You Can't Always Get What You Want:

Impact of *Credit Bureau* on Marketers Facing an FTC Investigation

Leonard L. Gordon
Partner | +1 212.370.6252 | lgordon@Venable.com

Shahin O. Rothermel
Associate | +1 202.344.4550 | sorothermel@Venable.com

VENABLE LLP

CLE Credit

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour, of which one hour applies to the general credit requirement, and by the State Bar of New York in the amount of one credit hour, of which one credit hour can be applied toward the Areas of Professional Practice requirement. Venable certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California and State Bar of New York, which govern minimum continuing legal education. Venable is a State Bar of California and State Bar of New York approved MCLE provider.

A code will be distributed through the Q&A chat section at the end of the program, and a CLE submission form will be sent to participants next week via email.

This presentation is intended as a summary of the issues presented and is not intended to provide legal advice. It is provided for the general information of the attendees. Legal counsel and advice should be sought for any specific questions and before taking any action in reliance on the information presented.

Agenda

- The FTC Act: Background
- Section 13(b) of the FTC Act
- Section 19 of the FTC Act
- Discussion of significant cases

VENABLE LLP

The FTC Act: Background

- Section 5(a) of the FTC Act provides that "**unfair or deceptive acts or practices** in or affecting commerce . . . are . . . declared unlawful." 15 U.S.C. Sec. 45(a)(1).
  - The FTC enforces a variety of other consumer protection statutes that prohibit specifically defined practices, which generally specify that violations are to be treated as if they were "unfair or deceptive" acts or practices under Section 5(a).
  - Many also provide that violations are to be treated as if they were violations of a trade regulation rule issued under Section 18 of the FTC Act, 15 U.S.C. Sec. 57a (and subject to civil penalties).

The FTC Act: Background

- Under Section 18 of the FTC Act, 15 U.S.C. Sec. 57a, the FTC is authorized to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5.
  - The FTC obtains penalties for violations by filing a suit in federal district court under Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. Sec. 45(m)(1)(A).
  - In addition, any person who violates a rule (irrespective of the state of knowledge) is liable for injury caused to consumers by the rule violation. (FTC seeks redress under Section 13(b) and Section 19 of the FTC Act, 15 U.S.C. Sec. 57b.)

VENABLE LLP

The FTC Act Enforcement Authority: Background

- **Investigative Powers**
  - The Commission's specific investigative powers are defined in Sections 6, 9, and 20 of the FTC Act, 15 U.S.C. Secs. 46, 49, and 57b-1, which authorize investigations and various forms of compulsory process.
- **Administrative Enforcement**
- **Judicial Enforcement**
- **Rulemaking Authority**
  - Under Section 18 of the FTC Act, 15 U.S.C. Sec. 57a, the FTC is authorized to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the Act.
  - The statute requires that Commission rulemaking proceedings provide an opportunity for informal hearings.

Section 13(b) of the FTC Act

- Whenever the Commission has reason to believe –
  - (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and;
  - (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final would be in the interest of the public – The Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. . . . Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

Section 19 of the FTC Act

- Subsection (a):
  - If any person, partnership, or corporation engages in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order . . . , then the Commission may commence a civil action . . . in a United States district court or in any court of competent jurisdiction of a State.
- Subsection (b):
  - The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers . . . resulting from the . . . unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice.

Enactment of Sections 13(b) and 19

- Section 13(b) was added to the FTC Act in 1973 to serve as a stopgap, preventative measure:
  - The major provisions of this section would . . . authorize the commission to go into federal court to seek temporary injunctions to prevent the continuation of particularly aggravated violations of the laws under its jurisdiction, pending the completion of the lengthy administrative proceedings and appeals which lead to a final cease-and-desist order. . . Each of these provisions is essentially a gap-filling measure; none would increase the commission's substantive jurisdiction in any respect . . . . 119 Cong. Rec. 36,610 (1973).
- Subsequent to the enactment of Section 13(b), Section 19 was enacted in 1975 to explicitly grant the FTC the authority to seek monetary relief for customers.

Conjunctive Reading of Sections 13 & 19

- Arguments that the FTC does not have jurisdiction under Section 13(b) to sue in federal court.
  - For a federal court to have jurisdiction, the FTC must allege that the defendant "is violating, or is about to violate" any provision of law enforced by the Federal Trade Commission.
  - The FTC cannot file a lawsuit for past conduct.
  - By omitting monetary relief in Section 13(b), and subsequently including it in Section 19, allowing the FTC to obtain such relief, renders Section 19 superfluous.
  - The FTC can obtain injunctive relief under section 13(b) but not other forms of monetary relief.

The FTC's Expansion of Sections 13(b)

- Since its enactment, the FTC incrementally expanded its ability to obtain monetary relief under Section 13(b), relying on two Supreme Court cases expressing an archaic view of equitable remedies:
  - *Porter v. Warner Holding Co.,* 328 U.S. 394 (1946): Holding that when the government sought to enforce the law, courts had retained all its equitable powers, including restitution or disgorgement.
  - *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960): applied *Porter* in holding that courts had full equitable authority to award lost wages from wrongful termination because the statute did not expressly take away such authority.
- However, the U.S. Supreme Court departed from this traditional understanding of equitable remedies in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) and refused to find an implied restitutional remedy.
  - "[W]here Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies[.]"

Kokesh v. SEC, 137 S. Ct. 1635 (2017)

- The Securities and Exchange Commission sued Kokesh for federal securities laws violations. The district court ruled in favor of the SEC and ordered Kokesh to pay $34.9 million for "ill-gotten gains causally connected" to Kokesh's violations. The Tenth Circuit affirmed.
- The Supreme Court reversed the decision, and held the SEC's disgorgement remedy constitutes a penalty, which makes it subject to the five-year statute of limitations in 28 U.S.C. § 2462.
- The Court explained that SEC disgorgement is a penalty because: (1) the SEC and courts used disgorgement "as a consequence for violating public laws"; (2) it is used for punitive purposes; and (3) SEC disgorgement is often not compensatory.
- But "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings."

VENABLE LLP

FTC v. Shire ViroPharma, Inc., 917 F.3d 147 (3d Cir. 2019)

- Background
  - The FTC sought a permanent injunction and restitution for Shire's allegedly unfair methods of preventing generic drug competition. Shire had ceased its allegedly illegal conduct five years before the FTC sought an injunction.
  - The district court granted Shire's motion to dismiss for the FTC's failure to meet the section 13(b) requirement that the violation is in process or imminent.
- The Third Circuit affirmed, and noted the alleged conduct ceased years prior to the FTC's complaint:
  - To file suit under section 13(b), the agency must include specific allegations that a defendant "is violating or about to violate" a law enforced by the FTC based on the plain language of the statute.
- "'[I]s about to violate' means something more than a past violation and likelihood of recurrence.

VENABLE LLP

FTC v. AMG Capital Management, LLC, 910 F.3d 417 (9th Cir. 2018) (O'Scannlain, Concurring)

- Background: The district court held that Defendants' high-interest, short-term payday loans were "deceptive" under the FTC Act and awarded the FTC $1.27 billion in equitable monetary relief. Defendants appealed, arguing that Section 13(b) only allows for injunctions, and equitable monetary relief is not an injunction.
- The Ninth Circuit affirmed, with a concurrence written by Judge O'Scannlain, bound by precedent, yet expressing skepticism of the FTC's authority under Section 13(b):
  - "[W]e have implausibly construed the word 'injunction' in § 13(b) to authorize the extensive power to order defendants to repay ill-gotten gains[,]" such that "our interpretation of § 13(b) is thus an impermissible exercise of judicial creativity[.]"
  - "These past errors, even if common, do not justify our continued disregard of the statute's text and the Supreme Court's related precedent [in *Kokesh*]."

VENABLE LLP

FTC v. Credit Bureau Center, 937 F.3d 764 (7th Cir. 2019)

- According to the FTC, Credit Bureau Center automatically enrolled consumers in a $29.94 monthly subscription for a credit-monitoring service without proper notice, allegedly violating several consumer protection laws. The FTC sued under Section 13(b) and sought a permanent injunction and restitution. The district court granted both requests.
- The Seventh Circuit affirmed the district court's judgment, except for the restitution award.
- The Seventh Circuit held that the FTC does not have authority to obtain restitution under Section 13(b) because the plain language of the statute provides only for injunctive relief.
- The Seventh Circuit reversed its previous interpretation of Section 13(b) in a previous decision, *FTC v. Amy Travel*, which held the statute authorized a court to issue equitable monetary relief.

VENABLE LLP

Liu v. SEC, 18-1501 (U.S. Supreme Court granted certiorari)

- Petitioners are challenging the authority of the SEC to seek disgorgement of funds illegally obtained from investors.
- Petitioners raised more than $27 million from investors, claiming they would use the funds to build and operate a cancer treatment center. A district court in the Central District of California determined that the petitioners kept about $8.2 million for themselves and never obtained permits to build the cancer center. The district court ordered disgorgement of the entire amount that had been raised from investors, imposed civil penalties equal to the $8.2 million the couple had personally received from the project, and permanently enjoined them from future solicitations of the type that triggered this prosecution.
- Petitioners appealed to the Ninth Circuit, pointing to the U.S. Supreme Court's statements in *Kokesh v. SEC* and argued that the district court lacked the power to order disgorgement. The Ninth Circuit affirmed the restitution award.

VENABLE LLP

Liu v. SEC, 18-1501

- Petitioners appealed to the Supreme Court, arguing that the SEC has legal authority to obtain only injunctive relief, equitable relief or civil monetary penalties in court, but not the right to obtain disgorgement of the full amount taken in from investors.
- The FTC and SEC have obtained disgorgement from federal courts under the theory that disgorgement is a form of equitable relief.
- The *Kokesh* decision stopped short of barring the SEC from obtaining disgorgement, but it did state that disgorgement did not appear to fall into any category of remedies that should be available to the SEC, writing “Disgorgement does not simply restore the status quo; it leaves the defendant worse off.”

Liu v. SEC, 18-1501

- The Supreme Court heard oral argument in *Liu* on March 4 and will issue an opinion before the end of June 2020.
- Petitioners first argue that, despite the comprehensive enforcement scheme authorizing the SEC to seek enumerated remedies, disgorgement in civil proceedings was not included. Thus "the absence of a particular remedy creates a 'presumption that [the] remedy was deliberately omitted.'"
- Petitioners also extend the holding in *Kokesh* that disgorgement is a penalty to argue that the Court should not regard disgorgement as "equitable relief," since "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.

Declaratory Judgments

- Companies under investigation affirmatively sue the Federal Trade Commission.
- Complaints request declaratory judgments that the companies' activities did not violate the laws alleged by the FTC.
- Complaints request declaratory relief concerning the FTC's structure, creation and enforcement of new rules, and the FTC's interpretation of laws and rules.

© 2020 / Confidential

Axon Enterprise v. FTC, Case No. 2:20-cv-0014 (D. Ariz., filed Jan. 3, 2020)

- On January 3, the FTC issued an administrative complaint challenging Axon's consummated acquisition of its body-worn camera systems competitor, VieVu, LLC.
- Axon filed a lawsuit in federal court challenging the FTC's constitutionality and seeking a declaratory judgment that the company did not violate the law.
  - Axon first alleges that the FTC's administrative procedures — whereby it acts as prosecutor, judge, and jury — violate Axon's Fifth Amendment due process right to a fair trial before a neutral judge. By subjecting itself to an FTC administrative proceeding, Axon will be forced to "submit to a hearing process with a preordained result."
  - Axon also alleges that FTC commissioners and ALJs, shielded from "at-will" removal by the President, violates Article II of the Constitution and the "Unitary Executive" principle. FTC commissioners and ALJs are "Executive officials exercising law-enforcement power" who are constitutionally required to be subject to at-will removal by the President under Article II.

Nerium International, LLC N/K/A Neora, LLC v. FTC (N.D. Ill. filed Nov. 1, 2019)

- Challenge of FTC's enforcement authority.
- Alleges the FTC has improperly created and reinterpreted the law on multilevel marketing companies (MLMs) without undergoing the proper legislation or rulemaking procedures, in order to effectively outlaw MLMs.
  - According to the complaint, the FTC created a new test for a pyramid scheme, which "was not only improperly adopted without Congressional action or through proper FTC rulemaking" but also "is vague, ambiguous, and incapable of being objective analysis."
- The complaint asks the court to declare that Nerium is not an unlawful pyramid scheme, and that the FTC's current interpretation of the FTC Act regarding pyramid schemes adopts an arbitrary and capricious standard that is not supported by evidence or prior law and thus is not a valid exercise of the FTC's power, among other relief.
  - FTC filed a lawsuit against Nerium in the District of New Jersey and is opposing the declaratory judgment action.

VENABLE LLP

Seila Law LLC v. CFPB, No. 19-7

On March 3, the court heard oral argument on the question of whether the vesting of executive authority in a single director of the Consumer Financial Protection Bureau violates the separation of powers.

Petitioners argue that the statutory structure of the CFPB is unconstitutional because the director of the CFPB can only be removed by the President "for cause." This is contrary to Article II of the Constitution empowering the president to remove "at will" principal officers of the Executive Branch.

- The single director structure of the CFPB deviates from Supreme Court precedent in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which held that FTC commissioners are not subject to "at will" removal because they exercise "quasi-legislative and quasi-judicial powers," with "limited powers of investigation," because "[a] single-director structure with for-cause removal is different from a multimember structure as a matter of historical practice, protection against governmental tyranny, and presidential control."

Consider whether the Court's reliance on the FTC's function in *Humphrey's Executor* still holds true today.

© 2020 / Confidential

Questions?

Leonard L. Gordon
+1 212.370.6252
lgordon@Venable.com

Shahin O. Rothermel
+1 202.344.4550
sorothermel@Venable.com

VENABLE LLP

Upcoming Webinars

- **Customer Reviews: The Dos and Don'ts,** Thursday, March 26, 2020

Regardless of what you sell, as long as you sell online, you likely rely on customer reviews to promote (or protect) your brand. Maybe you actively solicit customer feedback and post reviews on the company website. Maybe your products are marketed or sold on third-party sites where customer reviews are key to how the products are ranked and displayed on the site. Or maybe your customers actively post reviews or complaints on sites like the Better Business Bureau. However you approach customer reviews, their importance in e-commerce is increasing—as is the FTC's scrutiny of how companies manage reviews. This webinar will explore what is permissible and not permissible in this area.

- **Financial Services Advertising Enforcement Update,** Thursday, April 23, 2020

Our team at Venable will discuss the more significant regulatory actions taken by financial services regulators since the end of 2019 with regard to advertising practices. These regulators include the Consumer Financial Protection Bureau, the Federal Trade Commission, and prudential banking regulators.

For more information visit: www.Venable.com/adlaw

Visit Venable's Advertising and Marketing blog at: AllAboutAdvertisingLaw.com

© 2020 Venable LLP.
This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP