

# FTC Hits Road Block in DIRECTV Advertising Case Seeking \$3.95 Billion Remedy

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The Northern District of California recently ruled on DIRECTV's motion for judgment on partial findings in a case where the FTC is seeking \$3.95 billion in damages. The FTC's case alleges that DIRECTV engaged in misleading advertising over a span of more than a decade and across a variety of media channels ranging from television to the company's website, violating Section 5 of the FTC Act and the Restore Online Shopper's Confidence Act (ROSCA).

Specifically, the FTC alleges that the company failed to prominently display certain key provisions, such as the 24-month contract requirement and that advertised prices would increase after 12 months, on over 40,000 advertisements. The agency did not allege that the advertising in question was false, but that the details were not displayed sufficiently.

In partially granting DIRECTV's motion, the court found that the FTC failed to prove a Section 5 violation as to the company's banner, print, or TV ads because the agency did not establish that there was a misleading net impression among consumers, and because the Commission did not sufficiently identify the alleged net impression. The proffered evidence did not establish that the advertisements were likely to mislead a reasonable consumer.

The FTC provided evidence for less than 1,000 of the challenged 40,000 advertisements at issue in the case. The court determined that this, along with the additional evidence that the FTC did provide, such as expert testimony regarding three specific ads, were not enough for the agency to meet its burden. The court noted that the agency was not required to introduce all 40,000 ads into evidence, but it did need to explain why the conclusions made about a few ads could be generalized among a large number of others that varied in format, content, and emphasis. The court also highlighted that DIRECTV's print ads displayed the necessary disclosures in text that was in all caps, bolded, and in a dark font against a light background, which the court determined was likely sufficiently prominent and in compliance with the FTC's .com Disclosure guidance.

Notably, the court declined to make a similar conclusion about DIRECTV's website advertisements. The court found that the FTC's evidence, although "far from overwhelming" was enough to defer a determination about the Section 5 and ROSCA claims associated with the website advertising at issue. Specifically, the court focused on the fact that the challenged advertising required consumers to hover over or click on a link or icon to learn about the pertinent terms of the offer. In theory, therefore, a consumer could have flowed through the entirety of the online order process without confronting important details about the offer.

The court also discussed the FTC's nearly \$4 billion potential remedy, suggesting that the agency would be unlikely to meet its burden to prove an adequate basis for relief due to the court's partially

granting DIRECTV's motion. The court had issues with the FTC expert's calculation of unjust gains because he presumed that all of the defendant's subscribers for the time period at issue were misled in the same way, without a sufficient basis for that presumption other than the FTC's instruction. This presumption was especially problematic because there were so many iterations of the advertisements. However, the court deferred the issue to see if the FTC would be able to prove liability with the remaining claims.

In a case that is historic for the breadth of advertising at issue and the amount of damages the FTC seeks, the court's order creates significant challenges for the agency as to the remaining claims in the case. We will continue to monitor this case for any updates as it proceeds.

In the meantime, the case continues to be notable in highlighting the scrutiny that a company may face when failing to sufficiently disclose post-introductory prices and term commitments for subscription type plans. Following best practices and regulatory guidance on disclosing material terms are helpful steps to avoid such scrutiny in the first instance.