American Bar Association

What's In Store

What's In Store

Editors

Patricia A. Conners
Office of the Attorney General of Florida
Trish.Conners@myfloridalegal.com

Kay Lynn Brumbaugh
Giact Systems, LLC
kaylynn.brumbaugh@giact.com

Ilunga L. Kalala
Turner Broadcasting System, Inc.
ilunga.kalala@turner.com

Alysha Manji-Knight
Davies Ward Phillips & Vineberg LLP
amanji-knight@dwp.com

What's In Store is published periodically by the American Bar Association Section of Antitrust Law's Consumer Protection Committee, Privacy and Information Security Committee, and Advertising Disputes and Litigation Committee.

The views expressed in *What's In Store* are the authors' only and not necessarily those of the American Bar Association Section of Antitrust Law's Consumer Protection Committee, Privacy and Information Security Committee, and Advertising Disputes and Litigation Committee. If you wish to comment on the contents of *What's In Store*, please write to:

The American Bar Association
Section of Antitrust Law
321 North Clark Street
Chicago, IL 60654.

© 2019 American Bar Association

The contents of this publication may not be reproduced, in whole or in part, without written permission of the ABA. All requests for reprints should be sent to: Manager, Copyrights and Contracts, American Bar Association, 321 N. Clark, Chicago, IL 60654-7598, www.abanet.org/reprint.

From the Editors

Welcome to the Spring Edition of the ***What's In Store*** newsletter. March madness energy is in the air for the consumer protection bar with the Federal Trade Commission back to business after a winter government shutdown and the 67th Antitrust Law Spring Meeting just around the corner.

We first ventured southwest for an interview with Ken Paxton, Texas Attorney General, highlighting his office's major priorities for the 2019-2024 term, leadership role in multistate consumer protection cases, and full-court press on consumer protection enforcement.

Moving to the midwest, John C. Drake of Greensfelder's St. Louis office provides a play-by-play recap of the 2019 Consumer Protection Conference, which featured top enforcers and thought leaders from the consumer protection bar discussing a rich array of consumer protection-related content.

To the east, Andrew Lustigman and Morgan Spina of Olshan's New York office explore the FTC's permanent injunction powers in light of recent legal challenges. How will the FTC rebound from the recent Third Circuit *Shire ViroPharma* decision? (Read on to find out.)

In the west (of Italy), Veronica Pinotti of White and Case's Milan office gives us a consumer protection global compliance program playbook that demonstrates the best defense is a great global consumer protection compliance program offense.

Our buzzer beater article by David McGee, a third-year law student at The George Washington University Law School, compares compliance requirements under the new California Consumer Privacy Act with the EU's General Data Protection Regulation.

We hope to see you on March 26 in Washington, DC for the 67th Spring Meeting of the ABA Section of Antitrust Law, the premier event of the year for consumer protection and competition professionals worldwide. Inside this edition, you will find additional details about consumer protection-related events and sessions at the Spring Meeting. As always, please contact any of the editors to get more involved.

IN THIS ISSUE

Five Questions for Texas Attorney General Ken Paxton

Ken Paxton is the 51st attorney general of Texas. As the state's top law enforcement officer, Attorney General Paxton leads more than 4,000 employees in 38 divisions and 117 offices around Texas. He is a graduate of Baylor University and received his law degree from the University of Virginia School of Law.

1. ***You were recently reelected to a second term as Texas' 51st attorney general. What are some of the consumer protection accomplishments that defined your first term?***

Ensuring an open and fair marketplace is a critical role that we as attorneys general play. I have been very proud of the work of my Consumer Protection Division throughout the last four years – it has recovered millions of dollars for Texans and stopped countless deceptive acts from causing further harm. Two initiatives stand out in my mind as exemplifying the dedication of our team and the impact they have. First, was our campaign against the deceptive marketing and sale of synthetic cannabinoids, commonly referred to as K2, Kush, or synthetic marijuana. When I first took office, these dangerous products were sold openly on many store shelves throughout the state – and falsely marketed as legal and safe to consume, despite significant health risks, including death. My office launched an aggressive public awareness campaign that extended to Texas lawmakers. Taking advantage of tools provided by our Legislature and partners in law enforcement and city and county attorney offices, we were able to file 15 lawsuits in Houston, Dallas, San Antonio, and the Rio Grande Valley. To date, those lawsuits have resulted in court orders awarding over $22 million. Our legal actions sent a strong message to the business community to pull synthetic cannabinoids off their shelves. As a result, finding these products in legitimate businesses has become much more difficult, which has better protected Texas children who might otherwise think they are safe to use.

The other example I would highlight is our response to Hurricane Harvey. Even before Harvey made landfall in August 2017, consumers began identifying individuals and businesses that sought to take advantage of the emergency. In the aftermath we received thousands of complaints – many of which involved price gouging at gas stations – some of which charged as much as $9.99 a gallon for regular unleaded gas. My consumer division has brought over 50 actions against businesses engaged in illegal price gouging and recovered hundreds of thousands of dollars for those consumers that were victimized by these practices. Importantly, I believe these actions will force these outlier companies to think twice before they try to take advantage of Texans in the future.

2. ***What do you see as your major consumer protection priorities for your second term?***

The nationwide opioid epidemic may be one of the biggest public health crises we as a country have faced. Trying to abate the crisis is a massive undertaking that involves the hard work of all my fellow attorneys general and public health officials. For our part, we are using all available tools to protect Texans. We are currently in litigation with Purdue Pharma, the manufacturer of OxyContin, for its role in creating the current crisis by misrepresenting the addictive nature of these harmful substances. And we are not stopping with Purdue – my office has a multistate leadership role in ongoing investigations of other opioid manufacturers and distributors over their deceptive conduct. In addition, we are doing our part to educate the public about the dangers of opioids and through our recently launched Dose of Reality website (doseofreality.texas.gov), providing the

public with information about disposal facilities for unused prescriptions. I anticipate a continued emphasis on addressing the opioid crisis over the next several years.

In addition, Texans, like consumers nationwide, have enjoyed the benefits of new technologies that have allowed us to obtain information in an instant and to connect worldwide in ways that were never possible before. While many of these products are free for consumers, nothing comes without a cost. Ensuring that Texans know what personal information these companies collect and share, and how they safeguard sensitive personal information, will be a focus for me in the next several years. As an example, my consumer division brought an action against PayPal over its popular Venmo product for misrepresentations PayPal/Venmo made about its data sharing practices and security. As a result, Venmo is now more transparent about its practices, ensuring that consumers fully understand the consideration they are providing to use their service.

3. ***Texas frequently plays a leadership role in consumer protection multistate cases. Why is participating in multistate investigations an important part of your agency's mission?***

When deceptive or misleading practices are identified that affect consumers nationwide, a coordinated multistate effort by attorneys general is often the most powerful and effective response –and also one that's in the best interest of businesses. From the attorney general perspective, a multistate coalition helps us pool our resources and share our respective consumer divisions' unique expertise with one another. From the business's perspective, this approach allows a business to minimize the resources necessary to respond to our offices' inquiries and helps to ensure that the business is not faced with a patchwork of differing state laws and standards. In this sense, a multistate action is a win-win and ultimately creates a level playing field upon which a company can operate throughout the country.

Recent settlements with Wells Fargo and Johnson & Johnson are two great examples of effective multistate enforcement. In Wells Fargo, my office served in a leadership role in helping to negotiate a $575 million settlement over allegations that the bank was enrolling customers in a variety of products and services without their knowledge or consent. Not only did we coordinate with all other states and the District of Columbia in reaching a resolution, but we ensured our settlement was consistent with settlements between Wells Fargo and other agencies that addressed consumer remediation. In January of this year, my office led a 46-state settlement with Johnson & Johnson over its deceptive marketing of two hip replacement products. By having uniform injunctive relief, we helped ensure that Johnson & Johnson would not market in a deceptive and confusing manner in the future.

4. ***Texas is a large and diverse state. How do you make sure the entire state's consumer population is protected?***

That's absolutely right – not only is Texas spread across over 250,000 square miles with 254 counties, but the various regions of our state all face differing consumer protection issues because of their diversity. But our consumer division does a fantastic job of covering the entire state – we bring actions wherever and whenever they are necessary, and we work with the local communities to make sure we are addressing the issues facing our citizens. To that end, our consumer protection office has six physical locations, specifically, Austin, Dallas,

Houston, San Antonio, El Paso, and Pharr. We have also worked to enhance our online presence so consumers across Texas can connect with us. In fact, we recently launched a new website (www.texasattorneygeneral.gov/consumer-protection) that includes a far more streamlined and user-friendly series of consumer protection pages, along with an easy online complaint tool.

5. *How important is it for you to hear from consumers directly about the issues impacting them?*

Hearing from the public is vital for us and is the best way for us to know what issues affect the community. My staff reviews tens of thousands of complaints a year and looks for trends or significant issues that need attention. As mentioned earlier, the response following Hurricane Harvey is an important example of the value of consumer complaints. It was entirely through consumers phone calls, emails, and online complaints that we learned about locations engaged in illegal price gouging, which, in turn, allowed us to move quickly to address the conduct. Another example is a recent alert we put out regarding misleading homestead tax exemption offers. A number of complaints from consumers informed our decision to move quickly to educate the public and minimize the number of consumers victimized by confusing mailers. Often, aggrieved consumers serve as our first indication of a problem, and they sometimes serve as valuable witnesses when we move towards enforcement. I always strongly encourage Texans to notify my office whenever they feel taken advantage of or see something that needs to be addressed.

Consumer Protection at the 67th Antitrust Law Spring Meeting

We hope to see you at the following consumer protection-related events and sessions.

Tuesday, March 26

3:30 – 5:00 pm	**Pathways to Leadership**
5:30 – 7:00 pm	**Cocktails for Consumer Protection Party**

Interact with lawyers from across the country that practice consumer-protection law and view our outstanding line-up of Section periodicals focusing on consumer protection law.

Wednesday, March 27

9:00 – 10:15 am	**Fundamentals – Consumer Protection**
9:00 – 10:15 am	**GMO, BE, Organic, Natural: Do Labels Matter?**
9:00 – 10:15 am	**FTC Hearings: Consumer Protection Topics In-Depth**
10:45 am – noon	**Knock, Knock: When Congress Comes Calling**
1:45 – 3:15 pm	**Competition and Comparative Advertising: Can They Coexist?**
1:45 – 3:15 pm	**Kokesh, LabMD, and Agency Orders**
3:30 – 5:00 pm	**Consumer Protection Year in Review**
3:30 – 5:00 pm	**Trailblazers: The Women Behind Significant Antitrust/CP Milestones**

Thursday, March 28

8:30 – 10:00 am	**Briefing with the State Enforcers**
8:30 – 10:00 am	**Telemarketing Litigation is the New Black**
10:45 am – noon	**Chair's Showcase: Competition, Social Media, and Digital Services**
1:30 – 3:00 pm	**Big Data: Is it a Big Deal?**
1:30 – 3:00 pm	**Consumer Financial Protection Enforcement Under Trump**
1:30 – 3:00 pm	**Consumer Protection Litigation: U.S. Trends and Developments**
1:30 – 3:00 pm	**Hot Topics**
3:15 – 5:00 pm	**Reshaping Privacy Regulations – Compliance and Consequences**

Friday, March 29

8:30 – 9:45 am	**Agency Update with the FTC Bureau Directors**
8:30 – 9:45 am	**Mock Data Breach: Preparing Your Crisis Response**

Highlights from the 2019 Consumer Protection Conference in Nashville, TN

By John C. Drake

John Drake is a litigation associate in the St. Louis office of Greensfelder Hemker & Gale, P.C., where he is a member of the class action and appellate practice groups. John has experience defending clients in a wide range of consumer protection matters, including actions arising under the Missouri Merchandising Practices Act and other states' consumer-protection statutes. He also has a broad business litigation practice handling contract and other disputes for clients in the energy, financial services, telecommunications, and construction industries.

Federal Trade Commission Chairman Joseph Simons served as keynote speaker at the ABA Section of Antitrust Law, 2019 Consumer Protection Conference in Nashville, Tennessee on February 5, 2019. During his keynote address, and during remarks as part of a cross-border panel of government regulators, Chairman Simons explained to attendees that the FTC was seeking broader authority from Congress to respond to ever-growing consumer issues affecting privacy, advertising, and other consumer protection issues.

Attendees heard from more than two dozen regulators, law firm practitioners, in-house counsel, and a jurist on emerging issues in consumer protection law. The conference included a reception at the Noelle hotel and networking lunch at the Blake Shelton-owned Ole Red Conference Center and Restaurant on Broadway in the center of Nashville's downtown music district.

Chairman Simons was joined on a panel by his Canadian counterpart, Matthew Boswell, Interim Commissioner of Competition of the Competition Bureau of Canada. The panel was moderated by Patricia A. Conners, Chief Deputy Attorney General of Florida.

Chairman Simons noted that the FTC is seeking additional authority to enforce privacy laws in the nonprofit sector. The Chairman commented that the FTC was also seeking authority for stronger remedies for deceptive advertising claims, especially "Made in USA" claims. He suggested that the FTC should have authority to require refunds to be issued to consumers where there was evidence that deceptive claims were linked to an increase in sales for the offending company. Turning to the self-regulatory process, Chairman Simons said the FTC appreciates and pays attention to referrals from the National Advertising Division of the Council of Better Business Bureaus, Inc. (NAD). Robocalls continue to be the top complaint received by the FTC, accounting for two-thirds of the approximately 500,000 complaints the agency receives monthly; Chairman Simons said many illegal robocalls involved fraud and deception and originated overseas. Despite those challenges, Chairman Simons touted successes in addressing the problem, including a $23 million settlement obtained by the FTC in December 2018 involving robocall claims.

Interim Commissioner Boswell discussed Canada's enforcement priorities and successes, describing settlements over claims of "drip-pricing," where a company advertises a low price that ends up being bloated with mandatory fees after the customer has already interacted with the advertisement. Other advertising issues drawing the attention of Canadian regulators are "Made in Canada" claims and health performance claims. Interim Commissioner Boswell said the Canadian Competition Bureau was looking to begin seeking preliminary injunctions to enforce Canadian consumer protection laws for the first time, although they have traditionally been difficult to obtain in Canada. Such preliminary injunctions would safeguard consumers (*e.g.*, regulators could take action rather than wait until consumer harm has already taken place). In Florida, Chief Deputy Attorney General Conners said the attorney

general's office has aggressively investigated and prosecuted internet scams targeting the elderly and military servicemembers.

Privacy issues and the impacts on consumers and marketers of the recently enacted EU General Data Protection Regulation (GDPR) and California Consumer Privacy Act of 2018 (CCPA) were extensively discussed by presenters at the conference. The conference occurred as businesses doing cross-border marketing along with their outside and in-house counsel are in the throes of developing and implementing compliance programs in light of these changes in the privacy regulatory environment. Broadly speaking, the GDPR compels digital marketers to allow consumers to opt-in to e-mail and other digital marketing, tightens limits on how digital marketers can collect consumer data, and requires advertisers to protect personal and personal-identifiable information they obtain from consumers, among other changes. The CCPA requires that digital advertisers permit consumers to opt out of the sale of their personal information to third parties. While the CCPA is to be formally effective as of January 2020, it will have some retroactive application, so lawyer-attendees and presenters commented on ongoing compliance work with clients. Presenters explained that the implications of the new laws on businesses doing inter-state and cross-border sales and marketing on-line are broad and profound in a regulatory space that had already been undergoing rapid change.

Privacy lawyer Thomas F. Zych, a Partner and the Chair of the Emerging Technologies practice at Thompson Hine in Cleveland, Ohio, said it was important for counsel to advise their clients that engage in cross-border business about the overlay of the various state, federal and international regulatory regimes in the context of the manner in which the companies use information. Further, Zych commented that counsel must be mindful of clients' individual cultures and how their existing models can be modified to satisfy the GDPR and the new California statute in a way that does not harm the company's business. Perhaps more important than the creation of any particular privacy compliance program at a company is inculcating a general culture of compliance, Zych opined.

Ilunga Kalala, privacy counsel in Atlanta, GA for Turner Broadcasting System, Inc., shared the in-house perspective on implementation of the new privacy requirements. The company owns CNN, Bleacher Report, and dozens of other properties with online services impacted by the existing and emerging privacy laws. Kalala explained that digital publishers that rely on advertising for revenue may need to re-visit third-party agreements to ensure that service providers adequately protect consumer data and honor consumer data rights requests.

A powerhouse panel of in-house counsel from Uber Technologies, Inc., Walmart Stores Inc., and Herbalife Nutrition were joined by Laura Brett, director of NAD, and Crowell and Moring LLP Partner Christopher A. Cole to discuss approaches for and challenges with corporate compliance programs for consumer protection. Brett described the benefits of self-regulation through programs like NAD as a pathway to corporate compliance. Successful self-regulation, she explained, requires clear standards, independence, transparency and accountability.

Pamela Jones-Harbour, Senior Vice President Global Member Compliance & Privacy at Herbalife, described the company's training program for its independent members. In particular, each member may have individual sales and marketing approaches but must not run afoul of state and federal prohibitions on deceptive advertising. Herbalife's training includes professionally produced web-based training portals that offer examples of proper and

improper claims about the financial benefits of becoming an Herbalife member and glossy pamphlets outlining best practices for the collection and use of personal information of customers and leads.

Uber Technologies Chief Compliance and Ethics Officer Scott Schools described the company's approach to gaining compliance with various and rapidly changing regulatory regimes as the ride-hailing company expanded around the world at, what he called "the speed of now."

Closing out the panel, Cole described an outside counsel approach to guiding companies through development of a compliance program, including assistance with development and dissemination of appropriate policies and procedures, investigation of gaps in existing programs and considerations surrounding internal investigations. Cole explained that a good compliance program can provide some defense to a regulatory enforcement action.

Other panels focused on a series of historic FTC hearings that took place throughout 2018, described a multi-state opioid investigation led by state attorneys general, and discussed whether consumer protection law and enforcement had kept up with the pace of change in mobile marketing. The Honorable Jon S. Tigar, U.S. District Judge for the Northern District of California, moderated a panel on the state of the law with respect to whether tangible harm is required to open a consumer protection case and how federal courts have approached the issue since the U.S. Supreme Court's 2016 *Spokeo* decision on tangible harm.

You're Invited!
ABA Programming

How Much Is It? Global Enforcement of "DRIP Pricing"

May 9, 2019 5:00 pm ET

(May 10, 2019 9:00am Australia time)

"DRIP" pricing -- advertising part of the full price in the headline price -- is an emerging issue subject to enforcement around the world, particularly digital platforms. How has enforcement developed in active jurisdictions, including the US, Canada and Australia? How is consumer harm assessed? What are strategies for minimizing risk and defending challenges? Please join us for a discussion of these issues.

Moderator:

- Alysha Manji-Knight, Davis Ward Phillips & Vineberg LLP

Speakers:

- Charles Coorey, Gilbert + Tobin
- Richard Lawson, Manatt Phelps & Phillips LL
- Christian Warren, Competition Bureau (Canada)

FREE: Antitrust Section Members, Government, Non-profit Employees, Students

$25 Other Non-Members

Click here for more information and to register.

Are FTC Enforcement Powers Being Reigned In?

By Andrew Lustigman and Morgan Spina

Andrew Lustigman is the Chair of Olshan Frome Wolosky LLP's Advertising Marketing and Promotional Marketing Law Department where he counsels clients on a broad range of matters, including the clearance of advertising and marketing materials, the structuring of sweepstakes, games of skill, and other contests, the development of social media programs and direct marketing campaigns from a compliance standpoint, and the resolution of regulatory, competitor, intellectual property and privacy matters.

Morgan Spina is an associate in Olshan Frome Wolosky LLP's Intellectual Property and Advertising Marketing and Promotional Marketing Law Department where she advises clients on various advertising and intellectual property matters.

The Federal Trade Commission has routinely relied on Section 13(b) of the FTC Act (15 U.S.C. §53(b)) for authority to challenge in federal court violations of the FTC Act. Section 13(b) provides that when the FTC has "reason to believe" that an individual or corporate entity "is violating, or is about to violate" a law enforced by the FTC, that the FTC may bring suit in federal court "to enjoin such acts or practices." The FTC frequently pursues claims under this section, taking the position that that such injunctive claims are not subject to a statute of limitations. In addition, because the FTC is purportedly seeking only equitable relief, it blocks defendants from obtaining a jury trial.

In seeking injunctive relief, the FTC has always advocated, and federal courts have generally accepted, a broad interpretation of the powers granted under Section 13(b). These include the ability to obtain monetary relief as part of equitable relief, characterizing such remedies as equitable disgorgement. For years, the FTC's broad interpretations have attracted little resistance. More recently, however, the FTC has faced legal challenges to its presumptions of the statute on multiple fronts. This article explores some of these challenges.

In the first subset of cases, several litigants have challenged the FTC's authority to seek injunctive relief against a defendant based solely on prior conduct, without having to make a showing of current or impending illegal conduct. A second subset of cases questions the varied remedies sought by the FTC and ordered by courts pursuant to Section 13(b). While there is no question Section 13(b) provides authority for injunctive relief, the notion that injunctive relief can be construed broadly enough to include disgorgement of revenues and restitution is now under fire. Several recent federal court decisions have questioned whether Section 13(b) provides a proper basis for monetary recovery under the guise of equitable relief.

Can the FTC Obtain Injunctive Relief Based Solely on a Defendant's Past Conduct?

Two recent federal court decisions question the FTC's authority under Section 13(b) to seek injunctive relief based solely on a defendant's prior illegal conduct, as opposed to its current or impending conduct. Both opinions – one in the antitrust context and one in the consumer protection context -- cast doubt on the FTC's ability to use a "likely-to-recur" standard.

Section 13(b) provides, in relevant part, that the FTC may bring a suit in district court to enjoin certain acts or practices when the FTC "has reason to believe that any person, partnership, or corporation *is violating*, or is *about to violate*, any provision of law enforced by the Federal Trade Commission." [emphasis added]. Frequently, the FTC successfully argues that a defendant's prior

conduct may be used as evidence of likely recurrence of the same conduct, thereby observing the "about to violate" standard. Recent cases reflect a potential shift away from this interpretation of the statute.

FTC v. Shire ViroPharma

The FTC's powers to obtain an injunction under Section 13(b) were challenged in *FTC v. Shire ViroPharma,* an antitrust suit against a drug maker.[1] The FTC alleged that from 2006 through 2012, in an attempt to hinder its competitors, drug maker ViroPharma violated the FTC Act by inundating the Food and Drug Administration ("FDA") with dozens of sham citizen petitions and comments pertaining to its drug, Vancocin. The FTC sought a permanent injunction and other equitable relief against Shire ViroPharma (the corporate successor to ViroPharma) in Delaware federal court, seeking to enjoin Shire Viropharma from engaging in similar acts in the future with respect to a different drug. Of relevance here is the FTC's attempt to use evidence of ViroPharma's prior conduct as a means of seeking an injunction with respect to future conduct.

Consistent with prior accepted interpretations of Section 13(b), the FTC argued that the "is about to violate" language is commonly accepted and understood to mean that a past violation of law is "likely to recur" or "there exists some cognizable danger of recurrent violation." The FTC concluded that based on its prior conduct, Shire ViroPharma was "perfectly positioned" to employ the same tactics with a different drug in the future, and therefore a permanent injunction was appropriate.

The district court, however, disagreed with the FTC's position. In a March 20, 2018 decision, Judge Richard G. Andrews dismissed the FTC's reliance on the "likely to recur" standard to support the proposition that the defendant "is violating or is about to violate" a law enforced by the FTC.[2] Additionally, the court ruled that it did not believe that the FTC's allegations "plausibly suggest Shire ViroPharma is 'about to violate' any law enforced by the FTC, particularly when the alleged misconduct ceased almost five years before filing of the complaint." The court granted Shire ViroPharma's motion to dismiss, but also granted the FTC leave to amend its complaint within a reasonable time. Instead of amending its complaint, the FTC appealed the decision to the Third Circuit.

As this article was being finalized, the Third Circuit affirmed the District Court's dismissal of the FTC's complaint, stating that the FTC cannot overcome the language of Section 13(b), which requires the FTC to plead ongoing or imminent conduct. The appellate ruling states, "[s]imply put, Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation"[3]

FTC v. Hornbeam Special Situations, LLC.

Shortly after the *Shire ViroPharma* decision, the Northern District of Georgia issued an opinion casting similar doubts on the ability of Section 13(b) to provide relief to the FTC based solely on past conduct. In *FTC v. Hornbeam Special Situations, LLC*,[4] the FTC sought permanent injunctive relief and other equitable relief, including restitution, refund of monies paid, and disgorgement of ill-gotten monies, alleging that the defendants violated

[1] No. 17-131-RGA, 2018 WL 1401329 (D. Del. Mar. 20, 2018).

[2] *Id*. at *5.

[3] *FTC v. Shire ViroPharma, Inc.,* No. 18-1807, 2019 WL 908577, at *8 (3d Cir. Feb. 25, 2019).

[4] No. 1:17-cv-3094-TCB, 2018 WL 6254580 (N.D. Ga. Oct. 15, 2018).

FTC laws by marketing payday or cash advance loans to targeted groups of consumers. Allegedly, when consumers provided their bank account information under the pretense that they were applying for a loan, the defendants instead enrolled those consumers in an online coupon service that carried a monthly fee. Similar to the *Shire ViroPharma* case, the FTC sought to introduce evidence of the defendants' past conduct to indicate an imminent future breach of FTC laws, purportedly warranting an injunction and other relief pursuant to Section 13(b).

The court, however, rejected the FTC's position. The court reasoned that the FTC's long-held reliance on a "likely-to-recur" standard based on past conduct failed to comport with the statutory language, stating that to obtain relief provided under Section 13(b), "the FTC must demonstrate by more than conclusory allegations that it has a reason to believe that the laws entrusted to its enforcement are being or about to be violated."[5]

An aspect of this decision that has garnered particular attention – and which the court identified as an "oddity" – is the fact that two of the individual defendants died in the interim period between the FTC filing its complaint and the court entering this order. Of course, many causes of actions survive a defendant's death, and, as the court stated, the estate of a deceased defendant "may remain responsible for the temporal consequences of their decedents past misdeeds." However, examining the effect of deceased defendants in the context of claims brought pursuant to Section 13(b), the court articulated that "it strains credulity to blindly accept that the dead men are violating (or about to violate) any laws."[6]

As such, the court reiterated that under the plain meaning Section 13(b), in order to obtain an injunction, the FTC must establish that it has "a reason to believe that *each* of the Defendants is violating or is about to violate the law," and that this standard requires a showing of "more than mere likelihood of resuming the offending conduct."[7]

Following the court's order, the FTC amended its complaint and the defendants subsequently moved to dismiss. Although adjudication of the motion was delayed by the partial government shutdown of late 2018-early 2019, the court has since denied the defendants' motions to dismiss. The district court case has been stayed pending the defendants' appeal to the Eleventh Circuit.

Are the FTC's remedies limited to purely injunctive relief?

Section 13(b) permits the FTC to bring suit to enjoin certain practices, and states that "in proper cases, the Commission may seek, and after proper proof, the court may issue, a permanent injunction." For decades, the FTC successfully argued that a "permanent injunction" entitles the FTC to obtain not only an order permanently barring certain deceptive practices, but also grants the FTC the inherent power to seek, and the court to impose, all forms of equitable relief, including monetary relief by way of disgorgement and restitution. Some of the precedential decisions over the years were obtained

[5] *Id.* at *2.
[6] *Id*. at *3.

[7] The FTC's position is reminiscent of the agency's pursuit of injunctive against a widow in her capacity as the personal representative of a defendant that died in during the course of an FTC action. *See United States v. Lisa Levey*, No. CV 03-4670 (C.D. Cal.). Notably, Commissioner Orson Swindle dissented to the settlement arguing that the amount of relief obtained from the widow (who was not alleged to have been engaged in the conduct at issue) was "woefully inadequate." Commissioner Swindle went on record stating that notwithstanding the defendant's death, "crime does pay."

by default. In addition to challenging the FTC's ability to obtain relief based solely on a defendant's past conduct, the *Hornbeam* court also raised an issue with such a "loose interpretation" of the range of remedies available to the FTC under Section 13(b).

In *Hornbeam*, Judge Batten held that the language of Section 13(b) "clearly states that it is a provision for injunctive relief, temporary or permanent," further averring that the statute "mentions nothing of disgorgement or otherwise."[8] Even though Judge Batten recognized the principles of precedent and that the court is unequivocally bound by the interpretation of higher courts on this matter, he dedicated space within the opinion to highlight what he believes to be an ongoing incorrect interpretation of the statute. While it remains to be seen whether Judge Batten's criticism of prior accepted statutory interpretation is reflective of a more wide-reaching opinion on the bench, or whether his reading of the statute merely represents an outlier viewpoint, defendants should certainly press the ruling to their advantage whenever possible.

The *Hornbeam* opinion does not stand alone on this issue. Questions regarding availability of certain remedies under Section 13(b) were also raised in the Ninth Circuit in *FTC v. AMG Capital Management, LLC*.[9]

In *AMG Capital*, the FTC claimed that the defendant's payday loans violated the FTC Act because the loan notes associated with these loans were likely to mislead borrowers about the terms of the loans. On appeal, the Ninth Circuit panel concluded that the notes were likely to deceive consumers acting reasonably under the circumstances, and that the district court did not abuse its discretion in calculating the $1.27 billion award. In response to the defendant's argument that "equitable monetary relief" is not an injunction and therefore the court's order cannot derive authority from the statute, the Ninth Circuit panel concluded that while the defendant's argument has some merit, "it is foreclosed by our precedent."

Indeed, the *AMG Capital* decision cannot be construed as a strict acceptance of the FTC's interpretation of Section 13(b) on this issue. In separately written concurrence from Judge O'Scannlain, joined by Judge Bea, there was a significant rebuke of the status quo, recommending that the case be reviewed *en banc*[10] and suggesting that prior Ninth Circuit precedent on this point is "no longer tenable."[11] The concurrence argued that the Ninth Circuit's interpretation of the statute "wrongly authorizes a power that the statute does not permit."[12] The judges examined Section 13(b) in connection with Section 19 of the FTC Act, which authorizes the FTC to seek "such relief as the court finds necessary to redress injury to consumers" including, without limitation, "the refund of money or return of property" and "the payment of damages." The court differentiated between the two sections, stating that Section 13(b) is "forward-looking and preventative," whereas Section 19 is "backward-looking and remedial," and stated that allowing the award of monetary relief under Section 13(b) "circumvents" the procedural protections and intent of Section 19.

[8] Id. at *6.
[9] 910 F.3d 417 (9th Cir. 2018).
[10] Id. at 429.
[11] Id. As a matter of procedure, the rules of the Ninth Circuit do not allow a three-judge panel to reverse existing precedent absent *en banc* review, which is only granted when a majority of the circuit judges in regular active service order that the case be so reviewed. Fed. R. App. P. 35.
[12] 910 F.3d at 429.

What's Next?

Although these recent cases appear to disrupt the FTC's steady reliance on Section 13(b) as its preferred gateway to expansive remedies in federal court, it cannot yet be said that the interpretation of Section 13(b) has been decisively altered on a going-forward basis. Importantly, the decisions discussed in this article remain on appeal and the Ninth Circuit has not yet decided if it will undertake an *en banc* review of the *AMG Capital Management* decision. It is therefore unclear at this point whether these cases are mere outliers, or conversely, if the decisions will shape the FTC's approach to future enforcement actions. The statutory text of Section 13(b) appears on its face to pose issues for the FTC, so perhaps these recent decisions will prompt a call to Congress to make legislative changes that will establish clarity in this area. Regardless of what comes next, it is clear that the FTC's enforcement powers are being checked on multiple fronts.

Like what you see in this edition?

Want to get more involved?

Please contact Ilunga Kalala at ilunga.kalala@turner.com

Do Online Companies Really Need a Global Compliance Program for Consumer Protection?

By Veronica Pinotti

Veronica Pinotti is Partner at the Milan office of White & Case LLP. Veronica has more than 20 years of experience in the area of EU consumer and regulatory law. She regularly advises European and international clients before the European Commission, national competition and regulatory authorities, as well as civil and administrative courts.

There are many good reasons to expand the scope of global compliance programs to include consumer protection. First, it is a legal obligation in certain jurisdictions to implement a consumer protection compliance program. Second, it sets a business standard. Third, a compliance program helps to minimize production costs. Lastly, it can help lower the risk to the company and its managers of civil lawsuits, including class actions, and criminal prosecution.

The stakes are high. Noncompliance with rules and regulations can negatively affect the competitiveness and financial strength of a company (*e.g.*, by the imposition of fines and other penalties, or by suits for damages). It can also have negative consequences for managers and employees, result in disciplinary action, civil lawsuits or even the imprisonment of managers. Above all, compliance problems may interfere with normal business activities and may trigger negative publicity for a company. What follows is an overview of recommended global compliance policies and procedures.

Scope

An effective compliance program (*i.e.,* one that can mitigate fines and liabilities) needs to cover a wide

array of areas. For instance, it should include a functioning anti-corruption mechanism, which considers all regulations. It should also cover labor and trade regulations as well as the totality of the principles and guidelines, rights and obligations to which the company is managed.

The protection of customer data from employees, business partners and the company itself is another key aspect that needs to be addressed. Companies likewise must not forget to have policies in place that focus on the identification, classification, protection, archiving and deletion of data. Companies need to strive to identify and limit the risks posed by digital means of communication. The goal should be the methodological protection of the company's own intellectual property and the acceptance of the rights of third parties. Consumer protection violations may include unfair commercial practices and consumer law violations, which are carry severe penalties and are likely to generate global mass class actions.

Therefore, compliance rules should always entail adherence to competition laws so as to protect against massive fines. The goal should also be to engage in successful business transactions with the public sector by adhering to specific regulations.

Finally, environmental protection rules also need to be internalized, as does the prevention and prosecution of criminal conduct by employees (e.g., white collar crime).

Assessing Risks

The implementation of a comprehensive compliance program does not remove all risk factors, but as noted above, compliance programs often help to mitigate such risk.

What is needed to assess risks properly and put remedies in place?

First, a company should conduct an internal audit aimed at identifying potential areas of risk (*e.g.* in relation to compliance with European and national antitrust and consumer protection rules.) Companies should then assess the risk level and identify employees working in high-risk areas.

Next, companies should develop policies and training for employees to ensure that they are aware of all potential risks. This should include training, production of manuals, as well as antitrust protocols for external meetings, document and information sharing.

Companies should also carry out periodic reviews to ensure that the above goals are reached, including simulations, review of documentation of the agreements and arrangements in place as well as interviews of employees. Regularly, these compliance documents, guidelines and policies, procedures and management tools should be audited to ascertain the extent to which they are respected within the company. Finally, produce a narrow set of straightforward and accessible compliance rules in the form of guidelines or policies focused on the identified critical areas.

Whistleblowing

Companies that have employees in more than one country should also ideally have a single whistleblowing reporting system, tailored to reflect local data protection laws and whistleblowing regulations. While EU member states have more stringent data protection rules in place than the United States (though state laws in the U.S. are evolving), they do not protect whistle-blowers to the same extent as the U.S., unless the company takes extra steps to ensure protection.

Different systems can be implemented. These include telephone hotlines, Internet-based or internal email reporting systems (*e.g.*, a dedicated compliance account email address: compliance@xyz.com) and the installation of an independent ombudsperson (either internal or external) who employees can contact in case of suspected compliance violations.

Compliance Controls

Generally, three types of compliance controls can be distinguished.

- **Internal controls** are processes and procedures put in place by the company to ensure compliance.
- **Preventative controls** are designed to catch or prevent errors and irregularities before they occur. These include procedure manuals and training, the separation of duties in accounting processes, the proper approval of transactions, the requirement of adequate documentation for transactions, and physical security measures such as locking doors and otherwise controlling assets.
- Lastly, **detective controls** are designed to find errors or other problematic issues after they occur so that corrective action can be taken. Examples include taking physical inventories of assets to compare to recorded assets, reconciling bank and accounting records, and conducting variance analysis, and periodic audits and reviews.

Language

Multinational companies should consider developing a uniform program that applies globally rather than separate country-by-country programs. This fosters the emergence of a consistent company-wide culture of compliance.

Local implementation and enforcement requirements often include the translation of documents into the local languages. This applies not only to written policies, but also to live training.

Although some multinational groups have a single language in which internal business is conducted, translating and teaching the compliance program in other languages may be appropriate unless the workforce is sufficiently fluent in the official language and can understand the rules and procedures in place. In any event, this is a requirement in many jurisdictions in the world and therefore any decision not to have a local language compliance should be carefully considered.

You're Invited!
ABA Programming

Consumer Protection Monthly Update

April 9, 2019 1:00 – 2:00 pm ET

This telephonic update will summarize the significant developments in consumer protection law that occurred during February and March 2019. The presentation will cover cases, settlements, and other initiatives at the federal and state levels, as well as consumer class actions, Lanham Act litigation, and National Advertising Division case decisions. This program is a monthly series of updates in which individuals can call in and hear consumer protection practitioners report on the previous month's developments. The prepared portion of the program will last approximately 50 minutes and will be followed by Q&A.

FREE: Antitrust Section Members, Government, Non-profit Employees, Students

$25 Other Non-Members

Click here for more information and to register.

An Examination of the GDPR and the CCPA: How Each Law Can Raise Potential Enforcement and Compliance Problems for Businesses

By David McGee

David McGee is a 3L at The George Washington State University School of Law.

The EU General Data Protection Regulation ("GDPR") and the California Consumer Privacy Act of 2018 ("CCPA") both changed the legal landscape for a business's responsibilities and obligations to consumers and how businesses use consumer data.[13] This article will discuss some of the major provisions of each law and the challenges inherent in complying with these laws. Specifically, this article will address the scope of the GDPR and CCPA, how each law defines personal data, and the enforcement provisions found in each law.

Scope

Both the GDPR and the CCPA include a definition for "data subject" or "consumer," respectively, which includes geographic requirements. In particular:

	GDPR[14]	CCPA[15]
Definition of Person	The GDPR only protects natural persons and does not cover legal persons. The GDPR clarifies that a "data subject" is "an identified or identifiable natural person." A data subject does not need to have EU residency or be located in the EU for the GDPR to apply.	The CCPA only protects natural persons and does not cover legal persons. The CCPA defines consumer as, "A natural person who is a California resident."[16]

These definitions can create challenges for businesses with California and EU-based customers. Since the GDPR provides protection for EU "data subjects" that neither reside in the EU nor are in the EU, its personal scope is far reaching. Although the CCPA only provides protection for California residents, many businesses will be hard-pressed to distinguish California customers from other customers. So a business selling goods or services to EU data subjects and California residents must take note of compliance obligation under each of these laws.

[13] Council Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR]; California Consumer Privacy Act of 2018 ("CCPA"), CAL. CIV. CODE § 1798.100 et seq. (2018)

[14] GDPR Arts. 3, 4(a); Recitals 2, 14, 22-25

[15] CAL. CIV. CODE §§ 1798.140 (c), (g); 1798.145(a)(6)

[16] *See* CAL. CIV. CODE § 17014 (defining a California Resident as (1) every individual who is in the State for other than a temporary or transitory purpose, and (2) every individual who is domiciled in the State who is outside the State for a temporary or transitory purpose.)

In addition to including expansive definitions for "data subject" and "consumer," both the GDPR and the CCPA apply to a wide assortment of businesses.

	GDPR[17]	CCPA[18]
Definition of Business	The GDPR defines businesses in terms of whether they are "controllers" or "processors" of data. Controllers establish the means and purposes of data processing whereas processors process data on behalf of controllers. Controllers and processors can be natural or legal persons, for profit or not for profit.	The CCPA applies to businesses that are: (1) For Profit (2) Collect consumers' personal information (3) Determine the purposes and means of the processing (4) Does business in California (5) And meets any of the following thresholds: a. Gross Revenue in excess of $25 million b. Buys, receives for commercial purpose, or sells or shares the personal information of 50,000+ consumers, households, or devices c. Derives 50% or more of its annual revenues from selling consumers' personal information

While the GDPR applies to small and large companies alike, the CCPA carves out exceptions for certain businesses. For example, the CCPA exempts non-profit entities from compliance whereas the GDPR does not. Additionally, the CCPA has five enumerated threshold requirements for businesses subject to the CCPA. Therefore, a smaller company may not meet the California threshold for CCPA compliance but would still need to comply with the GDPR.

Companies dealing in consumer data need to be mindful of the territorial scope of their business as well as the territorial scope of their client base.

	GDPR[19]	CCPA[20]
Geographic Scope Provisions	The GDPR applies to organizations that do not have any presence in the EU, but offer goods, services, or monitor behavior of persons in the EU.	The CCPA applies to organizations that are doing business in California.

[17] GDPR Arts. 3, 4(1), 4(7), 4(8); Recitals 2, 14, 22-25
[18] CAL. CIV. CODE §§ 1798.140 (c), (g); 1798.145(a)(6)

[19] GDPR Arts. 3, 4(1); Recitals 2, 14, 22-25
[20] CAL. CIV. CODE §§ 1798.140 (c), (g); 1798.145(a)(6)

Personal Data Definitions

Each of the GDPR and CCPA include an expansive definition of personal data, however, these definitions are somewhat similar.

	GDPR[21]	CCPA[22]
Definition of Personal Data	Personal Data is defined as, "any information relating to an identified or identifiable natural person… in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of a natural person." The GDPR covers publicly available information as well as setting a higher standard for personal data that relates to health.	The CCPA has several different categories of data such as: identifiers (name, postal address, IP address, email, etc.), commercial information, biometric information, internet or other electronic network information, professional or employment information, and educational information. However, the CCPA has a caveat that aggregated consumer data is not considered personal data.

Although both laws have expansive definitions of personal information, there are certain important differences which should be considered. Notably, while the GDPR does protect a data subject's publicly available personal data, the CCPA does not. Additionally, the GDPR puts heightened security on medical information while the CCPA uses existing laws on the protection of medical information. Another interesting difference relates to how both laws teat aggregated information. In particular, the CCPA exempts aggregated data or data which is de-identified from the personal data definition.

Like what you see in this edition?

Want to get more involved?

Please contact Ilunga Kalala at ilunga.kalala@turner.com

[21] GDPR Arts. 4(1), 9; Recitals 26-30
[22] CAL. CIV. CODE §§ 1798.140 (b), (o)

Enforcement

Although each law provides for the assessment of civil monetary penalties, the nature and amount of those penalties varies significantly.

	GDPR[23]	CCPA[24]
Enforcement Provisions	Administrative Fines can be directly issued by a data protection authority. The penalty, depending on the violation, can result in: 1. Up to 2% of global annual turnover or €10 million, whichever is higher; or 2. 4% of global annual turnover or €20 million, whichever is higher.	Civil Penalties are issued by the court. Depending on the violation, the penalty may be up to: 1. $2,500 per violation or 2. $7,500 per violation for each intentional violation. Importantly, the CCPA does not provide a cap on the amount of damages.

Although GDPR penalties can be more significant, the total penalty amount will vary depending on "the nature, gravity, and duration of the infringement."[25]

	GDPR[26]	CCPA[27]
Who can Enforce?	Data Protection Authorities in the EU. Data subjects can claim both material and non-material damages thereby giving a right to private enforcement.	The Attorney General has the power to assess alleged violations and can seek both monetary penalties and injunctions. A civil right of action is only available when non-encrypted or non-redacted personal information is the subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of security obligations. However, under the CCPA, a private party wanting to bring an enforcement action needs to provide 30-day written notice. Within that time, the business can cure its violation of the CCPA. If the business continues their practice, a consumer then may bring a private action against the business.

[23] GDPR Arts. 83, 84; 79-82; Recitals 148-152; 141-147
[24] CAL. CIV. CODE §§ 1798.155; 1798.150

[25] *See* GDPR Art. 83, which features a complete list of contributing factors.

[26] GDPR Arts. 83, 84; 79-82; Recitals 148-152; 141-147
[27] CAL. CIV. CODE §§ 1798.155; 1798.150

The enforcement provisions under the GDPR and CCPA `could have a significant impact on a business's risk calculus. The GDPR places significantly higher fines on a non-compliant business, but the CCPA does not cap the damages. If a business were to continue to violate the CCPA, it could result in even higher fines than under the GDPR (*e.g.*, in particular, higher fines would be imposed for repeat violations that affect many consumers). Additionally, the GDPR affords private persons a much more expansive right of action than the CCPA does. The requirement that businesses have a right to cure helps consumers, but may not be able to always compensate consumers harmed by an individual business' practices.

Conclusion:

Businesses and their counsel need to be mindful of these GDPR and CCPA provisions and how such laws relate to their business model, customer base, and potential liability with respect to both government enforcement and private rights of action.