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VoIP, Meet VoIR—FTC Settlement Signals That Voice over Internet Robocall Service Providers Are Fair Game

By Leonard L. Gordon, Elliot Kelly & Helen M. Chen on September 29, 2020

The FTC's pursuit of companies purportedly engaged in telemarketing scams is nothing new, but its recent settlement with a company that allegedly assisted a fraudulent telemarketer by providing a Voice over Internet Protocol (VoIP) service is the first of its kind. VoIP is a technology that allows a company to make voice calls using a broadband Internet connection instead of a regular (or analog) phone line. VoIP services can make telemarketing more efficient and cheaper—particularly for autodialing and sending prerecorded messages. These features make it an attractive option for both legitimate and fraudulent telemarketers alike.

On July 29, 2019, the FTC and the Ohio attorney general sued **Educare** Center Services, Inc. (Educare), among other related entities and individuals, for engaging in an alleged telemarketing scheme that falsely promised consumers that Educare could significantly reduce the interest rate on consumers' credit cards, along with a 100% money back guarantee. Educare collected payments from consumers using Remotely Created Payment Orders (RCPOs), in direct contravention of the Telemarketing Sales Rule.

In December 2019, the FTC and the Ohio attorney general amended their **complaint** to include Globex Telecomm, Inc. (Globex) and 9506276 Canada Inc. (9506276), alleging that the two companies, in providing VoIP services, assisted and facilitated the telemarketing scheme. The complaint alleged that Globex and 9506276 knew or consciously avoided knowing that Educare misrepresented the interest rate reduction offer to consumers, and initiated outbound calls that delivered unlawful, prerecorded messages, among other things.

On September 22, 2020, the FTC and the Ohio AG announced a **settlement**, which requires Globex and 9506276 to pay $1.9 million in monetary relief and forces both companies to engage in more robust client screening and monitoring.

What Does This Mean for Common Carriers?

Readers may be surprised by the FTC's pursuit of Globex and 9506276, because of the exemption in Section 5 of the FTC Act limiting the FTC's enforcement authority against common carriers. After all, voice communication service providers would, at first glance, fall squarely within the definition of a common carrier. However, under FCC policies and precedent, VoIP services fall under "Information Services," and thus are not subject to the FCC's common carrier rules and policies. Instead, VoIP is treated and regulated like e-mail by the FCC, and the provision of VoIP services is considered a non-common-carrier activity.

This distinction is significant. In 2018, the Ninth Circuit analyzed the scope of the common carrier exemption and found that common carriers are exempt from FTC regulation only to the extent that a common carrier is engaging in common-carrier services. In other words, the test for applying the exemption is activity based, rather than status-based.

Here, liability for Globex and 9506276 Canada Inc. was based upon their provision of VoIP services, which is non-common-carrier activity. Signaling a greater trend, in January 2019, the FTC sent 19 letters to various VoIP service providers, warning them that "assisting and facilitating" illegal telemarketing or robocalling is against the law.

Lessons Learned – Best Practices

Taken together, this means that companies that provide VoIP services to telemarketing clients could find themselves staring down the barrel of an FTC action, whether they consider themselves to be a common carrier or not. The Globex settlement is instructive in providing some best practices to adopt and red flags to avoid.

- Establish detailed protocols for screening existing, new, and prospective clients. This should include a description of the client's business, its physical and billing addresses, and at least two trade or bank references;
- For telemarketer clients, obtain their national Do-Not-Call Registry Subscription Account Number, along with a description of their goods and services;
- Be wary of clients that pay for VoIP services via stored-value cards, cryptocurrency, or money transfer, those that do not have a public-facing website or social media presence,

and those that have been or currently are subject to a government investigative request.

Looking Ahead

As VoIP technology supplants traditional telephony, you can expect more from the FTC by way of enforcement against VoIP providers that work with telemarketers. VoIP providers should ensure that they are engaging in robust monitoring and screening of their clients to avoid FTC scrutiny.

The authors and others at Venable have considerable experience representing those subjected to Federal Trade Commission investigation and enforcement actions, and advising on regulatory compliance, including on matters related to risk management and other consumer protection concerns.

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FTC Schools Marketers on the ABCs of Negative Option Marketing

By Leonard L. Gordon & William Lawrence on September 16, 2020

We have written previously about the FTC's vigorous enforcement efforts relating to negative option marketing and its crackdown on alleged wrongdoing seeking to exploit the difficulties presented by COVID-19 (see blog posts **here** and **here**). Recently, the FTC continued its efforts with a complaint and settlement concerning negative option marketing to parents seeking online educational resources for their children.

On September 1, 2020, the FTC brought a complaint against online children's education company Age of Learning, Inc., d/b/a as ABCmouse, alleging that it operated a deceptive negative option program between 2015 and 2018. The FTC alleged that ABCmouse's actions violated both the FTC Act and the Restore Online Shoppers' Confidence Act (ROSCA) by (1) failing to adequately disclose that its 12-month memberships would automatically renew indefinitely; (2) failing to disclose that extensions on 30-day free trial memberships at reduced rates would automatically renew indefinitely; (3) advertising "easy cancellation," but creating a myriad of procedural hurdles to prevent cancellation; and (4) embedding pitfalls in the cancellation process to mislead customers into extending their memberships, as opposed to cancelling them. Furthermore, in some instances, even if a customer successfully navigated the cancellation process, ABCmouse would still charge for the cancelled services.

The FTC and Age of Learning entered into a proposed settlement order, on the same day, imposing a $10 million judgment and requiring ABCmouse to disclose important information to consumers when it offered negative option plans. ABCmouse is required to make such disclosers clearly, conspicuously, and immediately adjacent to any representation that a negative option feature is being offered on a free, trial, no obligation, or similar basis.

These disclosures include (1) what affirmative steps a consumer must take to avoid additional charges; (2) the total charges or frequency of charges unless a customer takes affirmative action; and (3) the deadline by which such action must be taken. Additionally, anywhere ABCmouse is attempting to obtain billing information, it must also disclose (a) the name of the seller of the product; (b) a product description; (c) any charge associated with cancellation; and (d) a simple cancellation mechanism to stop recurring charges. ABCmouse must also immediately send a written confirmation of any online order by email repeating all of the above disclosures, or send the same by mail within two days of telephone or mail-in orders.

The proposed settlement also requires that ABCmouse put in place specific informed consent procedures for any negative option offers. These procedures include, for all written offers, obtaining consent through a check box, signature, or similar method, which requires a consumer to expressly accept any negative option feature. This consent mechanism must also appear immediately adjacent to clear and conspicuous disclosures as outlined above. For oral offers, such disclosures must be made prior to obtaining billing information. Any consumers must further consent by providing the last four digits of the billing account number and affirming their understanding of the negative option feature, including steps to stop further charges. To prove compliance, ABCmouse is required to maintain unedited voice recordings of the entire transaction for three years.

The complaint and order here provide the ABCs regarding what the FTC believes is necessary to lawfully market negative option offers. Marketers would be wise to go to school on these issues.

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Following the Mone(tary Relief): District Court Limits the FTC’s Authority Post-Liu

By Leonard L. Gordon, Ellen T. Berge, Mary M. Gardner & Michael A. Munoz on September 10, 2020

In the wake of the Supreme Court’s opinion in *Liu v. SEC*, lower courts are starting to address the breadth of its applicability. On August 31, 2020, the District of Arizona welcomed the Supreme Court’s directives in *Liu* when denying Electronic Payment Solutions of America Inc.’s (EPS) bid for summary judgment against the FTC. To the extent other courts read *Liu* as similarly applicable, this could have broad implications for the FTC’s authority to obtain monetary relief.

In *FTC v. Electronic Payment Solutions*, No. 17-cv-2535-PHX-SMM (D. Ariz. Aug. 31, 2020), the FTC filed suit against EPS for playing a role in facilitating Money Now Funding’s alleged telemarketing scheme, and sought to recover approximately $4.67 million from EPS—the total amount EPS collected from credit card transactions for Money Now Funding minus refunds and chargebacks. EPS moved for summary judgment on the grounds that, in light of *Liu*, the FTC’s monetary claim should be limited to net profits. EPS argued that the FTC, despite alleging entitlement to several forms of monetary relief, was actually seeking disgorgement under several different names. Accordingly, EPS argued that *Liu* requires courts to limit disgorgement only to the amount of net profits that will be returned to consumers.

Although the Court denied EPS’s motion because it determined there were several facts still in dispute, the Court articulated important points regarding the applicability of *Liu*. First, and significantly, the court found that *Liu* applies to the FTC’s requests for both disgorgement and restitution. Specifically, the court held that the restitution and disgorgement awards sought by the FTC are not distinguishable when the court is awarding that relief pursuant to its equitable authority. The court found that disgorgement is awarded to prevent a defendant's unjust enrichment, and it is "within the court's discretion to determine how and to whom the money will be distributed[.]" The court found that the FTC's use of restitution is essentially a form of disgorgement. Thus, the court confirmed that any final monetary judgment awarded to the FTC must comply with the strictures of *Liu*.

The court also found that *Liu* restricts which parties may be held jointly and severally liable. Specifically, the court indicated that the FTC will have to prove that EPS and Money Now Funding acted as a partnership in conducting illegal activity, in order to hold EPS jointly and severally liable. Ultimately, however, the court determined that this issue is a question of fact that is not appropriate for resolution at summary judgment.

The court's treatment highlights exactly how *Liu* can shift the amount of money the FTC can obtain when bringing enforcement actions under Section13(b) of the FTC Act. **The Supreme Court will have the final say on these issues this fall**.

The authors and others at Venable have considerable experience representing payment processors and merchants in Federal Trade Commission investigations and law enforcement actions, including matters litigating the FTC's enforcement authority under Section 13(b) of the FTC Act and issues related to regulatory compliance, risk management, and other consumer protection concerns.

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FTC Follows up on Enforcement Priorities with Complaint Against Merchant Cash Advance Provider

By Ellen T. Berge, Andrew E. Bigart, Evan R. Minsberg & Makalia A. Griffith on August 11, 2020

Following a warning from earlier this year, the FTC recently **filed a complaint** against a group of corporate and individual defendants for allegedly misleading and deceiving small business "merchant cash advance" (MCA) customers. Structured properly, an MCA product offers an alternative to standard commercial credit under which the MCA provider purchases the right to receive a fixed amount of the customer's receivables to be paid based on a percentage of the customer's daily receipts.

Specifically, the FTC alleged that the defendants misrepresented the amount of financing small business customers would receive relative to their requests, misrepresented the necessity of collateral and personal guarantees, and engaged in unauthorized withdrawals from customers' bank accounts even after receiving the agreed upon amount of the customers' receivables. The complaint calls for permanent injunctive relief, rescission or reformation of the MCA contracts, restitution, refund and disgorgement.

The FTC's enforcement action is just one of its **recent efforts** to police alleged unfair and deceptive practices targeting small businesses. Given the current economic disruptions caused by COVID-19, we can expect that the FTC will continue to attack both deception and improper debt collection aimed at small businesses.

How MCAs Work

While there is no universal definition, an MCA is generally defined as an alternative financing product that involves a lump-sum payment to a merchant in return for a specified amount of the merchant's future receivables, to be paid to the MCA provider through an agreed-upon percentage of the merchant's daily credit card and/or debit card sales. When structured properly, an MCA is a purchase and sale transaction and should not be considered a loan or extension of credit under federal or state law. If not structured properly, an MCA may be subject to various federal and state laws and regulations governing extensions of credit, including: (1) state licensing and conduct requirements for lenders and loan brokers; (2) state usury limits; and (3) adverse action notice requirements under the federal Equal Credit Opportunity Act, among other requirements. In addition, as demonstrated by the FTC's recent enforcement action, MCAs are potentially subject to federal and state laws and regulations prohibiting unfair or deceptive acts and practices ("UDAP").

Misrepresentations of Collateral and Personal Guarantees

According to the FTC, the defendants mischaracterized "key" aspects of the MCAs, including that the MCAs did not require collateral or a personal guarantee, when the defendants did in fact require business owners to personally guarantee the MCAs. If the business defaulted, the defendants frequently filed lawsuits against the individual business owners who provided the personal guarantees. The complaint referenced the defendants' online advertisements, which included the alleged statements "No Personal Guarantee Loans" & "We Provide Capital With No Personal Guarantee."

Misrepresentations of Financing Amount

The FTC alleged that the defendants provided customers with "substantially less" financing than the total amount set out in the "Purchase Price" of the customers' contracts. The contracts defined "Purchase Price" as the total dollar amount to be provided to the customer in exchange for the "Purchased Amount" which represents the amount of the customers' receivables that the defendants were entitled to receive. Yet, customers received less financing than detailed due to the defendants withholding fees. According to the complaint, customers where made aware of the actual amount they would receive in a brief telephone call only after the customers signed their contracts.

Unauthorized Withdrawals

The complaint also alleged that the defendants engaged in unauthorized withdrawals from customer accounts by withdrawing daily payments from the accounts after the defendants had already received the full "Purchased Amount." According to the complaint, the defendants knew about the overpayments because their recordkeeping processes created a "lag" or "debit delay" that resulted in them collecting an additional 4–5 or more unauthorized payments.

This latest action follows the FTC's **warning** earlier this year that ISOs, brokers and lead generators that market MCAs and other financing products should avoid potentially false or unsubstantiated advertising claims. Director of the FTC's Bureau of Consumer Protection, Andrew Smith, noted that "[m]aking sure that lenders and funders don't deceive business borrowers or engage in servicing abuses is a big priority for the FTC." MCA providers are officially on notice that the FTC is paying close attention to the industry.

* * * * *

As discussed, the key to offering an MCA product is to make sure that it is designed properly from the outset — both to ensure that the MCA does not involve any unfair or deceptive practices and to avoid triggering federal and state laws governing loans. With respect to advertising the MCA, the provider should ensure that all key terms are disclosed clearly and conspicuously. Taking these, and other similar steps, are critical for minimizing risk and ensuring that the product is provided in a safe and responsible way.

For more information on factors impacting the recharacterization of an MCA as a loan or other MCA and commercial financing issues, please contact the authors.

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Proposed FTC Rule to Allow Civil Penalties for Deceptive "Made in USA" Claims

By Ellen T. Berge, Leonard L. Gordon, Lindsay B. Meyer, Melissa Landau Steinman & Elliot Kelly on July 29, 2020

Proud that your products are "Made in the USA"? Before you wave the flag, know that an unqualified Made in USA claim means that your product must be "all or virtually all" made in the United States, and the Federal Trade Commission has bolstered its enforcement authority over deceptive Made in USA claims with a new proposal to allow civil penalties for violations of its Made in the USA standards.

We previously blogged about recent Made in USA actions and the FTC's September 2019 Made in USA **workshop** to evaluate updates to the FTC's long-standing **Made in USA Enforcement Policy**. The Enforcement Policy provides that to substantiate an unqualified Made in USA claim, a product must be wholly domestic or *all or virtually all* made in the United States — meaning that "all significant parts and processing that go into the product are of U.S. origin." Qualified claims — for example, "Made in USA from imported leather" — may be acceptable if they include clear and conspicuous disclosure of the extent to which the product contains foreign parts, ingredients, components, and/or processing.

Commentators have often called for the Enforcement Policy to be codified, and it was no different at the September 2019 workshop. In June 2020, the FTC released a **staff report** on the Made in USA workshop and summarized the culmination of issues raised during the workshop as well as written submissions. The report explained that consumer perception evidence provided to the FTC failed to warrant changing the "all or virtually all" standard. In other words, at least a significant minority of consumers continued to expect a Made-in-USA-advertised product to be "all or virtually all" made in the United States. Many of the commentators agreed that the Commission should continue to focus its enforcement efforts on egregious offenders, while aggressively working to prevent misrepresentations through guidance and informal feedback to companies intending to comply. Some commentators were concerned that if the FTC pursued enforcement efforts against minor infractions, legitimate companies with viable Made in USA representations may choose not to advertise the claim because of the enforcement risk. Despite these comments, the report explained that commentators felt the FTC should be able to obtain civil penalties for egregious violations in the first instance.

Appearing to take these comments into account, in conjunction with issuing the staff report, the FTC announced a Notice of Proposed Rulemaking for the Made in USA Labeling Rule. Published in the Federal Register on July 16, 2020, the **proposed Rule** would incorporate much of the FTC's 1997 Enforcement Policy — and the "all or virtually all" requirement — but most notably the Rule would allow the FTC to seek civil penalties for violations. The civil penalty amount, adjusted for inflation pursuant to 16 CFR Part 1, is currently $42,530 per violation.

The proposed Rule is currently open for comment, but if it passes as written, advertisers must be wary that any violations could result in steep penalties. With the FTC's continued enforcement in the area, as recently as **March 2020 against Williams-Sonoma**, Inc., any doubts over the viability of a Made in USA representation should be discussed with competent counsel. If you are interested in submitting comments in the FTC's rulemaking or gaining a better understanding as to how these rules apply to your marketing efforts, please reach out to us.

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Certiorari Granted: Supreme Court Will Decide the Fate of FTC's Disgorgement Authority

By Leonard L. Gordon, Mary M. Gardner & Michael A. Munoz on July 10, 2020

Two weeks ago, the Supreme Court handed down its opinion in ***Liu v. SEC*** where it limited the SEC's disgorgement authority to net profits returned to investors. Today, the Supreme Court **granted certiorari** in two FTC cases to **decide** **whether** Section 13(b) of the FTC Act providing for "injunctive relief" includes the authority to obtain "equitable monetary relief" in the form of disgorgement.

In the first of the two cases, ***AMG Capital Management v. FTC***, the Ninth Circuit's decision determined below that injunctive relief includes all of the ancillary equitable powers vested in the courts to order equitable monetary relief, including disgorgement. Most notably, **Judge O'Scannlain and Judge Bea** concurred with the Ninth Circuit's decision to call into question the prior decisions the majority relied on in so ruling. In stark contrast, **the Seventh Circuit in *FTC v. Credit Bureau Center*** overturned its past precedent and determined that, by the express terms of Section 13(b), Congress only authorized restraining orders and injunctions, and thus it did not authorize the FTC to seek equitable monetary relief such as disgorgement. Another wrinkle to the contrast between these two cases is the dynamic between the FTC and the Solicitor General. **As we've blogged about before**, the Solicitor General is representing the FTC in *AMG*, but declined to take the case in *Credit Bureau Center* where the FTC appeared on its own behalf. Such a dynamic may lead to a divergence in the positions taken by the FTC and the Solicitor General office.

Though we've hinted before these cases *could* have a significant impact on the amount of monetary relief the FTC is entitled to seek (if at all), these cases *will* definitively decide whether the FTC is entitled to seek such relief. Because the Court has consolidated these cases, the Court has extended the time for oral argument to one hour. As the briefings in these cases are submitted and an oral argument date is set, we will continue to monitor and blog on future developments.

Two Conservative, But Very Different, Approaches to Calculating Civil Penalties: Harm vs. Deterrence

By Alexandra Megaris on June 29, 2020

Earlier this month, the FTC approved a settlement with a developer of popular apps for purported violations of the Children's Online Privacy Protection Act (COPPA). The Commissioners voted 4-1 to authorize the Department of Justice to file the complaint and the stipulated final order resolving the matter. Under the stipulated final order, the company was ordered to pay a $4 million civil penalty (although all but $150,000 of it was suspended for inability to pay). The lone dissent came from Commissioner Noah Phillips who issued a **dissenting statement** criticizing the "recent push to heighten financial penalties . . . without clear direction other than to maximize the amount in every case."

Commissioner Phillips made the case, as he has before, that *harm* should be the starting point when fashioning a penalty. Steeped in economic theory, he argued that "basing penalties on harm forces defendants to internalize the costs their behavior imposes on others, orienting conduct in a socially beneficial fashion." Chairman Simons also issued a **statement**, contending that starting with harm is "inapposite" when Congress explicitly prohibits practices and directs the agency to impose penalties.

The allegations against HyperBeard are straightforward. According to the FTC, because many of HyperBeard's apps are directed to children, it should not have collected persistent identifiers of the apps' users (used for targeted advertising) without first providing notice of the company's information practices and obtaining parental consent. Finding the $4 million penalty disproportionate to the harm, Commissioner Phillips compared the collection, use, and disclosure of *non-sensitive* personal information, such as persistent identifiers, to the disclosure of children's personal information which would allow them to be contacted, and provided a helpful analogy:

> **It is illegal to speed and illegal to steal. But we don't penalize those two the same way, nor do we ignore the difference between driving 76 miles per hour and driving 103; or between stealing $100 and $100 million. To do so would be perverse, both from the perspective of justice and social consequences.**

Chairman Simons drew a line between statutes seeking to balance competing costs and benefits and statutes where civil penalties are specifically proscribed in order to deter future misconduct. In other words, *deterrence* should be the starting point. Chairman Simons laid out the following standard:

> **I believe that the goal of the civil penalty should be to make compliance more attractive than violation. Said another way, violation should not be more profitable than compliance.**

In the case at hand, the FTC attempted to estimate the revenue from the "illegal" behavioral advertising. It then considered the following statutory factors in deciding whether to adjust the penalty amount upwards or downwards: HyperBeard's degree of culpability, history of prior related conduct, prior law enforcement actions, timeliness of corrective action, ability to pay, willfulness, and threat posed to consumers; the effect on Hyperbeard's ability to continue to do business; and "such other matters as justice may require," such as, cooperation with the FTC's investigation, past approaches to similar violations, and expectations of businesses and consumers.

As Chairman Simons concluded, "[c]ivil penalties will be an ongoing discussion here at the FTC." With millions—if not hundreds of millions—of dollars riding on it, we certainly hope so.