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Flexing the Agency's Muscles: What FTC Notice of Penalty Offenses Really Means for Advertisers

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Over the course of 10 days a few months ago, 700 companies and 70 for-profit colleges received notice of the intent of the Federal Trade Commission ("FTC" or "Commission") to pursue civil penalties under Section 5(m)(1)(b) of the FTC Act if these companies and colleges engage in certain conduct deemed by the FTC to be unfair or deceptive.

The notices sought to achieve two important FTC objectives:

- First, force addressees to consider their marketing messages and compliance programs; and
- Second, reintroduce (or reinforce) the threat of significant monetary penalties for those who need discipline.

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The warnings will undoubtedly alter the dynamic of new investigations as parties consider the costs and benefits of negotiating consent orders that include payment of consumer redress.

But what if parties resist and the FTC were forced to litigate? There, a third objective – to convince a court that the FTC's Penalty Offense Authority entitles it to civil penalties based on these notices – is much less likely to be realized.

UNITED STATES V. DODGE

United States v. Hopkins Dodge, Inc.,[1] is on point, and it is not favorable to the FTC. In that case, the U.S. Court of Appeals for the First Circuit affirmed the district court's motion for summary judgment "on the ground that the F.T.C. had failed to make specific findings as required by 15 U.S.C. 45(m)(1)(B)."

Why does it matter here? Well, have a look at the language of 5(m)(1)(b):

> (B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission

may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice –

Here is the critical passage in 5(b):

If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

In both civil penalty notices the FTC sent out, it cited a case that should not support civil penalties for any conduct. The case was *MacMillan*, in which the FTC made no findings. Indeed, it never took up the case.

The FTC said this:

FINAL ORDER On June 12, 1980 the Commission stayed the effective date of the unappealed Initial Decision in this matter, pending a determination whether or not the matter should be docketed for review. After further consideration, the Commission has decided not to place the case on its docket, but instead to lift the stay and allow the Initial Decision to become the decision of the Commission. It is hereby ordered, That the Initial Decision become the decision of the Commission, and that the order to cease and desist be entered.

Enough to satisfy a court following *AMG Capital Management*? Unlikely. The Commission explicitly stated it had not reviewed the matter, much less made findings or determinations.

Now consider 5(m)(2). It entitles anyone not a party to the prior administrative proceeding(s) to both a de novo trial of issues of fact, including whether the non-party's conduct is sufficiently similar to the conduct in the underlying proceeding(s) and a review, by the court in which the penalty is sought, of the FTC's prior determination that a particular act or practice is unfair or deceptive.

The cases the FTC cites in its notices are decades old and deal with practices and industries that are far different from today's practices and industries. The 1984 *Cliffdale* decision, for example, the most recent case on the list, dealt with car mileage-boosting claims.

How will that apply to claims for internet access, smart devices, tech services, and other products and services that did not exist when the cases were brought? Seems a stretch, to say the least.

Yet another hurdle: unlike 13(b) actions, which the FTC can bring on its own, it will have to persuade DOJ to bring civil penalty cases.

CONCLUSION

In short, we can be confident that the FTC will dangle the sword of the synopses and astronomical penalties ($43,280 for every time a false or deceptive claim is made) over everyone who got the notice and whose claims vaguely resemble the generic nuggets the Commission delivered. We can also expect that these efforts could generate more *Hopkins* and *AMG*-like decisions if the Commission attempts to press its position in the courts.

One also must wonder how this appears to Congress, which has been told repeatedly that, without 13(b) monetary authority, the Commission is nearly powerless to pursue its enforcement agenda. It will be interesting to see whether this flexing of muscle might undermine that assertion, making it less likely that we will see Congress enact a change in the law.

Note

1. *United States v. Hopkins Dodge, Inc.,* 849 F.2d 311 (8th Cir. 1988).