

Ask Forgiveness, Not Permission:

A New Way For Insurers To Think About Electronic Commerce Legislation

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For his LOMA Emerging Technology Conference audience, lawyer Arthur Chartrand discussed Federal Government, NAIC, and state-generated White Papers, reports, and studies on the Internet. He examined regulatory issues and gave the audience his unique perspective on the appropriate role of regulatory agencies in dealing with electronic commerce.

The biography form for **Arthur Chartrand**, a speaker at LOMA's recent Emerging Technology Conference, says "Insurance Regulatory Counsel, former attorney with the National Association of Insurance Commissioners." Knowing that his speech was titled, "The Internet and Regulatory Agencies: What Does the Future Hold?" his listeners might have supposed that he, being a lawyer and former NAIC counsel, would make a loud cry for more regulation, legislation, and consumer protection for the Internet and electronic commerce. They couldn't have been more wrong.

Chartrand's message is simple: electronic commerce is a good thing. The Internet is a good thing. Insurance on the Internet is a very good thing. We don't need more regulation. We don't need more legislation. "What I ask and continue to ask when I see any new regulatory proposal about electronic commerce or the Internet, particularly insurance on the Internet, is simply this: is the issue any different than what we deal with in the traditional media of print, television, or radio? In my opinion, it's not," Chartrand said. "The same concern, the same fraud potential, the same evils that have always been there, they're just in a new form. And our laws already prescribe punishment for most of them."

But the regulatory agencies seem not to agree

with Chartrand. "The Federal Government, the NAIC, the states, they are all in on the action," he said. "So far, there has mostly been a big flurry of activity. A lot of White Papers and reports are being generated out there. But be assured that legislation and regulation are always close behind when those sorts of reports are generated." For his Emerging Technology Conference audience, Chartrand covered a few of those reports and regulatory issues and gave the audience his unique perspective on the appropriate role of regulatory agencies in dealing with electronic commerce.

The Federal Government

There is a lot of regulatory activity related to electronic commerce in Federal agencies, particularly the Federal Trade Commission (FTC) and the broader Department of Commerce.

The FTC claims the authority to prohibit unfair or deceptive advertising in any medium. According to a recent FTC report on the Internet, "Advertising must tell the truth and not mislead consumers." In general, that sounds like a good idea. "But I wonder where the FTC has been?" Chartrand asked. "The FTC makes no specific statements about TV ads or late-night infomercials, and now they are suddenly worried the Internet is going to present some new untold threat to all of us. I don't think so."

In April 1998, the FTC issued a White Paper report titled Advertising and Marketing on the Internet: The Rules of the Road. That report says, "Claims on the Internet must be substantiated, especially when they concern health, safety, and performance." Again, not a bad idea, but Chartrand doesn't see the novelty in that sort of pronouncement. "On television, they claim that 4 out of 5 dentists recommend Crest, that Colgate gets your teeth whiter, that Anacin works faster, and that a cup of Folgers in the morning is going to make you have a great day," he said. "Suddenly, the FTC insinuates that claims like these made on the Internet are now somehow worse than they were on TV or radio,

or that they're unique, or pose some sort of new threat. Again, I don't think so."

In June 1998, the FTC released another report, *Privacy Online: A Report to Congress*. This report was a three-year study of online information practices in which the FTC concluded that many Americans will not transact business online because they fear their personal information will be collected, sold, or stolen. In the same report, the FTC surveyed about 1,400 Web sites and declared that only 14 percent gave notice to visitors about their information collection practices. Only two percent, the report said, have an established, formal information privacy policy. The FTC said that industry has been "too slow in regulating itself to ensure basic principles of fair information collection." What does the FTC conclude? We need more legislation. "I ask if these Web sites intended to misuse your personal information, or were going to be negligent with it, would disclosing their official policy on their information collection practices make any difference? I don't think so," Chartrand said.

On July 5, 1998, the Department of Commerce released its revised White Paper policy statement on domain names. The Commerce Department proposed replacing the existing domain name registration system by creating a new, private, nonprofit, U.S.-based organization to manage domain name functions. The Commerce Department also said they envision a competitive system of registries in which private companies could compete for the registration of users and the maintenance of generic top-level domain names.

"This is one area where I think legislation may not be a bad idea, and there may be some proper role in the government," Chartrand said. "For example, when I registered a domain name for my office, I didn't pick www.chartlaw.com because I thought it was a cute contraction between 'Chartrand' and 'law.' A Canadian company bought the Chartrand domain name

along with thousands of others, and they extort companies to buy the domain names back from them. That's an abuse, and preventing such activities may be an area where there is some appropriate government role."

It's difficult to predict what other action the government will take in the future. "But there will be more White Papers, more regulation of the Internet, and more regulation of electronic commerce from the Federal Government without a doubt," Chartrand said. "I'm not sure it's going to benefit the financial services industry, and it may be more restrictive than helpful overall, but the legislation will happen."

The NAIC

The NAIC (National Association of Insurance Commissioners) has multitudes of studies, initiatives, task forces, study groups, and working groups regarding electronic commerce for the insurance industry. And some of them have in mind slapping on a healthy bit of regulation along the way. But the NAIC is also sponsoring some very promising initiatives.

Probably the most promising and ambitious online NAIC initiative is the system for electronic rate and form filing (SERFF). SERFF sets the basic framework for electronic commerce among the state insurance departments and the insurance industry. Another NAIC product to watch is the standards being developed for market conduct examiners. The NAIC Market Conduct Examiners' Handbook has a full chapter under development called "Internet Activities Examination." These developments will certainly have an effect on the development of e-commerce standards in the insurance industry.

Additionally, the NAIC produced an Internet White Paper called "Marketing of Insurance over the Internet." It has good background on the history of electronic applications, electronic signatures, and a history of the Internet itself. It

stops short of calling for massive legislation and regulation, but there are two rules that are crucial for insurers to follow.

First, companies using the Internet for insurance commerce that want to stay clear of regulatory problems must disclose early and often who they are, the name of the company, the company's address, and other contact information. It sounds pretty basic, but many Web sites never provide that information, or they place it so that it's difficult to find.

Second, but equally important, the White Paper admonishes insurers to state clearly and often in what states they are licensed and for what particular products. That information is extremely important to regulators. "If you do both these things, you should not be—understand that I say should not be—exposed to any greater risk that you are via conventional print or other media," Chartrand said.

The States

There is a great deal of state activity related to electronic commerce, most of it focused on electronic or digital signatures. Virtually every state has one, if not several, legislative proposals or laws passed related to what electronic and digital signatures are. "I don't think too many of them pose a lot of problems, and they're not very obtrusive," Chartrand said. "But they are incredibly wordy, and some are very hard to understand." Mostly what they really say is that both electronic and digital signatures are authorized and okay to use. A few, however, are worth mentioning.

In 1996, Florida adopted the Electronic Signature Act. The Act authorized the use of electronic signatures for both public and private communications. However, the Act also created a new bureaucracy within the Secretary of State's office to "verify" electronic signatures. It authorized the Secretary of State to create a system of "voluntary licensure" of electronic signature certification authorities. This would

"fund a government program through license fees and audit charges for identification of standards and requirements for licensure, audit procedures to assure program compliance, insurance reserves or bonding requirements, and procedures for license verification or suspension." The Act also recommended the creation of a special class of attorneys authorized to authenticate and execute electronic international transactions.

Utah has the Utah Digital Signature Act. This act and its amendments are similar to Florida, but also purport to govern the use of the public/private key pair encryption and certification authorities along with it. The Act also creates distinct civil and criminal penalties for the theft or unauthorized use of one's signature key.

Indiana's Electronic Digital Signature Act was enacted in June 1997. The Indiana Act recognizes digital signatures, but only recognizes them as effective, "if that electronic signature is unique to the person using it, is capable of verification, and is under the sole control of the person using it." The Act says that the signature is invalidated if the documents linked to it have been altered.

"What is so different about that from the status quo of pen and paper signatures we've been dealing with for years?" Chartrand asked. "Nothing. Rare is an existing state statute, or even an industry practice, which outright requires or even implies that a signature must necessarily be via a tangible ink transfer mechanism to a flat wood fiber derivative medium (pen and paper). The laws out there don't say electronic signature, but they don't say pen and paper signature either. They say signature. I've seen no signature statutes that specify you have to use a Bic Pen versus a pheasant quill either, but we don't draft legislation about those. I question whether we need all this enabling legislation for electronic commerce."

In August 1998, the Governor of Illinois signed into law the Illinois Electronic Commerce

Security Act, comprehensive legislation designed to facilitate electronic commerce. The Act expressly authorizes the use of electronic records and electronic signatures, recognizes the need and demand for secure electronic records and signatures, specifies the legal rules related to digital signatures, and authorizes all state agencies to conduct their business electronically. Chartrand would prefer that insurance companies take a more progressive approach, assuming that insurers can operate in the electronic world unless they are specifically prohibited rather than specifically authorized. “We need to reengineer and rethink before we simply run wild with electronic commerce, especially when it comes to insurance regulation,” Chartrand said. “Had we not stopped to reengineer and rethink when the automobile was invented, my guess is we’d probably still be using our cars to transport our horses around. Who today would dare dream up some new contraption that would hurl people through neighborhoods at 60 miles an hour, sitting on top of 20 gallons of highly flammable liquid and surrounded by a bunch of glass? I think with the EPA studies, the licensing, the regulation, the lawsuits, a development like the automobile probably wouldn’t happen today. My frustration with a lot of regulators and legislators is that they don’t understand how quickly the Internet is moving. They don’t understand that they need to cast off their old ways of doing things, that they need to stand back and promote electronic commerce rather than figure out what’s wrong with it.”

The key to electronic commerce success, Chartrand says, is to keep the Internet in perspective. There is incredible fraud and crime committed daily on the telephone, via the U.S. Mail Service, on television and radio, and via the use of pen and paper signatures. The Internet should be treated with the same attention, legislation, and regulation as these other media, no more, no less. “Hysteria simply isn’t necessary,” Chartrand said. “With these innovations, particularly the Internet and electronic commerce, let’s at least get the

pipelines built. Let’s get commerce online up and running and healthy, then let’s go out and maybe regulate the heck out of it.”

The Companies

But, for most companies, the idea of building pipelines, engaging in full-bore electronic commerce from application to delivery, and waiting until later to ask regulators for forgiveness rather than permission is nothing short of anathema. It goes against the grain to dive into electronic initiatives without the states’ blessing. And, because of this, marketers and technology specialists in insurance companies may very well run up against a brick wall—their e-commerce plans and initiatives stopped dead in the hallowed halls of the corporate legal department because there is no approved electronic commerce legislation.

“There is a way out of this tangle,” Chartrand says. “But you must be supported by upper management. There’s no doubt. If everybody’s cowering behind their lawyers nothing will ever get done. I realize it’s very difficult in large corporations to get that support, but I encourage you to seek it actively. With the support of upper management, you can hold a fire to the lawyers and say ‘We want to do this. You help figure out how we can do it.’ Why is this so crucial? Because if you don’t get ahead of the enabling legislation, if you don’t move forward quickly, some other company will take the initiative—and, probably not so far away, your customers.”

