

Introduction

Consumer Protection Developments: New Challenges and Unanswered Questions

BY KELLIE LERNER AND ROBIN MOORE

IN THE LAST DECADE, SWEEPING technological innovation has transformed how we work, how we socialize, how we make purchases, and even how we eat. Not surprisingly, seeds of change are often sowed by actions that create new challenges and unanswered questions. How has consumer protection law evolved and adapted to these ever-increasing technological disruptions that now characterize our modern economy? What new regulatory and statutory frameworks have emerged to protect consumers in this era? This issue of *ANTITRUST* features articles that examine these questions from diverse perspectives to provide government and private lawyers with practical insight on how to deal with future challenges in consumer protection law and enforcement.

Regulatory Developments

One of the most significant consumer protection developments in recent years was the passage of the Dodd-Frank Act, which consolidated previously scattered financial consumer protection laws and created the Consumer Financial Protection Bureau.¹ Since its creation in 2010, much has been written about the scope of the agency's power and specific actions it has taken.² The contributors to this issue add to that discussion by examining the impact of the CFPB on the enforcement landscape.

An interview with Jessica Rich, Director of the FTC's Bureau of Consumer Protection from 2013–2017, explores the impact of the CFPB on the FTC, which prior to the CFPB was the primary federal agency enforcing financial consumer protection laws. Among other things, Rich discusses the FTC's shift away from targeting practices better suited to the new agency and towards cases involving new financial technologies such as crowdfunding, Bitcoin, and mobile payments.

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Allyson Baker, Andrew Hernaki, and Peter Frechette discuss the CFPB's recent enforcement efforts as well as the nuances of dealing with an agency that has enforcement, regulatory, and supervisory roles.

Because conduct that results in a civil investigation may also implicate criminal enforcement, Jennifer Lee and John Marti explore the CFPB's coordination with the Department of Justice.

Howard Morse and Sarah Swain address another development—the increasing number of attorneys who have expanded their antitrust practice into the consumer protection sphere. Focusing on the similarities and differences between consumer protection and antitrust investigations, Morse and Swain explore strategies for responding to FTC consumer protection investigations, protecting confidential information, and negotiating settlements.

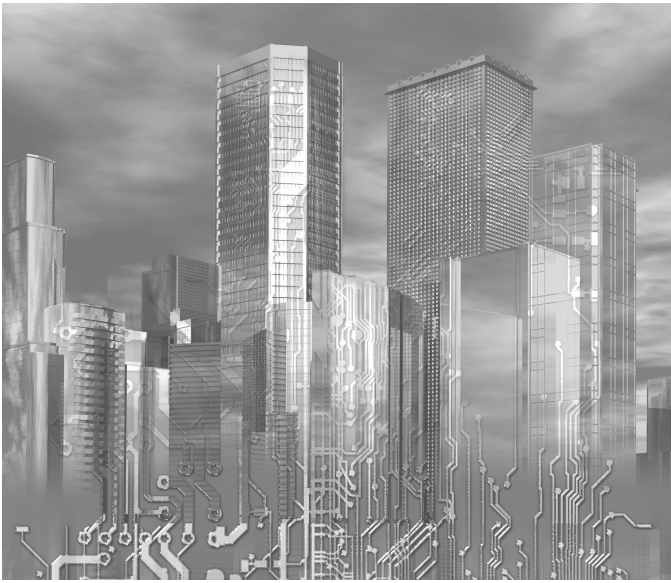
Privacy and Data Security

This issue also explores the evolving legal landscape surrounding privacy and data security, where the law is constantly adapting to new technological advances.

Libbie Canter and Ted Karch take a look back at the last eight years of privacy and data security enforcement at the Federal Trade Commission. Canter and Karch discuss lessons learned from a spate of high-profile enforcement actions, in which the FTC sued technological behemoths for security vulnerabilities that led to massive data breaches.

Meredith Halama and Michael Sherling examine recent FTC enforcement activity focused on the collection of private consumer data. Halama and Sherling provide historical context with a review of FTC hearings and reports addressing the issue, including the seminal 2012 Privacy Report, and address recent FTC enforcement actions against companies that either failed to implement privacy choice mechanisms in the manner described to consumers or failed to adequately disclose the existence or extent of data tracking.

Michael McLellan discusses *Spokeo, Inc.* and its impact on the threshold issue of private standing to enforce statutory violations arising from the retention, collection, or disclosure of private consumer data. McLellan examines how lower courts have applied *Spokeo* in a variety of contexts to glean



some practical advice on how it may be interpreted going forward.

Kim Peretti and Nameir Abbas examine how the role of lawyers has evolved in cybersecurity. With the dawn of massive data breaches, cybersecurity now represents enterprise risk for corporations that may be confronted with regulatory, public relations, and class action attacks after a breach. Peretti and Abbas discuss how lawyers now play a central role in managing cybersecurity risk, from pre-incident planning, cyber risk mitigation, and incidence response.

And if there were ever any doubt, Sharon Roberg-Perez makes a strong case that the future has now indeed arrived with an in-depth look at the many ways biometric systems are a ubiquitous feature of daily life. Roberg-Perez offers insight into the available legal remedies for breaches of biometric privacy and canvasses recent decisions interpreting privacy rights under state biometric privacy statutes as well as the Fair Credit Reporting and Privacy Acts.

Advertising

Finally, we explore a variety of advertising issues.

Howard Beales and Tim Muris add to the perennial debate over the boundaries of claim substantiation. They argue that the FTC's "competent and reliable scientific evidence" standard for health and technical or science-based claims³ should not include two randomized and controlled human clinical trials (RCTs) because, among other things, such a requirement may deprive consumers of valuable information. Similarly, in a counterpoint to David Vladeck's article in the Fall 2016 issue of *ANTITRUST*,⁴ they assert that the FTC has no authority to use Section 13(b) to obtain consumer redress in traditional substantiation cases.

Christopher Cole adds to the substantiation discussion, exploring how to deal with the "competent and reliable scientific evidence" standard where industry standards are evol-

ing or do not yet exist. Building on a discussion of a variety of testing methods, he outlines a series of considerations for those seeking to substantiate novel products or claims.

The issue rounds out its examination of advertising by tackling questions sparked by evolving technology, the introduction of new advertising platforms, and recent developments in the legal landscape.

Amy Mudge explores issues associated with ensuring that consumers understand that native advertising is in fact advertising.

Roger Colaizzi, Chris Crook, Claire Wheeler, and Taylor Sachs examine the line between puffery and comparative advertising in light of evolving legal standards.

Daniel Brown, Christina Hanson, and Chip Magid trace the extensive litigation and recent FDA proceedings involving the term "natural" in the labeling of food products and argue that, although there are diverse points of view, the FDA should adopt a rule defining it.

Finally, Mark Patterson explores the intersection between consumer protection and antitrust in online information platforms.

Change

When an administration changes, it is always tempting to revisit the enforcement efforts of prior years, and, relying on the maxim that "past is prologue," predict shifts similar to those practitioners have seen before. This issue of *ANTI-TRUST*, however, has looked at consumer protection developments through a much wider lens—taking into account not only the changing legal landscape and potential shift in enforcement priorities but also the technological developments, evolving marketing platforms, and scientific advancements that will continue to shape key areas of consumer protection practice. This multi-faceted analysis provides an excellent framework for understanding the current state of consumer protection law, and, perhaps more importantly, it offers a strong foundation for analyzing consumer protection issues as the law continues to evolve. ■

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (2010) (codified in scattered sections U.S.C.).

² See, e.g., Joseph L. Barloon, Darren M. Welch & Neepa K. Mehta, "Leveling the Playing Field": Implications of CFPB Authority over Non-Depository Financial Institutions, *ANTITRUST*, Spring 2013, at 71; John E. Villafranco & Kristin A. McPartland, *New Agency, New Authority: An Update on the Consumer Financial Protection Bureau*, *ANTITRUST SOURCE* (Feb. 2012), http://www.americanbar.org/content/dam/aba/directories/antitrust/feb12_villafranco_2_27f.authcheckdam.pdf.

³ The FTC has long required that, for health and technical or science-based claims, the advertiser possess "competent and reliable scientific evidence." See, e.g., FED. TRADE COMM'N, BUREAU OF CONSUMER PROTECTION, *DIETARY SUPPLEMENTS: AN ADVERTISING GUIDE FOR INDUSTRY 9* (1998), <https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf>.

⁴ See David C. Vladeck, *Time to Stop Digging: Failed Attacks on FTC Authority to Obtain Consumer Redress*, *ANTITRUST*, Fall 2016, at 89.