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## Consumer News

Timothy J. Clulo

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# Consumer News

## Regulators and Congress Move to Counter 900-Number Phone Fraud

The Federal Communication Commission ("FCC") recently proposed new regulations to crack down on fraud in the \$1-billion-a-year "pay-per-call" industry. The proposed rules are a response to the more than two thousand complaints the FCC has received in the last two years. Consumer groups and the National Association of Attorneys General ("NAAG") have also called for new standards. "The 900 pay-per-call service has emerged as one of the most significant vehicles for consumer fraud in recent history," according to a NAAG task force report.

The Justice Department moved quickly to support adoption of the proposed guidelines. "My goal in filing these comments is simply to make it more difficult for 900-number rip-off artists to mislead and defraud consumers," said Attorney General Dick Thornburgh. "Given the interstate nature of many of these calls, a clean sweep of the problem has to include remedial action at the federal level."

Pay-per-call started locally in the 1970s, but the 900 area code

bates. Legitimate 900-number services include: stock market quotes, travel information, and charitable fund-raising. But according to consumer groups and NAAG, 900-numbers have been used for fraudulent sweepstakes, phony vacation offers, false offers of credit cards, fraudulent job offers and sex-talk lines.

"The vast majority of callers receive good value for their money," countered Thomas Pace of the Information Industry Association, a trade group representing approximately 600 pay-per-call companies. "A tiny minority of scam artists hog the headlines, tarnish the industry's reputation, discourage innovative services and close off new markets."

If adopted, the FCC's regulations would require that all 900-number calls include a preamble stating the costs, describing the service, and explaining the consumer's right to hang up during the disclosure message without incurring a charge. The preamble must also include a warning that children need parental permission to make the call. Additionally, the regulations would require regional phone companies to offer free call blocking of all 900 telephone numbers from a customer's telephone. Local phone companies would be prohibited from disconnecting a customer's basic service for failure to pay for 900-number services.

In addition to the FCC rulemaking, the Federal Trade Commission ("FTC") is investigating 900-number fraud. Speaking before a Congressional sub-committee, FTC Chairman Janet Steiger said that a "significant portion" of the FTC's \$42 million consumer protection budget is directed against telemarketing fraud. Steiger announced the FTC has brought four lawsuits since July against pay-per-call firms, winning a \$1 million settlement from a Georgia firm that offered free job listings but charged \$18 for each call.

The federal regulators' efforts

have not satisfied some members of Congress, who have introduced legislation in both chambers with bi-partisan support. "It's now a billion-dollar industry with virtually no consumer protection and, to a great extent, has become the home to many scam artists who are

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recycling all of the old types of scams with this new technology," said Rep. Bart Gordon (D-Tenn.) sponsor of the House legislation. "I'm particularly concerned that it's playing on the most vulnerable in our society, those in need of credit or jobs, the lonely and children. I think there is great reason to be concerned."

## Collision Damage Waivers for Rental Cars Under Attack

Legislation was recently introduced in Congress to ban car-rental companies from selling collision damage waivers, policies which often add \$9 to \$16 a day to the advertised price of a rental car. The waivers, which generate \$500 to \$600 million a year according to industry officials, have been widely criticized by consumer groups, state attorneys general, and even some car-rental companies. "It's a classic consumer rip-off," said Lucinda Sikes, a consumer affairs lawyer for the U.S. Public Interest Research Group.

According to the bill's sponsor, Rep. Cardiss Collins (D-Ill.), sale of the waivers is a "highly abusive anti-consumer practice" which "misleads and gouges" renters who are often in a hurry. She said a customer's own auto insurance or

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was not used until 1980 when ABC television utilized telephone lines to get an instant poll during the Carter-Reagan presidential de-

credit card frequently provides coverage for rental cars. Collins' bill would require that car rental agencies, rather than renters, assume financial responsibility for damage to rented vehicles. More than twenty states have passed legislation affecting collision damage waivers, including outright bans in New York and Illinois. Car-rental industry representatives disagree on the legislation. The two

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largest companies, Hertz and Avis, support the ban. "We believe that this bill will protect consumers from excessive pricing, deception and abuse in [waiver] sales, promote greater competition in car rentals and bring the actual cost of renting an automobile much closer to that anticipated by the consumer," said Paul Tschirhart, Hertz senior vice president and general counsel. But small and medium-sized rental firms fear that the waiver ban would deprive them of revenue and make it impossible to compete with the big companies. Stanley Bregman, of the Car Rental Coalition, said the bill "would be devastating to the smaller companies," especially assuming financial responsibility for vehicle damage. "In Illinois, a state that abolished renter responsibility and made it illegal to sell collision damage waivers, the prices of all rental vehicles immediately skyrocketed," Bregman said.

Testifying before the House Subcommittee on Commerce, Consumer Protection and Competitiveness, Illinois Attorney General Roland Burris said no rental car companies had gone out of business since the waiver ban was instituted at the beginning of 1989. "We have not had any adverse effect in Illinois," said Burris.

### Former FCC Chairman Advocates Franchise Fees On Television And Cable Licensees

On the thirtieth anniversary of his speech to broadcasters depicting television as "a vast wasteland," former Federal Communications Commission ("FCC") Chairman Newton Minow recently advocated levying franchise fees on television and cable licensees and an excise tax on new televisions and video tape recorders. The money, Minow says, would be used to improve public television in the United States. Speaking before the Gannet Foundation Media Center at Columbia University, Minow said, "In 1961 I worried that my children would not benefit much from television; today, I worry that my grandchildren will actually be harmed by it."

Minow called television a public resource which cannot be regulated by the market alone. He said his initiative would help raise \$1 billion a year for the public broadcasting system. Japan currently spends twenty times more per person than the United States on public broadcasting.

Minow is now director of the Annenberg Washington program in Communication Policy Studies at Northwestern University and counsel to the Chicago-based law firm, Sidley and Austin.

### Cigarette Health Claims Challenged

Three anti-smoking groups filed petitions with the Federal Trade Commission ("FTC") recently, calling advertisements for a "denicotined" cigarette false and misleading. The American Cancer Society, the American Heart Association and the American Lung Association made the charges against Philip Morris Company's "Next" and "De-Nic" brands of cigarettes being test-marketed in Florida and Arizona.

"Philip Morris has employed an aggressive media and advertising campaign to dupe consumers into believing that these cigarettes are

safer and non-addictive," said Scott Ballin of the Coalition on Smoking or Health, an organization formed by the three groups. In April, the coalition asked the Food and Drug Administration ("FDA") to classify the cigarettes as drugs, arguing that they had been marketed as having health benefits. Drug classification would require timely and costly research by the FDA.

Philip Morris director of communications, Les Zuke, says the FTC petition is without merit. "If you look at the ads, all they say is Next is a low-nicotine cigarette that uses a process similar to decaffeinating coffee beans, and Next has the smooth taste of a light cigarette."

### The Politics of Fuel Efficiency

A major battle is shaping up on Capitol Hill this summer over a bill which would require more fuel efficient cars and trucks by the turn of the century. The subject of the legislation has drawn interest from two Senate committees, the Bush Administration, environmental groups, the auto industry, and highway safety advocates. The focus of all the attention is a bill that would mandate an increase in corporate average fuel efficiency ("CAFE") from the current 27.5 miles per gallon ("mpg") to forty mpg over a ten year period. The bill was introduced in the Senate by co-sponsors Richard Bryan (D-Nev.) and Slade Gorton (R-Wash.); similar legislation has been introduced in the House.

"This legislation will begin the process of changing the conditions that make us so dependent on the unstable Middle East and on the oil that we know ultimately is a finite resource," said Bryan.

The Bryan bill has already cleared the Senate Commerce

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# Recent Cases

## Recreational Use Statute Immunized Landowners From Liability for Personal Injuries

In *Larini v. Biomass Industries, Inc.*, 918 F.2d 1046 (2d Cir. 1990), the United States Court of Appeals for the Second Circuit held that New York's recreational use statute, N.Y. Gen. Oblig. Law § 9-103 (McKinney 1988), immunized a landowner from liability to an injured snowmobiler.

### Background

On February 19, 1980, Biomass Industries, Inc. ("Biomass") purchased approximately nine hundred acres of undeveloped wilderness in Windham, New York. Two years later, Biomass subdivided the property and improved the access road. As part of the road improvements, Biomass placed a drainage pipe under the road to channel water from an adjacent pond. This drainage pipe created a stream bed seven to nine feet below the road level.

Upon completion of the subdivision and the road improvements, Biomass offered some of the lots for public sale. Prior to March 1, 1986, an authorized real estate agent provided Keith Larini ("Larini") with a site plan, price quotations, and a viewing of the available lots.

In the early evening of March 1, 1986, without the permission of the real estate agent or a Biomass representative, Larini rode a snowmobile along the access road to view the specific lot which he was interested in purchasing. Biomass had blocked the access road entrance with a metal gate and a wall of snow. Biomass also had posted "No Trespassing" signs along the unplowed road. Nevertheless, Larini entered the subdivision.

As Larini travelled along the access road, he decided to drive off the roadway toward the stream

bed. As he drove into the stream bed, Larini was thrown from his snowmobile and landed against the embankment. Larini suffered serious personal injuries from the accident.

Subsequently, Larini and his wife, Sally (the "Larinis"), sued Biomass in the United States District Court for the Northern District of New York to recover damages for Larini's injuries.

### District Court Proceedings

In the district court, Biomass moved for summary judgment. Biomass claimed that it was immune from liability under the New York recreational use statute, N.Y. Gen. Oblig. Law § 9-103 (McKinney 1988). On March 16, 1990, the district court held that the statute applied and granted Biomass's motion for summary judgment. The Larinis appealed the dismissal to the United States Court of Appeals for the Second Circuit.

### Second Circuit Opinion

#### Recreational Use Statute

The New York legislature originally enacted § 9-103 to encourage landowners to make their property available for specified recreational activities such as fishing, hunting, and trapping. Through amendments, the legislature expanded the specified activities to include hiking, horseback riding, and snowmobiling. The statute provided in part that an owner of certain recreational property was immune from liability to others for personal injuries occurring on the recreational property unless: (1) for consideration, the landowner granted a party permission to take part in a specified recreational activity on his land; or (2) the landowner willfully or maliciously failed to guard or warn against a dangerous condition on his land. N.Y. § 9-103(2)(a), (b) (McKinney 1988).

First, the Larinis argued that the statute should not apply. Alternatively, they argued that if the statute did apply, Biomass was liable

under either the consideration exception or the willful or malicious conduct exception. Finally, the Larinis argued that the common law duty of reasonable care applied in this case.

#### Applicability of Statutory Immunity

The Larinis argued that the statute was inapplicable to immunize Biomass, as Biomass violated the purpose of the statute. The statute's purpose was to encourage access to recreational lands by limiting liability to landowners. The Larinis argued that Biomass tried to prevent public access to the property when it posted "No Trespassing" signs and placed blockades at the front entrance of the subdivision. Because Biomass acted inconsistently with the purpose of the statute, the Larinis contended that Biomass should not be immunized from liability.

The court rejected the Larinis' argument. The court found that although Biomass sealed off the access road, the property was still accessible and remained useable for several of the statute's enumerated activities.

The Larinis next argued that the property did not fall within the scope of the recreational use statute; the property was not physically conducive to snowmobiling because it contained numerous obstacles such as trees, stone walls, and a pond.

The court rejected the Larinis' argument. The court found that the property was very appealing to snowmobilers and that the obstacles only added to the attractiveness of the undeveloped woodlands. Thus, the court concluded that the property was conducive to snowmobiling and was of a type generally appropriate for recreational snowmobiling by the public. The court held that the property fell within the scope of the statute.

#### Consideration Exception

The Larinis also argued that Biomass was liable under the stat-