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Consumer News

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Consumer News

FCC Moves to Reregulate Cable Television

Reacting to growing consumer dissatisfaction with cable television, the Federal Communication Commission ("FCC") proposed new rules in late 1990 that would give most communities power to regulate cable rates. Under current FCC rules, only three percent of the nation's 9,500 cable systems have any local price controls despite operating in virtual monopolies. "We are attempting to develop rules that deal as sensitively as possible with the marketplace and give the public some assurance of fairness," said FCC Chairman Alfred C. Sikes.

Deregulated by Congress in 1984, the cable industry has enjoyed great financial success. Cable television grew to a \$17.5 billion industry in 1989 and is now in 54 million American households, up from 30 million homes before deregulation. According to the General Accounting Office, cable fees have risen by an average of thirty-six percent since 1986. In some parts of the country, rates have increased by one hundred percent.

The FCC's proposal would tighten the "effective competition" standard which determines whether local governments may regulate rates. According to the current definition, effective competition exists where three over-the-air, or broadcast, television stations are available. Under the new three-part definition of effective competition, communities would have the authority to approve basic cable rates unless six or more unduplicated broadcast channels are available and less than fifty percent of the households with televisions subscribe to cable.

Further, local governments would not be granted rate-making authority if another multi-channel service is operating that reaches at least half the homes in an area and is used by at least ten percent of the households. This would include a second competing cable system, microwave broadcasting, or direct

broadcast satellites.

Finally, a cable company may avoid rate regulation under the FCC proposal by providing evidence that it is a "good actor." While details of this definition are not formulated, a "good actor" would be a cable operator that provides basic cable service at comparable rates to those offered by cable companies operating in communities where effective competition exists.

Although pleased that the FCC is acting to tighten its current cable regulations, consumer groups and local government officials reacted cautiously to the proposal. "The 'good actor' clause could be a loophole that eats up the entire rule," said Nicholas Miller, a Washington lawyer who represents several cities on cable issues.

James P. Mooney, president of the National Cable Television Association disagreed. "This proposal raises the prospect of the government inhibiting the future development of cable programming by crimping its economic lifeblood."

The Department of Justice ("DOJ") recently endorsed the new FCC standards, but proposed several changes. Most notably, DOJ rejected the "good actor" standard calling this approach "impractical largely because of the difficulties in comparing different cable system markets."

Last year, Congress nearly passed legislation reregulating cable television, but a veto threat from President Bush helped kill the measure late in the session. Since then, several cable reregulation bills have been proposed by Congress in the present session.

Strict Standards Proposed to Help the Disabled

The Department of Justice ("DOJ") recently proposed draft regulations outlining the steps businesses must take in order to comply with the Americans with Disabilities Act of 1990 ("ADA"). Signed into law by President Bush

last July, the ADA prohibits discrimination against the United States' 43 million disabled persons in employment, mass transportation, public accommodations, and virtually all businesses open to the public.

The proposed rules interpret only Title III of the ADA, the public accommodations section of the law. Restaurants, retailers, parks, professional offices, theaters, and banks would be affected by the regulations. For example, restaurants would be required to admit guidedogs and provide menus in braille to the blind. In addition, hotels would be required to provide special phones and television closed-caption decoders for the hearing impaired, and theatres and other arenas could not segregate people in wheelchairs from general seating areas. About 3.8 million businesses nationwide would have to make changes by July 1992 if the proposed rules are adopted.

"These regulations represent a fair and balanced enforcement tool for the Americans with Disabilities Act," said Attorney General Dick Thornburgh in a statement accompanying the draft rules. "The Department of Justice has sought to strike a balance between the right of persons with disabilities to enter the mainstream of society and the workplace and the financial and physical limits of the business community."

The proposed regulations take a flexible approach to achieving accessibility for the disabled in existing structures. Businesses would be exempt from making modifications or providing an alternative service if such steps are considered too difficult or too expensive to accomplish. No exemption would be available for new construction or remodeling.

Supporters of the ADA applauded the draft rules. "The regulations show a clear understanding of the issues of discrimination against people with disabilities," said Patricia A. Wright, director of governmental affairs for the Disability Rights Education and Defense

Fund Inc. But business groups claimed the new regulations were too vague. "They seem to want the courts to define the terms on the backs of small businesses," said Wendy Lechner, manager of research and policy development for the National Federation of Independent Business, a small business trade group.

The Justice Department considered a concrete formula for defining "too difficult or too expensive," but rejected it as overly restrictive. Advocates for the disabled contend that litigation will be limited because the bill does not authorize the award of damages to individuals. Only the DOJ may bring enforcement actions under the law. The penalties include civil fines of up to \$50,000 for first offense and \$100,000 for subsequent offenses.

Mixed Signals From the Economy

In an effort to end the nearly year-long recession, the Federal Reserve cut interest rates recently, recognizing that the economy is still weak in several sectors, especially manufacturing. The discount rate, the amount federal reserve banks charge their member banks for short term loans, was dropped from 6 percent to 5.5 percent, its lowest level since 1987. Major banks, including Citibank and First National Bank of Chicago, followed suit by dropping their prime rate by a one-half percent to 8.5 percent.

"Action was taken in light of continued weakness in economic activity, especially in the industrial and capital goods areas, and evidence of abating inflationary pressures," according to a statement issued by the Federal Reserve Board of Governors.

"The Fed is saying that the post-war recovery in the U.S. economy has not occurred," said William Sullivan, director of money market research for Dean Witter Reynolds Inc.

The news of the lowered rates was welcomed by the Bush Administration and many economists who had called for a relaxation in monetary policy. "We certainly believe the availability of credit is

ANNOUNCEMENT

The National Association of Consumer Agency Administrators (NACAA) will hold its sixteenth annual NACAA conference on June 9-12 in Hilton Head, South Carolina. The conference "Consumer Protection: The Ethical and Practical Challenges of the 1990s" will include a consumer education award breakfast and workshop discussions on such topics as ethics of consumer professionals, environmental consumer protection, telecommunications, small consumer protection agencies and mandatory warranties for used cars. Featured speakers will be Steve Brobeck, Executive Director Consumer Federation of America; Mark Green, Commissioner City of New York Consumer Affairs; and Ellen Haas, Executive Director Public Voice for Food and Health Policy.

For more information please contact the National Association of Consumer Agency Administrators (NACAA), 1010 Vermont Avenue, N.W. Suite 514 Washington, D.C. 20005 (202) 347-7395.

still a concern, and we want to make sure regulators and others are doing things properly and don't make credit less available than it should be," said White House chief economic adviser, Michael Boskin.

The Federal Reserve's action was spurred by recent reports of continued economic deterioration and lower inflation. The Commerce Department reported that U.S. output of goods and services declined in the first quarter at an annual rate of 2.8 percent. The drop was greater than the 1.6 percent rate of decline recorded for the last quarter of 1990. An important barometer of inflation, the consumer price index ("CPI") fell in March for the first time since April 1986, according to the Labor Department. The CPI fell 0.1 percent after modest increases in the first two months of 1991. The

March report brought the overall rate of retail inflation for the first three months of the year to 2.4 percent, a marked decrease from the 1990 annual rate of 6.1 percent and the lowest in several years.

"We're beginning to see a moderation in inflation that a recession should produce," said Bruce Steinberg, an economist with Merrill Lynch. "We should see inflationary momentum declining through the end of the year." Nancy Kimmelman, chief economist for Thompson Financial Networks in Boston, concurred. "Inflation is not going to be a big problem for the economy in 1991...(it) is not an impediment to growth and economic recovery."

Experts disagree on the duration of the recession and prospects for recovery. "I am reasonably confident the economy will turn up," said Lyle Gramely, chief economist at the Mortgage Bankers Association and a former Federal Reserve governor. "Still, you have to make adjustments, and the latest numbers are softer than I and others would have expected." But the chief economist for the U.S. Chamber of Commerce was more gloomy. Richard W. Rahn predicted the recession would continue throughout the year, surpassing the sixteen month recession of 1981-82 as the longest decline since the Great Depression.

Deceptive Automobile Advertisements

Spurred by a series of suspect car advertisements by manufacturers and dealers, the Federal Trade Commission ("FTC"), offices of state attorneys general, and automobile trade associations moved recently to crack down on deceptive and misleading claims. "As the

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Recent Cases

College's Failure To Provide Educational Service Is No Defense To Nonpayment Of Student Loans

In *Veal v. First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990), the United States Court of Appeals for the Seventh Circuit held that despite a close connection between a college and two lenders of student loans, the college's alleged fraudulent activity and failure to provide educational service was no defense to loan repayment unless the loans were guaranteed by the federal government. The court affirmed the district court's dismissal of the fraud complaint because the claim did not specify particular acts of fraud, as required by Rule 9(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 9(b). In addition, the court noted that the Federal Trade Commission rule regarding the preservation of consumer defenses, 16 C.F.R. § 433.2 (1991), is inapplicable to loans made, issued, or guaranteed under the Higher Education Act of 1965. 20 U.S.C.A. §§ 1070-99 (West 1991).

Background

Representatives of Adelphi Business College ("Adelphi") recruited Kerry Veal and several of his classmates ("the Students"). The only qualifications required of the Students were that they have a legitimate permanent address and phone number and that they be unemployed. An Adelphi recruiter approached each student, either on the street or by telephone, and described Adelphi's ability to help them find a job. Arriving at Adelphi, the Students took a ten minute "entrance examination" and enrolled in a "bookkeeping" course. Adelphi told the Students that they should not worry about financing their Adelphi education because the school had made loan arrangements for them.

Adelphi prearranged loans for the Students with First American Savings Bank and with Security Savings and Loan Association ("the Lenders"). Adelphi used the Lenders' loan forms and promissory notes preprinted with the respective Lender's name which the Lenders had already approved. The Students signed the promissory notes at the time of enrollment. Adelphi assured the Students that the school had prearranged loan approval with the Lenders and made certain that the requisite loan forms reached the Lenders. The Lenders continually made the loans to finance the education promised by Adelphi.

After beginning the "bookkeeping" course, one of the Students attempted to enroll in a computer course, only to learn that Adelphi had no computers. Another of the Students entitled to a refund on his student loan never received the refund. Other students never received diplomas, certificates, or job placement assistance. Adelphi eventually filed for bankruptcy and closed, making it impossible for the Students to complete their courses. The Lenders informed the Students that since the Students were no longer enrolled in school, they were expected to begin repaying their loans immediately. The Students filed a claim in the United States District Court for the Northern District of Indiana against the Lenders and others, seeking rescission of their guaranteed student loans, reinstatement of their Pell Grant eligibility, and damages. The Students did not name Adelphi as a defendant in this case. Instead, the Students declared that the existence of a "close connection" between Adelphi and the Lenders rendered the Lenders liable for Adelphi's alleged wrongdoing.

The District Court's Decision

The district court granted the Lenders' motion to dismiss the Students' complaint. The Students' complaint centered around

the alleged fraudulent activity of Adelphi. The Students claimed that Adelphi breached its promise to provide the Students with an education and job placement services, that it used material misstatements to induce the Students to enroll in the school, and that Adelphi breached its duty of care by negligently failing to use reasonable means to give the Students truthful and accurate information. The Students also alleged that Adelphi and the Lenders violated the Higher Education Act of 1965 ("HEA"), 20 U.S.C.A. §§ 1070-99 (West 1991) and that Adelphi breached its fiduciary duty to the Students. Finally, the Students stated that Adelphi and the Lenders violated the Indiana Deceptive Practices Act. Ind. Code Ann. §§ 24-5-0-5-1-5-9 (West 1980 & Supp. 1990).

In response to the Students' counts, the Lenders filed a motion to dismiss for failure to state a claim. The Lenders maintained that the case was subject to the HEA which preempts the Students' state law remedies; the HEA did not provide for a private right of action. Furthermore, the Lenders claimed that the Students did not specifically charge the Lenders with any wrongful activities. The trial court rejected the Students' "close connection" argument; the trial court granted the Lenders' motion to dismiss for failure to state a claim. The Students appealed the dismissal to the United States Court of Appeals for the Seventh Circuit.

The Seventh Circuit's Opinion

In affirming the lower court's dismissal of the action, the Seventh Circuit addressed the Students' claims based on fraudulent activity, their suggestion of a "close connection" between Adelphi and the Lenders, and their attempt to apply the Federal Trade Commission ("FTC") rule on the preservation of consumer defenses, 16 C.F.R. § 433.2 (1991), and the Indiana Code, Ind. Code Ann. §§