Recent Supreme Court and Appellate Decisions

Tuesday, September 29, 2020

Stephen Freeland, Partner, Venable LLP

Len Gordon, Partner, Venable LLP

Mary Gardner, Associate, Venable LLP

VENABLE LLP

1

CLE Credit

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1.5 hours, of which 1.5 hours applies to the general credit requirement, and by the State Bar of New York in the amount of 1.5 hours, of which 1.5 credit hours 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.

Disclaimer:

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.

VENABLE LLP

2

Recent Court Decisions Impacting FTC Enforcement Authority

VENABLE LLP

3

3

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.

VENABLE LLP

4

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).
- Two years after Congress enacted Section 13(b), it enacted Section 19 in 1975 to explicitly grant the FTC the authority to seek monetary relief for harm to consumers.

VENABLE LLP

5

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

VENABLE LLP

6

Comparing Relief Permitted Under Section 13(b) and Section 19

- Examination of the plain language of the statutes.
  - Section 13(b): That in proper cases the Commission may seek, and after proper proof, the court may issue, **a permanent injunction**.

  vs.

  - Section 19: "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."
- Arguments that the FTC does not have jurisdiction under Section 13(b) to sue in federal court for equitable monetary relief.
  - 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.

VENABLE LLP

7

The FTC's Expansion of Section 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[.]"

VENABLE LLP

8

A Tale of Two Decisions: Monetary Relief Under Section 13(b)

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

- 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, relying on circuit precedent that "§ 13 empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution."
- Judge O'Scannlain wrote a concurring opinion, 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

9

A Tale of Two Decisions: Monetary Relief Under Section 13(b)

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.
- The Seventh Circuit relied on *Meghrig* as clarification that the Court's equitable authority is limited by the plain text of Section 13(b).

VENABLE LLP

10

A Tale of Two Decisions: Monetary Relief Under Section 13(b)

- On July 9, 2020, the Supreme Court granted certiorari in both *AMG Capital Management* and Credit Bureau. No. 19-825.
- The question the Court will consider is: "Whether Section 13(b) of the [FTC] Act, by authorizing 'injunction[s],' also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief."
- This case is posed to alter the FTC's preferred enforcement mechanism.
  - As of mid-2019, there were 55 cases pending in federal district courts seeking equitable monetary relief under Section 13(b).
  - The FTC brings dozens more each year.

VENABLE LLP

11

Stays Pending *AMG Capital Management* and *Credit Bureau Center*

Case	District	Stay Granted/Denied
FTC v. Kutzner, No. 8:16-cv-999-DOC-AFM	C.D. Cal.	Denied on 7/28
FTC v. Cardiff, No. 18-cv-2103-DMG	C.D. Cal.	Denied on 9/9/20
FTC v. Nudge, LLC, No. 19-cv-867-DBB-DAO	D. Utah	Pending as of 7/20/20
FTC v. Zurixx, No. 19-cv-713-DAK-DAO	D. Utah	Pending as of 8/18/20
FTC v. Lending Club Corp., No. 18-cv-2454, 2020 WL 4898136	N.D. Cal.	Granted on 8/20/20
FTC v. Hornbeam Special Situations, LLC, No. 17-cv-3094-WMR, 2020 WL 5492991	N.D. Ga.	Denied on 9/10/20
FTC v. Match Group Inc., No. 3:19-cv-2281-K	N.D. Tex.	Pending as of 9/8/20
FTC v. Simple Health Plans, LLC, No. 18-cv-62593-DPG	S.D. Fl.	Denied on 8/3/20

VENABLE LLP

12

A Potential Supreme Court Precursor to *AMG/Credit Bureau*?

- *Liu v. SEC,* 140 S. Ct. 1936 (2020)
  - Petitioners raised more than $27 million from investors, claiming they would use the funds to build and operate a cancer treatment center that was never built. The Central District ordered:
    - Disgorgement of the entire amount that had been raised from investors: $27 million,
    - Payment of civil penalties equal to the $8.2 million the couple had personally received from the project, and
    - Entry of a permanent injunction against the defendants.
  - Petitioners appealed to the Ninth Circuit, which affirmed the restitution award.
  - Petitioners then 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.
    - 15 U.S.C. § 78u(d)(5) states that in any action brought "by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

VENABLE LLP

13

A Potential Supreme Court Precursor to *AMG/Credit Bureau*?

- *Liu v. SEC,* 140 S. Ct. 1936 (2020)
  - On June 22, 2020, the Supreme Court issued its decision, holding that disgorgement can be a form of "equitable monetary relief" provided the SEC checks certain boxes in obtaining it from a defendant.
  - Those boxes include:
    - Disgorgement must be calculated based on the net profits from the wrongdoing after deducting legitimate expenses.
    - Disgorged funds must be returned to wronged consumers, where feasible.
    - To avoid transforming an equitable remedy into a punitive measure, joint and several liability should be limited to "partners engaged in concerted wrongdoing."
- Open questions after *Liu*:
  - What constitutes a legitimate business expense?
  - What type of conduct rises to the level of concerted wrongdoing?

VENABLE LLP

14

The Potential Impact of *Liu* on FTC Enforcement Actions

- *FTC v. Electronic Payment Solutions*, No. 17-cv-2535-PHX-SMM (D. Ariz. Aug. 31, 2020)
  - FTC filed suit against EPS for playing a role in facilitating Money Now Funding's alleged unlawful 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.
  - Though the Court denied EPS's motion because there were several facts still in dispute, it limited the FTC's ability to recover monetary relief in two ways:
    - *Liu* applies regardless of whether the FTC seeks restitution or disgorgement; in this context, the court ruled that they are indistinguishable remedies.
    - The FTC has to prove that EPS and Money Now Funding acted as "partners in concert" as articulated in *Liu* in order to hold EPS jointly and severally liable.

VENABLE LLP

15

Limiting Section 13(b) Suits to Actions Involving Ongoing or Imminent Wrongdoing

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

16

Constitutional Challenges to Independent Agencies

Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020)

- The Supreme Court held that the single-director structure of the Consumer Financial Protection Bureau (CFPB) violates the separation of powers for two reasons:
  - The CFPB director wields "executive power" in the form of promulgating binding rules, broad prohibitions on unfair and deceptive practices, and "unilaterally issue[s] final decisions awarding legal and equitable relief in administrative adjudications[.]"
  - The CFPB director is a single individual, rather than a multi-party "non-partisan" commission, that is insulated from presidential removal, as the Court previously relied on in upholding the structure of the FTC in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).
- The Court placed significant weight on the second element, going so far as to advise the remedy is simply converting the CFPB to a multi-member panel without revising its authority.
- Potential significance for the FTC?
  - The Court noted that its conclusion in *Humphrey's Executor* "that the FTC did not exercise executive power has not withstood the test of time."
  - However, the fact that the FTC is overseen by a multi-party commission, rather than a single individual, weighs against a finding of unconstitutional structure pursuant to *Seila Law*.

VENABLE LLP

17

Recent Court Decisions Impacting The Interpretation and Application of the TCPA

VENABLE LLP

18

Overview of the TCPA

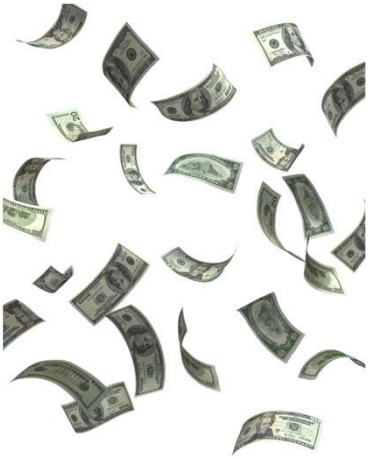
- Telephone Consumer Protection Act, 47 U.S.C. § 227
  - Regulates and restricts ***outbound*** communications.
    - Generally prohibits:
      - Telemarketing and non-telemarketing calls/texts to cell phones, using autodialers without proper consent;
      - Prerecorded message calls to cell phones and landlines without proper consent and required disclosures;
      - Inaccurate caller ID information; and
      - Telemarketing calls/texts to numbers on the National Do Not Call Registry (NDNC) and company-specific internal do not call lists (IDNCs).
  - Under the TCPA, a text message is a "call."
  - Enforced by the FCC and private plaintiffs.

VENABLE LLP

19

Overview of the TCPA

- Statutory damages: $500 per text (or up to $1,500 per text for willful or knowing violations).
  - No cap on damages.
  - Top 10 TCPA class action settlements between $10 million and $76 million.
  - $925 million jury award in *Wakefield v. ViSalus, Inc.* (D. Or. 2019).
  - $267 million jury award in *Perez v. Rash Curtis & Assocs.* (N.D. Cal. 2019).
- FCC fines: up to about $20,000 per call/text (TRACED Act, Dec. 2019)



VENABLE LLP

20

Automatic Telephone Dialing Systems Under the TCPA

- Autodialer ("Automatic Telephone Dialing System") – "capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers." 47 U.S.C. § 227(a)(1).
- Basically, a platform that has the "***capacity***" to dial thousands of numbers in a short period of time without human involvement.
- *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018)
  - Set aside 2015 FCC order, which asserted that equipment should be defined as an autodialer if it has the potential, future "capacity" to dial random or sequential numbers, even if that capacity could be added only through certain modifications or software updates.
  - But noted that there is a "significant fog of uncertainty" as to what is an autodialer.

VENABLE LLP

Circuits Divided Over the Meaning of ATDS

Majority Interpretation of Autodialer:

- For a platform to be an ATDS, it must have the capacity to both store *and* produce numbers using a random or sequential generator and to dial such numbers
  - *Glasser v. Hilton Grand Vacations Company, LLC* 948 F.3d 1301 (11th Cir. 2020)
  - *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020) (written by Judge Coney Barrett)
  - *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018)

Minority Interpretation of Autodialer:

- For a platform to be an ATDS, it must store "telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator."
  - *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019)
  - *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018)
  - *Duran v. La Boom Disco Inc.*, 955 F.3d 279 (2d Cir. 2020)
  - *Allan v. Pennsylvania Higher Education Assistance Agency*, 968 F.3d 567 (6th Cir. 2020)

VENABLE LLP

Resolution of the ATDS Circuit Split is on the Horizon

Facebook Inc. v. Duguid, No. 19-511, cert. granted (U.S. July 9, 2020)

- Oral argument recently set for December 8, 2020 to decide the circuit split regarding whether the definition of an ATDS encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator."
- Facebook's opening brief argues that the Ninth Circuit's decision below was wrong in three ways:
  - The plain text of the ATDS definition confirms that "random or sequential number generator modifies both "store" *and* "produce."
  - The historical context of the TCPA demonstrates Congress's concern with the specific practice of randomly or sequentially generating numbers that tie up emergency lines or businesses with multiple lines.
  - The practical consequences of the Ninth Circuit's reading renders any modern phone an ATDS.

VENABLE LLP

Resolution of the ATDS Circuit Split Is on the Horizon—The Federal Government Weighs In

- The United States, as intervenor-respondent, filed its brief supporting Facebook's position that the ATDS definition should be narrowly read to apply only to devices that have the capacity to use a random or sequential number generator to store or produce telephone numbers.
- The United States' brief echoes Facebook's argument that the legislative history and policy concerns support this narrow reading of the ATDS definition.
- It adds that Congress's use of preexisting state laws that regulated autodialers as a backdrop when enacting the TCPA is informative.
  - Specifically, "[t]he majority of state-law restrictions on automated telemarketing in effect at the time applied only if a specified type of automatic dialing technology was used *and* the system was capable of delivering a message using an artificial or prerecorded voice."

VENABLE LLP

Stays Pending *Facebook v. Duguid*

Case	District	Stay Granted/Denied
Yosef Smith v. JPMorgan Chase Bank, N.A., No. 2:20-cv-1777-CBM	C.D. Cal.	Denied
Fabricant v. Elavon, Inc. et al, No. 2:20-cv-2960-SVW	C.D. Cal.	Denied
Odeh-Lara v. Synchrony Bank, No. 2:19-cv-02446-PSG-AGR	C.D. Cal.	Pending
Canady v. Bridgecrest Acceptance Corp., No. 19-cv-4738-PHX-DWL	D. Ariz.	Granted
Tiefenthaler v. Target Corporation, No. 1:19-cv-12412	D. Mass.	Denied (without prejudice to refile after close of discovery)
Pittenger v. First National Bank of Omaha, No. 20-cv-10606, 2020 U.S. Dist. LEXIS 171062	E.D. Mich.	Denied
Hicks v. Houston Baptist University, No. 5:17-cv-629	E.D.N.C.	Denied
Wright v. Exp Realty, LLC, No. 6:18-cv-1851-Orl-40EJK	M.D. Fla.	Granted

VENABLE LLP

25

Stays Pending *Facebook v. Duguid* cont'd…

Case	District	Stay Granted/Denied
Komaiko v. Baker Techs., No. 19-cv-03795-DMR, 2020 U.S. Dist. LEXIS 143953	N.D. Cal.	Denied
Charman v. Homes.Com, Inc., No. 3:20-cv-1086	S.D. Cal.	Pending
Massaro v. Beyond Meat, Inc. Et Al, No. 3:20-cv-510	S.D. Cal.	Pending
McGrath v. Conn Appliances, Inc., No. 4:19-cv-1930-DJB	S.D. Tex.	Denied
Wright v. Keller Williams Realty, Inc., No. 1:18-cv-775	W.D. Tex.	Granted
Lacy v. Comcast Cable Commc'ns, No. 3:19-cv-5007-RBL	W.D. Wash.	Denied
Jensen v. Roto-Rooter Serv's Co, No. 2:20-cv-223-JCC	W.D. Wash.	Granted (stay pending Barr extended)
Williams v. PillPack, LLC, No. C19-5282-RBL	W.D. Wash.	Denied

VENABLE LLP

26

Does the TCPA Violate the First Amendment?

Barr v. AAPC, 140 S. Ct. 2335 (July 6, 2020)

- AAPC challenged the constitutionality of the TCPA, arguing that the 2015 Government Debt Exception to ATDS calls was an unconstitutional content-based restriction.
- The Supreme Court struck down and severed the 2015 Government Debt Exception to the TCPA, but held that the balance of the TCPA was constitutional.
- A plurality of opinions found that the exception was a content-based restriction that violated the First Amendment. The majority relied on the exception's distinction regarding the message a speaker is permitted to convey:
  - "A robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech."
- The Court, however, severed the exception in order to leave the remainder of the TCPA in place for two reasons:
  - First, the exception and the TCPA fall under the Communications Act of 1934 which contains a severability clause.
  - Second, the presumption of severability applies where the TCPA could function adequately and independently as it did prior to 2015.

VENABLE LLP

27

Questions?

Stephen Freeland
Partner
+1 202.344.4837
srfreeland@Venable.com

Leonard Gordon
Partner
+1 212.370.6252
lgordon@Venable.com

Mary Gardner
Associate
+1 202.344.4398
mmgardner@Venable.com

VENABLE LLP

28

VENABLE LLP

29