

Sept 22, 2020

***U.S. Supreme Court
October Term 2020:
What's in Store for Free
Enterprise?***

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SIDLEY

“Consumer Protection” Litigation When Good Intentions Threaten Free Enterprise

1. Overly Aggressive Government Agencies

2. Statutory Penalties in Ambiguous Statutes

3. Litigation Tourism

Overly Aggressive Government Agencies



AMG Capital Management v. FTC

FTC v. Credit Bureau Center

Section 13(b) of FTC Act

- Permits FTC to file suit “to enjoin” unlawful acts
- Provides for “temporary restraining order,” “preliminary injunction,” and “permanent injunction”
- Makes no mention of restitution or other monetary relief—and does not speak broadly of “equitable relief,” which *Liu* said could include “disgorgement”
- Breaking from precedent, Seventh Circuit said injunction not include restitution
- But Ninth Circuit said it does, as did every other circuit that addressed issue

Why Do We Care?

- Defendants in these cases are bad actors
 - AMG misrepresented the terms for payday loans, including triple-digit interest rates and renewals
 - Credit Bureau Center deceptively offered “free” credit report but obscured key detail: \$29.94 month “membership” subscription
- **But** Hydraulic Pressure To Settle: FTC actions against established companies that lawfully sell products, with threats of hundreds of millions or even billions of dollars in “restitution”



Why Do We Care?

FTC 2019 Monetary Penalties



TOP 5 REDRESS, DISGORGEMENT AND CIVIL CONTEMPT JUDGMENTS

Equifax*	\$425 million
University of Phoenix	\$190.97 million
AdvoCare International, L.P.	\$150.1 million
AT&T Mobility	\$60 million
OMICS Group	\$50.13 million



TOP 5 CIVIL PENALTY CASES**

Google LLC & YouTube LLC***	\$136 million
Musical.ly (TikTok)	\$5.7 million
NetDotSolutions (James Christiano)	\$1.35 million
Jasjit Gotra (Alliance Security)	\$300,000
Media Mix 365	\$264,000

*Equifax will also pay an additional \$175 million in civil penalties to 48 states, the District of Columbia and Puerto Rico, as well as \$100 million to the CFPB

**This does not include the Facebook settlement, which would require the company to pay \$5 billion in civil penalties, because the final order and judgment has not yet been entered by the court.

***Google and YouTube paid an additional \$34 million to the state of New York

NEW REDRESS,
DISGORGEMENT
AND CIVIL
CONTEMPT AWARDS

\$1.17 billion

CIVIL PENALTIES
AWARDED**

\$143.76 million

Why Do We Care?

Structure

- Other provisions in statute speak of money, but this one does not

Notice

- Those provisions require FTC to give notice of a violation to defendant either by obtaining a cease-and-desist order or by promulgating a final rule that “defines with specificity” the prohibited act

Separation of Powers

- Recent Supreme Court jurisprudence counsels against judicial creation of remedies that are inconsistent with text
 - FTC relies on cases from 1940s (*Porter*) and 60s (*Mitchell*) that took different approach to statutory construction and are inconsistent with current jurisprudence (ex: *Meghrig*)

Other Observations

FTC is alone

- DOJ not on briefs
- OSG is not doing oral argument

FTC already arguably lost—under *Liu*, equitable monetary awards are limited

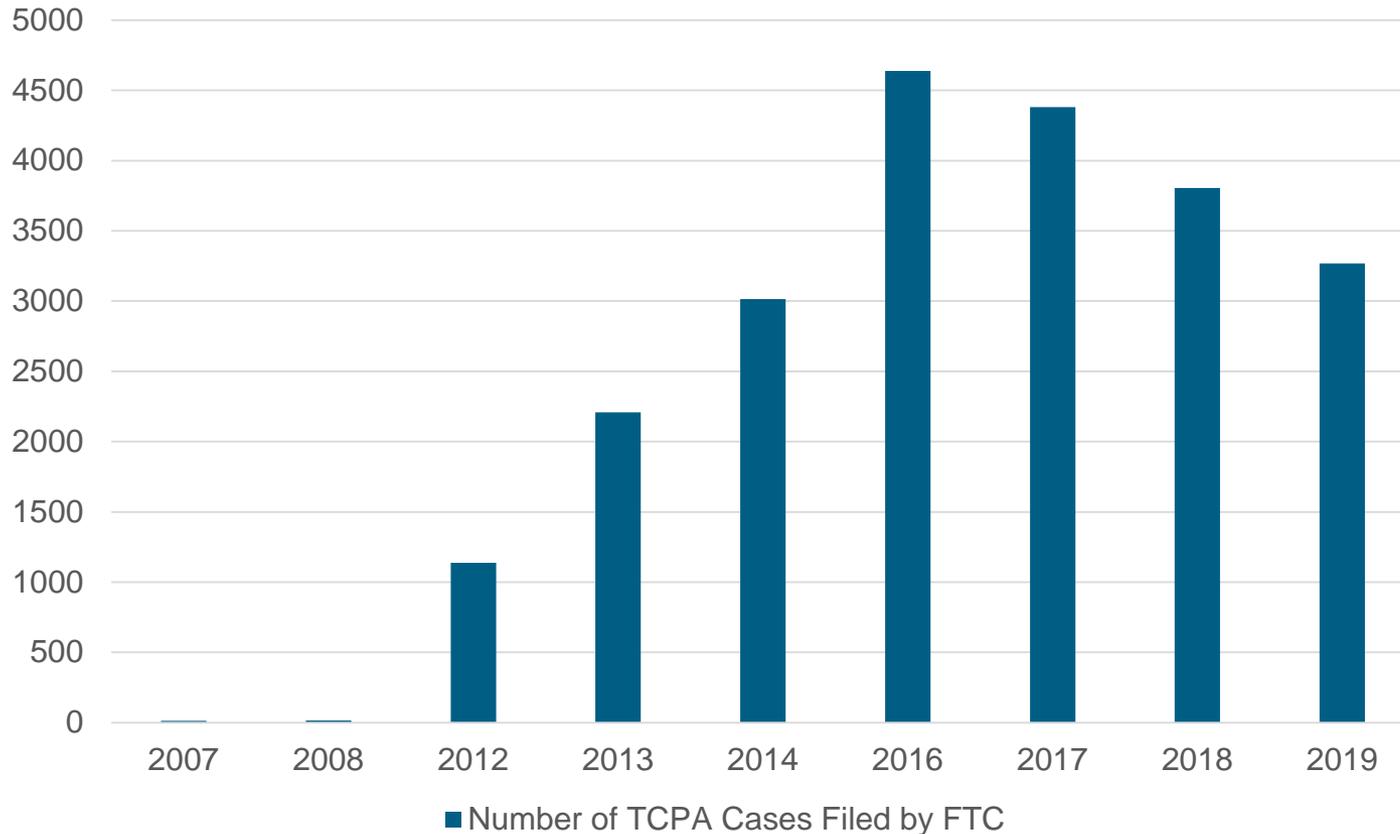
- Net profits, not revenues
- From the unlawful activity (the “infringing ... component”), not entire business or product
- If awarded to victims

Statutory Penalties in Ambiguous Statutes: *Facebook v. Duguid*



Recent Explosion of TCPA Cases

Number of TCPA Cases Filed by FTC



*WebRecon Stats for June 2020: An Interesting Dichotomy, WebRecon LLC (July 20, 2020), <https://bit.ly/3gqOtWA>;
WebRecon Stats for Dec 2019 and Year in Review: How Did Your Favorite Statutes Fare?, WebRecon LLC (Jan. 28, 2020), <https://bit.ly/2DZrBit>; U.S. Chamber Institute for Legal Reform, Analysis: TCPA Litigation Skyrockets Since 2007; Almost Doubles Since 2013 (Feb. 5, 2016), <https://bit.ly/3k5gLYR>; U.S. Chamber Institute for Legal Reform, The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages (Oct. 2013), <https://bit.ly/2EMUnDv>

Telephone Consumer Protection Act of 1991

- In relevant part, it prohibits the use of “any automatic telephone dialing system or an artificial or prerecorded voice” to “make a call” to any “cellular telephone service” (or other specified targets), unless consent
 - Also prohibits calls to residential land line using “artificial or prerecorded voice” without consent
- Statute provides for statutory damages of “\$500 . . . for each . . . violation” and authorizes up to treble damages against anyone who “willfully or knowingly violate[s]” the law.
- FCC and several circuit courts have said that texts are included
 - Supreme Court has assumed this position
 - Results “from overreliance on the statute’s purpose and a game of follow the leader” (Cory Andrews, Washington Legal Foundation)

What Did Facebook Do?

- Consumer protection: Sends text messages to consumers if an account has been accessed by an unrecognized device or browser
 - Consumers have to opt-in to this security feature
 - When they do so, Facebook stores their cell number and texts them when suspicious access
- Plaintiff received text messages but did not have a Facebook account
 - Likely, his cell number was recycled and previously belonged to a Facebook user who opted-in
- In any event, the important thing is that the text message, though erroneous, was not the product of a “random or sequential number generator”

What Is an “Automatic Telephone Dialing System”?

- The term means “equipment which has the capacity—
(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
(B) to dial such numbers”
- Ninth Circuit held that the highlighted phrase modified only “produce,” not “store”
- Not only inconsistent with text, but also would open up all smart phones to TCPA exposure and statutory penalties—*Don't misdial!*

Litigation Tourism



- Clinical trials generally occur in dozens of states; perhaps all 50
- Missouri courts have recognized jurisdiction based on bottling of product in-state even though bottling not relevant to claims
- Mere but-for connection should not be enough
- There needs to be a *material* link between defendant's forum conduct and plaintiff's *specific claims*
- *Rios v. Bayer Corp.*, 2020 IL 125020 (rejecting jurisdiction on pleadings because clinical trials and other in-state contacts did not supply “adequate” or “jurisdictionally relevant links”)

One More Case ...

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