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What a Fine Mess:

Avoiding the Privacy and Cybersecurity Regulators' Crosshairs

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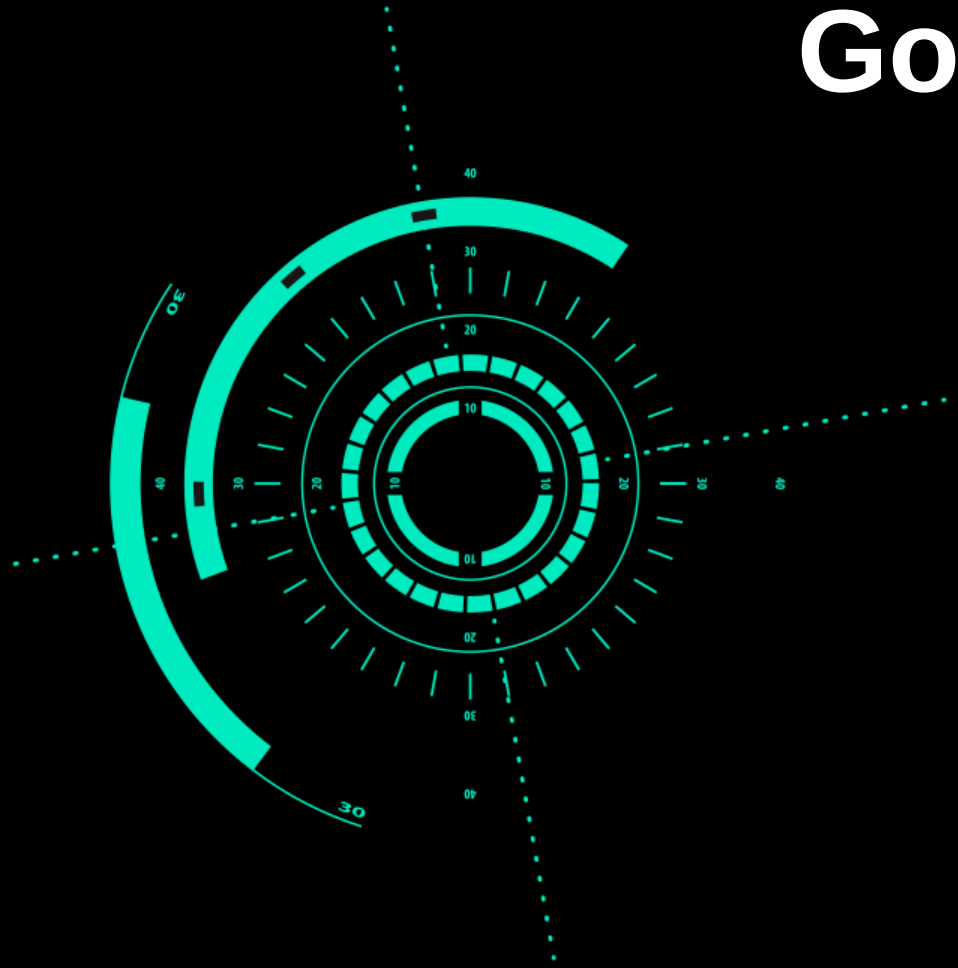
Goals



- Identify most active regulators
- Analyze trends in privacy enforcement
- Provide practical risk minimization tools
- Stimulate discussion

Federal Trade Commission

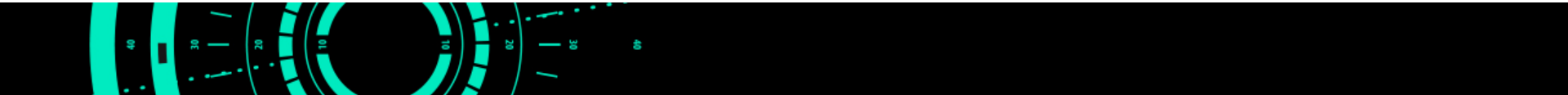
- *FTC v. Wyndham*
- *In the Matter of LabMD, Inc.*
- *FTC v. AT&T Mobility*
- *In the Matter of Nomi Technologies, Inc.*

HHS Office for Civil Rights

- *Memorial Hermann Health System*
- *CardioNet, Inc.*
- *Memorial Healthcare System*
- *Advocate Health Care Network*
- *NY and Presbyterian Hosp. / Wellpoint*
- *Affinity Health Plan*

Foreign Data Protection Authorities

- *WhatsApp / Facebook*
- *Canada's Anti-Spam Law*
- *Latin American Privacy Developments*
- *GDPR*



State Attorneys General

- *Target*
- *Kaiser Foundation Health Plan, Inc.*
- *Triple-S Management Corp.*
- *Aaron’s Inc.*

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Thank you

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FTC v. AT&T Mobility LLC

United States Court of Appeals for the Ninth Circuit

June 17, 2016, Argued and Submitted, San Francisco, California; August 29, 2016, Filed

No. 15-16585

Reporter
835 F.3d 993 *; 2016 U.S. App. LEXIS 15913 **; 2016-2 Trade Cas. (CCH) P79,744

FEDERAL TRADE COMMISSION, Plaintiff-Appellee, v. AT&T MOBILITY LLC, a limited liability company, Defendant-Appellant.

Subsequent History: Rehearing, en banc, granted by *FTC v. AT&T Mobility LLC, 2017 U.S. App. LEXIS 8236 (9th Cir. Cal., May 9, 2017)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 3:14-cv-04785-EMC. Edward M. Chen, District Judge, Presiding.

FTC v. AT&T Mobility LLC, 87 F. Supp. 3d 1087, 2015 U.S. Dist. LEXIS 43272 (N.D. Cal., 2015)

Disposition: REVERSED AND REMANDED.

Core Terms

common carrier, exemption, Packers, Stockyards, customers, mobile, activity-based, entities, district court, carrier, activities, regulate commerce, throttling, unlimited, status-based, Commerce, legislative history, non-common, Agriculture, regulation, practices, unfair, deference, speed, motion to dismiss, data services, contends, products, Food, meat

Case Summary

Overview

HOLDINGS: [1]-The district court erred in denying the mobile company's motion to dismiss the Federal Trade Commission's action brought under § 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45(a)*, because based on the language and structure of the Act, the common carrier exception was a status-based exemption and the company, as a common carrier, was not covered by § 5 of the Act.

Outcome
Judgment reversed. Case remanded.

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

HN1[] Section 5 of the Federal Trade Commission Act exempts, among others, common carriers subject to the Acts to regulate commerce.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

HN2[] Under § 5 of the Federal Trade Commission Act, pursuant to which the Federal Trade Commission may prevent persons, partnerships, or corporations, except common carriers subject to the Acts to regulate commerce from using unfair or deceptive acts or practices in or affecting commerce. *15 U.S.C.S. § 45(a)(2)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] The appellate court reviews a district court's ruling on a motion to dismiss de novo.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

HN4[] Section 5 of the Federal Trade Commission Act contains an exemption for "common carriers subject to the Acts to regulate commerce." 15 U.S.C.S. § 45(a)(2). Section 5 states: The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in 15 U.S.C.S. § 57a(f)(3), Federal credit unions described in § 57a(f)(4), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended 7 U.S.C.S. § 181 et seq., except as provided in § 406(b) of said Act, 7 U.S.C.S. § 227(b), from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

HN5[] "Common carrier" is not defined in the Federal Trade Commission Act. Acts to regulate commerce are defined as the Interstate Commerce Act of 1887, the Communications Act of 1934, and all Acts amendatory thereof and supplementary thereto. 15 U.S.C.S. § 44. When § 5 of the Federal Trade Commission Act was enacted, only the Interstate Commerce Act was included within the term "Acts to regulate commerce." The Communications Act was added to the definition of "Acts to regulate commerce" after its passage. Wheeler-Lea Act § 2, 52 Stat. 111 (1938).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

HN6[] The common carrier exception in the Federal Trade Commission Act is a status-based exemption.

Governments > Legislation > Interpretation

HN7[] In interpreting a statute, the court first considers the language of the statute itself.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

HN8[] The phrase "common carriers subject to the Acts to regulate commerce," 15 U.S.C.S. § 45(a)(2), does not contain any language suggesting that the activities of a common carrier affect the exemption's application. A literal reading of the words Congress selected simply does not comport with an activity-based approach.

Governments > Legislation > Interpretation

HN9[] The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there.

Governments > Legislation > Interpretation

HN10[] There is a presumption that Congress is aware of past judicial interpretations and practices when it legislates.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

HN11[] Section 5 of the Federal Trade Commission Act exempts persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921. 15 U.S.C.S. § 45(a)(2). The "insofar" as language, clearly indicative of an activity-based approach, undermines the plausibility of an argument

that the exemption for "common carriers subject to the Acts to regulate commerce" requires an activity-based interpretation. The language of the common carrier exemption meaningfully varies from that of the Packers and Stockyards exemption.

Governments > Legislation > Interpretation

HN12[] The use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words. Congress's explicit decision to use one word over another in drafting a statute is material. It is a decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning.

Governments > Legislation > Interpretation

HN13[] It is unnecessary to rely on legislative history to construe unambiguous statutory language.

Governments > Legislation > Interpretation

HN14[] If the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Amendments

HN15[] When Congress acts to amend a statute, the courts presume it intends its amendment to have real and substantial effect.

Governments > Legislation > Interpretation

HN16[] It is not for the court to rewrite the statute so that it covers only what the court thinks is necessary to achieve what the court thinks Congress really intended. That is a job for Congress, not the courts.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN17[] Under Skidmore, non-binding agency opinions may be entitled to deference, with the weight of such a judgment in a particular case dependent upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

HN18[] The common carrier exemption in § 5 of the Federal Trade Commission Act carves out a group of entities based on their status as common carriers. Those entities are not covered by § 5 even as to non-common carrier activities.

Summary:

SUMMARY[**]

Federal Trade Commission Act

The panel reversed the district court's denial of AT&T Mobility LLC's motion to dismiss, and remanded for an entry of an order of dismissal in an action brought by the Federal Trade Commission under *section 5 of the FTC Act* that took issue with the adequacy of AT&T's disclosures regarding its data throttling plan, under which AT&T intentionally reduced the data speed of its customers with unlimited mobile data plans.

Section 5 of the FTC Act contains an exemption for "common carriers subject to the Acts to regulate commerce." *15 U.S.C. § 45(a)(2)*. The panel held that AT&T was excluded from the coverage of *section 5 of the FTC Act*, and FTC's claims could not be maintained. Specifically, the panel held that, based on the language and structure of the FTC Act, the common carrier exception was a status-based exemption and that AT&T,

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

as a common carrier, was not covered by *section 5*.

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Joel Marcus (argued), Director of Litigation; Matthew M. Hoffman and David L. Sieradzki, Attorneys; David C. Shonka, Acting General Counsel; Federal Trade Commission, Washington, D.C.; Evan Rose, Matthew D. Gold, and Linda K. Badger, Federal Trade Commission, San Francisco, California; for Plaintiff-Appellee.

Judges: Before: Richard R. Clifton, and Sandra S. Ikuta, Circuit Judges, and William Q. Hayes,* District Judge. Opinion by Judge Clifton.

Opinion by: Richard R. Clifton

Opinion

[*995] CLIFTON, Circuit Judge:

Through a practice referred to by the Federal Trade Commission as "data throttling," AT&T Mobility LLC intentionally reduces the data speed of its customers with unlimited mobile data plans.[1] A throttled customer receives data at a substantially reduced speed during a given billing cycle once the customer's data usage during that billing cycle exceeds a threshold determined by AT&T. Unlimited data plan customers are throttled without regard to real-time network **[**3]** congestion.

The FTC filed a complaint against AT&T under *section 5 of the FTC Act*, *15 U.S.C. § 45(a)*, taking issue with the adequacy of AT&T's disclosures regarding its data throttling program. The central issue before us is whether AT&T is covered by ***HN1***[↑] *section 5*, which exempts, among others, "common carriers subject to the Acts to regulate commerce." We conclude that AT&T is excluded from the coverage of *section 5*, and that the FTC's claims cannot be maintained.

I.

AT&T offers mobile voice service and mobile data service to its customers. Mobile data service allows customers with smartphones to access the internet using AT&T's mobile data network. Customers with mobile data service can, among other things, send and receive email, use GPS navigation, and stream videos.

In 2007, AT&T became the exclusive service provider for the Apple iPhone in the United States. At that time, AT&T began offering iPhone customers an "unlimited" mobile data plan, allowing users access to an unlimited amount of data for a fixed monthly rate. Starting in June 2010, however, AT&T stopped offering unlimited mobile data plans to new customers. **[**4]** Since then, it has required new customers to select one of various "tiered" data plans, under which a customer has a set data allowance per month for a fixed monthly rate and incurs additional charges for any data usage in excess of the set data allowance. Customers with preexisting unlimited data plans were grandfathered into the new system to avoid encouraging them to switch to a different service provider.

In July 2011, AT&T decided to begin reducing the speed at which unlimited data plan users receive data on their smartphones. Under AT&T's data throttling program, unlimited data plan customers are throttled for the remainder of a billing cycle once their data usage during that cycle exceeds a certain threshold. Although AT&T attempts to justify this program as necessary to prevent harm to the network, AT&T's throttling program is not actually tethered to real-time network congestion. Instead, customers are subject to throttling even if AT&T's network is capable of carrying the customers' data. AT&T does not regularly throttle its tiered plan customers, no matter how much data those customers use.

The FTC contends that AT&T failed to adequately inform its customers of its data throttling **[**5]** program. It asserts two claims against AT&T ***HN2***[↑] under *section 5 of the FTC Act*, pursuant to which the FTC may **[*996]** "prevent persons, partnerships, or corporations, except . . . common carriers subject to the Acts to regulate commerce . . . from using . . . unfair or

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* The Honorable William Q. Hayes, United States District Judge for theSouthern District of California, sitting by designation.

[1] The facts presented here are those alleged by the FTC in its Complaint. We will refer to the practice by the FTC's term, data throttling.

deceptive acts or practices in or affecting commerce." *15 U.S.C. § 45(a)(2)*.

In Count I, the FTC asserts that AT&T's imposition of data speed restrictions on customers with contracts "advertised as providing access to unlimited mobile data" and without terms "provid[ing] that [AT&T] may modify, diminish, or impair the service of customers who use more than a specified amount of data" is an unfair act or practice. In Count II, the FTC asserts that AT&T's failure to adequately disclose that it "imposes significant and material data speed restrictions on unlimited mobile data plan customers who use more than a fixed amount of data in a given billing cycle" is a deceptive act or practice.

AT&T filed a motion to dismiss the FTC's Complaint, contending that it is immune from liability under *section 5* because of its status as a common carrier. The FTC opposed the motion, arguing that AT&T is not exempt from liability for violations in connection with its mobile data service, a non-common carrier service, **[**6]** because the common carrier exemption in *section 5* protects entities with the status of common carrier only to the extent that the service in question is a common carrier service.

While the motion to dismiss was pending, the Federal Communications Commission reclassified mobile data service from a non-common carrier service to a common carrier service.[2] In response, AT&T argued to the district court that the FCC's Reclassification Order, even though prospective in application, stripped the FTC of authority to maintain its claims against AT&T, even as to past violations.[3]

[7]** It is undisputed that AT&T is and was a "common carrier[] subject to the Acts to regulate commerce" for a substantial part of its activity, but prior to the FCC's Reclassification Order, its mobile date service was not identified and regulated by the FCC as a common carrier service.

The district court denied AT&T's motion to dismiss. *See FTC v. AT&T Mobility LLC, 87 F. Supp. 3d 1087 (N.D. Cal. 2015)*. It rejected AT&T's view of the common carrier exemption, concluding that it applies "only where the entity has the status of common carrier and is actually engaging in common carrier activity." *Id. at 1104*. The district court also rejected AT&T's argument that the FCC's Reclassification Order stripped the FTC of authority to pursue its claims. *Id. at 1102-04*. According to the district court, the Reclassification Order had no effect on the FTC's authority over AT&T's past alleged misconduct. *Id. at 1104*.

AT&T requested that the district court certify its order denying the motion to dismiss for immediate appeal pursuant to *28 U.S.C. § 1292(b)*. The district court agreed but did not stay the proceedings before it. Following the district court's certification order, AT&T filed an unopposed **[*997]** petition for permission to appeal, which this court granted.

II.

HN3[] We review a district court's ruling on a motion to dismiss **[**8]** de novo. *Colony Cove Properties, LLC v. City of Carson, 640 F.3d 948, 955 (9th Cir. 2011)*.[4]

A.

HN4[] *Section 5 of the FTC Act*, on which the FTC

[2] This classification was recently upheld by the D.C. Circuit in *U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 2016 WL 3251234 (D.C. Cir. 2016)*.

[3] The FCC has also taken issue with AT&T's data throttling program. On June 17, 2015, it issued a Notice of Apparent Liability, finding that AT&T "apparently willfully and repeatedly violated the [FCC's] Open Internet Transparency Rule by: (1) using the misleading and inaccurate term 'unlimited' to label a data plan that was in fact subject to prolonged speed reductions after a customer used a set amount of data; and (2) failing to disclose the express speed reductions that it applied to 'unlimited' data plan customers once they hit a specified data threshold." *See In the Matter of AT&T Mobility, LLC, 30 F.C.C. Rcd. 6613 (2015)*.

[4] AT&T brought its motion pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure*, stating that the issue before the district court was "[w]hether th[e] Court possesses subject-matter jurisdiction over the FTC's complaint, notwithstanding the fact that *15 U.S.C. § 45(a)(2)* deprives the FTC of regulatory jurisdiction over 'common carriers subject to the Acts to regulate commerce.'" AT&T's framing of its motion is incorrect. The FTC's statutory authority to bring claims against AT&T has no bearing on the district court's jurisdiction to consider the FTC's Complaint. *See* ***United States v. Alisal Water Corp., 431 F.3d 643, 650 (9th Cir. 2005)***. The district court had jurisdiction over the FTC's claims even if the FTC lacked the statutory authority to bring those claims. AT&T's motion, in other words, raises a *Rule 12(b)(6)* issue, not a *Rule 12(b)(1)* issue.

relies, contains an exemption for "common carriers subject to the Acts to regulate commerce." *15 U.S.C. § 45(a)(2)*. *Section 5* states:

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in *section 57a(f)(3)* of this title, Federal credit unions described in *section 57a(f)(4)* of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, **[**9]** partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [*7 U.S.C.A. § 181 et seq.*], except as provided in *section 406(b) of said Act [7 U.S.C.A. § 227(b)*], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Id. ***HN5***[⬆] "Common carrier" is not defined in the FTC Act. "Acts to regulate commerce" are defined as the Interstate Commerce Act of 1887, the *Communications Act of 1934*, and "all Acts amendatory thereof and supplementary thereto." *15 U.S.C. § 44*. When *section 5* was enacted, only the Interstate Commerce Act was included within the term "Acts to regulate commerce." The Communications Act was added to the definition of "Acts to regulate commerce" after its passage. *See Wheeler-Lea Act § 2, 52 Stat. 111 (1938)*.

The issue presented to us is whether the common carrier exemption in *section 5* is status-based, such that an entity is exempt from regulation as long as **[*998]** it has the status of a common carrier under the "Acts to regulate commerce," or is activity-based, such that an entity with the status of a common carrier is exempt only when the activity the FTC is attempting to regulate is a common carrier activity.

AT&T advocates a status-based interpretation of the exemption, **[**10]** arguing that its status as a common carrier under the Communications Act shields it from liability under *section 5* even as to non-common carrier activity. According to AT&T, the common carrier exemption bars the FTC from in any way regulating an entity with the status of a common carrier under *section 5*, even if the common carrier engages in non-common carrier activity.

The FTC, on the other hand, contends that the exemption should be read as activity-based, arguing that an entity is shielded from *section 5* liability only to the extent it has the status of a common carrier and the activity at issue is a common carrier activity. According to the FTC, AT&T is not exempt from *section 5* liability in this case because mobile data service was not a common carrier activity at the time of AT&T's alleged violations.

We conclude, based on the language and structure of the FTC Act, that ***HN6***[⬆] the common carrier exception is a status-based exemption and that AT&T, as a common carrier, is not covered by *section 5*.

HN7[⬆] In interpreting a statute, we first consider the language of the statute itself. *See Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009)*. The plain language of the common carrier exemption casts the exemption in terms of status, contrary to the FTC's position. ***HN8***[⬆] The phrase "common carriers **[**11]** subject to the Acts to regulate commerce," *15 U.S.C. § 45(a)(2)*, does not contain any language suggesting that the activities of a common carrier affect the exemption's application. A literal reading of the words Congress selected simply does not comport with an activity-based approach. *See BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004)* (***HN9***[⬆] "The preeminent canon of statutory interpretation requires us to 'presume that the legislature says in a statute what it means and means in a statute what it says there.'" (quoting *Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)*) (brackets omitted)).

The common carrier exemption is surrounded by exemptions for "banks," "savings and loan institutions," and "Federal credit unions," all of which the FTC acknowledges are status-based exemptions even though phrased in similar terms as the common carrier exemption it contends is activity-based. The fact that surrounding exemptions are defined in terms of status suggests that "common carriers subject to the Acts to regulate commerce" also carves out a group of entities based on status.

In adopting the FTC's view of the common carrier

exemption, the district court concluded that the term "common carrier" was understood to encompass both a status and an activity prior to enactment of the FTC Act. It based this conclusion **[**12]** on a number of Supreme Court cases identifying a regulatory distinction for common carriers between common carrier and non-common carrier activities. In *Santa Fe, Prescott & Phoenix Railway Company v. Grant Brothers Construction Company, 228 U.S. 177, 33 S. Ct. 474, 57 L. Ed. 787 (1913)*, for example, the Court noted "the established doctrine . . . that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation," but explained that "this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier." *Id. at 184, 185*. Likewise, in *Railroad Company v. Lockwood, 84 U.S. 357, 21 L. Ed. 627 (1873)*, the Court stated that an entity is a common carrier when it carries articles as part of its "regularly established business," but may "become a private carrier, or a bailee for hire, when . . . [it] undertakes to carry something which it is not [its] business to carry." *Id. at 377*. Prior to the enactment of the FTC Act, the Supreme Court also recognized that common carriers fell outside the scope of the Interstate Commerce Act to the extent they engaged in non-common carrier activities. *See Kansas City S. Ry. Co. v. United States, 282 U.S. 760, 764, 51 S. Ct. 304, 75 L. Ed. 684 (1931)* ("There is no doubt that common carriers, subject to the Interstate Commerce Act, may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the act."); *Interstate [*999] Commerce Comm'n v. Goodrich Transit Co., 224 U.S. 194, 211, 32 S. Ct. 436, 56 L. Ed. 729 (1912)* (noting **[**13]** that non-common carrier activities are not within the Interstate Commerce Commission's jurisdiction).

While these cases recognize a distinction between common carrier and non-common carrier activities in the regulation of entities with common carrier status, they do not show that when Congress used the term "common carrier" in the FTC Act, it could only have meant "common carrier to the extent engaged in common carrier activity." There is no indication that the regulatory distinction in the cases the district court cited is implicit in Congress's phrasing of the common carrier exemption.

Moreover, awareness of the potential duality of common carriers pre-FTC Act may actually cut against the FTC's argument. Given ***HN10***[⬆] the "presum[ption] that Congress is aware of 'past judicial interpretations and practices' when it legislates," *Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 720 (9th Cir. 2010)* (quoting *In re Egebjerg, 574 F.3d 1045, 1050 (9th Cir. 2009))*, it would be expected that Congress would have been more precise in its language if it intended the FTC to retain regulatory authority over a common carrier's non-common carrier activity.

A status-based interpretation of the common carrier exemption also derives significant support from the language of the Packers and Stockyards exemption. ***HN11***[⬆] *Section 5 of the FTC Act* exempts "persons, partnerships, **[**14]** or corporations *insofar as they are subject* to the Packers and Stockyards Act, 1921." *15 U.S.C. § 45(a)(2)* (emphasis added). The "insofar as" language, clearly indicative of an activity-based approach, undermines the plausibility of the FTC's argument that the exemption for "common carriers subject to the Acts to regulate commerce" requires an activity-based interpretation. The language of the common carrier exemption meaningfully varies from that of the Packers and Stockyards exemption. *See S.E.C. v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003)* (***HN12***[⬆] "[T]he use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words. . . . Congress's explicit decision to use one word over another in drafting a statute is material. . . . It is a decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning.").

B.

The FTC argues that the "insofar as" language in the Packers and Stockyards exemption in *section 5 of the FTC Act*, which on its face clearly indicates Congress's intent to adopt an activity-based approach for that exemption (and therefore, by contrast, indicates that Congress intended to retain a status-based interpretation of the common carrier exemption) actually does not indicate **[**15]** such an intent. The FTC bases this argument on the legislative history of the Packers and Stockyards exemption, but this argument is unpersuasive. To the contrary, our understanding of the statute based on its plain language is bolstered by

examination of the statutory history of the Packers and Stockyards exemption and of the FTC's own decisions prior to an amendment of that exemption.

As originally enacted, "persons, partnerships, or corporations *subject to* the Packers and Stockyards Act" were exempted from liability. *Wheeler-Lea Act § 3, 52 Stat. 111, 111-12 (1938)* (emphasis added). In 1958, Congress amended the exemption to contain the "insofar as" language present today. *See Pub. L. No. 85-909, § 3, 72 Stat. 1749, 1750 (1958)*. The **[*1000]** FTC contends that the Packers and Stockyards exemption was always activity-based and that the amendment was merely a part of a Congressional effort to clarify the jurisdictional responsibilities of the FTC versus the Secretary of Agriculture. ***HN13***[↑] It is unnecessary to rely on legislative history to construe unambiguous statutory language, *see Miranda v. Anchondo, 684 F.3d 844, 849 (9th Cir. 2012)* (***HN14***[↑] "If the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease." (quoting *In re Ferrell, 539 F.3d 1186, 1190 n.10 (9th Cir. 2008)*)). But even considering the FTC's arguments, the legislative history **[**16]** does not bear out the FTC's claims. The relevant House Report stated that the bill "deals with a reassignment of jurisdiction over unfair trade practices." H.R. Rep. No. 85-1507, at 3. If the amendment had merely been a clarification of the FTC's authority, it is unlikely that the amendment would have been characterized as a jurisdictional "reassignment."

The House Report also suggested a status-based understanding of existing law, stating that "[u]nder present law, the Secretary of Agriculture has exclusive jurisdiction over all unfair trade practices engaged in by packers." *Id.* at 3. The Report noted that "the Secretary has jurisdiction over unfair trade practices in the sale by packers of many articles (such as sporting goods) which are either not at all or only remotely related to agricultural products," while "the Federal Trade Commission does not have jurisdiction over many of the large national grocery chains by reason of their ownership of a 20 percent or more interest in packinghouses." *Id.* at 3, 4. If the Packers and Stockyards exemption was truly activity-based prior to its amendment, these statements would have made little sense.

The FTC points to *Food Fair Stores, Inc., 54 F.T.C. 392 (1957)*, in support of its argument that the Packers and **[**17]** Stockyards Act and the corresponding exemption in the FTC Act were understood to be activity-based prior to the 1958 amendment, such that the 1958 amendment is of no consequence to its position. Although the FTC stated in *Food Fair Stores* that "Congress has not removed all activities of packers from the jurisdiction of the Federal Trade Commission, as has been done in the Federal Trade Commission Act in the case of banks," the decision nonetheless acknowledged that the FTC lacked jurisdiction over the non-packer activities of entities subject to the Packers and Stockyards Act. The FTC stated:

> It seems clear from the language of the [Packers and Stockyards] Act and from the legislative history that Congress designedly made the definition of packer a very broad one. The general purpose was to regulate certain practices of the meat packing business in all its ramifications regardless of its organization or unrelated activities. About the only persons Congress seemed to exempt were those having no packer affiliations. Thus, an independent tanner would not be a packer, merely because of being in the tannery business. Nor would an independent marketer, simply because he marketed meats, meat **[**18]** food products and livestock products, etc. But if either engaged in certain activities traditionally connected with the packing business, or had a designated degree of affiliation therewith, they were included in the definition of packer.

Id. at 405. The FTC rejected the argument that "the jurisdiction of the Secretary of Agriculture does not extend to those products not associated with [an entity's] packing business" in concluding that the grocery chain at issue fell within the definition of "packer" and was therefore subject to **[*1001]** the Secretary of Agriculture's jurisdiction. *Id. at 406, 408*.

In reaching that conclusion, the FTC cited its own decision from one year earlier, *Armour & Co., 52 F.T.C. 1028 (1956)*, in which it dismissed a complaint regarding a packer's advertising of oleomargarine. In concluding that the Secretary of Agriculture had jurisdiction and the FTC did not, the FTC traced the relevant legislative history of the Packers and Stockyards Act, noting that it reflected Congress's intention to encompass a packer's unrelated activities

within its general regulation of packers. *Id. at 1034-36*. The FTC's opinions prior to amendment of the Packers and Stockyards exemption in 1958 appear more consistent with our understanding of the statutory text than **[**19]** with the FTC's current arguments.

The FTC also fails to adequately explain what motivation Congress would have had to amend the Packers and Stockyards exemption in 1958 if that exemption was at that time already understood to be activity-based. The FTC links the amendment to *Food Fair Stores*, but it makes little sense for Congress to have amended the Packers and Stockyards Act and the FTC Act exemption if, as the FTC argues, *Food Fair Stores* merely reaffirmed that the FTC retained some jurisdiction over packers. *See Johnson v. Consumerinfo.com, Inc., 745 F.3d 1019, 1022 (9th Cir. 2014)* (***HN15***[↑] "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." (quoting *Stone v. INS, 514 U.S. 386, 397, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)))*. The more likely explanation is that *Food Fair Stores* took a status-based approach to the Packers and Stockyards Act that Congress squarely addressed in 1958 by "reassign[ing]" jurisdiction over unfair trade practices between the FTC and the Secretary of Agriculture. H.R. Rep. No 85-1507, at 3.

The district court relied on *Crosse & Blackwell Co. v. FTC, 262 F.2d 600 (4th Cir. 1959)*, to reject AT&T's argument regarding the significance of the 1958 amendment. In *Crosse*, the Fourth Circuit concluded that Crosse & Blackwell, a canner of soups and similar products, was not exempt from the FTC Act simply because products responsible **[**20]** for something less than three per cent of its annual sales contained meat, thus rejecting the argument that the company's processing of that meat made it wholly subject to regulation by the Secretary of Agriculture. It reached that result by interpreting the pre-1958 Packers and Stockyards Act and FTC Act exemption to be activity-based, stating that "it was never intended that relatively inconsequential activity which might be classified as meat packing should insulate all of the other activities of a corporation from the reach of the Federal Trade Commission." *Id. at 605*. The opinion explicitly acknowledged that it was rejecting "a literal interpretation" of the FTC Act exemption, stating that it "must be laid aside for it is 'plainly at variance with the policy of the legislation as a whole.'" *Id.* (quoting *Ozawa v. United States, 260 U.S. 178, 194, 43 S. Ct. 65, 67 L. Ed. 199 (1922))*. Instead, the court relied on its view of Congress's "apparent purpose and intention" in enacting the Packers and Stockyards Act, namely to regulate "the businesses of the stockyards and of the packers as those industries were known and understood at the time." *Id. at 604, 606*. It observed that Congress, when it enacted the Packers and Stockyards Act, had not anticipated that entities would acquire packing **[**21]** businesses in order to wholly escape regulation by the FTC. *Id. at 604-05*. According to the Fourth Circuit, Congress's attention was focused solely on the businesses of packers and stockyards as such, and it would not **[*1002]** have made sense for Congress to "saddle[] [the Secretary of Agriculture] with responsibility in areas far beyond the bounds of his concern." *Id. at 606*.

Although *Crosse* supports the FTC's interpretation of the pre-1958 Packers and Stockyards exemption, it does not do so persuasively. For one thing, the facts are obviously dissimilar. AT&T's status as a common carrier is not based on its acquisition of some minor division unrelated to the company's core activities that generates a tiny fraction of its revenue. More broadly, the *Crosse* decision seems to be based on little more than the court's own view of the most effective regulatory regime in explicit disregard of the words of the statute. But the text of a statute cannot be disregarded in that manner. ***HN16***[↑] "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago, 560 U.S. 205, 215, 130 S. Ct. 2191, 176 L. Ed. 2d 967 (2010)*. That is a job for Congress, not the courts. In addition, the legislative history relied upon in the **[**22]** *Crosse* opinion is limited to the origin of the Packers and Stockyards Act of 1921, with no attention to the history or language of the more directly relevant statute, *section 5 of the FTC Act*. Both the relevant text and a more careful review of that statute's legislative history demonstrate that when that statute exempted entities "subject to" the Packers and Stockyards Act, as it did prior to 1958, the Packers and Stockyards exemption was status-based. When it was amended in that year to exempt entities "insofar as they are subject" to the Packers and Stockyards Act, the exemption became activity-based. The other exemptions in *section 5*, including the exemption for common

carriers, were not altered, however, and they remained status-based, then and now.

In denying AT&T's motion to dismiss, the district court relied on legislative history for the more pertinent statute, the FTC Act, citing a statement made during the debate over the House bill that later became the FTC Act. Representative Stevens stated:

> I have no doubt that there are many financial institutions of that sort in this country which are engaged in some industrial pursuit that would come within the scope of this act. . . . They ought to be under the jurisdiction **[**23]** of this commission in order to protect the public, in order that all of their public operations should be supervised, just the same as where a railroad company engages in work outside of that of a public carrier. . . . [E]very corporation engaged in commerce except common carriers, and even as to them I do not know but that we include their operations outside of public carriage regulated by the interstate-commerce acts.

51 Cong. Rec. 8996 (May 21, 1914).

The FTC contends that Representative Stevens "plainly envisioned an activity-based reading of the exception," but his statement was equivocal on its face. What he actually said was "I do not know," reflecting possible uncertainty in Representative Stevens's mind as to the actual scope of the bill. Moreover, even if Representative Stevens favored an activity-based reading of the common carrier exemption, his statement represented the understanding of only one member of Congress, not a powerful or persuasive indicator of Congress's intent. *See* *New Eng. Power Co. v. New Hampshire, 455 U.S. 331, 342, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982)* ("Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.'" (quoting *Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 26, **[*1003]** 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977)*)). The FTC does not cite **[**24]** to any other portion of the FTC Act's legislative history to support its position.

C.

The district court also concluded that the FTC's interpretation, though not entitled to *Chevron* deference,[5] was entitled to some deference under *Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*. ***HN17***[↑] Under *Skidmore*, non-binding agency opinions may be entitled to deference, with "[t]he weight of such a judgment in a particular case . . . depend[ent] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id. at 140*.

It is true, as the district court noted, that the FTC has in recent years interpreted the common carrier exemption as activity-based. *See e.g., FTC-FCC Consumer Protection Memorandum of Understanding*, at 2 (Nov. 16, 2015); *Broadband Connectivity Competition Policy*, FTC Staff Report, at 38 (June 2007); *Prepared Statement of the Fed. Trade Comm'n*, 2003 WL 21353573, at *19 (2003); *FTC Reauthorization, Hearing Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism*, S. Hrg. 107-1147, at 28 (2002) (statement **[**25]** of Hon. Sheila F. Anthony, FTC). Under such circumstances, *Skidmore* deference may be appropriate. We conclude, however, that even if the agency's interpretation is entitled to some deference under *Skidmore*, such deference is insufficient to overcome the factors that point strongly in favor of AT&T's position. Given the language of the common carrier exemption and the structure of the FTC Act, we are not persuaded by the FTC's interpretation.

Because we conclude that the common carrier exemption is a status-based exemption that excludes AT&T from *section 5*'s coverage, we need not address AT&T's remaining arguments regarding overlapping regulation and the effect of the FCC's Reclassification Order.

III.

HN18[↑] The common carrier exemption in *section 5 of the FTC Act* carves out a group of entities based on their status as common carriers. Those entities are not covered by *section 5* even as to non-common carrier activities. Because AT&T was a common carrier, it

[5] The FTC has not argued that *Chevron* deference is appropriate in this case. The FTC explicitly disclaimed any reliance on *Chevron* before the district court. *See* *AT&T Mobility LLC, 87 F. Supp. 3d at 1101*.

cannot be liable for the violations alleged by the FTC. The district court's denial of AT&T's motion to dismiss is reversed, and the case is remanded for entry of an order of dismissal.

REVERSED AND REMANDED.

FTC v. AT&T Mobility LLC

United States Court of Appeals for the Ninth Circuit

May 9, 2017, Filed

No. 15-16585

Reporter
2017 U.S. App. LEXIS 8236 *

FEDERAL TRADE COMMISSION, Plaintiff-Appellee, v. AT&T MOBILITY LLC, a limited liability company, Defendant-Appellant.

Prior History: **[*1]** D.C. No. 3:14-cv-04785-EMC. Northern District of California, San Francisco.

FTC v. AT&T Mobility LLC, 835 F.3d 993, 2016 U.S. App. LEXIS 15913 (9th Cir. Cal., 2016)

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For RICHARD BLUMENTHAL, Senator, Amicus Curiae: Adina Hyman Rosenbaum, Attorney, Public Citizen Litigation Group, Washington, DC.

For Center For Media Justice, Amicus Curiae: Andrew Jay Schwartzman, Washington, DC.

For Consumers Union, Amicus Curiae: Seth E. Mermin, Berkeley, CA.

For Data Privacy And Security Law Professors, Amicus Curiae: Paul K. Ohm, Washington, DC.

For **[*2]** Public Knowledge, Amicus Curiae: Charles S. Duan, Public Knowledge, Washington, DC.

For Consumer Federation of America, Consumer Federation of California, Consumer Action, National Association of Consumer Advocates, National Consumers League, Center For Digital Democracy, Center For Democracy & Technology, Electronic Privacy Information Center, Benton Foundation, Common Sense Kids Action, And Privacy Rights Clearinghouse, Amicus Curiae: Seth E. Mermin, Berkeley, CA.

For New America's Open Technology Institute, Amicus Curiae: Andrew Jay Schwartzman, Washington, DC.

For Color of Change, Amicus Curiae: Andrew Jay Schwartzman, Washington, DC.

Judges: THOMAS, Chief Judge.

Opinion by: THOMAS

Opinion

ORDER

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to *Federal Rule of Appellate Procedure 35(a)* and *Circuit Rule 35-3*. The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit.

End of Document

FTC v. Wyndham Worldwide Corp.

United States Court of Appeals for the Third Circuit

March 3, 2015, Argued; August 24, 2015, Opinion Filed

No. 14-3514

Reporter
799 F.3d 236 *; 2015 U.S. App. LEXIS 14839 **; 2015-2 Trade Cas. (CCH) P79,269

FEDERAL TRADE COMMISSION v. WYNDHAM WORLDWIDE CORPORATION, a Delaware Corporation WYNDHAM HOTEL GROUP, LLC, a Delaware limited liability company; WYNDHAM HOTELS AND RESORTS, LLC, a Delaware limited liability company; WYNDHAM HOTEL MANAGEMENT INCORPORATED, a Delaware Corporation, Wyndham Hotels and Resorts, LLC, Appellant

Prior History: **[**1]** On Appeal from the United States District Court for the District of New Jersey. (D.C. Civil Action No. 2-13-cv-01887). District Judge: Honorable Esther Salas.

FTC v. Wyndham Worldwide Corp., 10 F. Supp. 3d 602, 2014 U.S. Dist. LEXIS 47622 (D.N.J., 2014)

Disposition: Judgment affirmed.

Core Terms

unfair, consumers, cybersecurity, practices, regulation, fair notice, network, hotels, requirements, deference, deceptive, privacy, agency's, hackers, agency's interpretation, complaints, notice, district court, allegations, companies, Commerce, courts, internal quotation marks, property management, ascertainable, passwords, statutes, policy statement, parties, first instance

Case Summary

Overview

HOLDINGS: [1]-The three requirements in *15 U.S.C.S. § 45(n)* may be necessary rather than sufficient conditions of an unfair practice, but the appellate court was not persuaded that any other requirements proposed by the company posed a serious challenge to the Federal Trade Commission's (FTC) claim; [2]-The company repeatedly argued there was no FTC interpretation of *§ 45(a)* or *(n)* to which the federal courts must defer in this case, and, as a result, the courts had to interpret the meaning of the statute as it applied to the company's conduct in the first instance; [3]-Thus, the company could not argue it was entitled to know with ascertainable certainty the cybersecurity standards by which the FTC expected it to conform; [4]-The company could only claim that it lacked fair notice of the meaning of the statute itself—a theory it did not meaningfully raise and was unpersuasive.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] The appellate court has plenary review of a district court's ruling on a motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. In this review, the appellate court accepts all factual allegations as true, construes the complaint in the light most favorable to the plaintiff, and determines whether, under

any reasonable reading of the complaint, the plaintiff may be entitled to relief.

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN2[] The Federal Trade Commission Act of 1914 prohibited unfair methods of competition in commerce, 15 U.S.C.S. § 45(a)). Congress explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase unfair methods of competition by enumerating the particular practices to which it was intended to apply. The takeaway is that Congress designed the term as a flexible concept with evolving content, and intentionally left its development to the Commission.

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN3[] After several early cases limited "unfair methods of competition" to practices harming competitors and not consumers, Congress inserted an additional prohibition in § 45(a) against "unfair or deceptive acts or practices in or affecting commerce."

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN4[] For the next few decades, the Federal Trade Commission (FTC) interpreted the unfair-practices prong primarily through agency adjudication. But in 1964 it issued a "Statement of Basis and Purpose" for unfair or deceptive advertising and labeling of cigarettes, *29 Fed. Reg. 8324, 8355 (July 2, 1964)*, which explained that the following three factors governed unfairness determinations: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers (or competitors or other businessmen). Almost a decade later, the Supreme Court implicitly approved these factors, apparently acknowledging their applicability to contexts other than cigarette advertising and labeling. The Court also held that, under the policy statement, the FTC could deem a practice unfair based on the third prong—substantial consumer injury—without finding that at least one of the other two prongs was also satisfied.

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN5[] In 1994, Congress codified the 1980 Policy Statement at 15 U.S.C.S. § 45(n): The Commission shall have no authority under this section to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination. Like the 1980 Policy Statement, § 45(n) requires substantial injury that is not reasonably avoidable by consumers and that is not outweighed by the benefits to consumers or competition. It also acknowledges the potential significance of public policy and does not expressly require that an unfair practice be immoral, unethical, unscrupulous, or oppressive.

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN6[] Although unfairness claims usually involve actual and completed harms, they may also be brought on the basis of likely rather than actual injury. And the Federal Trade Commission Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs, 15 U.S.C.S. § 45(n). More importantly, that a company's conduct was not the most proximate cause of an injury generally does not immunize liability from foreseeable harms.

Banking Law > Federal Acts > Federal Trade Commission Act > Scope & Enforcement

HN7[] A recent amendment to the Fair Credit Reporting Act directed the Federal Trade Commission (FTC) and other agencies to develop regulations for the proper disposal of consumer data, 15 U.S.C.S. § 1681w. The Gramm-Leach-Bliley Act required the FTC to establish standards for financial institutions to protect consumers' personal information, 15 U.S.C.S. § 6801(b). And the Children's Online Privacy Protection Act ordered the FTC to promulgate regulations requiring children's websites, among other things, to provide notice of what information is collected from children, how the operator uses such information, and the operator's disclosure practices for such information, 15 U.S.C.S. § 6502.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN8[] A conviction or punishment violates the Due Process Clause of our Constitution if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN9[] The level of required notice for a person to be subject to liability varies by circumstance. A judicial construction of a criminal statute violates due process if it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. The precise meaning of "unexpected and indefensible" is not entirely clear, but the courts frequently use language implying that a conviction violates due process if the defendant could not reasonably foresee that a court might adopt the new interpretation of the statute.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN10[] The fair notice doctrine extends to civil cases, particularly where a penalty is imposed. Lesser degrees of specificity are allowed in civil cases because the consequences are smaller than in the criminal context. The standards are especially lax for civil statutes that regulate economic activities. For those statutes, a party lacks fair notice when the relevant standard is so vague as to be no rule or standard at all.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN11[] A different set of considerations is implicated when agencies are involved in statutory or regulatory interpretation. Broadly speaking, agencies interpret in at least three contexts. One is where an agency administers a statute without any special authority to create new rights or obligations. When disputes arise under this kind of agency interpretation, the courts give respect to the agency's view to the extent it is persuasive, but they retain the primary responsibility for construing the statute. As such, the standard of notice afforded to litigants about the meaning of the statute is not dissimilar to the standard of notice for civil statutes generally because the court, not the agency, is the ultimate arbiter of the statute's meaning.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Administrative Law > Judicial Review > Standards of Review > Constitutional Right

HN12[] The third context is where an agency interprets the meaning of its own regulation. Here also courts typically must defer to the agency's reasonable interpretation. Private parties are entitled to know with ascertainable certainty an agency's interpretation of its regulation. Indeed, the due process clause prevents deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN13[] A higher standard of fair notice applies in the second and third contexts than in the typical civil statutory interpretation case because agencies engage in interpretation differently than courts. In resolving ambiguity in statutes or regulations, courts generally adopt the best or most reasonable interpretation. But, as the agency is often free to adopt any reasonable construction, it may impose higher legal obligations than required by the best interpretation.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

HN14[] Courts generally resolve statutory ambiguity by applying traditional methods of construction. Private parties can reliably predict the court's interpretation by applying the same methods. In contrast, an agency may also rely on technical expertise and political values. It is harder to predict how an agency will construe a statute or regulation at some unspecified point in the future, particularly when that interpretation will depend on the political views of the President in office at that time.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN15[] 15 U.S.C.S. § 45(a) does not implicate any constitutional rights. It is a civil rather than criminal statute. And statutes regulating economic activity receive a "less strict" test because their subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN16[] The relevant legal rule is not so vague as to be no rule or standard at all. 15 U.S.C.S. § 45(n) asks whether the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. While far from precise, this standard informs parties that the relevant inquiry here is a cost-benefit analysis, that considers a number of relevant factors, including the probability and expected size of reasonably unavoidable harms to consumers given a certain level of cybersecurity and the costs to consumers that would arise from investment in stronger cybersecurity. Fair notice is satisfied here as long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute.

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN17[] But even where the ascertainable certainty standard applies to fair notice claims, courts regularly consider materials that are neither regulations nor adjudications on the merits.

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Judges: Before: AMBRO, SCIRICA, and ROTH, Circuit Judges.

Opinion by: AMBRO

Opinion

[*240] OPINION OF THE COURT

AMBRO, Circuit Judge

The Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce." *15 U.S.C. § 45(a)*. In 2005 the Federal Trade Commission began bringing administrative actions under this provision against companies with allegedly deficient cybersecurity that failed to protect consumer data against hackers. The vast majority of these cases have ended in settlement.

On three occasions in 2008 and 2009 hackers successfully accessed Wyndham Worldwide Corporation's computer systems. In total, they stole personal and financial information for hundreds of thousands of consumers leading to over $10.6 million dollars in fraudulent charges. The FTC filed suit in federal District Court, alleging that Wyndham's conduct was an unfair practice and that its privacy policy was deceptive. The District Court denied Wyndham's motion to dismiss, and **[**4]** we granted interlocutory appeal on two issues: whether the FTC has authority to regulate cybersecurity under the unfairness prong of *§ 45(a)*; and, if so, whether Wyndham had fair notice its specific cybersecurity practices could fall short of that provision.[1] We affirm the District Court.

I. Background

A. Wyndham's Cybersecurity

Wyndham Worldwide is a hospitality company that franchises and manages hotels and sells timeshares through three subsidiaries.[2] Wyndham licensed its brand name to approximately 90 independently owned hotels. Each Wyndham-branded hotel has a property management system that processes consumer information that includes names, home addresses, email addresses, telephone numbers, payment card account numbers, expiration dates, and security codes. Wyndham "manage[s]" these systems and requires the hotels to "purchase and configure" them to its own specifications. Compl. at ¶ 15, 17. It also operates a computer network in Phoenix, Arizona, that connects its data center with the property **[**5]** management systems of each of the Wyndham-branded hotels.

[1] On appeal, Wyndham also argues that the FTC fails the pleading requirements of an unfairness claim. As Wyndham did not request and we did not grant interlocutory appeal on this issue, we decline to address it.

[2] In addition to Wyndham Worldwide, the defendant entities are Wyndham Hotel Group, LLC, Wyndham Hotels and Resorts, LCC, and Wyndham Hotel Management, Inc. For convenience, we refer to all defendants jointly as Wyndham.

The FTC alleges that, at least since April 2008, Wyndham engaged in unfair cybersecurity practices that, "taken together, unreasonably and unnecessarily exposed consumers' personal data to unauthorized access and theft." *Id.* at ¶ 24. This claim is fleshed out as follows.

1. The company allowed Wyndham-branded hotels to store payment card information in clear readable text.

2. Wyndham allowed the use of easily guessed passwords to access the property management systems. For example, to gain "remote access to at least one hotel's system," which was developed by Micros Systems, Inc., the user ID and password were both "micros." *Id.* at ¶ 24(f).

[*241] 3. Wyndham failed to use "readily available security measures"—such as firewalls—to "limit access between [the] hotels' property management systems, . . . corporate network, and the Internet." *Id.* at ¶ 24(a).

4. Wyndham allowed hotel property management systems to connect to its **[**6]** network without taking appropriate cybersecurity precautions. It did not ensure that the hotels implemented "adequate information security policies and procedures." *Id.* at ¶ 24(c). Also, it knowingly allowed at least one hotel to connect to the Wyndham network with an out-of-date operating system that had not received a security update in over three years. It allowed hotel servers to connect to Wyndham's network even though "default user IDs and passwords were enabled . . . , which were easily available to hackers through simple Internet searches." *Id.* And, because it failed to maintain an "adequate[] inventory [of] computers connected to [Wyndham's] network [to] manage the devices," it was unable to identify the source of at least one of the cybersecurity attacks. *Id.* at ¶ 24(g).

5. Wyndham failed to "adequately restrict" the access of third-party vendors to its network and the servers of Wyndham-branded hotels. *Id.* at ¶ 24(j). For example, it did not "restrict[] connections to specified IP addresses or grant[] temporary, limited access, as necessary." *Id.*

6. It failed to employ "reasonable measures to detect and prevent unauthorized access" to its computer network or to "conduct security **[**7]** investigations." *Id.* at ¶ 24(h).

7. It did not follow "proper incident response procedures." *Id.* at ¶ 24(i). The hackers used similar methods in each attack, and yet Wyndham failed to monitor its network for malware used in the previous intrusions.

Although not before us on appeal, the complaint also raises a deception claim, alleging that since 2008 Wyndham has published a privacy policy on its website that overstates the company's cybersecurity.

> We safeguard our Customers' personally identifiable information by using industry standard practices. Although "guaranteed security" does not exist either on or off the Internet, we make commercially reasonable efforts to make our collection of such [i]nformation consistent with all applicable laws and regulations. Currently, our Web sites utilize a variety of different security measures designed to protect personally identifiable information from unauthorized access by users both inside and outside of our company, including the use of 128-bit encryption based on a Class 3 Digital Certificate issued by Verisign Inc. This allows for utilization of Secure Sockets Layer, which is a method for encrypting data. This protects confidential information—such as credit **[**8]** card numbers, online forms, and financial data—from loss, misuse, interception and hacking. We take commercially reasonable efforts to create and maintain "fire walls" and other appropriate safeguards . . . .

Id. at ¶ 21. The FTC alleges that, contrary to this policy, Wyndham did not use encryption, firewalls, and other commercially reasonable methods for protecting consumer data.

B. The Three Cybersecurity Attacks

As noted, on three occasions in 2008 and 2009 hackers accessed Wyndham's network and the property management systems of Wyndham-branded hotels. In April 2008, hackers first broke into the local network of a hotel in Phoenix, Arizona, which was connected to Wyndham's network and the Internet. They then **[*242]** used the brute-force method—repeatedly guessing users' login IDs and passwords—to access an administrator account on Wyndham's network. This enabled them to obtain consumer data on computers throughout the network. In total, the hackers obtained unencrypted

information for over 500,000 accounts, which they sent to a domain in Russia.

In March 2009, hackers attacked again, this time by accessing Wyndham's network through an administrative account. The FTC claims that Wyndham was **[**9]** unaware of the attack for two months until consumers filed complaints about fraudulent charges. Wyndham then discovered "memory-scraping malware" used in the previous attack on more than thirty hotels' computer systems. *Id.* at ¶ 34. The FTC asserts that, due to Wyndham's "failure to monitor [the network] for the malware used in the previous attack, hackers had unauthorized access to [its] network for approximately two months." *Id.* In this second attack, the hackers obtained unencrypted payment card information for approximately 50,000 consumers from the property management systems of 39 hotels.

Hackers in late 2009 breached Wyndham's cybersecurity a third time by accessing an administrator account on one of its networks. Because Wyndham "had still not adequately limited access between . . . the Wyndham-branded hotels' property management systems, [Wyndham's network], and the Internet," the hackers had access to the property management servers of multiple hotels. *Id.* at ¶ 37. Wyndham only learned of the intrusion in January 2010 when a credit card company received complaints from cardholders. In this third attack, hackers obtained payment card information for approximately 69,000 customers **[**10]** from the property management systems of 28 hotels.

The FTC alleges that, in total, the hackers obtained payment card information from over 619,000 consumers, which (as noted) resulted in at least $10.6 million in fraud loss. It further states that consumers suffered financial injury through "unreimbursed fraudulent charges, increased costs, and lost access to funds or credit," *Id.* at ¶ 40, and that they "expended time and money resolving fraudulent charges and mitigating subsequent harm." *Id.*

C. Procedural History

The FTC filed suit in the U.S. District Court for the District of Arizona in June 2012 claiming that Wyndham engaged in "unfair" and "deceptive" practices in violation of *§ 45(a)*. At Wyndham's request, the Court transferred the case to the U.S. District Court for the District of New Jersey. Wyndham then filed a Rule 12(b)(6) motion to dismiss both the unfair practice and deceptive practice claims. The District Court denied the motion but certified its decision on the unfairness claim for interlocutory appeal. We granted Wyndham's application for appeal.

II. Jurisdiction and Standards of Review

The District Court has subject-matter jurisdiction under *28 U.S.C. §§ 1331*, *1337(a)*, and *1345*. We have jurisdiction under *28 U.S.C. § 1292(b)*.

HN1[↑] We have plenary **[**11]** review of a district court's ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Farber v. City of Paterson, 440 F.3d 131, 134 (3d Cir. 2006)*. In this review, "we accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Pinker v. Roche Holdings **[*243]** Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)*.

III. FTC's Regulatory Authority Under *§ 45(a)*

A. Legal Background

HN2[↑] The Federal Trade Commission Act of 1914 prohibited "unfair methods of competition in commerce." Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (codified as amended at *15 U.S.C. § 45(a)*). Congress "explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' . . . by enumerating the particular practices to which it was intended to apply." *FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-40, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)* (citing S. Rep. No. 63-597, at 13 (1914)); *see also* S. Rep. No. 63-597, at 13 ("The committee gave *careful consideration* to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce . . . . It concluded that . . . there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others." (emphasis added)). The takeaway is that Congress designed **[**12]** the term as a "flexible concept with evolving content," *FTC v. Bunte Bros., 312 U.S. 349, 353, 61 S. Ct. 580, 85 L. Ed. 881, 32 F.T.C. 1848 (1941)*, and "intentionally left [its] development . . . to

the Commission," *Atl. Ref. Co. v. FTC, 381 U.S. 357, 367, 85 S. Ct. 1498, 14 L. Ed. 2d 443 (1965)*.

HN3[] After several early cases limited "unfair methods of competition" to practices harming competitors and not consumers, *see, e.g., FTC v. Raladam Co., 283 U.S. 643, 51 S. Ct. 587, 75 L. Ed. 1324, 15 F.T.C. 598 (1931)*, Congress inserted an additional prohibition in *§ 45(a)* against "unfair or deceptive acts or practices in or affecting commerce," Wheeler-Lea Act, Pub. L. No. 75-447, § 5, 52 Stat. 111, 111 (1938).

HN4[] For the next few decades, the FTC interpreted the unfair-practices prong primarily through agency adjudication. But in 1964 it issued a "Statement of Basis and Purpose" for unfair or deceptive advertising and labeling of cigarettes, *29 Fed. Reg. 8324, 8355 (July 2, 1964)*, which explained that the following three factors governed unfairness determinations:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Id. ***[**13]*** Almost a decade later, the Supreme Court implicitly approved these factors, apparently acknowledging their applicability to contexts other than cigarette advertising and labeling. *Sperry, 405 U.S. at 244 n.5*. The Court also held that, under the policy statement, the FTC could deem a practice unfair based on the third prong—substantial consumer injury—without finding that at least one of the other two prongs was also satisfied. *Id.*

During the 1970s, the FTC embarked on a controversial campaign to regulate children's advertising through the unfair-practices prong of *§ 45(a)*. At the request of Congress, the FTC issued a second policy statement in 1980 that clarified the three factors. FTC Unfairness Policy Statement, Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Senate Comm. on Commerce, Sci., and Transp. (Dec. 17, 1980), *appended to Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984)* [hereinafter **[*244]** 1980 Policy Statement]. It explained that public policy considerations are relevant in determining whether a particular practice causes substantial consumer injury. *Id. at 1074-76*. Next, it "abandoned" the "theory of immoral or unscrupulous conduct . . . altogether" as an "independent" basis for an unfairness claim. *Int'l Harvester Co., 104 F.T.C. at 1061 n.43*; 1980 Policy Statement, *supra at 1076* ("The Commission has . **[**14]** . . never relied on [this factor] as an independent basis for a finding of unfairness, and it will act in the future only on the basis of the [other] two."). And finally, the Commission explained that "[u]njustified consumer injury is the primary focus of the FTC Act" and that such an injury "[b]y itself . . . can be sufficient to warrant a finding of unfairness." 1980 Policy Statement, *supra at 1073*. This "does not mean that every consumer injury is legally 'unfair.'" *Id.* Indeed,

> [t]o justify a finding of unfairness the injury must satisfy three tests. [1] It must be substantial; [2] it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and [3] it must be an injury that consumers themselves could not reasonably have avoided.

Id.

HN5[] In 1994, Congress codified the 1980 Policy Statement at *15 U.S.C. § 45(n)*:

> The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. **[**15]** In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695. Like the 1980 Policy Statement, *§ 45(n)* requires substantial injury that is not reasonably avoidable by consumers and that is not outweighed by the benefits to consumers or competition. It also

acknowledges the potential significance of public policy and does not expressly require that an unfair practice be immoral, unethical, unscrupulous, or oppressive.

B. Plain Meaning of Unfairness

Wyndham argues (for the first time on appeal) that the three requirements of *15 U.S.C. § 45(n)* are necessary but insufficient conditions of an unfair practice and that the plain meaning of the word "unfair" imposes independent requirements that are not met here. Arguably, *§ 45(n)* may not identify all of the requirements for an unfairness claim. (While the provision forbids the FTC from declaring an act unfair "unless" the act satisfies the three specified requirements, it does not answer whether these are the *only* requirements for a finding of unfairness.) Even if so, some of Wyndham's **[**16]** proposed requirements are unpersuasive, and the rest are satisfied by the allegations in the FTC's complaint.

First, citing *FTC v. R.F. Keppel & Brother, Inc., 291 U.S. 304, 54 S. Ct. 423, 78 L. Ed. 814, 18 F.T.C. 684 (1934)*, Wyndham argues that conduct is only unfair when it injures consumers "through unscrupulous or unethical behavior." Wyndham Br. at 20-21. But *Keppel* nowhere says that unfair conduct must be unscrupulous or unethical. Moreover, in *Sperry* the Supreme Court rejected the view that the FTC's 1964 policy **[*245]** statement required unfair conduct to be "unscrupulous" or "unethical." *405 U.S. at 244 n.5*.[3] Wyndham points to no subsequent FTC policy statements, adjudications, judicial opinions, or statutes that would suggest any change since *Sperry*.

Next, citing one dictionary, Wyndham argues that a practice is only "unfair" if it is "not equitable" or is "marked by injustice, partiality, or deception." Wyndham Br. at 18-19 (citing *Webster's Ninth New Collegiate Dictionary* (1988)). Whether these are requirements of an unfairness claim makes little difference here. A company does not act equitably when it publishes a privacy policy to attract customers who are concerned about data privacy, fails to make good on that promise by investing inadequate resources in cybersecurity, exposes its unsuspecting customers to substantial financial injury, and retains the profits of their business.

We recognize this analysis of unfairness encompasses some facts relevant to the FTC's deceptive practices claim. But facts relevant to unfairness and deception claims frequently overlap. *See, e.g.*, *Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 980 n.27, 247 U.S. App. D.C. 167 (D.C. Cir. 1985)* ("The FTC has determined that . . . making unsubstantiated advertising claims may be both an unfair and a deceptive practice."); *Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1367 (11th Cir. 1988)* ("[A] practice may be both deceptive and unfair . . . .").[4] We cannot completely disentangle the two theories here. **[**18]** The FTC argued in the District

[3] *Id.* ("[Petitioner] argues that . . . [the 1964 statement] commits the FTC to the view that misconduct in respect of the third of these criteria is not subject to constraint as 'unfair' absent a concomitant showing of misconduct according to the first or second of these criteria. But all the FTC said in the [1964] statement . . . was that '[t]he wide variety of decisions interpreting the elusive concept of unfairness *at least* makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it **[**17]** is seriously detrimental to consumers or others.'" (emphasis and some alterations in original, citation omitted)).

[4] The FTC has on occasion described deception as a subset of unfairness. *See Int'l Harvester Co., 104 F.T.C. at 1060* ("The Commission's unfairness jurisdiction provides a more general basis for action against acts or practices which cause significant consumer injury. This part of our jurisdiction is broader than that involving deception, and the standards for its exercise are correspondingly more stringent . . . . [U]nfairness is the set of general principles of which deception is a particularly well-established and streamlined subset."); *Figgie Int'l, 107 F.T.C. 313, 373 n.5 (1986)* ("[U]nfair practices are not always deceptive but deceptive practices are always unfair."); *Orkin Exterminating Co., 108 F.T.C. 263, 363 n.78 (1986)*. So have several FTC staff members. *See, e.g.*, J. Howard Beales, Director of the Bureau of Consumer Protection, FTC, Marketing and Public Policy Conference, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003) ("Although, in the past, they have sometimes been viewed as mutually exclusive legal theories, Commission precedent incorporated in the statutory codification makes clear that deception is properly viewed as a subset of unfairness."); Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission* **[**20]** *Act*, 70 Geo. L.J. 225, 265-66 (1981) ("Although deception is generally regarded as a separate aspect of section 5, in its underlying rationale it is really just one specific form of unfair consumer practice . . . . [For example, the] Commission has held that it is deceptive for a merchant to make an advertising claim for which he lacks a reasonable basis, regardless of whether the claim is eventually proven true or false . . . . Precisely because unsubstantiated ads are deceptive in this manner, . . . they also affect the exercise of consumer sovereignty and thus constitute an unfair act or practice.").

Court that consumers could not reasonably avoid injury by booking with another hotel chain because Wyndham had **[*246]** published a misleading privacy policy that overstated its cybersecurity. Plaintiff's Response in Opposition to the Motion to Dismiss by Defendant at 5, *FTC v. Wyndham Worldwide Corp., 10 F. Supp. 3d 602 (D.N.J. 2014)* (No. 13-1887) ("Consumers could not take steps to avoid Wyndham's unreasonable data security [before providing their personal information] because Wyndham falsely told consumers that it followed 'industry standard practices.'"); *see* JA 203 ("On the reasonabl[y] avoidable part, . . . consumers certainly would not have known that Wyndham had unreasonable data security practices in this case . . . . We also allege that in [Wyndham's] privacy policy they deceive consumers by saying we do have reasonable security data practices. That is one way consumers couldn't possibly have avoided providing a credit card to a company."). Wyndham did not challenge this argument in the District Court nor does it do so now. If Wyndham's conduct satisfies the reasonably avoidable requirement at least partially because of its privacy policy—an inference we find plausible at this stage of the litigation—then the policy is directly **[**19]** relevant to whether Wyndham's conduct was unfair.[5]

Continuing on, Wyndham asserts that a business "does not treat its customers in an 'unfair' manner when the business *itself* is victimized by criminals." Wyndham Br. at 21 (emphasis in original). It offers no reasoning or authority for this principle, and we can think of none ourselves. **[**21]** ***HN6***[↑] Although unfairness claims "usually involve actual and completed harms," *Int'l Harvester, 104 F.T.C. at 1061*, "they may also be brought on the basis of likely rather than actual injury," *id. at 1061 n.45*. And the FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs. *15 U.S.C. § 45(n)* ("[An unfair act or practice] causes or is *likely to cause* substantial injury" (emphasis added)). More importantly, that a company's conduct was not *the most* proximate cause of an injury generally does not immunize liability from foreseeable harms. *See Restatement (Second) of Torts § 449* (1965) ("If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act[,] whether innocent, negligent, intentionally tortious, or criminal[,] does not prevent the actor from being liable for harm caused thereby."); *Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n, 66 F.3d 669, 688 (4th Cir. 1995)* ("Proximate cause may be found even where the conduct of the third party is . . . criminal, so long as the conduct was facilitated by the first party and reasonably foreseeable, and some ultimate harm was reasonably foreseeable."). For good reason, Wyndham does not argue that the cybersecurity intrusions were unforeseeable. That would be particularly implausible as to the second **[**22]** and third attacks.

Finally, Wyndham posits a *reductio ad absurdum*, arguing that if the FTC's unfairness authority extends to Wyndham's conduct, then the FTC also has the authority to "regulate the locks on hotel room doors, . . . to require every store in the land to post an armed guard at the door," Wyndham Br. at 23, and to sue supermarkets that are "sloppy about sweeping up banana peels," Wyndham Reply Br. at 6. **[*247]** The argument is alarmist to say the least. And it invites the tart retort that, were Wyndham a supermarket, leaving so many banana peels all over the place that 619,000 customers fall hardly suggests it should be immune from liability under *§ 45(a)*.

We are therefore not persuaded by Wyndham's arguments that the alleged conduct falls outside the plain meaning of "unfair."

C. Subsequent Congressional Action

Wyndham next argues that, even if cybersecurity were covered by *§ 45(a)* as initially enacted, three legislative acts since the subsection was amended in 1938 have reshaped the provision's meaning to exclude cybersecurity. ***HN7***[↑] A recent amendment to the Fair Credit Reporting Act directed the FTC and other agencies to develop regulations for the proper disposal of consumer data. *See* Pub. L. No. 108-159, § 216(a), 117 Stat. 1952, 1985-86 (2003) (codified **[**23]** as

[5] No doubt there is an argument that consumers could not reasonably avoid injury even absent the misleading privacy policy. *See, e.g.*, James P. Nehf, *Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy*, *2005 U. Ill. J.L. Tech. & Pol'y. 1* (arguing that consumers may care about data privacy, but be unable to consider it when making credit card purchases). We have no occasion to reach this question, as the parties have not raised it.

amended at 15 U.S.C. § 1681w). The Gramm-Leach-Bliley Act required the FTC to establish standards for financial institutions to protect consumers' personal information. *See* Pub. L. No. 106-102, § 501(b), 113 Stat. 1338, 1436-37 (1999) (codified as amended at 15 U.S.C. § 6801(b)). And the Children's Online Privacy Protection Act ordered the FTC to promulgate regulations requiring children's websites, among other things, to provide notice of "what information is collected from children . . . , how the operator uses such information, and the operator's disclosure practices for such information." Pub. L. No. 105-277, § 1303, 112 Stat. 2681, 2681-730-732 (1998) (codified as amended at 15 U.S.C. § 6502).[6] Wyndham contends these "tailored grants of substantive authority to the FTC in the cybersecurity field would be inexplicable if the Commission already had general substantive authority over this field." Wyndham Br. at 25. Citing *FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)*, Wyndham concludes that Congress excluded cybersecurity from the FTC's unfairness authority by enacting these measures.

We are not persuaded. The inference to **[**24]** congressional intent based on post-enactment legislative activity in *Brown & Williamson* was far stronger. There, the Food and Drug Administration had repeatedly disclaimed regulatory authority over tobacco products for decades. *Id. at 144*. During that period, Congress enacted six statutes regulating tobacco. *Id. at 143-44*. The FDA later shifted its position, claiming authority over tobacco products. The Supreme Court held that Congress excluded tobacco-related products from the FDA's authority in enacting the statutes. As tobacco products would necessarily be banned if subject to the FDA's regulatory authority, any interpretation to the contrary would contradict congressional intent to regulate rather than ban tobacco products outright. *Id. 137-39*; *Massachusetts v. EPA, 549 U.S. 497, 530-31, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)*. Wyndham does not argue that recent privacy laws *contradict* reading corporate cybersecurity into *§ 45(a)*. Instead, it merely asserts that Congress had no reason to enact them if the FTC could already regulate **[*248]** cybersecurity through that provision. Wyndham Br. at 25-26.

We disagree that Congress lacked reason to pass the recent legislation if the FTC already had regulatory authority over some cybersecurity issues. The Fair Credit Reporting Act requires (rather than authorizes) **[**25]** the FTC to issue regulations, *15 U.S.C. § 1681w* ("The Federal Trade Commission . . . *shall* issue final regulations requiring . . . ." (emphasis added)); *id. § 1681m(e)(1)(B)* ("The [FTC and other agencies] *shall* jointly . . . prescribe regulations requiring each financial institution . . . ." (emphasis added)), and expands the scope of the FTC's authority, *id. § 1681s(a)(1)* ("[A] violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce . . . and shall be subject to enforcement by the [FTC] . . . irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the [FTC] Act."). The Gramm-Leach-Bliley Act similarly requires the FTC to promulgate regulations, *id. § 6801(b)* ("[The FTC] shall establish appropriate standards for the financial institutions subject to [its] jurisdiction . . . ."), and relieves some of the burdensome *§ 45(n)* requirements for declaring acts unfair, *id. § 6801(b)* ("[The FTC] shall establish appropriate standards . . . to protect against unauthorized access to or use of . . . records . . . which could result in substantial harm *or inconvenience to any customer*." (emphasis added)). And the Children's Online Privacy **[**26]** Protection Act required the FTC to issue regulations and empowered it to do so under the procedures of the Administrative Procedure Act, *id. § 6502(b)* (citing *5 U.S.C. § 553*), rather than the more burdensome Magnuson-Moss procedures under which the FTC must usually issue regulations, *15 U.S.C. § 57a*. Thus none of the recent privacy legislation was "inexplicable" if the FTC already had some authority to regulate corporate cybersecurity through *§ 45(a)*.

Next, Wyndham claims that the FTC's interpretation of *§ 45(a)* is "inconsistent with its repeated efforts to obtain from Congress the very authority it purports to wield here." Wyndham Br. at 28. Yet again we disagree. In two of the statements cited by Wyndham, the FTC

[6] Wyndham also points to a variety of cybersecurity bills that Congress has considered and not passed. "[S]ubsequent legislative history . . . is particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990)*.

clearly said that some cybersecurity practices are "unfair" under the statute. *See Consumer Data Protection: Hearing Before the Subcomm. on Commerce, Mfg. & Trade of the H. Comm. on Energy & Commerce*, 2011 WL 2358081, at *6 (June 15, 2011) (statement of Edith Ramirez, Comm'r, FTC) ("[T]he Commission enforces the FTC Act's proscription against unfair . . . acts . . . in cases where a business['s] . . . failure to employ reasonable security measures causes or is likely to cause substantial consumer injury."); *Data Theft Issues: Hearing Before the Subcomm. on Commerce, Mfg. & Trade of the H. Comm. on Energy & Commerce*, 2011 WL 1971214, at *7 (May 4, 2011) (statement of David C. Vladeck, Director, FTC Bureau of Consumer Protection) (same).

In the two other cited statements, given in 1998 and 2000, the FTC only acknowledged that it **[**27]** cannot require companies to adopt "fair information practice policies." *See* FTC, *Privacy Online: Fair Information Practices in the Electronic Marketplace—A Report to Congress* 34 (2000) [hereinafter *Privacy Online*]; *Privacy in Cyberspace: Hearing Before the Subcomm. on Telecomms., Trade & Consumer Prot. of the H. Comm. on Commerce*, 1998 WL 546441 (July 21, 1998) (statement of Robert Pitofsky, Chairman, FTC). These policies would protect consumers from far more than the kind of "substantial injury" typically covered by *§ 45(a)*. In addition **[*249]** to imposing some cybersecurity requirements, they would require companies to give notice about what data they collect from consumers, to permit those consumers to decide how the data is used, and to permit them to review and correct inaccuracies. *Privacy Online*, *supra* at 36-37. As the FTC explained in the District Court, the primary concern driving the adoption of these policies in the late 1990s was that "companies . . . were capable of *collecting* enormous amounts of information about consumers, and people were suddenly realizing this." JA 106 (emphasis added). The FTC thus could not require companies to adopt broad fair information practice policies because they were "just collecting th[e] information, and consumers [were not] injured." *Id.*; *see also* Order Denying Respondent LabMD's Motion to Dismiss, *No. 9357, 2014 FTC LEXIS 2 at *51 (Jan. 16, 2014)* [hereinafter *LabMD Order* ***[**28]*** or *LabMD*] ("[T]he sentences from the 1998 and 2000 reports . . . simply recognize that the Commission's existing authority may not be sufficient to effectively protect consumers with regard to *all* data privacy issues of potential concern (such as aspects of children's online privacy) . . . ." (emphasis in original)). Our conclusion is this: that the FTC later brought unfairness actions against companies whose inadequate cybersecurity resulted in consumer harm is not inconsistent with the agency's earlier position.

Having rejected Wyndham's arguments that its conduct cannot be unfair, we assume for the remainder of this opinion that it was.

IV. Fair Notice

HN8[↑] A conviction or punishment violates the *Due Process Clause* of our Constitution if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317, 183 L. Ed. 2d 234 (2012)* (internal quotation marks omitted). Wyndham claims that, notwithstanding whether its conduct was unfair under *§ 45(a)*, the FTC failed to give fair notice of the specific cybersecurity standards the company was required to follow.[7]

A. Legal Standard

HN9[↑] The level of required notice for a person to be subject to liability varies by circumstance. In *Bouie v. City of Columbia*, the Supreme Court held that a "judicial construction of a criminal statute" violates due process if it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)* (internal quotation marks omitted); *see also Rogers v. Tennessee, 532 U.S. 451, 457, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001)*; *In re Surrick, 338 F.3d 224, 233-34 (3d Cir. 2003)*. The precise meaning of "unexpected and indefensible" is not entirely clear, *United States v. Lata, 415 F.3d 107, 111*

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[7] We do not read Wyndham's briefing **[**29]** as raising a meaningful argument under the "discriminatory enforcement" prong. A few sentences in a reply brief are not enough. *See* Wyndham Reply Br. at 26 ("To provide the notice required by due process, a statement must in some sense declare what conduct the law proscribes and thereby constrain enforcement discretion . . . . Here, the consent decrees at issue . . . do not limit the Commission's enforcement authority in any way." (citation omitted)).

(1st Cir. 2005), but we and our sister circuits frequently use language implying that a conviction violates due process if the defendant could not reasonably foresee that a court might adopt the new interpretation of the statute.[8]

[*250] ***HN10***[↑] The fair notice doctrine extends to civil cases, particularly where a penalty is imposed. *See Fox Television Stations, Inc., 132 S. Ct. at 2317-20*; *Boutilier v. INS, 387 U.S. 118, 123, 87 S. Ct. 1563, 18 L. Ed. 2d 661 (1967)*. "Lesser degrees of specificity" are allowed in civil cases because the consequences are smaller than in the criminal context. *San Filippo v. Bongiovanni, 961 F.2d 1125, 1135 (3d Cir. 1992)*. The standards are especially lax for civil statutes that regulate economic activities. For those statutes, a party lacks fair notice when the relevant standard is "so vague as to be no rule or standard at all." *CMR D.N. Corp. v. City of Phila., 703 F.3d 612, 631-32 (3d Cir. 2013)* (internal quotation marks omitted).[9]

HN11[↑] A different set of considerations is implicated when agencies are involved in statutory or regulatory interpretation. Broadly speaking, agencies interpret in at least three contexts. One is where an agency administers a statute without any special authority to create new rights or obligations. When disputes arise under this kind of agency interpretation, the courts give respect to the agency's view to the extent it is persuasive, but they retain the primary responsibility for construing the statute.[10] As such, the standard of notice afforded to litigants about the meaning of the statute is not dissimilar to the standard of notice for civil statutes generally **[*251]** because the court, not the agency, is **[**32]** the ultimate arbiter of the statute's meaning.

The second context is where an agency exercises its authority to fill gaps in a statutory scheme. There the agency is primarily responsible for interpreting the statute because the courts must defer to any reasonable construction it adopts. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. Courts appear to apply a more stringent standard of notice to civil regulations than civil statutes: parties are entitled to have "ascertainable certainty" of what conduct is legally required by the regulation. *See Chem. Waste Mgmt., Inc. v. EPA, 976 F.2d 2, 29 (D.C. Cir. 1992)* (per curiam) (denying petitioners' challenge that a recently promulgated EPA regulation fails fair notice principles); *Nat'l Oilseed Processors Ass'n. v. OSHA, 769 F.3d 1173, 1183–84, 413 U.S. App. D.C. 85 (D.C. Cir. 2014)* (denying petitioners' challenge that a recently promulgated OSHA regulation fails fair notice principles).

HN12[↑] The third context is where an agency interprets the meaning of its own regulation. Here also

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[8] *See Ortiz v. N.Y.S. Parole, 586 F.3d 149, 159 (2d Cir. 2009)* (holding that the "unexpected and indefensible" **[**30]** standard "requires only that the law . . . not lull the potential defendant into a *false sense of security*, giving him *no reason even to suspect* that his conduct *might* be within its scope." (emphases added)); *In re Surrick, 338 F.3d at 234* ("[We] reject [the] contention that . . . nothing in the history of [the relevant provision] had stated *or even foreshadowed* that reckless conduct *could* violate it. Indeed, in view of the foregoing, the [state court's] decision . . . was neither 'unexpected' nor 'indefensible' by reference to the law which had been expressed prior to the conduct in issue." (emphases added)); *Warner v. Zent, 997 F.2d 116, 125 (6th Cir. 1993)* ("'The underlying principle is that no man shall be held criminally responsible for conduct which *he could not reasonably understand* to be proscribed.'" (emphasis added) (quoting *United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954)*); *id. at 127* ("It was *by no means unforeseeable* . . . that the [court] would [construe the statute as it did]." (emphasis added)); *see also Lata, 415 F.3d at 112* ("[S]omeone in [the defendant's] position *could not reasonably be surprised* by the sentence he eventually received . . . . We reserve for the future the case . . . in which a sentence is imposed . . . that is *higher than any that might realistically have been imagined* at the time of the crime . . . ." (emphases **[**31]** added)).

[9] *See also Bongiovanni, 961 F.2d at 1138*; *Boutilier, 387 U.S. at 123*; *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n, 558 F.3d 1301, 1310 (11th Cir. 2009)*; *Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 507 (5th Cir. 2001)*; *Columbia Nat'l Res., Inc. v. Tatum, 58 F.3d 1101, 1108 (6th Cir. 1995)*.

[10] *See Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)* ("[The agency interpretation is] not controlling upon the courts by reason of [its] authority [but is a] body of experience and informed judgment to which courts . . . may properly resort for guidance."); *Christenson v. Harris Cnty., 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)* ("[Agency interpretations are] entitled to respect under [*Skidmore*], but only to the extent that [they] have the power to persuade." (internal quotation marks omitted)); *see also* Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them* "Chevron *Space" and* "Skidmore *Weight"*, *112 Colum. L. Rev. 1143, 1147 (2012)* ("*Skidmore* . . . is grounded in a construct of the agency as responsible expert, arguably possessing special knowledge of the statutory meaning a court should consider in *reaching its own judgment*." (emphasis added)).

courts typically must defer to the agency's reasonable interpretation.[11] We and several of our sister circuits have stated that private parties are entitled to know with "ascertainable certainty" an agency's interpretation of its regulation. *Sec'y of Labor v. Beverly Healthcare-Hillview, 541 F.3d 193, 202 (3d Cir. 2008)*; *Dravo Corp. v. Occupational Safety & Health Rev. Comm'n, 613 F.2d 1227, 1232-33 (3d Cir. 1980)*.[12] Indeed, "the *due process clause* prevents . . . deference from validating the application of a regulation that fails to give fair **[**33]** warning of the conduct it prohibits or requires." *AJP Constr., Inc., 357 F.3d at 75* (internal quotation marks omitted).

HN13[↑] A higher standard of fair notice applies in the second and third contexts than in the typical civil statutory interpretation case because agencies engage **[*252]** in interpretation differently than courts. *See* Frank H. Easterbook, *Judicial Discretion in Statutory Interpretation*, *57 Okla. L. Rev. 1, 3 (2004)* ("A judge who announces deference is approving a shift in interpretive method, not just a shift in the identity of the decider, as if a suit were being transferred to a court in a different venue."). In resolving ambiguity in statutes or regulations, courts generally adopt the *best* or *most reasonable* interpretation. But, as the agency is often free to adopt *any reasonable construction*, it may impose higher legal obligations than required by the best interpretation.[13]

Furthermore, ***HN14***[↑] courts generally resolve statutory ambiguity by applying traditional methods of construction. Private parties can reliably predict the court's interpretation by applying the same methods. In contrast, an agency may also rely on technical expertise and political values.[14] It is harder to predict how an agency **[**36]** will construe a statute or regulation at

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[11] *See* *Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)* ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is . . . controlling unless plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)); *Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337, 185 L. Ed. 2d 447 (2013)* ("When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)); *Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 150-51, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991)* ("In situations in which the meaning of [regulatory] language is not free from doubt, the reviewing court should give effect to the agency's interpretation so long as it is reasonable." (alterations in original, internal quotations omitted)); *Columbia Gas Transp., LLC v. 1.01 Acres, More or Less in Penn Twp., 768 F.3d 300, 313 (3d Cir. 2014)* ("[A]s an agency interpretation of its own regulation, it is deserving of deference." (citing *Decker*)).

[12] *See also* *Wis. Res. Prot. Council v. Flambeau Mining Co., 727 F.3d 700, 708 (7th Cir. 2013)*; *AJP Const., Inc. v. Sec'y of Labor, 357 F.3d 70, 75-76, 360 U.S. App. D.C. 55 (D.C. Cir. 2004)* (quoting *Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1329, 311 U.S. App. D.C. 360 (D.C. Cir. 1995)*); *Tex. Mun. Power Agency v. EPA, 89 F.3d 858, 872, 319 U.S. App. D.C. 217 (D.C. Cir. 1996)*; *Ga. Pac. Corp. v. Occupational Safety & Health Rev. Comm'n, 25 F.3d 999, 1005 (11th Cir. 1994)*; *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 528 F.2d 645, 649 (5th Cir. 1976)*. In fact, the Supreme Court applied *Skidmore* to an interpretation by an agency of a regulation it adopted instead of deferring to that interpretation because the latter would have "seriously undermine[d] the principle that agencies should provide regulated parties fair warning **[**34]** of the conduct [a regulation] prohibits or requires." *Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167, 183 L. Ed. 2d 153 & n.15 (2012)* (second alteration in original, internal quotation marks omitted) (citing *Dravo, 613 F.2d at 1232-33* and the "ascertainable certainty" standard).

[13] *See* *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)* ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."); **[**35]** *Decker, 133 S. Ct. at 1337* ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)); *Auer, 519 U.S. at 462-63* ("[The rule that Fair Labor Standards Act] exemptions are to be narrowly construed against . . . employers . . . is a rule governing judicial interpretation of statutes and regulations, not a limitation on the Secretary's power to resolve ambiguities in his own regulations. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." (internal quotation marks omitted)).

[14] *See* *Garfias-Rodriguez v. Holder, 702 F.3d 504, 518 (9th Cir. 2012)* (rejecting the applicability of the judicial retroactivity test to a new Board of Immigration Appeals' interpretation because the "decision fill[ed] a statutory gap and [was] an exercise [of the agency's] policymaking function"); Easterbrook, *supra at 3* ("Judges in their own work forswear the methods that agencies employ" to interpret statutes, which include relying on "political pressure, the President's view of happy outcomes, cost-benefit studies . . . and the other tools of policy wonks . . . .").

some unspecified point in the future, particularly when that interpretation will depend on the "political views of the President in office at [that] time." Strauss, *supra at 1147*.[15]

Wyndham argues it was entitled to "ascertainable **[**37]** certainty" of the FTC's interpretation of what specific cybersecurity practices are required by *§ 45(a)*. Yet it has contended repeatedly—no less than seven separate occasions in *this* case—that there is no FTC rule or adjudication about cybersecurity that merits deference here. The necessary implication, one that Wyndham itself has explicitly drawn on two occasions noted below, is that federal courts are to interpret *§ 45(a)* in the first **[*253]** instance to decide whether Wyndham's conduct was unfair.

Wyndham's argument has focused on the FTC's motion to dismiss order in *LabMD*, an administrative case in which the agency is pursuing an unfairness claim based on allegedly inadequate cybersecurity. *LabMD Order, supra.* Wyndham first argued in the District Court that the *LabMD Order* does not merit *Chevron* deference because "self-serving, litigation-driven decisions . . . are entitled to no deference at all" and because the opinion adopted an impermissible construction of the statute. Wyndham's January 29, 2014 Letter at 1-2, *FTC v. Wyndham Worldwide Corp., 10 F. Supp. 3d 602 (D.N.J. 2014)* (No. 13-1887).

Second, Wyndham switched gears in its opening brief on appeal to us, arguing that *LabMD* does not merit *Chevron* deference because courts owe no deference to an agency's interpretation of the "boundaries **[**38]** of Congress' statutory delegation of authority to the agency." Wyndham Br. at 19-20.

Third, in its reply brief it argued again that *LabMD* does not merit *Chevron* deference because it adopted an impermissible construction of the statute. Wyndham Reply Br. at 14.

Fourth, Wyndham switched gears once more in a Rule 28(j) letter, arguing that *LabMD* does not merit *Chevron* deference because the decision was nonfinal. Wyndham's February 6, 2015 Letter (citing *LabMD, Inc. v. FTC, 776 F.3d 1275 (11th Cir. 2015)*).

Fifth, at oral argument we asked Wyndham whether the FTC has decided that cybersecurity practices are unfair. Counsel answered: "No. I don't think consent decrees count, I don't think the 2007 brochure counts, and I don't think *Chevron* deference applies. So are . . . they asking this federal court in the first instance . . . [?] I think the answer to that question is yes . . . ." Oral Arg. Tr. at 19.

Sixth, due to our continuing confusion about the parties' positions on a number of issues in the case, we asked for supplemental briefing on certain questions, including whether the FTC had declared that cybersecurity practices can be unfair. In response, Wyndham asserted that "the FTC has not declared unreasonable cybersecurity practices 'unfair.'" Wyndham's Supp. Memo. at 3 **[**39]**. Wyndham explained further: "It follows from [our] answer to [that] question that the FTC is asking the federal courts to determine in the first instance that unreasonable cybersecurity practices qualify as 'unfair' trade practices under the FTC Act." *Id. at 4*.

Seventh, and most recently, Wyndham submitted a Rule 28(j) letter arguing that *LabMD* does not merit *Chevron* deference because it decided a question of "deep economic and political significance." Wyndham's June 30, 2015 Letter (quoting *King v. Burwell, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015)*).

Wyndham's position is unmistakable: the FTC has not yet declared that cybersecurity practices can be unfair; there is no relevant FTC rule, adjudication or document that merits deference; and the FTC is asking the federal courts to interpret *§ 45(a)* in the first instance to decide whether it prohibits the alleged conduct here. The implication of this position is similarly clear: if the federal courts are to decide whether Wyndham's conduct was unfair in the first instance under the statute without deferring to any FTC interpretation, then this case involves ordinary judicial interpretation of a civil statute, and the ascertainable certainty standard does not apply. The relevant question is not **[*254]** whether

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[15] *See also Brand X Internet Servs., 545 U.S. at 981* ("[T]he agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . in response to . . . a change in administrations." (internal quotation marks omitted, first omission in original)); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)* (Rehnquist, J., dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its . . . regulations.").

Wyndham had fair **[**40]** notice of the *FTC's interpretation* of the statute, but whether Wyndham had fair notice of what the *statute itself* requires.

Indeed, at oral argument we asked Wyndham whether the cases cited in its brief that apply the "ascertainable certainty" standard—all of which involve a court reviewing an agency adjudication[16] or at least a court being asked to defer to an agency interpretation[17]—apply where the court is to decide the meaning of the statute in the first instance.[18] Wyndham's counsel responded, "I think it would, your Honor. I think if you go to *Ford Motor [Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981)]*, I think that's what was happening there." Oral Arg. Tr. at 61. But *Ford Motor* is readily distinguishable. Unlike Wyndham, the petitioners there did not bring a fair notice claim under the *Due Process Clause*. Instead, they argued that, per *NLRB v. Bell Aerospace Co., 416 U.S. 267, 94 S. Ct. 1757, 40 L. Ed. 2d 134 (1974)*, the FTC abused its discretion by proceeding through agency adjudication rather than rulemaking.[19] More importantly, the Ninth Circuit was reviewing an agency adjudication; it was not interpreting the meaning of the FTC Act in the first instance.

In addition, our understanding of Wyndham's position is consistent with the District Court's opinion, which concluded that the FTC has stated a claim under *§ 45(a)* based on the Court's interpretation of the statute and without any reference to *LabMD* or any other agency adjudication or regulation. *See FTC v. Wyndham Worldwide Corp., 10 F. Supp. 3d 602, 621-26 (D.N.J. 2014)*.

[*255] We thus conclude that Wyndham was not entitled **[**43]** to know with ascertainable certainty the FTC's interpretation of what cybersecurity practices are required by *§ 45(a)*. Instead, the relevant question in this appeal is whether Wyndham had fair notice that its conduct could fall within the meaning of the statute. If later proceedings in this case develop such that the proper resolution is to defer to an agency interpretation that gives rise to Wyndham's liability, we leave to that time a fuller exploration of the level of notice required. For now, however, it is enough to say that we accept Wyndham's forceful contention that we are interpreting the FTC Act (as the District Court did). As a necessary consequence, Wyndham is only entitled to notice of the meaning of the statute and not to the agency's interpretation of the statute.

B. Did Wyndham Have Fair Notice of the Meaning of § 45(a)?

Having decided that Wyndham is entitled to notice of the meaning of the statute, we next consider whether the case should be dismissed based on fair notice principles.

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[16] *See Fox Television Stations, Inc., 132 S. Ct. 2307, 183 L. Ed. 2d 234* (vacating an FCC adjudication for lack of fair notice of an agency interpretation); ***PMD Produce Brokerage Corp. v. USDA, 234 F.3d 48, 344 U.S. App. D.C. 126 (D.C. Cir. 2000)*** (vacating the dismissal of an administrative appeal issued by a Judicial Officer **[**41]** in the Department of Agriculture because the agency's Rules of Practice failed to give fair notice of the deadline for filing an appeal); *Gen. Elec. Co., 53 F.3d 1324, 311 U.S. App. D.C. 360* (vacating an EPA adjudication for lack of fair notice of the agency's interpretation of a regulation); *FTC v. Colgate-Palmolive Co., 380 U.S. 374, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965)* (reviewing an FTC adjudication that found liability).

[17] *See In re Metro-East Mfg. Co., 655 F.2d 805, 810-12 (7th Cir. 1981)* (declining to defer to an agency's interpretation of its own regulation because the defendant could not have known with ascertainable certainty the agency's interpretation).

[18] We asked, "All of your cases on fair notice pertain to an *agency's interpretation* of its own regulation or the statute that governs that agency. Does this fair notice doctrine apply where it is a *court* announcing an *interpretation* of a *statute in the first instance*?" Oral Arg. Tr. at 60 (emphases added).

[19] To the extent Wyndham could have raised this argument, we do not read its briefs to do so. Indeed, its opening brief appears to repudiate the theory. Wyndham Br. at 38-39 ("The district court below framed the fair notice issue here as whether 'the FTC must formally promulgate regulations before bringing its unfairness claim.' With all respect, that characterization of Wyndham's position is a straw man. Wyndham has never **[**42]** disputed the general principle that administrative agencies have discretion to regulate through either rulemaking or adjudication. *See, e.g.*, [*Bell Aerospace Co., 416 U.S. at 290-95*]. Rather, Wyndham's point is only that, however an agency chooses to proceed, it must provide regulated entities with constitutionally requisite fair notice." (internal citations omitted)). Moreover, the Supreme Court has explained that where "it is doubtful [that] any generalized standard could be framed which would have more than marginal utility[, the agency] has reason to . . . develop[] its standards in a case-by-case manner." *Bell Aerospace Co., 416 U.S. at 294*. An agency's "judgment that adjudication best serves this purpose is entitled to great weight." *Id.* Wyndham's opening brief acknowledges that the FTC has given this rationale for proceeding by adjudication, Wyndham Br. at 37-38, but, the company offers no ground to challenge it.

We do not read Wyndham's briefs as arguing the company lacked fair notice that cybersecurity practices can, as a general matter, form the basis of an unfair practice under § 45(a). Wyndham argues instead it **[**44]** lacked notice of what *specific* cybersecurity practices are necessary to avoid liability. We have little trouble rejecting this claim.

To begin with, Wyndham's briefing focuses on the FTC's failure to give notice of its interpretation of the statute and does not meaningfully argue that the statute itself fails fair notice principles. We think it imprudent to hold a 100-year-old statute unconstitutional as applied to the facts of this case when we have not expressly been asked to do so.

Moreover, Wyndham is entitled to a relatively low level of statutory notice for several reasons. ***HN15***[↑] *Subsection 45(a)* does not implicate any constitutional rights here. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)*. It is a civil rather than criminal statute.[20] *Id. at 498-99*. And statutes regulating economic activity receive a "less strict" test because their "subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id. at 498*.

In this context, ***HN16***[↑] the relevant legal rule is not "so vague as to be 'no rule or standard at all.'" *CMR D.N. Corp., 703 F.3d at 632* (quoting *Boutilier, 387 U.S. at 123*). *Subsection 45(n)* asks whether "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." While far from precise, this standard informs parties that the relevant inquiry here is a cost-benefit analysis, *Pa. Funeral Dirs. Ass'n v. FTC, 41 F.3d 81, 89-92 (3d Cir. 1992)*; *Am. Fin. Servs. Ass'n, 767 F.2d at 975*, that considers a number of relevant factors, including the probability and expected size of reasonably unavoidable harms to consumers given a certain level of cybersecurity and the costs to consumers that would arise from investment in stronger cybersecurity. We ac **[*256]** knowledge there will be borderline cases where it is unclear if a particular company's conduct falls below the requisite legal threshold. But under a due process analysis a company is not entitled to such precision as would eliminate all close calls. *Cf. Nash v. United States, 229 U.S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 1232 (1913)* ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates **[**46]** it, some matter of degree."). Fair notice is satisfied here as long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute.

What appears to us is that Wyndham's fair notice claim must be reviewed as an as-applied challenge. *See United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975)*; *San Filippo, 961 F.2d at 1136*. Yet Wyndham does not argue that its cybersecurity practices survive a reasonable interpretation of the cost-benefit analysis required by *§ 45(n)*. One sentence in Wyndham's reply brief says that its "view of what data-security practices are unreasonable . . . is not necessarily the same as the FTC's." Wyndham Reply Br. at 23. Too little and too late.

Wyndham's as-applied challenge falls well short given the allegations in the FTC's complaint. As the FTC points out in its brief, the complaint does not allege that Wyndham used *weak* firewalls, IP address restrictions, encryption software, and passwords. Rather, it alleges that Wyndham failed to use *any* firewall at critical network points, Compl. at ¶ 24(a), did not restrict specific IP addresses *at all*, *id.* at ¶ 24(j), did not use *any* encryption for certain customer files, *id.* at ¶ 24(b), and did not require some users to change their default or factory-setting **[**47]** passwords *at all*, *id.* at ¶ 24(f). Wyndham did not respond to this argument in its reply brief.

Wyndham's as-applied challenge is even weaker given it was hacked not one or two, but three, times. At least after the second attack, it should have been painfully clear to Wyndham that a court could find its conduct failed the cost-benefit analysis. That said, we leave for another day whether Wyndham's alleged cybersecurity

[20] While civil statutes containing "quasi-criminal penalties may be subject to the more stringent review afforded criminal statutes," *Ford Motor Co., 264 F.3d at 508*, we do not know what remedy, if any, the District Court will impose. And Wyndham's briefing **[**45]** does not indicate what kinds of remedies it is exposed to in this proceeding.

practices do in fact fail, an issue the parties did not brief. We merely note that certainly after the second time Wyndham was hacked, it was on notice of the possibility that a court *could* find that its practices fail the cost-benefit analysis.

Several other considerations reinforce our conclusion that Wyndham's fair notice challenge fails. In 2007 the FTC issued a guidebook, *Protecting Personal Information: A Guide for Business*, FTC Response Br. Attachment 1 [hereinafter *FTC Guidebook*], which describes a "checklist[]" of practices that form a "sound data security plan." *Id. at 3*. The guidebook does not state that any particular practice is required by *§ 45(a)*,[21] but it does counsel against many of the specific practices alleged here. For instance, it recommends that companies "consider **[**48]** encrypting sensitive information that is stored on [a] computer network . . . [, c]heck . . . software vendors' websites regularly for alerts about new vulnerabilities, and implement policies for installing vendor-approved patches." *Id. at 10*. It recommends using "a firewall to protect [a] computer from hacker attacks while it is connected to the **[*257]** Internet," deciding "whether [to] install a 'border' firewall where [a] network connects to the Internet," and setting access controls that "determine who gets through the firewall and what they will be allowed to see . . . to allow only trusted employees with a legitimate business need to access the network." *Id. at 14*. It recommends "requiring that employees use 'strong' passwords" and cautions that "[h]ackers will first try words like . . . the software's default password[] and other easy-to-guess choices." *Id. at 12*. And it recommends implementing a "breach response plan," *id. at 16*, which includes "[i]nvestigat[ing] security incidents immediately and tak[ing] steps to close off existing vulnerabilities or threats to personal information," *id.* at 23.

As the agency responsible for administering the statute, the FTC's expert views about the characteristics of a "sound data security plan" could certainly have helped Wyndham determine in advance that its conduct might not survive the cost-benefit analysis.

[21] For this reason, we agree with Wyndham that the guidebook could not, on its own, provide "ascertainable certainty" of the FTC's interpretation of what specific cybersecurity **[**49]** practices fail *§ 45(n)*. But as we have already explained, this is not the relevant question.

Before the attacks, the FTC also filed complaints and entered into consent decrees in administrative cases raising unfairness claims based on inadequate corporate cybersecurity. FTC Br. at 47 n.16. The agency published these materials on its website and provided notice of proposed consent orders in the Federal Register. Wyndham responds that the complaints cannot satisfy fair notice principles because they are not "adjudications on the merits."[22] Wyndham Br. at 41. ***HN17***[] But even where the "ascertainable certainty" standard applies to fair notice claims, courts regularly consider materials that are neither regulations nor "adjudications on the merits." *See, e.g.*, *United States v. Lachman, 387 F.3d 42, 57 (1st Cir. 2004)* (noting that fair notice principles can be satisfied even where a regulation is vague if the agency "provide[d] a sufficient, publicly accessible statement" of the agency's interpretation of the regulation); **[**50]** *Beverly Healthcare-Hillview, 541 F.3d at 202* (citing *Lachman* and treating an OSHA opinion letter as a "sufficient, publicly accessible statement"); *Gen. Elec. Co., 53 F.3d at 1329*. That the FTC commissioners—who must vote on whether to issue a complaint, *16 C.F.R. § 3.11(a)*; ABA Section of Antitrust Law, *FTC Practice and Procedure Manual* 160-61 (2007)—believe that alleged cybersecurity practices fail the cost-benefit analysis of *§ 45(n)* certainly helps companies with similar practices apprehend the possibility that their cybersecurity could fail as well.[23]

[22] We agree with Wyndham that the consent orders, which admit no liability and which focus on prospective requirements on the defendant, were of little use to it in trying to understand the specific requirements imposed by *§ 45(a)*.

[23] We recognize it may be unfair to expect private parties back in 2008 to have examined FTC complaints or consent decrees. Indeed, these may not be the kinds of legal documents they typically consulted. At oral argument we asked how private parties in 2008 would have known to consult them. The FTC's only answer was that "if you're a careful general counsel you do pay attention to what the FTC is doing, and you do look at these things." Oral Arg. Tr. at 51. We also asked whether the FTC has "informed the public that it **[**51]** needs to look at complaints and consent decrees for guidance," and the Commission could offer no examples. *Id.* at 52. But Wyndham does not appear to argue it was unaware of the consent decrees and complaints; it claims only that they did not give notice of what the law requires. Wyndham Reply Br. at 25 ("The fact that the FTC publishes these materials on its website and provides notice in the Federal Register, moreover, is immaterial—the problem is not that Wyndham lacked notice *of the consent decrees* [which

[*258] Wyndham next contends that the individual allegations in the complaints are too vague to be relevant to the fair notice analysis. Wyndham Br. at 41-42. It does not, however, identify any specific examples. And as the Table below reveals, the individual allegations were specific and similar to those here in at least one of the four or five[24] cybersecurity-related unfair-practice complaints that issued prior to the first attack.

Wyndham also argues that, even if the individual allegations are not vague, the complaints "fail to spell out what specific cybersecurity practices . . . actually triggered the alleged violation, . . . provid[ing] only a . . . description of certain alleged problems that, '*taken together*,'" fail the cost-benefit analysis. Wyndham Br. at 42 (emphasis in original). We part with it on two fronts. First, even if the complaints do not specify which allegations, in the Commission's view, form the necessary and sufficient conditions of the alleged violation, they can still help companies apprehend the possibility of liability under the statute. Second, as the Table below shows, Wyndham cannot argue that the complaints fail to give notice of the necessary and sufficient conditions of an alleged *§ 45(a)* violation when all of the allegations in at least one of the relevant four or five **[**53]** complaints have close corollaries here. *See* Complaint, *CardSystems Solutions, Inc.*, No. C-4168 (FTC 2006) [hereinafter CCS].

Table: Comparing CSS and Wyndham Complaints
CSS Wyndham

Go to table1

[*259] In sum, we have little trouble rejecting Wyndham's fair notice claim.

V. Conclusion

The three requirements in *§ 45(n)* may be necessary rather than sufficient conditions of an unfair practice, but we are not persuaded that any other requirements proposed by Wyndham pose a serious challenge to the FTC's claim here. Furthermore, Wyndham repeatedly argued there is no FTC interpretation of *§ 45(a)* or *(n)* to which the federal courts must defer in this case, and, as a result, the courts must interpret the meaning of the statute as it applies to Wyndham's conduct in the first **[**55]** instance. Thus, Wyndham cannot argue it was entitled to know with ascertainable certainty the cybersecurity standards by which the FTC expected it to conform. Instead, the company can only claim that it lacked fair notice of the meaning of the statute itself—a theory it did not meaningfully raise and that we strongly suspect would be unpersuasive under the facts of this case.

We thus affirm the District Court's decision.

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reference the complaints] but that consent decrees [and presumably complaints] by their nature do not give notice *of what Section 5 requires*." (emphases in original, citations and internal quotations omitted)).

[24] The FTC asserts that five such complaints issued prior to the first **[**52]** attack in April 2008. *See* FTC Br. at 47-48 n.16. There is some ambiguity, however, about whether one of them issued several months later. *See* Complaint, *TJX Co.*, No. C-4227 (FTC 2008) (stating that the complaint was issued on July 29, 2008). We note that this complaint also shares significant parallels with the allegations here.

Table1 (*Return to related document text*)

	CSS	Wyndham
1	Created unnecessary risks to personal information by storing it in a vulnerable format for up to 30 days, CSS at ¶ 6(1).	Allowed software at hotels to store payment card information in clear readable text, Compl. at ¶ 24(b).
2	Did not adequately assess the vulnerability of its web application and computer network to commonly known or reasonably foreseeable attacks; did not implement simple, low-cost and readily available defenses to such attacks, CSS at ¶ 6(2)-(3).	Failed to monitor network for the malware used in a previous intrusion, Compl. at ¶ 24(i), which was then reused by hackers later to access the system again, *id.* at ¶ 34.
3	Failed to use strong passwords to prevent a hacker from gaining control over computers on its computer network and access to personal information stored on the network, CSS at ¶ 6(4).	Did not employ common methods to require user IDs and passwords that are difficult for hackers to guess. *E.g.*, allowed remote access to a hotel's property management system that used default/factory setting passwords, Compl. **[**54]** at ¶ 24(f).
4	Did not use readily available security measures to limit access between computers on its network and between those computers and the Internet, CSS at ¶ 6(5).	Did not use readily available security measures, such as firewalls, to limit access between and among hotels' property management systems, the Wyndham network, and the Internet, Compl. at ¶ 24(a).
5	Failed to employ sufficient measures to detect unauthorized access to personal information or to conduct security investigations, CSS at ¶ 6(6).	Failed to employ reasonable measures to detect and prevent unauthorized access to computer network or to conduct security investigations, Compl. at ¶ 24(h).

Table1 (*Return to related document text*)

LabMD, Inc. v. FTC

United States Court of Appeals for the Eleventh Circuit

November 10, 2016, Decided

No. 16-16270-D

Reporter
2016 U.S. App. LEXIS 23559 *

LABMD, INC., Petitioner, versus FEDERAL TRADE COMMISSION, Respondent.

Prior History: **[*1]** Petition for Review of a Decision of the Federal Trade Commission.

In the Matter of LabMD, Inc., 2016 FTC LEXIS 128 (F.T.C., July 28, 2016)

Core Terms

FTC, consumers, unfair, personal information, likely to cause, dictionaries, downloaded, irreparable, substantial injury, probable, costs, pending appeal, companies, practices, services

Case Summary

Overview

ISSUE: Whether the operator of a clinical laboratory was entitled to a stay pending appeal of an FTC order requiring the operator to implement data security compliance measures. HOLDINGS: [1]-There was a serious question as to whether the FTC reasonably interpreted the standard under *15 U.S.C.S. § 45(n)* for finding an act or practice unfair. It was not clear that a reasonable interpretation of *§ 45(n)* included intangible harms like those found in the instant case, nor did "likely to cause" as used in *§ 45(n)* include something that had a low likelihood; [2]-Compliance with the FTC's order would cause the operator irreparable harm in light of its current financial situation; [3]-No other parties would be injured by the stay because there was no current risk of a breach of the operator's data records, as the business was no longer operational.

Outcome
Motion for stay pending appeal granted.

LexisNexis® Headnotes

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > Appellate Stays

HN1[] The traditional standard for a stay pending appeal balances four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The first two factors are the most critical. But a motion can still be granted upon a lesser showing of a substantial case on the merits when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay. Granting a stay that simply maintains the status quo pending appeal is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the stay would inflict irreparable injury on the movant.

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN2[] The Federal Trade Commission (FTC) Act declares that unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce are unlawful, and authorizes the FTC to prevent any such method of competition or unfair or deceptive act or practice. 15 U.S.C.S. § 45(a). Section 45(n) provides the standard of proof for the FTC, stating that the act or practice is only unfair if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C.S. § 45(n).

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

HN3[] Congress intentionally left development of the term "unfair" as used in 15 U.S.C.S. § 45 to the Federal Trade Commission because of the many and variable unfair practices which prevail in commerce.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

HN4[] In determining whether an agency's interpretation of a statute is reasonable, a court looks to the plain meaning of the statute. The court may use dictionaries in discerning the plain meaning, but they are not dispositive. The court may also look to the statutory context and legislative history as well.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

HN5[] 15 U.S.C.S. § 45(n) is a codification of the Federal Trade Commission's (FTC's) 1980 Policy Statement on Unfairness. That Policy Statement notably provided that the FTC is not concerned with merely speculative harms, but that in most cases a substantial injury involves monetary harm or unwarranted health and safety risks. Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN6[] The U.S. Court of Appeals for the Eleventh Circuit does not read the word "likely" as used in 15 U.S.C.S. § 45(n) to include something that has a low likelihood. The court does not believe an interpretation that does this is reasonable.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN7[] In the context of preliminary injunctions, the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.

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For Chamber of Commerce **[*2]** of The United States of America, Amicus Curiae: William S. Consovoy, Consovoy McCarthy, PLLC, Arlington, VA.

For Gary Miliefsky, Amicus Curiae: John J. Park Jr., Strickland Brockington Lewis, LLP, Atlanta, GA.

Judges: Before: MARTIN, JORDAN, and JILL PRYOR, Circuit Judges.

Opinion

BY THE COURT:

LabMD's "Time Sensitive Motion to Stay Enforcement of the Commission's Final Order Pending Appeal, and for a Temporary Stay While the Court Considers the Motion" is **GRANTED**.

I.

LabMD operated as a clinical laboratory from 2001 through early 2014. It received specimen samples for testing and reported the results to patients' physicians. As part of its business, LabMD received sensitive personal information for over 750,000 patients, which included their names, birthdates, addresses, and Social Security numbers, as well as certain medical and insurance information.

In 2005, LabMD's billing manager downloaded and installed a peer-to-peer file-sharing program called LimeWire on her work computer. She did this so she could download music and video files for her personal use. Unfortunately, LimeWire allows other users to search for and download any file that is available for sharing on a computer connected to the file-sharing **[*3]** program. The billing manager designated her "My Documents" folder on her computer as a folder from which files could be searched and downloaded. At the same time a file designated the "1718 file," which contained 1,718 pages of sensitive personal information for roughly 9,300 patients, including their names, birthdates, and Social Security numbers, was also in the billing manager's "My Documents" folder that was accessible through LimeWire.

In 2008, Tiversa Holding Company ("Tiversa"), a data security company, notified LabMD that it had a copy of the 1718 file. Tiversa employed forensic analysts to search peer-to-peer networks specifically for files that were likely to contain sensitive personal information in an effort to "monetize" those files through targeted sales of Tiversa'a data security services to companies it was able to infiltrate. Tiversa tried to get LabMD's business in this way. Tiversa repeatedly asked LabMD to buy its breach detection services, and falsely claimed that copies of the 1718 file were being searched for and downloaded on peer-to-peer networks.

After LabMD declined to purchase Tiversa's services, Tiversa informed the Federal Trade Commission ("FTC") that LabMD **[*4]** and other companies had been subject to data breaches involving its customers' personal information in 2009. Tiversa's CEO instructed one of his employees to "make sure [LabMD is] at the top of the list" of companies that had suffered a security breach that was given to the FTC. Notably, Tiversa did not include any of its own current or former clients on the list. Tiversa hoped that the FTC would contact the companies on its list of those subject to security breaches, so those companies would feel pressured to purchase Tiversa's services out of fear of an FTC enforcement action.

As a result of the information provided by Tiversa, the FTC launched an investigation into LabMD's data security practices in 2010. Despite the dissent of at least one commissioner, the FTC relied on the information provided by Tiversa, including the false assertion that at least four different Internet Protocol addresses had downloaded the 1718 file from peer-to-peer networks. The FTC voted to issue a complaint against LabMD in 2013. The FTC alleged that LabMD failed to provide reasonable and appropriate security for its customers' personal information and that this failure caused (or was likely to cause) substantial **[*5]** consumer injury, constituting an unfair act in violation of the *Federal Trade Commission Act*, *15 U.S.C. § 45*. This complaint resulted in an Administrative Law Judge ("ALJ") holding an evidentiary hearing beginning in May 2014, which concluded in July 2015. After hearing the parties' evidence, the ALJ dismissed the complaint, finding a failure of proof that LabMD's computer data security practices "caused" or were "likely to cause" substantial consumer injury. The ALJ found that because there was

no proof anyone other than Tiversa had downloaded the 1718 file, it was unlikely that the information in that file was the source of any harm now or would be in the future. The ALJ also rejected the argument that a hypothetical risk of future harm was a sufficient basis for holding that the breach was likely to cause future harm.

This ruling was appealed to the FTC. The FTC reversed, holding that the ALJ applied the wrong standard in deciding whether LabMD's data security practices were unreasonable and therefore constituted an unfair act in violation of the FTC Act. The FTC vacated the ALJ's ruling and issued a Final Order requiring LabMD to implement a number of compliance measures, including creating a **[*6]** comprehensive information security program; undergoing professional routine assessments of that program; providing notice to any possible affected individual and health insurance company; and setting up a toll-free hotline for any affected individual to call.

LabMD ceased operations in January 2014. LabMD says its business could not bear the costs imposed by the FTC investigation and litigation, so it had to close. LabMD has essentially no assets, no revenue, and does not plan to resume business in the future. It obtained counsel pro bono because it could not afford to pay a lawyer. LabMD now has no employees, and keeps only the records required by law in a secured room, on an unplugged computer that is not connected to the Internet. LabMD has less than $5,000 cash on hand, and is subject to a $1 million judgment for terminating its lease early.

II.

LabMD decided to appeal the FTC's Final Order to this Court, and sought a stay from the FTC pending our review. The FTC denied the stay, and LabMD now asks us to grant the stay.

HN1[↑] The "traditional" standard for a stay pending appeal balances four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on **[*7]** the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder, 556 U.S. 418, 425-26, 129 S. Ct. 1749, 1756, 173 L. Ed. 2d 550 (2009)* (quotation omitted). "The first two factors . . . are the most critical." *Id. at 434, 129 S. Ct. at 1761*. But a motion can still be "granted upon a lesser showing of a substantial case on the merits when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay." *Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986)* (quotation omitted and alteration adopted). We have also "emphasized" that granting a stay that simply maintains the status quo pending appeal "is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the [stay] would inflict irreparable injury on the movant." *Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981)* (per curiam) (quotation omitted).[1] LabMD has made this showing.

A.

This case turns on whether the FTC's interpretation of *§ 45(n)* is reasonable. ***HN2***[↑] The FTC Act declares that "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce" are unlawful, and authorizes the FTC to prevent any such method **[*8]** of competition or unfair or deceptive act or practice. *15 U.S.C. § 45(a)*. *§ 45(n)* provides the standard of proof for the FTC, stating that the act or practice is only unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *15 U.S.C. § 45(n)* (emphasis added).

LabMD argues that the FTC Order misinterpreted and misapplied the FTC Act because it declared the actions of LabMD's "unfair" without properly assessing whether LabMD caused or was likely to cause substantial injury to consumers. See *15 U.S.C. § 45(n)*. The FTC's ruling did not point to any tangible harm to any consumer, because there is no evidence that any consumer suffered a harm such as identity theft or physical harm. Instead, the FTC found actual harm here due to the sole fact of the 1718 file's unauthorized disclosure. The FTC also

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[1] In *Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)* (en banc), we adopted as binding precedent all decision of the former Fifth Circuit handed down before October 1, 1981. *Id. at 1209*. Ruiz was issued on June 26, 1981. *650 F.2d at 555*.

found that consumers suffered a "privacy harm" that may have affected their reputations or emotions, which therefore constituted a substantial injury. Alternatively, the FTC found that the unauthorized exposure of the 1718 file was likely to cause substantial injury.

We recognize that the FTC's interpretation **[*9]** of *§ 45(n)* is entitled to Chevron deference, if it is reasonable. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984)*; *United States v. Mead Corp., 533 U.S. 218, 226-27, 229, 121 S. Ct. 2164, 2171, 2172, 150 L. Ed. 2d 292 (2001)*. We also know the Supreme Court has specifically instructed that ***HN3***[] "Congress intentionally left development of the term 'unfair' to the [FTC]" because of "the many and variable unfair practices which prevail in commerce." *Atl. Ref. Co. v. FTC, 381 U.S. 357, 367, 85 S. Ct. 1498, 1505, 14 L. Ed. 2d 443 (1965)* (quotation omitted).

But as LabMD points out, there are compelling reasons why the FTC's interpretation may not be reasonable. ***HN4***[] In determining whether the FTC's interpretation was reasonable, we look to the plain meaning of the statute. We may use dictionaries, as did the FTC, in discerning the plain meaning, but they are not dispositive. See *Yates v. United States, 574 U.S. , 135 S. Ct. 1074, 1081-82, 191 L. Ed. 2d 64 (2015)*. We may also look to the statutory context and legislative history as well. Id.

First, it is not clear that a reasonable interpretation of *§ 45(n)* includes intangible harms like those that the FTC found in this case. As the FTC Opinion said, ***HN5***[] *§ 45(n)* is a codification of the FTC's 1980 Policy Statement on Unfairness. FTC, Policy Statement on Unfairness (Dec. 17, 1980), *https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness* . That Policy Statement notably provided that the FTC "is not concerned with . . . merely speculative harms," but that "[i]n most cases a substantial injury involves monetary harm" or "[u]nwarranted health and safety risks." Id. **[*10]** "Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair." Id. The FTC Opinion here also relied upon the legislative history of *§ 45(n)*. But the Senate Report that the FTC relied on also says that "[e]motional impact and more subjective types of harm alone are not intended to make an injury unfair." S. Rep. No. 103-130, 1993 WL 322671, at *13 (1993). Further, LabMD points out that what the FTC here found to be harm is "not even 'intangible,'" as a true data breach of personal information to the public might be, "but rather is purely conceptual" because this harm is only speculative. LabMD has thus made a strong showing that the FTC's factual findings and legal interpretations may not be reasonable.

Second, it is not clear that the FTC reasonably interpreted "likely to cause" as that term is used in *§ 45(n)*. The FTC held that "likely to cause" does not mean "probable." Instead, it interpreted "likely to cause" to mean "significant risk," explaining that "a practice may be unfair if the magnitude of the potential injury is large, even if likelihood of the injury occurring is low." The FTC looked to different dictionaries and found different definitions of "likely." It is through this approach that it argues its construction is correct, considering the statute's context as a whole. Even respecting this process, our reading of the same dictionaries leads us to a different result. The FTC looked to dictionary definitions **[*11]** that say "likely" means "probable" or "reasonably expected."[2] Reliance on these dictionaries can reasonably allow the FTC to reject the meaning of "likely" advocated by LabMD, that is, a "high probability of occurring." However, we read both "probable" and "reasonably expected," to require a higher threshold than that set by the FTC. In other words, ***HN6***[] we do not read the word "likely" to include something that has a low likelihood. We do not believe an interpretation that does this is reasonable.

LabMD raises many other arguments in support of its case that the FTC misinterpreted and misapplied *§ 45(n)* here. Because the statutory interpretation questions we've pointed out thus far are sufficient for LabMD to make a substantial case on the merits and present a serious legal question, we need not address LabMD's other claims now.

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[2] The FTC cited "Dictionary.com," which defined "likely" as "reasonably . . . expected;" Black's Law Dictionary, which defined it as "reasonably expected;" Merriam-Webster, which defined it as "having a high probability of occurring or being true;" and Collins English Dictionary, which defined it as "probable." The FTC Opinion emphasized that Collins also defined it as "tending [to] or inclined," but we do not see how that phrase is not also a synonym for "reasonably expected."

B.

The costs of complying with the FTC's Order would cause LabMD irreparable harm in light of its current financial situation. The FTC Order requires LabMD to implement a number of compliance measures including creating a comprehensive information security program; undergoing routine professional assessments **[*12]** of that program; providing notice to any possible affected individual and health insurance company; and setting up a toll-free hotline for any affected person to call. The costs associated with these measures are hotly debated by the parties. LabMD says the costs will exceed $250,000. The FTC does not offer its own estimate, but disputes the $250,000 figure. Regardless, it is clear that the postage for the notice requirements alone would be more than $4,000. Certainly the costs of all the other measures would add to that amount.

LabMD is no longer an operational business. It has no personnel and no revenue. It now has less than $5,000 cash on hand. It reported a loss of $310,243 last fiscal year, and has a pending $1 million judgment against it on account of its early termination of its lease. LabMD cannot even afford legal representation, and is relying on pro bono services for this appeal.

Ordinary compliance costs are typically insufficient to render harm irreparable. See, e.g., *Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 115 (2d Cir. 2005)*. But given LabMD's bleak outlook, the costs of compliance pending appeal would constitute an irreparable harm. See id.; *Texas v. United States EPA, 829 F.3d 405, 433-34 (5th Cir. 2016)*. This is especially so because if LabMD is ultimately successful on appeal, the costs **[*13]** would not be recoverable in light of the FTC's sovereign immunity. See *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d 1268, 1289 (11th Cir. 2013)* (***HN7***[⬆] "In the context of preliminary injunctions, . . . the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."). Therefore, this factor favors granting LabMD's requested stay.

C.

There would be no injury to other parties, much less a substantial injury, as a result of this stay. There is no current risk of a breach of LabMD's data records. It is not now an operational business, and it has no plans to resume. The only records containing sensitive personal information that LabMD currently possesses are those it is required by law to keep. LabMD maintains this information on a computer in a locked, secure room, unplugged, and not connected to the Internet. When LabMD is called upon to send a copy of a record to a former client, it plugs in the computer (without connecting to the Internet), prints a hard copy, unplugs the computer, and mails or faxes that hard copy to the client. Thus, there is no current risk of breach.

For those patients whose personal information was in the 1718 file, there is no evidence of a current risk to them. Specifically, there is no evidence **[*14]** that any consumer ever suffered any tangible harm, or that anyone other than Tiversa, LabMD, or the FTC has seen the 1718 file.[3] Although the FTC's Order denying LabMD's stay application says there remains a potential risk of harm to consumers whose information was in this file, we think it improbable that a party downloaded this information now years ago, has not used it for several years, but may yet use it for nefarious purposes before this appeal terminates. Therefore, this factor favors granting the requested stay as well.

D.

The public interest factor is neutral. On the one hand, there is no evidence that any consumer is currently at risk. On the other, the over 9,000 consumers whose personal information was breached deserve to know the breach occurred, even if its effects were minimal. However, the record contains nothing that persuades us of an identifiable risk that these consumers will be harmed by a delay of the notice while this appeal is pending. Therefore, this factor does not point in favor of granting or in favor of denying LabMD's motion.

III.

In conclusion, the balance of equities favors granting LabMD's motion. Under the standard articulated in Ruiz, LabMD has (at least) **[*15]** presented a serious legal question. *650 F.2d at 565*. Lab MD has also shown that it will be irreparably harmed absent a stay; and that issuing a stay will not injure any other party or the public. See id. Therefore, its motion for a stay pending appeal is granted.

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[3] Tiversa also provided a copy of this file to a Dartmouth professor for research purposes, but this fact is irrelevant to our analysis.

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