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Negative-Option Billing - Understanding the Stealth Scams of the '90s

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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,

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- 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 obligation 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 channels 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 merchant 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 non–payment), 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)