequently electronic and devoid of the personal dealings that existed before consolidation and computerization. As a result, there exists a much greater potential for consumer abuse in the area of negative option billing - particularly in transactions involving (1) a low dollar amount, (2) customers who are billed on a regular basis, and (3) customers without legal sophistication.

The Commission's Rule on the subject of negative options appears to have effectively dealt with what, in 1973, was the most significant negative option problem - the Book of the Month Club type offering. The requirement that all participants be provided "prenotification" of the full details of each upcoming delivery, in the context of an existing contractual setting, minimized the potential for consumers paying for items they did not order or having to repackage and mail the item to the sender.

In terms of current practices, an excellent starting point for the Commission's re-evaluation of its negative option rule is the very recent declaration on the subject by the U.S. Congress. As part of the Cable Television Consumer Protection and Competition Act of 1992, Congress enacted 47 U.S.C. § 543(f), which reads:

> Negative option billing prohibited. A cable operator shall not charge a subscriber for any service or equipment that the subscriber *has not affirmatively requested by name.* For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment. (emphasis supplied)

---

[2] The term "billing" is used in conjunction with negative options since that is the point in time when it becomes clear that the merchant contends the merchandise or services provided in the absence of an explicit consumer order (i.e. by negative option) must be paid for.

Further, 39 U.S.C. § 3009(c), and supportive interpretations by the Commission, prohibits billing for unordered merchandise - which is defined, in § 3009(d), as merchandise mailed *"without the prior expressed request or consent of the recipient."* (emphasis supplied)

Both provisions deal with the "billing" aspects of the transaction and focus on the requirement that billing take place only upon the "affirmative request" or the "prior expressed request or consent" of the customer. While the Commission's rule appears to have dealt with Book of the Month Club "prenotification" type plans, this more recent legislation covers other "negative option" type offerings. The current challenge facing the Commission in its review of the Rule is to clarify the situations when a customer in fact has made an "affirmative request" or provided a "prior expressed request or consent" to a transaction which will result in an obligation on the part of the recipient.

FORMAL COMMENTS

1. Is there a continuing need for the Negative Option Rule?

The existing Rule has been of considerable value to consumers dealing with Book of the Month type offerings. As stated below, this value would be considerably enhanced if the Commission expanded the Rule to cover other recently developed negative option proposals. The rule should be expanded to cover practices, usually called "continuity plans." These plans often attempt to enroll customers through the use of "free offers" or other inducements. These inducements may in themselves violate disclosure rules but they are also often ways of trapping unwary consumers in the morass of a negative option plan.

(a) What benefits has the Rule provided to purchasers of the product affected by the rule?

As to "prenotification" plans, Wisconsin has received few consumer complaints. In distinct contrast, however, are problems arising from negative option plans which, pursuant to an agreement with the consumer, involve sending merchandise, or services, without prenotification. Here, without any prior identification of (a) the product, (b) the price, or (c) the frequency of delivery, a customer receives goods and possibly services.

Under these circumstances the elements of an unfair practice are present. The customer bears the entire obligation of either paying for the goods or rejecting the transaction by returning the merchandise at his or her expense - oftentimes in the face of an invoice for the merchandise and concomitant collection demands. This is particularly intimidating for the elderly and other customers not equipped to respond to a consummated negative option mailing.

(b) Has the Rule imposed costs on purchasers?

As far as the existing Rule is concerned, it would seem likely that consumers, because of "prenotification," have saved those costs related to returning unwanted merchandise or, for various reasons, retaining the unwanted merchandise and paying for it.

Any contention by direct marketers, in these days of modern "economics," that consumers would pay even less if merchandisers could further reduce their costs by not having to comply with the Rule would be to elevate form over substance. Absence of the Rule would, in this context, reward in the marketplace those companies most skilled at abusing their customers in an unregulated context and leave the least sophisticated and vulnerable consumers at their mercy. The forces of competition would have little effect on these companies. Many of these companies would be "fly by night" with no concern for long term customer relations. Further, public information about abusive practices,

particularly in the context presented here, is difficult to acquire by the average consumer - thus making "comparison shopping" all but impossible.

2. What changes, if any, should be made to the Rule to increase the benefits of the Rule to purchasers?

It is imperative that the Commission declare, as part of its Rule, that billing a person for unordered merchandise is an unfair practice and that seeking an agreement from the consumer to waive rights created by this declaration is similarly unfair.

This leaves open the question as to what is considered an "order," particularly in respect to the details of an order made for shipment at a later date. If the consumer agrees to a plan that provides additional merchandise will be sent, without prenotification, and this merchandise is not fully identified or priced, the agreement is no more than an agreement to waive the protection of a negative option Rule.

Any offering which proposes an agreement that, in the future, the consumer will periodically be sent merchandise or services, which will be considered ordered unless returned, should be conditioned upon:

(1) a complete prenotification procedure, such as set forth in the existing rule,

(2) explicit disclosure of the exact merchandise to be sent, and its date of delivery, in any prenotification,

(3) complete written disclosure of the elements of the initial agreement, including an explicit written confirmation of any oral or electronic transaction, and

(4) limitations on the frequency of prenotification mailings and the nature of the merchandise to be sent, i.e. merchandise which is difficult to repackage or return.

This proposal would likely include the regulation of "continuity" plans, which do not utilize a prenotification procedure. While the Commission did not include continuity

plans in its initial Rule, its reasons for this decision appear to be related to certain commercial arrangements, such as "subscription shipments or library standing order arrangements."[3] A continuity plan, in an ordinary consumer transaction, would appear to be nothing more than a "prenotification" plan without the prenotification, i.e. the major protective element of the Rule.

If objection is made on behalf of certain commercial or specialized transactions, as was done in the 1973 proceedings, the Rule could exclude them. While silence might indicate a purchaser's acceptance in these exceptional situations, this premise is totally inappropriate in mass transactions with lay consumers.

(a) How would these changes affect costs incurred by merchants and purchasers?

Requiring a company to obtain an affirmative order from a customer, or to send a "prenotification" prior to mailing, would likely increase a merchant's costs - as would any regulation, whether it be environmental or consumer oriented. Any such savings could conceivably reduce costs of both merchants and purchasers.

Here, since the issue is one of fundamental fairness, i.e. not to be billed for unordered merchandise - recognized by Congress in the Cable Act and in the Postal code, costs should not be a major factor in the Commission's decision, particularly when compared with costs incurred by consumers in receiving and paying for unordered merchandise or the personal costs of anxiety and inconvenience in repackaging and returning the unordered merchandise.

---

[3] 62 Fed. Reg. p. 15136, n. 3

3. What significant burdens or costs, including costs of compliance, has the Rule imposed on firms subject to its requirements?

Given the fact that the Rule has existed for over twenty years without significant challenge, and was reaffirmed in 1986, it is unlikely that the Rule has imposed significant burdens or costs, particularly since it does not regulate merchants who do not use the "prenotification" procedure. Also, books were the primary subject of the initial Rule. Their postage weight, and possibly costs of production, would result in some savings to traditional "Book of the Month" promoters if they could avoid unwanted orders, and attendant return postage, through prenotification.

Recent, non-prenotification, offerings, however, frequently involve video tapes, audio tapes and compact discs. The postage and production costs related to these items are likely much lower, thus making the economic risk to the merchant much less if the unordered merchandise is not returned and the economic gain much greater if the customer pays for it.

4. What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on firms subject to its requirements and how would these changes affect the benefits provided by the Rule?

As previously indicated, the subject matter of this Rule relates to billing for merchandise which was not ordered by the consumer. At some point in time, the costs related to compliance must be outweighed by the importance of the Rule's protection. When dealing with a fundamental concept, such as the right not to be sent and billed for merchandise which has not been explicitly ordered, the incremental costs necessary for a merchant to obtain a valid order from a customer represent only the cost of operating fairly. Deviation from this premise will adversely affect fair competition by rewarding those who use the most oppressive tactics and injuring those who attempt to deal with their customers fairly.

5. Does the Rule overlap or conflict with other federal, state, or local laws or regulations?

The Rule does not conflict with any Wisconsin laws of general application. State laws or regulations dealing with regulated industries, such as banking or telecommunications, may have specific provisions which might differ from the Commission's Rule. Barring specific state laws or recitations to the contrary, an FTC regulation is normally not preemptive of state law and may well work in conjunction with that law.

Of greater importance, is the leadership role that can be taken by the Commission in respect to dealing with this complex subject. As previously indicated, negative option billing and related practices is a national problem, frequently, if not always, crossing state lines and involving large national or international corporations. While states can deal with these practices to some extent, and have done so through organizations such as the National Association of Attorneys General, the resources of the Federal Trade Commission are of critical importance, both from the standpoint of interstate enforcement and from the standpoint of the extensive regulatory hearings and expertise which will be needed to promulgate a meaningful rule in this area.

6. In what manner does new technology affect consumers' rights or sellers' responsibilities under the Rule?

New technology has changed the entire playing field since the Rule was promulgated in 1974 and reviewed in 1986. Of particular concern is the increased use of automation in respect to telephone solicitation, ordering, customer identification, sophisticated computerized direct mail solicitations, credit card authorizations, and electronic ordering over the Internet. Matters will become even more complex, as they have with cable television, when the item ordered may be an electronic service - such as

a cable television pay per view movie. The customer may not even be aware that the service is being provided and may incur a charge before any chance to cancel.

These modern developments are of particular concern when the specifics of a consumer order are at issue. It is imperative that the consumer have some means of effectively documenting (a) the specific details of the order - prior to the delivery of merchandise or services, (b) the cancellation or confirmation of the order, and (c) attempts to return merchandise.

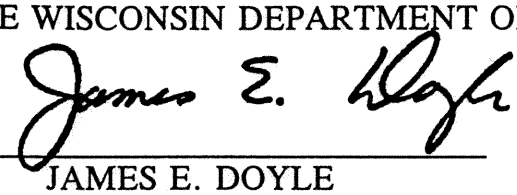
7. Are there abuses occurring in the promotion, sale, or operation of negative option plans that are not prohibited or regulated by the Rule?

As previously indicated, there are negative option practices, such as continuity plans, which are not currently prohibited by the Rule. Because of the inherent unfairness of billing for unordered merchandise, appropriate regulation is the only meaningful means of dealing with the problems associated with solicitations which seek a consumer's agreement to waive the fundamental right to receive, and be billed for, only those goods or services which have been explicitly ordered.

Under the circumstances, the suggested amendment to the rule would be to prohibit negative option plans - as has already been done in the Cable Act and the Postal Codes. The deviation from this principle, as reflected in the prenotification provisions in the current Rule, should be viewed not as an authorization of negative option billing but rather, through "prenotification", a limited recognition that a consumer, after entering into an explicit contractual relationship, can agree to a tightly regulated process of prenotification as a means of assent to a specific proposal. This should be contrasted against any offering where the consumer agrees, in advance, to waive his rights to assent to any such proposal.

Respectfully Submitted:

THE WISCONSIN DEPARTMENT OF JUSTICE

BY 

JAMES E. DOYLE
ATTORNEY GENERAL
STATE OF WISCONSIN

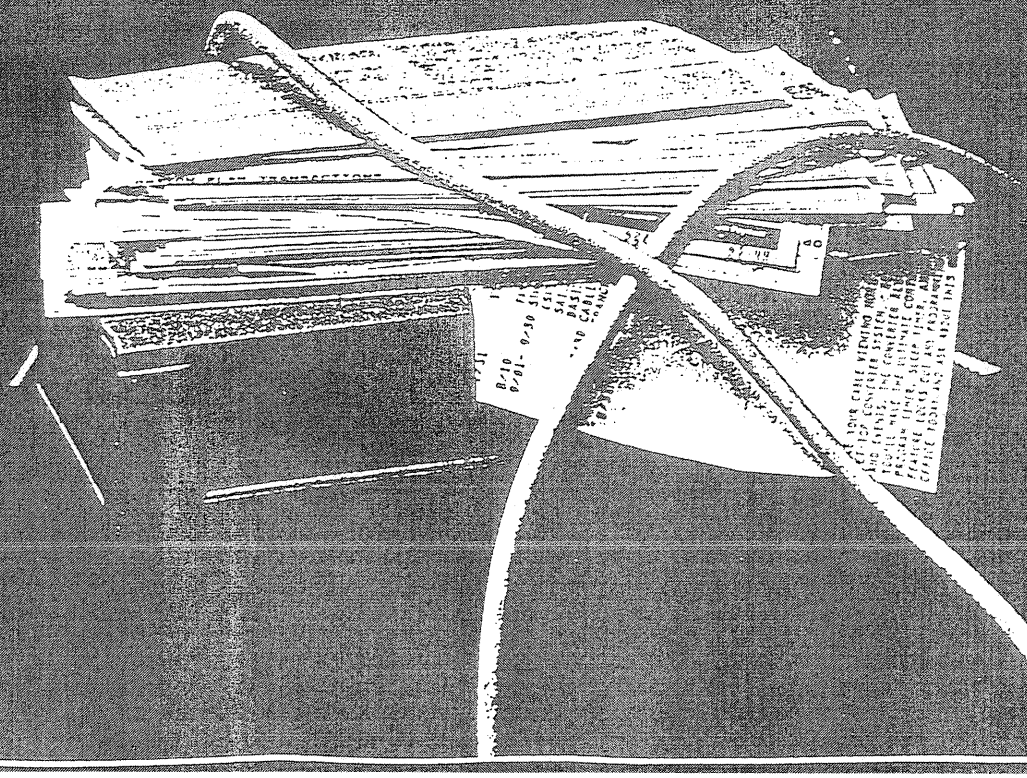
June 18, 1997

LOYOLA UNIVERSITY CHICAGO

Volume 7 Number 1 Autumn 1994

Loyola Consumer Law Reporter

"Free" Services?



Loyola Consumer Law Reporter

Loyola Consumer Law Reporter Volume 7, Number 1, Autumn 1994. ISSN 1041-5114.

Cite as: 7 Loy. Consumer L. Rep. This issue went to press January 23, 1995.

The editors welcome unsolicited lead articles written by practicing attorneys, judges, law professors, and other qualified people. Generally, manuscripts should total 15–30 double–spaced typed pages. Magnetic media are preferred. Endnotes should conform to *The Bluebook: A Uniform System of Citation*, fifteenth edition, published by the Harvard Law Review Association. We cannot return manuscripts. For more information, call the *Loyola Consumer Law Reporter* office at 312/915-7181.

The *Loyola Consumer Law Reporter* is published quarterly by the students of Loyola University School of Law. Subscriptions are $15 per year.

Address all correspondence to:

Loyola Consumer Law Reporter
Loyola University Chicago School of Law
One East Pearson Street
Chicago, Illinois 60611-2055

Complete sets and individual back issues of the *Reporter* can be ordered directly from:

William S. Hein & Co.
1285 Main Street
Buffalo, New York 14209-1911
Phone 800/828-7571 and 716/882-2600
Fax 716/883-8100

CONTENTS

Articles

5 **Negative–Option Billing**

How sellers can take your money without telling you beforehand, and what consumer protection attorneys are doing about it.

By Bruce A. Craig

14 **Automobile Leasing**

Recent cases and regulations have started to give consumers the protection they need. One lawyer argues there still isn't enough.

By Daniel A. Edelman

Departments

2 **Consumer News**

McDonald's coffee scalds a customer and lands the company in hot water
The Disabilities Act expands to cover half a million more companies
New cigarette lighter regulations adopted to protect young children

24 **Recent Cases**

ERISA preempts Illinois law for HMO claims
Car lessees' early–termination rights spelled out
Requirement to split utility expenses between tenants deemed actionable
Minnesota statutes protect rent–to–own customers
Lanham Act does not cover consumer claims of false advertising
Court finds no disposable lighter manufacturer liability in child's death
Fair Debt Collections Practice Act awards limited to $1000 over damages

Cover photo by Ray Chao

Layout design by David Braverman

Negative–Option Billing

Understanding the stealth scams of the '90s

Sellers have new ways to get your money without telling you first. What's legal and what isn't? A Wisconsin Assistant Attorney General explains.

By Bruce A. Craig

No one denies that modern technology brings many benefits to today's consumer. This same technology, however, opens the door for sophisticated large–scale exploitation of consumers. In this age of extensive customer databases containing tens of millions of names, the temptation for businesses to add a small charge to each invoice through negative–option and other similar billing practices is powerful indeed.

Recent litigation concerning the cable television industry illustrates the potential benefits of giving in to this temptation. After a provider changed from a negative–option to a positive–option billing procedure, its executive vice president stated that it had scaled down the number of subscribers it expected to order its service from 80 percent to 50 percent.[1] Thus, by the provider's own estimate, 30 percent of its customers would have paid a one–dollar charge even though they would not have ordered the service if required to ask for it. These customers would have provided $1.86 million of extra revenue every month, based solely on the manner in which the service was offered and billed.

Although cable companies were perhaps the first to attempt implementation of modern negative–option billing on a large scale, the principles underlying these practices have increasingly interested others with similar billing opportunities. Because of this, it is helpful, from the consumer's standpoint, to examine the circumstances under which negative–option billing, or related practices, are likely to succeed. This article attempts to clarify the nature of these billing abuses, the reasons why they work, and what actions might minimize their impact on the consuming public by providing:

- a discussion of what negative–option billing is;
- an account of how consumers were protected from negative–option billing schemes in the cable television industry;
- an analysis of the elements of successful negative–option billing;
- a summary of current laws on the subject;
- a general discussion of the types of proposals where negative–option billing, or variations of it, would most likely succeed; and,

Bruce A. Craig is an Assistant Attorney General with the Wisconsin Department of Justice. He received his B.S. in Business Administration from Northwestern University in 1960 and his LL.B. from the University of Wisconsin Law School in 1964. Mr. Craig focuses primarily on the areas of consumer protection and antitrust. He recently litigated cases involving the negative–option billing practices of Tele–Communications, Inc. and Time Warner in respect to their cable television services.

- suggestions for preventing future consumer injury caused by negative–option billing and other billing abuses.

What is a negative–option offering?

A negative–option offering occurs when a merchant's sales proposal to a prospective customer becomes an agreement to buy *unless the customer tells the merchant that the proposal is rejected.*

Until recently, if one were asked to name a negative–option proposal, the usual response would describe an offering similar to that of the Book of the Month Club. With this offering, for a small payment, the participant receives many books right away provided she agrees to buy a certain number of regularly priced books over a period of time. Until the minimum amount is ordered and the membership cancelled, the participant receives a monthly publication that features the Club's "Book Of The Month." The Club encloses a card allowing the customer to refuse the featured book. If the Club does not receive the card within a stated time, it sends the customer the book and a bill for that selection. As a result of such negative–option offerings, many families have acquired an abundance of unwanted items because they failed to return a card within a stated time period.

The Federal Trade Commission ("FTC") has regulated Book of the Month Club–type offerings, referred to as "prenotification plans," since 1973.[2] Since regulation, these plans have not had a significant adverse impact on consumers. In the above example, the FTC requirement that a written notice precede a mailing now allows the participant to prevent the mailing of the book by returning the card within a specified time. This softens the impact of the negative–option by eliminating the need for the consumer to repackage and return the unordered merchandise. Further, the only consumers affected by these plans are those who seek an initial contract with the offeror.

In the past several years, a new version of negative–option billing has evolved. This version, recently implemented by certain cable television providers, involves placing a charge for unordered services or merchandise on the customer's monthly bill. Usually, accompanying materials or other notices inform the customer of the negative–option proposal. These materials state that a charge has been added to the bill and that the proffered service or merchandise will be considered an ordered item, for current and subsequent billing periods, unless the customer notifies the offeror that they are not wanted.

Unlike the traditional prenotification–type offer, these new negative–option practices are imposed on a seller's entire customer database and not just on those people responding to a solicitation to enter into a negative–option agreement. In addition, there is no prior agreement and no selection card. The seller simply places the charge on a customer's monthly bill as an amount due. It becomes the customer's responsibility to discover the charge and inform the seller that the service or merchandise is not desired.

Accordingly, the size of the target audience and the potential for increased revenues for the seller is significantly greater than with a prenotification–type negative–option plan. Additionally, the seller does not have to construct a "club" type offering in order to implement the practice.

Litigation exposes the '90s version

Tele–Communications, Inc. ("TCI"), the largest cable supplier in the country,[3] recently attempted this modern version of negative–option billing. In early 1991, TCI notified each of its customers by mail and through its television channels that it was introducing a new movie channel called ENCORE. In its promotional brochure, TCI informed customers that effective July 1991, it would add a charge of $1 for ENCORE to their monthly bills. The brochure further stated:

> If you want to continue receiving ENCORE—do nothing! Unless you notify us of your desire not to receive ENCORE, we will assume that you want to subscribe to it and we will bill you each month. *Your continued payment of the monthly charge for ENCORE will be considered as your election to subscribe to it* [emphasis added].

As presented, the customer was burdened with the responsibility of contacting the company to request that the charge be removed from the invoice. However, if the customer paid the charge already included in the cable bill, TCI would consider the payment an ENCORE service order.

This practice deviated from general concepts of fairness and contract law as it imposed a contractual obliga-

tion on a customer for a service that was never ordered. The customer, who had not initiated the transaction, carried the sole responsibility for cancelling the agreement.

Moreover, the economic impact of this practice was considerable. Collecting the $1 payment from each of the 6.2 million TCI households[4] that were offered the ENCORE proposal would have raised an extra $6.2 million each month. By any standard, this would have been a significant consumer injury.

In May and June 1991, the attorneys general of several states began investigating the ENCORE proposal.[5] Several states, including Wisconsin,[6] initiated legal proceedings against TCI with respect to negative–option billing and other similar billing practices. These proceedings were premised on the theory that billing for unordered services violated state unfair trade practice laws. On June 14, 1991, TCI publicly announced that it would change its ENCORE offering to a traditional positive–option plan. The invoices containing the ENCORE negative–option charges were never sent to TCI customers.[7]

The ENCORE proposal, even though withdrawn, came to the attention of Congress. At the time, Congress was considering whether to amend the Cable Communications Policy Act of 1984[8] to rectify what it considered improper rate increases and other related unfair practices enabled by the *de facto* monopolistic position held by cable companies in most parts of the United States.

> The ENCORE billing practice deviated from general concepts of fairness and contract law.

In January 1992, Senator Gorton of Washington offered an amendment to the proposed 1992 Cable Act[9] under consideration. In his discussion of the amendment, he stated:

> This first amendment, the one before the Senate right now, is in response to a marketing ploy which TCI employed in the State of Washington and elsewhere, last year.
>
> TCI launched a new movie channel called Encore. The company expected that 60 to 70 percent of all TCI subscribers would take this new service.
>
> ...Under TCI's plan, the cable subscriber would have automatically purchased the service unless that subscriber called TCI and physically canceled it.[10]

Senator Gorton's amendment specifically addressed negative–option billing in its modern context. Enacted into law as part of the 1992 Cable Act, it provides:

> A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.[11]

Despite this new legislation, in September 1993, Time Warner, the country's second largest cable operator,[12] along with a number of other cable operators, implemented a negative–option billing effort that differed from TCI's ENCORE proposal. With this plan, the channels that were offered as newly created and optional services were already included within one of Time Warner's existing multi–channel services previously ordered by the cable customer.

For example, in the Milwaukee area, Time Warner "unbundled" two channels from its 28 channel "Basic" service and two channels from its 23 channel "Standard" service into separate, optional, single channel services, each referred to as an "a la carte" channel. As in TCI's ENCORE proposal, Time Warner told its customers in advance of the negative–option and that the channels could be canceled "at any time" by calling the local Time Warner office.[13]

Time Warner's reasons for its negative–option efforts were most likely motivated by a desire to avoid the rate re–regulation mandated in the new 1992 Cable Act. Under the new law, single channel "a la carte" services were, in some circumstances, exempt from rate regulation.[14]

If successful in its efforts, Time Warner would have been able to avoid rate regulation on four[15] of its popular channels. At the same time, it would have minimized subscriber losses with respect to these now optional chan-

nels by eliminating the requirement of providing services only in response to a customer's affirmative order. Time Warner's negative–option billing effort attempted to avoid the need for affirmative customer orders by billing for these new services as if they had been ordered. Only customers who recognized that they had an option, and then exercised it by refusing the service, would be deemed to have rejected the optional services.

In response to these practices, Wisonsin authorities charged Time Warner with negative–option billing.[16] As in its case against TCI, the state alleged that the procedure was an unfair trade practice prohibited under its "little FTC Act."[17]

Time Warner then commenced a federal action against Wisconsin officials responsible for the state case.[18] It contended that the Federal Communications Commission ("FCC"), in orders and rulings interpreting the 1992 Cable Act, had explicitly authorized this type of negative–option in order to implement other policies expressed in the Act. Time Warner also claimed that the FCC had, in the process, preempted the states from pursuing any consumer protection effort intended to halt this billing procedure. Time Warner sought to enjoin Wisconsin's enforcement efforts and presented questions of first impression on the federal preemption issue. Consistent with their objection to TCI's negative–option effort, the attorneys general of 27 states filed an *amicus curiae* brief supporting Wisconsin's position on this issue.

In its decision on March 17, 1994, the federal district court decision, rejected Time Warner's preemption arguments.[19] Moreover, the FCC, in its recent Order on Reconsideration, clarified some of its earlier statements relied upon by Time Warner for its legal position in the federal action. The FCC made it clear that:

> There is nothing in the language of Section 3(f) or its legislative history to suggest that the Commission has exclusive jurisdiction over negative–option billing or that state and local governments are precluded from addressing such practices.[20]

In May 1994, Time Warner, by stipulation with the state of Wisconsin, agreed to make a positive–option offer to its Wisconsin customers previously billed by a negative–option method.

The attraction of negative–option billing

A provider may market almost any service or merchandise with a negative–option offering. However, some factors make negative–option billing especially attractive to marketers. Some of these factors are listed here.

Low unit cost. Although some billing abuses can secure relatively large revenues without the customer's affirmative approval, an item sold through negative–option billing is less likely to be noticed if it is low in cost. Furthermore, even if the customer happens to notice the charge, he or she might not devote much attention to it because of the time and effort to determine the cause of the charge and to have it removed from the bill. Moreover, those in vulnerable positions, such as the elderly or foreign born persons, might feel intimidated or deterred from objecting to the charge.

Large customer base and regular billing cycle. If the unit cost is low, then a company seeking to implement a negative–option will need enough billable customers to justify the effort. The company will also benefit from a monthly billing cycle so the advantage gained by implementing the negative–option plan may be realized on a regular basis.

Some degree of customer trust. Most customers of a large billing company have a certain degree of trust, based upon past practices, that the "Amount Due" portion of a monthly bill includes charges only for items actually ordered or purchased. Most credit card issuers, large department stores, gasoline companies, utilities, and cable operators fall into the "trustworthy" category. This status should ideally last until billing abuses become more prevalent or more publicized.

The billed item is a service rather than merchandise. If merchandise is received in the mail, it will likely raise consumer doubts as to why it was sent and who will be seeking payment. By contrast, a service, such as a television channel, might go unnoticed because it adds nothing tangible to the consumer's possession.

The billing procedure does not unduly antagonize the customer or draw attention from consumer protection authorities. Most businesses with large, regularly–billed customer bases would not want to risk the loss of any significant portion of those customers, or take a chance of being sued by local or state authorities should their negative–option billing practices be subjected to public scrutiny. This risk is minimized if the billed amount is

small and the company has an explanation that might appease customers and enforcement officials should the negative–option plan be detected.

TCI, for example, informed its customers about the practice in advance. Time Warner also informed its customers about the practice in advance and claimed that it assumed its customers wanted its now optional "a la carte" channels because they had previously ordered them as part of a multi–channel package. Merchants also reduce the risk of adverse consumer reaction by immediately rectifying the billing problems of the small percentage of consumers who do complain.

If a merchant configures a negative–option offering that remains below consumer and enforcement levels of concern, and if that offering is made to a large customer base that will be billed regularly, negative–option billing has the potential to provide substantial additional income to the billing merchant.

Means to oppose negative–option billing

Aside from the explicit prohibition against negative–option billing in the 1992 Cable Act and the FTC regulation of prenotification–type negative–option plans, no body of law adequately deals with negative–option billing and other billing abuses. There exist, however, some laws supporting the premise that it is improper to bill a person for items not expressly requested by the recipient.

The federal unordered merchandise rule and state unsolicited goods statutes. Section 3009 of the Postal Reorganization Act[21] declares that mailing unordered merchandise is an unfair trade practice that violates the Federal Trade Commission Act. The statute also recognizes that it is an unfair trade practice to mail any person a bill or other communication for such merchandise. According to the statute, "unordered merchandise" is defined as "merchandise mailed without the prior expressed request or consent of the recipient."[22] In 1978, the FCC [23] ratified its earlier adoption of Section 3009 as the proper interpretation of the FTC Act.[24] Furthermore, it clarified that its prohibition was not limited to items sent in the mail.

State provisions address similar issues. For example, Wisconsin's statute pertaining to unsolicited goods provides:

> If unsolicited goods or merchandise of any kind are either addressed to or intended for the recipient, the goods or merchandise shall, unless otherwise agreed, be deemed a gift to the recipient who may use them or dispose of them in any manner without any obligation to the sender.[25]

Further, consumer protection rules in Oregon state that it is an unfair trade practice to "[s]end any bill to a consumer for unordered goods or services."[26] In this context "unordered goods or services" are defined as "[g]oods or services which are sent or provided without the prior expressed request or consent from the person receiving the goods or services."[27]

Such laws and regulations demonstrate a legislative public policy determination that it is unfair to bill a consumer for merchandise that she has not expressly requested. Although not defined, an "express request" would likely be something other than mere silence or acquiescence to the mailing. The the negative–option billing prohibition in the 1992 Cable Act provides: "[A] subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."[28]

State UDAP statutes. Each of the fifty states provides some form of consumer law of general application dealing with consumer issues.[29] Many of these laws are patterned after Section 45(a)(1) of the Federal Trade Commission Act[30] and prohibit unfair or deceptive acts or practices ("UDAP").

Wisconsin's actions against TCI and Time Warner were based on a statute that prohibits unfair trade practices and unfair methods of competition.[31] The state's position was that billing a customer for an unordered service and requiring her to request the charge be removed from the bill, constituted an unfair practice.

Furthermore, the state alleged that the practice was unfair because it placed the burden on the customer to detect a transaction she did not create. Such a practice takes unfair advantage of the fact that some customers will not notice the unordered service among the other items listed on the invoice, or will not know to look for the charge since they have ordered no new services. An "Amount Due" notice may also intimidate certain customers into paying the charge simply because it is demanded by a large provider of important services, such

as a cable television operator or a telephone company. This is most likely true for elderly and other vulnerable customers. Laws prohibiting deception might also remedy this situation. Including these unordered charges within the "Amount Due" could be found to constitute a deceptive statement. Mere attempts to notify the customer that the charge is on the invoice are unlikely to negate the otherwise deceptive claim that the amount is due.

General contract law. Under ordinary circumstances, contracts require an offer and acceptance, sometimes described as a "mutual meeting of the minds and an intention to contract."[32] This normally entails an indication of assent on the part of the buyer.

While, in certain settings, the law tolerates silence as acceptance, this usually applies only in exceptional circumstances, such as where the offeree silently takes offered benefits or where the offeror relies on a manifestation that silence may operate as acceptance.[33] These exceptions typically apply only where the parties were in a long–standing relationship, with personal knowledge of each other. The principle hardly seems appropriate to relationships between, for instance, a cable operator and 10 million customers of varying degrees of sophistication and awareness.

> An unsolicited service might not raise questions because it adds nothing tangible to one's possession.

Furthermore, applying a legal principle that recognizes silence as acceptance in this context would likely be rejected as a violation of public policy.[34] Existing legislative prohibitions against unordered merchandise and cable negative–option billing provide the basis for such public policy and should stand as a barrier against imposing any similar procedure by a large merchant on its individual customers.

Abuses akin to negative–option billing

As previously discussed, the attractive elements of a technique such as negative–option billing are: increased revenues to a company beyond those for positively ordered goods or services, and the availability of a credible explanation should the customer or consumer authorities question the charge. However, given the adverse public attention directed at overt negative–option efforts, such as in the case of TCI, the future will likely produce more subtle marketing endeavors to secure orders from customers under circumstances involving less than full disclosure of the customer's obligations. Following are illustrations of such potential variations of the traditional negative–option offering.

Delayed Charge Offerings. A tactic related to the negative–option proposal is to offer a customer an attractively priced (or free) item and link the order for that item with the customer's agreement to purchase another item or to pay an increased price on the ordered item at a later time. Disclosure of the linked agreement is usually not provided in direct connection with the offer for the attractive item. Rather, it is often buried in accompanying materials and offered in less than clear terms.

For example, the practice of offering free credit cards to credit–approved prospects has been used in conjunction with a delayed charge offering. Included in the merchant's offer, for those who accept the card, is a "free" hot line service for lost credit cards or a membership in a buyer's protection plan or travel club. Not so clearly disclosed is the fact that an annual charge for this service will be added to the customer's bill after the expiration of the "free" period. If the offer is accepted, the charge will eventually appear on a customer's invoice among the other charges for ordered services or merchandise. The customer may then pay the charge because it goes unnoticed, or because she assumes that the merchant would not bill her for an unordered service. Alternatively, the customer may be unsure or unable to prove whether she in fact ordered the service because she no longer has any of the original order forms. Finally, the customer may not challenge the charge for fear of losing credit privileges, or because it is a time–consuming process and not worth the effort.

The lure of such a proposal to merchants with a large customer base may be difficult to resist. Under usual circumstances, if the billing proposal is professionally structured, only a small percentage of customers will seek a refund or cancellation. The payments of all non–complaining customers will inure to the benefit of the billing mer-

chant with little significant risk of losing any meaningful portion of its customer base due to adverse publicity. Additionally, the merchant can thereafter periodically reimpose the charge for the service or item as if it had been ordered under regular circumstances.

Multiple Order Proposals. A multiple order proposal of concern to the consumer[35] seeks to induce a customer to place an order for an attractively priced item, disguising the fact that other items are also being ordered for later delivery. This can be accomplished by making only vague reference to the other orders or by separating the language in the solicitation materials relating to the order for the discounted or "bait" item from proposals relating to the later orders. In some circumstances, the customer obligations are contained only on the order blank. When the customer makes an order, she returns the order form to the merchant, thereby depriving herself of any record of the transaction. These proposals differ from the traditional prenotification–type offer where the elements of the multiple order are completely set forth in the ordering materials, the customer is aware of the overall obligation, and written advance notice affords the customer the opportunity to avoid the merchandise being mailed.

Continuity Plans. Related to the multiple order proposal and the FTC–regulated prenotification plan is the continuity plan. This offering asks the customer to join a club similar to a Book of the Month Club. However, in such cases, the merchandise is sent, on approval, at regular intervals without giving the customer an opportunity to avoid the mailing (*i.e.*, prenotification). The plan usually does not require any minimum number of purchases and permits the customer to return the merchandise to avoid any charges.

The fact that continuity plans do not allow the customer to prevent the merchandise from being sent distinguishes them from the prenotification–type offerings authorized by the FTC regulation. For reasons not fully clear to the writer, in its comments accompanying the promulgation of the negative–option rule, the FTC decided not to make the rule applicable to:

> [N]egative option merchandisers who optionally tender merchandise to subscribers: *i.e.* those who send, pursuant to prior authorization by the customer, merchandise to the subscriber without previously sending a monthly selection notice. These plans, known as continuity plans...are so different from the prenotification negative–option type of clubs (such as book and record clubs) that separate treatment is warranted by the Commission if and when complaints by consumers justify Commission attention.[36]

This decision appears to exempt continuity plans from coverage under the rule even though the FTC described them as "negative–option merchandisers." It would seem that the absence of "prenotification" in continuity plans (*i.e.*, that they do not offer the customer an advance mailing that gives her the opportunity to prevent the merchandise from being sent) would make the offering a greater enforcement concern than the traditional prenotification–type offering.[37]

Renewal Billing. This practice involves billing a customer for an ordered item, such as a magazine or a lawn care service, after the completion of the initial contract term. The illegal aspects of this particular practice are more difficult to identify because many legitimate contractual relationships, such as a newspaper subscription, contemplate a continuing ordering relationship.

This issue in most routine transactions is resolved by the merchant's practice of billing in advance for a contract renewal. If the renewal invoice is paid, the merchant assumes that the customer wants continued service.

Problems arise when the merchant provides the service or merchandise after the initial term under the assumption that the customer wanted to renew the contract, but failed to affirmatively renew. As a result, the customer is billed or charged for the items in question. Areas of concern focus on the adequacy of the initial contract in disclosing that the customer's order for the service or merchandise will be automatically renewed without further notice unless the customer informs the merchant otherwise. In addition to questions of adequate contractual disclosure, the impact of this practice may be minimized with an understanding that the customer will be fully notified, in advance, of the planned renewal and afforded a meaningful opportunity to cancel prior to the delivery of any services or goods.

By varying the traditional manner in which they bill continuing subscription type orders (*i.e.*, billing in advance and giving the customer the chance to cancel by nonpayment), some merchants capitalize on consumer expectations and lack of caution by billing for the continuing

service after it has been provided and after the initial term of the contract.

Price Increases. In situations where ordered items are billed to the customer on a monthly basis, such as cable or telephone service, the potential exists to increase the price of the ordered item above that agreed upon by the customer in the initial order. Billing for an ordered item at a price higher than agreed upon is similar to billing for an unordered item. An agreement to purchase an item for $1 per month should not be construed as a future agreement to be billed at $2 per month.

In this context, the right of the customer to be billed at agreed–upon rates conflicts with the seller's need to raise prices during the pendency of an ongoing monthly billing arrangement. Although the matter deserves further investigation into abuses, one current resolution of this problem is to require the merchant to notify the customer in advance of the price increase and allow the customer the opportunity to cancel the service subject to the increase without further obligation. For instance, Wisconsin law requires a cable operator to "give a subscriber at least 30 days' advance written notice before instituting a rate increase."[38]

In conclusion, the common thread among these billing abuses is the seller's attempt to increase the amount of money being paid by an existing customer by: (a) implementing negative–option billing; (b) disguising price increases or the order of other items in solicitation materials; or (c) billing for items ordered under deceptive circumstances or renewal procedures. These are only an indication of what the consumer may face in the future, as ordering and billing become more electronic in nature.

Looking into the future

As dealings with service and merchandise providers become more centralized, the number of bills customers receive in the mail will decrease. Today, it is not uncommon for a typical consumer to receive monthly bills from gas and electric utilities, a telephone company, a cable service, a department store or gasoline company, and general service credit card companies such as Visa or MasterCard.

With increasing technology and the developing "telecommunications superhighway," many customer orders are being placed electronically through telephone contacts or computer modems. Payment for ordered items may be made by placing a charge on the customer's credit card or automatically and electronically from the customer's checking account. The potential for billing abuses will increase with these technological developments as will the degree of sophistication of those determined to abuse the process.

Although still in their early stages, state laws have begun to respond to some of these recently implemented billing abuses. Negative–option billing has been prohibited at the federal level as to cable providers. While state laws of general import, such as those prohibiting unfair and deceptive conduct, have been somewhat valuable in challenging vague or non–contextual ordering or reordering language, they will likely be supplemented with prohibitions and requirements intended to deal specifically with modern day billing abuse.

From the consumer's standpoint, it will be necessary to examine all ordering and billing materials with greater care. Rather than dealing with local merchants, consumers will most likely deal with the computerized headquarters of national or international companies. Undoing an inadvertent order or payment will therefore become more difficult, and the risk of a damaged credit reputation will be enhanced. To further exacerbate the problem, once a customer falls victim to an ordering or billing scheme she might, for future contacts, be added to a computerized customer list of persons susceptible to that scheme.

Persons advising consumer groups should begin to collect and publicize contractual and billing abuses. Merchants who want to retain their customers may respond to inquiries about abusive billing tactics and modify their procedures.

Attorneys should begin to develop fertile areas of class action or multiple party litigation against mass marketers who use ordering or billing procedures that may violate state consumer protection laws. Many of these laws also provide private redress for similar practices with the potential for restitution awards and reasonable attorney's fees.

With the onset of consumer directed technology, the nature of consumer transactions has changed considerably in the past 10 years. In the future, it will change and evolve at an even faster rate. The challenge for consumers and consumer advocates will be to identify new areas of billing abuse and to use the same technology that enables those abuses to assist in their prevention.

ENDNOTES

[1]*Subs to TCI: We Want Our $1 Encore*, CABLE WORLD, July 1, 1991, at 20.

[2]16 C.F.R. § 425.1 (1994).

[3]TCI and its subdivisions currently serve about 15 million subscribers. *What Makes Top Seven MSO's Tick: Roadmap of How the Cable Highway Interconnects*, ADVERTISING AGE, April 11, 1994, at S–10.

[4]*Subs to TCI: We Want Our $1 Encore*, *supra* note 1.

[5]Under the aegis of the National Association of Attorneys General ("N.A.A.G."), a cable task force, led by the state of Florida and consisting of state consumer attorneys from approximately 21 states, was formed to contact TCI and deal with the ENCORE situation. It is likely that this group was instrumental in TCI's eventual decision to withdraw its negative option proposal.

[6]Tele–Communications, Inc., No. 91–2294 (Wis. Dep't of Agric., Trade & Consumer Protection, July 28, 1993). During this time period, the states of Florida and Washington also commenced legal proceedings.

[7]The Wisconsin litigation continued notwithstanding TCI's change in billing procedures. TCI contended that its ENCORE negative–option proposal was not illegal. The state also charged that TCI had previously used a negative–option plan in "unbundling" its Expanded Basic service and in offering a program guide. Unbundling, a practice of offering a service once part of a multiple service package through negative–option billing, will be discussed in this article in another context: the cable offering of Time Warner in 1993. The TCI litigation was resolved in July 1993, after two weeks of trial, by a stipulated injunction prohibiting negative option billing and several related practices.

[8]47 U.S.C. §§ 521–559 (1991).

[9]Formally known as the Cable Television Consumer Protection and Competition Act of 1992. The primary purpose of the act was to reinstitute the regulation of rates charged by cable operators to their customers.

[10]138 CONG. REC. S567 (daily ed. Jan. 29, 1992) (statement of Sen. Gorton).

[11]47 U.S.C. § 543(f) (1994).

[12]*What Makes Top Seven MSO's Tick: Roadmap of How the Cable Highway Interconnects, supra* note 3.

[13]In other parts of Wisconsin, Time Warner offered its "a la carte" channels as a positive–option offering.

[14]47 U.S.C. § 543 (l)(2)(B) (1994) excludes "video programming offered on a per channel or per program basis" from the definition of "cable programming service" which, under 47 U.S.C. § 543(c), is the category of cable service subject to rate regulation.

[15]In Milwaukee, Time Warner offered four channels by negative option under the "a la carte" practice: WTBS, WGN, the Discovery Channel and E!–TV.

[16]Time Warner Entertainment, No. 93–2490 (Wis. Dep't of Agric., Trade & Consumer Protection, filed Sept. 1, 1993). Century Communications Group was also sued for similar practices. Century Communications, No. 93–2529, (Wis. Dep't of Agric., Trade & Consumer Protection, filed Nov. 16, 1993).

[17]WIS. STAT. § 100.20 (1993). Many states have prohibitions against unfair trade practices and unfair methods of competition that are patterned after similar federal provisions authorizing the Federal Trade Commission to pursue these practices. *Cf.* 15 U.S.C. § 45 (1994). The stipulated order in the Wisconsin TCI case, issued under this section and which established the state's position on negative option billing, prohibited "[b]illing a customer for any cable service that the customer has not affirmatively ordered by name."

[18]Time Warner Cable v. Doyle, 847 F. Supp. 635 (W.D. Wis. 1994).

[19]Time Warner has appealed the district court decision to the 7th Circuit U.S. Court of Appeals, Cause No. 94–1894. Oral argument before the 7th Circuit took place on September 22, 1994.

[20]FCC Third Order on Reconsideration, 74 Rad. Reg.2d (P & F) 1274 (1994).

[21]39 U.S.C. § 3009 (1994).

[22]39 U.S.C. § 3009(d) (1994).

[23]43 Fed. Reg. 4113 (1978).

[24]15 U.S.C. § 45(a)(1) (1994).

[25]WIS. STAT. § 241.28 (1993).

[26]OR. ADMIN. R. 137.20.300 (1991) (Oregon).

[27]*Id.*

[28]47 U.S.C. § 543(f) (1994).

[29]JONATHAN A. SHELDON, NAT'L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES 31 (3d. ed. 1991).

[30]15 U.S.C. § 45(a)(1) (1994).

[31]WIS. STAT. § 100.20(1) (1993).

[32]Garvey v. Buhler, 430 N.W.2d 616 (Wis. Ct. App. 1988).

[33]*Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

[34]RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

[35]There is nothing inherently unfair about a customer affirmatively ordering a series of items to be delivered over a period of time. Concern arises, however, if the details of the proposal, particularly as to later deliveries and obligations, are vague or ineffectively disclosed.

[36]38 Fed. Reg. 4896–915 (1973).

[37]In the appendix to its discussion of the Negative Option Rule (38 Fed. Reg. 4914), the FTC referred to objections made by some merchandisers to inclusion under the rule of all arrangements that tender merchandise on an optional basis, such as continuity plans. Some objections related to commercial "Standing Order Plans" entered into with libraries or magazine retailers. Other objections were voiced by specialized merchants, such as the "Wine of the Month" Club. The FTC did not explain why it did not deal with these unique situations, as suggested in the record, by limiting the rule to sales to retail purchasers.

[38]WIS. STAT. § 134.42(2)(d) (1993)

Vote Record

Assembly Committee on Consumer Affairs

Date: 10/23/97
Moved by: Johnsrud
Seconded by: Ott
AB: AB 169
Clearinghouse Rule:
AB: SB:
Appointment:
AJR: SJR:
Other: Introduction and adoption of LRB s 0173/9 with an amendment to create a 9mo delayed effective date and applicability. To be /10.?
A: SR:
A/S Amdt: 1 (LRB s 0173/10 ?)
A/S Amdt: to A/S Amdt:
A/S Sub Amdt:
A/S Amdt: to A/S Sub Amdt:
A/S Amdt: to A/S Amdt: to A/S Sub Amdt:

Be recommended for:
- [X] Passage ~~ASM~~
- [X] Introduction
- [X] Adoption
- [ ] Rejection
- [ ] Indefinite Postponement
- [ ] Tabling
- [ ] Concurrence
- [ ] Nonconcurrence
- [ ] Confirmation

Committee Member	Aye	No	Absent	Not Voting
Rep. Clifford Otte, Chair	X			
Rep. DuWayne Johnsrud	X			
Rep. Alvin Ott	X			
Rep. Michael Lehman	X			
Rep. Frank Urban	X			
Rep. Annette Polly Williams	X			
Rep. Donald Hasenohrl			X	
Rep. Spencer Black	X			
Totals:	7	0	1	0

[X] Motion Carried [ ] Motion Failed

Vote Record

Assembly Committee on Consumer Affairs

Date: 10/23/97
Moved by: Johnsrud
Seconded by: Ott
AB: 169
Clearinghouse Rule:
AB: SB: Appointment:
AJR: SJR: Other:
A: SR:

A/S Amdt: 1
A/S Amdt: to A/S Amdt:
A/S Sub Amdt:
A/S Amdt: to A/S Sub Amdt:
A/S Amdt: to A/S Amdt: to A/S Sub Amdt:

Be recommended for:

- [X] Passage ASA1 to AB 169 See attached vote record
- [ ] Introduction
- [ ] Adoption
- [ ] Rejection
- [ ] Indefinite Postponement
- [ ] Tabling
- [ ] Concurrence
- [ ] Nonconcurrence
- [ ] Confirmation

Committee Member	Aye	No	Absent	Not Voting
Rep. Clifford Otte, Chair	X			
Rep. DuWayne Johnsrud	X			
Rep. Alvin Ott	X			
Rep. Michael Lehman	X			
Rep. Frank Urban	X			
Rep. Annette Polly Williams	X			
Rep. Donald Hasenohrl			X	
Rep. Spencer Black	X			
Totals:	7	0	1	0

- [X] Motion Carried
- [ ] Motion Failed

Assembly Hearing Slip

(Please print plainly)

Date: 3/27/97

Bill No. AB 169
Or
Subject

Rep. Clifford Otte
(Name)

(Street Address or Route Number)

(City & Zip Code)

author
(Representing)

Speaking *in favor:* ☒

Speaking *against:* ☐

Registering *in favor:* ☐

Registering *against:* ☐

Speaking for *information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 3/27/97

Bill No. AB 169
Or
Subject

Jim Rabbitt & David Ghilardi
(Name)

~~5555 DOES~~ Dept of Ag. Trade & Cons. Prot.
(Street Address or Route Number)

2811 Agriculture Drive, Madison 53708
(City & Zip Code)

DATCP
(Representing)

Speaking *in favor:* ☒

Speaking *against:* ☐

Registering *in favor:* ☐

Registering *against:* ☐

Speaking for *information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 3/27/97

Bill No. AB 169
Or
Subject NEGATIVE OPTION

CURT WINTER
(Name)

10876 SMOKEY MTN. TR
(Street Address or Route Number)

BLUE MOUNDS, WI, 53517
(City & Zip Code)

LAWN CARE OF WIS, INC
(Representing)

Speaking *in favor:* ☐

Speaking *against:* ☒

Registering *in favor:* ☐

Registering *against:* ☒

Speaking for *information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 3-27-97

Bill No.
Or
Subject

Peter C. Christianson
(Name)

15. Pinckney Suite 600
(Street Address or Route Number)

MSN WI 53701-2113
(City & Zip Code)

Wisconsin Landscape federation
(Representing)

Speaking *in favor:* ☐

Speaking *against:* ☐

Registering *in favor:* ☐

Registering *against:* ☒

Speaking for *information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 8/14/97

Bill No. AB 169
Or
Subject

Clifford Otte
(Name)

(Street Address or Route Number)

(City & Zip Code)

author.
(Representing)

Speaking *In favor:* ☑

Speaking *against:* ☐

Registering *In favor:* ☐

Registering *against:* ☐

Speaking for *Information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 8/14/97

Bill No. AB 169
Or
Subject

Guy Lofts
(Name)

722 Pullen Dr
(Street Address or Route Number)

Madison
(City & Zip Code)

WI 53714
(Representing)

Speaking *In favor:* ☑

Speaking *against:* ☐

Registering *In favor:* ☐

Registering *against:* ☐

Speaking for *Information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 8/14

Bill No. AB169
Or
Subject

DAVID GHILARDI
(Name)

(Street Address or Route Number)

(City & Zip Code)

DATCP
(Representing)

Speaking *In favor:* ☒

Speaking *against:* ☐

Registering *In favor:* ☐

Registering *against:* ☐

Speaking for *Information only;*
Neither for nor against: ☐

Please return this slip to a messenger promp

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 8/14/97

Bill No. A-169
Or
Subject

GARY WILLIAMS
(Name)

PO BOX 5345
(Street Address or Route Number)

MADISON WI 53705
(City & Zip Code)

WIS. AUTO & TRUCK DEALERS ASSOC.
(Representing)

Speaking *in favor:* ☐

Speaking *against:* ☑

Registering *in favor:* ☐

Registering *against:* ☐

Speaking for *information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

FOR EXEMPTIONS

Assembly Hearing Slip

(Please print plainly)

Date: ~~8~~ 8/14

Bill No. AB169
Or
Subject

BRUCE CRAIG
(Name)

238 ALDEN DR
(Street Address or Route Number)

MADISON, WI. 53705
(City & Zip Code)

Self
(Representing)

Speaking *in favor:* ☐

Speaking *against:* ☒

Registering *in favor:* ☐

Registering *against:* ☐

Speaking for *information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 8-14-97

Bill No. AB 169
Or
Subject

Senator Alice Clausing
(Name)

(Street Address or Route Number)

(City & Zip Code)

(Representing)

Speaking *in favor:* ☐

Speaking *against:* ☐

Registering *in favor:* ☒

Registering *against:* ☐

Speaking for *information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 8/14

Bill No. AB 169
Or
Subject

JERRY HANCOCK
(Name)

(Street Address or Route Number)

(City & Zip Code)
DOJ
(Representing)

Speaking *in favor:* ☐

Speaking *against:* ☑

Registering *in favor:* ☐

Registering *against:* ☐

Speaking for *information only;*
Neither for nor against: ☐

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms
Room 411 West
State Capitol
Madison, WI 53702