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LESSONS FROM FTC'S LOSS IN, AND SUBSEQUENT ABANDONMENT OF, DIRECTV ADVERTISING CASE

by M. Sean Royall, Richard H. Cunningham, Brett S. Rosenthal, and Emily Riff

The FTC recently suffered a significant setback in a closely watched advertising practices case against DirecTV. Specifically, on August 16, 2018, Judge Gilliam of the U.S. District Court for the Northern District of California granted judgment in favor of DirecTV on the majority of the claims at the close of the FTC's case in chief—including all claims relating to DirecTV's disclosures in its advertising—before DirecTV began to present its own case in defense. And then yesterday, the FTC agreed to dismiss the remainder of its case voluntarily with prejudice, fully ending the enforcement action.

Judge Gilliam's decision reflects an emphatic rejection of both the disclosure standards sought by the FTC and the agency's proposed approach to monetary equitable remedies. The court's analysis should be of interest to companies that sell services on a subscription basis or that offer a variety of price, service, and promotional options.

The FTC's Claims Against DirecTV

After a lengthy investigation, in March 2015, the FTC filed a complaint alleging that DirecTV engaged in deceptive advertising practices in violation of § 5(a) of the FTC Act, 15 U.S.C. § 45(a), as well as the Restore Online Shoppers Confidence Act (ROSCA), 15 U.S.C. §§ 8401 *et seq.* The FTC claimed that DirecTV violated § 5 by failing to adequately disclose several features of its subscription services, including:

- The introductory discounted price lasted only twelve months while subscribers were bound to a 24-month commitment;
- Subscribers who cancelled early would be charged a cancellation fee; and
- Subscribers would automatically incur monthly charges if they did not cancel a premium channel package after a free three-month promotion period (the "premium channel negative option").

In addition, the FTC claimed that DirecTV did not clearly and conspicuously disclose the premium channel negative option on its website and failed to obtain express informed consent for charges, in violation of ROSCA.

M. Sean Royall and **Richard H. Cunningham** are Partners, and **Brett S. Rosenthal** and **Emily Riff** are Associates, with Gibson, Dunn & Crutcher LLP. Text, with references, available at www.wfllegalpulse.com.

The challenged advertisements appeared in a variety of different media—including television commercials, print advertisements in newspapers and direct mailings, Internet banner ads on third-party websites, and ads on DirecTV's own website—over about a ten-year period. During the relevant period, DirecTV ran several different television commercials, tens of thousands of different print advertisements, over 150 different Internet banner ads, and revised its own website numerous times.

The FTC claimed that all of these advertisements were deceptive because each did not adequately disclose the offer features described above. However, while the ads each presented similar promotional offers, the ads used different formats and presented materially different terms and options.

The agency's theory of liability was not that the advertisements contained false statements or even that the advertisement entirely omitted material information. Instead, the FTC's central theory was that critical details about the offers "were not disclosed prominently enough" relative to other information in the ads. Op. at 8. According to the FTC, DirecTV effectively made material "omissions by *inadequately* disclosing material terms after the advertised price ha[d] been prominently featured in DirecTV's advertisements." Op. at 8 (emphasis added). As the FTC argued, "DirecTV's advertisements consistently create an overall 'net impression' that the company's service may be obtained for substantially less than consumers ultimately must pay over the course of their 24-month contract." Op. at 10 (quoting FTC's pretrial statement).

The FTC's Evidence

The case was tried to Judge Gilliam in August 2017. At trial, the FTC relied heavily on expert testimony. To prove its "net impression" theory, the FTC and its experts focused on a few print advertisements that the experts said were representative of DirecTV's advertising. FTC's survey expert, Dr. Erdem, testified that one particular print advertisement was "sufficiently representative" of over one hundred other print ads that her conclusions applied to the unstudied ads. Op. at 12.

The FTC's other expert witness, Dr. Pratkanis, testified similarly that the characteristics of two print ads he studied were "generalizable to 'hundreds' of other advertisements he reviewed." Op. at 12 (quoting Dr. Pratkanis' testimony). Over two hundred other ads were put into evidence, the vast majority of which were introduced by stipulation without live testimony, and the FTC sought restitution on the basis of over 39,000 additional ads that were never introduced into evidence.

Dr. Erdem studied "whether DirecTV's website and print advertisements clearly and conspicuously disclosed certain items about the contract, price terms, et cetera." Op. at 17. To test this, Dr. Erdem created a web-based survey involving an actual print ad as a control stimulus and a modified test version of the ad as a comparative stimulus. In the modified version, Dr. Erdem changed the manner in which certain information regarding price and terms appeared. She then asked survey respondents a number of questions about the offers and concluded that the modified version of the ad increased "consumer understanding" of the terms. Op. at 18.

Dr. Pratkanis, on the other hand, did not perform any empirical testing. Instead, he testified based on his expertise in marketing that "general principles of social influence such as 'throwing the lowball' and 'free gift' can increase the 'likelihood' that someone would make a purchase." Op. at 20 (quoting Dr. Pratkanis' testimony).

The FTC also relied on eye tracking studies. According to the FTC, these studies showed that participants did not focus visually on the disclosures when viewing the advertisements. The FTC argued that this showed that the disclosures were not prominent enough.

The FTC also presented evidence of spikes in customer calls at four months and thirteen months after subscription, which the FTC argued showed that customer complaints increased at times when the allegedly deceptive terms kicked in.

Finally, the FTC relied on internal DirecTV documents describing customer “pain points” and recommending ideas for improvement. The FTC contended that these documents showed DirecTV’s awareness that its advertising practices were harmful to consumers.

For its theory of monetary restitution, the FTC instructed its damages expert, Dr. Rascher, to presume that all customers had an expectation that they would pay the same introductory price for two years. Applying this assumption to all DirecTV customers over almost a decade, Dr. Rascher concluded that a “reasonable estimate (under *Commerce Planet*) of the unjust gains DirecTV collected from consumers” was \$3.95 billion. Op. at 42-44 (citing *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1063 (C.D. Cal. 2012)).

The Court Dismisses Most of the FTC’s Claims

At the close of the FTC’s case in chief, DirecTV moved for a judgment on partial findings under Federal Rule of Civil Procedure 52(c). The court granted the motion as to most of the FTC’s claims. Op. at 1. It concluded that the FTC failed to prove that DirecTV’s print, television, or banner ads were deceptive and noted that “this case did not involve the type of strong proof the Court would expect to see in a case seeking nearly \$4 billion in restitution based on a claim that all of DirecTV’s 33 million customers between 2007 and 2015 were necessarily deceived.” Op. at 7, 35.

However, the court deferred judgment on the claims involving DirecTV’s website because it could not “say conclusively at this stage that the FTC has failed to prove that [a certain] version of the website could create a net impression that was likely to deceive a consumer acting reasonably under the circumstances.” Op. at 37.

An act or practice is deceptive under § 5 of the FTC Act if (1) “there is a representation, omission, or practice, (2) that is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material.” Op. at 7 (quoting *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001)). The court recognized that, even if an ad “contains some truthful disclosures, a representation still ‘may be likely to mislead by virtue of the net impression it creates.’” Op. at 7 (quoting *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006)); see also *Gill*, 265 F.3d at 956 (evaluating the “overall net impression” created by an advertisement).

The Dismissed Advertising Claims

The court found that the FTC failed to prove deception as to any of DirecTV’s ads. First, the FTC “failed to establish that there was any misleading ‘net impression,’ or even to identify clearly what it claims the net impression was” for the “very small” number of advertisements actually analyzed by the experts. Op. at 8. Second, the FTC also “failed to articulate what common net impression is conveyed by the over 40,000 challenged advertisements . . . or to explain how and why that

impression would be likely to mislead a reasonable consumer.” Op. at 8-9.

Even if (counterfactually) the FTC had shown deception for the print advertisement, it had not adequately explained “why conclusions about a handful of advertisements can be applied to derive a uniform net impression for an extremely large number of others that vary significantly in format, content, and emphasis.” Op. at 29.

The court explained that it “must first determine what ‘net impression’ the advertisements at issue create, so that it can then decide whether this net impression was likely to mislead reasonable consumers.” Op. at 10. In conducting this analysis, the court “considers the face of the advertisement, and may also consider extrinsic evidence.” Op. at 10. Given the voluminous record and the many different types of ads accused by the FTC, the court approached its analysis in two parts, first examining the print ad that Dr. Erdem’s surveys had studied before turning its attention to the remainder of the accused ads.

Regarding the print ad that Dr. Erdem studied, the court found “based on its facial review” of the ad that “the net impression a reasonable consumer would take away from this advertisement is that a promotional price applies for 12 months, that a 24-month agreement is required, that an early cancellation fee of \$20 per month will apply if the customer cancels before the end of the 24-month period, that services will continue at the end of any promotion period at the then-applicable regular rate unless the customer contacts DirecTV to change the services, and that the customer needs to call a toll-free number or go to DirecTV’s website to subscribe.” Op. at 16. “These provisions are adequately disclosed throughout the advertisement, and while the ad contains a substantial amount of information, a reasonable consumer would understand that this is because subscription satellite television service is a complex product with a number of options for price, level of service, package features and other components.” Op. at 16. Notably, all of these conclusions were based solely on the court’s review of the ad itself, including the critical disclosures that appeared at the bottom of the ad in print that the FTC had characterized as “fine,” “buried,” and “hidden.”

The FTC’s extrinsic evidence was also unpersuasive. The court found that Dr. Erdem’s survey “suffers from several flaws that essentially negate its probative value.” Op. at 18. Erdem’s findings “that changing the presentation of certain information may result in better recollection of that information simply does not support the conclusion that the information was likely to mislead as presented in its original form.” Op. at 18. The court criticized Dr. Erdem for having not performed a “deception study” or “copy testing” akin to those often done in Lanham Act cases. Op. at 18. In addition, Dr. Erdem “did not test, and therefore cannot establish, why a consumer responded that he or she did not know or recall the terms.” Op. at 19.

Finally, “Dr. Erdem’s web study did not adequately replicate the experience of a prospective customer viewing the ad in paper form” because “the survey taker had to scroll down the screen to see [the] disclosures” on the web-based survey. Op. at 19-20. Regarding Dr. Pratkanis’ “social influence” analysis, the court discounted it largely because he had done no empirical testing and “could not measure” the impact on consumers’ behavior. Op. at 21-23.

The court distinguished several cases that the FTC had relied on, including *Cyberspace*, *AMG Services*, and *FTC v. Johnson*, for the proposition that advertisements may be misleading even when relevant information was technically disclosed if the “overall presentation would lead a reasonable consumer to conclude that the terms were materially different than the true terms.” Op. at 23. The

court highlighted the Johnson court's observation that there is "a significant distinction between sites that clearly offer subscription-based or membership-based services to a consumer with a trial period and negative option, on one hand, and sites that offer to ship a product for a one-time payment with a bundled membership trial period and negative option on the other." Op. at 25 (quoting *Johnson*, 96 F. Supp. 3d at 1141-42).

The court also found it "self-evident that this case bears no resemblance to cases in which a defendant represents in an advertisement that the consumer will receive a benefit ... only to turn around and impose a concealed and unwanted burden." Op. at 26.

On the other accused advertisements, the court found that, "[e]ven had the FTC shown that [the print ad discussed above] created a misleading net impression, it failed to show how that impression is generalizable to hundreds or thousands of additional advertisements." Op. at 27. The court rejected the FTC's experts' conclusory opinions that the ads they had analyzed were representative of the other ads. It also found the other extrinsic evidence offered by the FTC to be insufficient. Regarding the eye-tracking studies, the court remarked that the mere "fact that study participants' eyes may be more drawn to bright colors and pictures than to written details during a simulation test conducted on a computer simply does not provide persuasive support for the FTC's claim that advertisements describing a multifaceted offer for a plainly complex product like subscription satellite television services were misleading." Op. at 31.

On the customer calls, the court found that the FTC had not established why consumers were calling. And regarding the DirecTV committee that studied customer "pain points," the court found that "DirecTV's investment of substantial resources in analyzing its operations, candidly identifying areas of improvement, and following through on a number of improvements" did not support finding deception and, if anything, showed that this case was "very unlike the straightforward deception cases" relied on by the FTC. Op. at 34.

Claims Relating to DirecTV's Website and Application Flow

Although the "FTC's case as to the website was far from overwhelming, the Court [found] it appropriate to defer a determination on these claims until after the close of the evidence." Op. at 36. The court engaged in the same facial review of the website as it had of the other advertisements, but it reached a different conclusion for the website: "Based on a facial review of the [website], the Court cannot say conclusively that the FTC has failed to prove that [] the website could create a net impression that was likely to deceive a consumer acting reasonably under the circumstances." Op. at 37.

An important difference between the website and other ads was that, while the other ads showed the key disclosures on the face of the ads, on the website "significant details only became visible if the prospective customer moused over a small info hover, labeled only 'Offer Details,' at the bottom of the landing page under the 'View All Packages' button." Op. at 37. Other "significant details appeared only if a prospective customer clicked the blue 'Additional Offer Details' link" on certain pages in the application flow. Op. at 38.

In addition, the court noted that it has "significant questions" about the FTC's damages theory, even assuming that the FTC prevails on its website-related claims. Op. at 43. The court noted that the FTC would have an "uphill climb" to prove that all of the consumers who saw the

different versions of the web site were misled in the same way (or misled at all). As the Court explained, “this issue, and the breadth of the FTC’s interpretation of the ‘presumption of reliance,’ creates a significant possibility that at the close of the evidence the FTC will be unable to establish a reasonable approximation of damages, or that its approximation will be substantially or even entirely rebutted by the Defendant.” Op. at 44.

Presumably in part due to Judge Gilliam’s skepticism toward these claims, the FTC agreed to voluntarily dismiss them and terminate its enforcement action against DirecTV. The court entered an order of dismissal with prejudice on October 22, 2018.

Key Takeaways

- **Express disclosures in ads—even in “fine print”—can be important.** In dismissing the FTC’s challenge to DirecTV’s ads, the court relied heavily on express disclosures that clearly explained the terms of the offer. The court found that even if consumers might be distracted by other features in the advertising, reasonable consumers would review the disclosures that appeared in black and white at the bottom of the page before agreeing to purchase, at least where a product or service as complex as a satellite television subscription is involved. This suggests that express, unavoidable disclosures can defeat “net impression” claims.
- **The possibility of “better” disclosures may be insufficient to establish deception.** The court disregarded survey evidence showing that consumers had greater recall of key terms using alternative disclosures. The court found that such studies, which are relatively common in unfair and deceptive practices cases, establish only that alternative disclosures are more easily recollected, not that the accused disclosures are deceptive. The court seemed to express a preference instead for confusion studies similar to those presented in Lanham Act cases. The court’s opinion also suggests that qualitative analyses that assess participants’ live thought process may be more useful than post-hoc surveys in establishing how consumers understand marketing statements.
- **Even relatively similar ads may have to be evaluated separately.** The court made clear that the FTC has a heavy burden to overcome when attempting to establish the relationship between disparate advertisements. Experts’ mere assertion that advertisements are representative of one another will not suffice. Rather, the FTC must show why conclusions about one advertisement can fairly be applied to another.
- **The FTC may be required to approach monetary remedies in a more nuanced, rigorous manner in future cases.** The court suggested that the FTC must calculate its proposed equitable monetary relief using a methodology that directly links the challenged practice to consumer harm. This court thus rejected the FTC’s common approach of basing monetary remedy calculations on the presumption that, if the FTC proves that an unfair or deceptive practice occurred, all consumers are harmed.