FTC Updates – Intuit, Mag-Moss, and More

August 26, 2022

It's late August, but there's a lot going on at the FTC and in consumer protection news more generally. This blogpost highlights some recent FTC-related news, as well as several issues related to the FTC's legal authority that bear watching.

Intuit

As we blogged here, the FTC filed suit in March against Intuit for its alleged deception in claiming that its online tax preparation service is "free" when it's only free for taxpayers filing "simple returns." As we reported, the FTC filed an administrative complaint while also seeking a TRO in federal district court, even as multiple State AGs were investigating and Intuit claimed it had pulled its "free" claims off its website. Soon after, the FTC lost its motion for the TRO; the States and Intuit entered into a multi-state settlement; and Intuit moved for withdrawal of the FTC's case from administrative adjudication (per FTC Rule 3.26(c), to allow the FTC to determine "whether the public interest warrants further litigation"), which the FTC granted.

In its motion for withdrawal, Intuit argued that the case had become moot, in large part due to the multi-state settlement. However, on August 19, the Commission issued an order disagreeing with that assessment and returning the case to administrative litigation. Soon after, FTC complaint counsel filed a motion for summary decision seeking entry of a cease-and-desist order without need for a trial.

The merits of this case are interesting – FTC counsel argues that Intuit shouldn't be able to use the word "free" unless the product is free for everyone or, alternatively, the conditions for making it free (and the fact that it isn't free for everyone) are clearly disclosed at the outset of the offer. But the dynamics between the FTC and the State AGs are just as notable. In its recent motion, FTC counsel argues that an FTC order is necessary because the State settlement is "inadequate, allow[s] ongoing deception and harm, and … undermine[s] consumer welfare." In particular, says FTC counsel, the State settlement allows key disclosures to be "hidden behind" a hyperlink for "space-constrained" ads and sunsets key provisions after 10 years. At a time when the FTC is increasingly teaming with the States to obtain monetary relief (post-AMG), this battle over the adequacy of their settlement could get messy.

Lesser-Known Kids' Advertising Provision in Mag-Moss (Section 18(h))

There's a provision in Mag-Moss that's worth a reminder. Section 18(h) reads: "The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination … that such advertising constitutes an unfair act or practice…."

Congress added this provision to the law (along with Mag-Moss' onerous rulemaking requirements) in response to the FTC's perceived overreach in the 70s – notably, its proposal to regulate kids'

advertising ("kid vid"), the "pending proceeding" referenced in 18(h). While that proceeding was generally viewed as an effort to regulate TV ads for unhealthy food, the FTC's proposal extended more broadly – to a potential "[b]an [on] all televised advertising for any product … [to] audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising." In other words, the rulemaking record makes it possible to construe "substantially similar proceeding," within the meaning of 18(h), quite broadly.

At least one Senator hasn't forgotten about this provision: In the markup to Senator Markey's kids privacy bill (S. 1628), Senator Lee inserted an amendment stating that "[n]othing in this Act may be construed to authorize any action by the Commission that would violate Section 18(h) of the [FTC] Act."

The question now is how this provision might affect the FTC's current efforts to strengthen privacy protections for kids and teens. The FTC's "commercial surveillance" ANPR includes numerous questions about kids and teens that extend far beyond the FTC's authority under COPPA, presumably in reliance on other legal authority. The FTC also is planning an October virtual event on "stealth advertising" directed to kids and teens, and just this week invited additional public comment on this issue. Is the FTC considering Mag-Moss rulemaking here? Would it proceed under its deception or unfairness authority? If the latter, would Congress or the courts find the rulemaking to be "substantially similar" to kid vid?

The FTC's *Other* Mag Moss Rulemakings

With so much focus on the FTC's "commercial surveillance" ANPR, we shouldn't forget that the FTC has two other Mag-Moss rulemakings underway – one on impersonation fraud (launched December 2021), and another on deceptive earnings claims (launched February 2022). So far, the FTC has sought comment in both proceedings (through an ANPR) but has not yet advanced to the stage of proposing a rule.

We're watching here for clues about the FTC's ability to navigate the cumbersome Mag-Moss process in proceedings that (at this juncture) are narrower and more focused than the FTC's privacy effort. The impersonation fraud rulemaking is fairly specific, and is based on numerous FTC cases that, the agency states, demonstrate the "prevalence" required by Mag-Moss. While the earnings claims rulemaking is broader (especially given the multiple contexts and industries in which earnings claims are made), it's still more defined than the privacy ANPR, since it relates to a specific type of claim. (Even with this more defined focus, the ANPR has resulted in over 1600 comments, which the FTC must now review before proceeding to the proposed rule stage.) Progress in these first two rulemakings could shed light on how the FTC will fare in the third.

Another Threat to the FTC's Authority – Axon Enterprise v. FTC

On the heels of its loss in AMG, the FTC is facing another challenge at the Supreme Court, this time in a case involving its administrative process. The question in this case (Axon Enterprise v. FTC) is whether a company can challenge the constitutionality of the FTC and its administrative process in federal district court or whether it must follow the procedures laid out in Section 45 of the FTC Act for review of cease-and-desist orders. As a legal matter, the Supreme Court will be considering whether, in enacting Section 45, Congress "impliedly stripped" federal district courts of jurisdiction over constitutional challenges to the FTC's structure and process.

If the answer is "yes," then companies must wait until an order has been entered before raising

constitutional challenges, and then pursue their claims in a court of appeals, per the Section 45 review process. If the answer is "no," then companies may bring constitutional challenges to federal district court whenever they have standing to do so, potentially in the midst of an investigation or administrative litigation.

Why is this important? The AMG case blocked the FTC's main avenue for obtaining monetary relief (Section 13(b)), forcing it to rely on other tools to obtain such relief. One of those tools is obtaining a cease-and-desist order through administration litigation and then seeking monetary relief in federal district court under Section 19. If companies can bring constitutional challenges in the midst of an investigation or administrative litigation, the FTC's path to obtaining monetary relief (indeed any relief) becomes that much more difficult. In addition, federal district courts weighing constitutional challenges may lack relevant expertise (on, e.g., privacy or advertising issues) and are not obliged to provide the FTC with the deference afforded by the Rule 45 review process. The consequences here could be significant.

Individual Liability

One final tidbit to highlight is the fact that, in at least two recent high-profile cases (involving Twitter and Facebook), the FTC decided not to pursue individual liability. As readers may recall, some FTC Commissioners have emphasized the need to name individuals in its cases and have criticized settlements that fail to do so. For example, Commissioner Slaughter and then-Commissioner Chopra dissented from the 2019 settlement with Facebook, despite other significant relief obtained, largely due to the failure to name Mark Zuckerberg in the case. They leveled similar criticisms in TikTok and Google. Chair Khan has also emphasized individual liability in her speeches.

We don't believe that the FTC is retreating from its commitment to pursue individual liability in its cases. However, these two data points suggest that it at least recognizes the challenges and trade-offs of doing so in particular cases. We'll be watching for further developments on this front to see how the current set of Commissioners is approaching the issue of individual liability.

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We'll continue to track all of these developments and will provide updates here.