

## 2020 Virtual ABA Antitrust Spring Meeting: Consumer Protection Takeaways

This year, the American Bar Association adopted an all-virtual format to conduct its 68th Antitrust Law Spring Meeting. This is the third of three updates addressing the event. (The [first part](#) covered state and federal enforcement priorities, and the [second part](#) covered merger enforcement.)

We offer some key takeaways from three sessions focused on consumer protection: an annual review of the consumer protection landscape, developments in consumer privacy, and insights into the Federal Trade Commission's enforcement activities and priorities.

### Consumer Protection: Year in Review

Influencer marketing, consumer reviews, health claims, and privacy concerns led the 2019 consumer-protection landscape according to Joanna Bolton (Dell Inc.), Gustav W. Eyler (U.S. Department of Justice, Civil Division) and Anahid Ugurlayan (Better Business Bureau, National Advertising Division) during a podcast panel moderated by Deon Woods Bell (FTC, International Affairs).

Bolton highlighted the FTC's 2019 publication "Disclosures 101 for Social Media Influencers," which supplements the FTC's Endorsement Guides about disclosing material connections between advertisers and endorsers. The new publication uses plain language in a user-friendly format to help influencers understand their obligations and make the necessary disclosures transparently.

Bolton noted that the publication encourages disclosure toward the beginning of an online post, not at the end or visible only after a user clicks a link for additional information. Bolton also reminded listeners that, although influencers are responsible for their posts, the product brands must ensure that their endorsers are aware of the disclosure requirements and implement monitoring practices for compliance.

The panel also addressed consumer reviews and their impact on purchasing decisions, with "high star" ratings and positive reviews encouraging consumers to buy products and services. The panel emphasized that where the reviewer receives an incentive to provide the evaluation, that incentive must be prominently disclosed to avoid deceiving the consumer. Ugurlayan identified, for example, the National Advertising Division's recommendation that Pyle Audio discontinue or modify online reviews for its NutriChef Vacuum Sealer to include a clear and conspicuous disclosure that the reviewers are incentivized with the promise of free product or an unspecified "reward."

The panel further reminded listeners that health-related claims must be supported by competent and reliable scientific evidence—specifically, clinical trials that are methodologically sound. Reliable trials include double-blind, placebo-controlled, and randomized human clinical studies using the product advertised with the target audience.

Eyler noted that claims related to diagnosis, cure, mitigation, treatment, or prevention of diseases may turn dietary supplements into drugs under the current legal framework, pursuant to which all "drug sales" require regulatory approval by the U.S. Food and Drug Administration. Eyler also observed that the DOJ can bring both

civil and criminal actions against companies that flout those health-related rules.

The panel closed by identifying the issues about which they are most interested in the coming year. The COVID-19 pandemic was top of mind for each of the participants. Ugurlayan said that coronavirus-related product claims are on the NAD's radar, particularly claims involving dietary supplements that assert increased immunity to fight the virus.

Bolton is watching closely as state privacy legislation develops and California begins to enforce its Consumer Privacy Act. But she noted that priorities are changing in light of the COVID-19 pandemic. Despite a lot of chatter, U.S. Congress has not passed comprehensive privacy legislation, and Bolton hypothesized that in response to the pandemic—including the use of technology to track the virus's spread—Congress may finally act.

Eyler anticipates that COVID-19 will affect consumer protection laws and enforcement actions. The DOJ is particularly focused on claims about cures, treatments, and other fraudulent inducements related to the pandemic. Eyler said that addressing the scourge of robocalls is a priority, with the DOJ coordinating with the FTC and Federal Communications Commission to implement new congressional directives. These agencies, he said, are focused on reducing the number of robocalls, particularly those involving consumer fraud.

## **U.S. Privacy Law's Future: Pandemic Impacts?**

In 2018, significant legal developments came to bear on consumer privacy, including the passage of the General Data Protection Regulation by the European Union, the fallout from the Facebook-Cambridge Analytica data investigation, and "comprehensive" state-level privacy legislation in California. Since then, many have anticipated comprehensive federal legislation to create clarity, certainty, and uniformity.

Now the United States is faced with mass-scale collection of data to fight the COVID-19 pandemic. This data collection and its implications animated the discussion presented by the ABA Antitrust Law Section's Privacy and Information Security Committee.

The panel, moderated by Christopher N. Olsen (Wilson Sonsini Goodrich & Rosati PC), included Maneesha Mithal (FTC, Division of Privacy and Identity Protection, Bureau of Consumer Protection), Alison Pepper (American Association of Advertising Agencies), Jessica Rich (former director, FTC Bureau of Consumer Protection), and Lee Tien (Electronic Frontier Foundation).

To begin, Rich pointed to parallels and distinctions between the current crisis and the response to the attacks of Sept. 11, 2001. In the early days of this millennium, clear partisan differences arose between Democrats who were pushing to protect consumer privacy and Republicans who were united in their opposition.

Due to terrorist concerns that led to the passage of the Patriot Act (most of which remains intact), there was a shift from privacy paradigms based on "notice and choice" to privacy restrictions being limited to incidents of clear demonstrable harm. Not only did the focus move away from notice and choice, but greater emphasis was also placed on the specific issue of data security. Rich explained that these dynamics have shaped the development of privacy policy in the country for the past 15 years.

Lee, a consumer-privacy advocate, identified other key distinctions. Post-9/11, the level of private-sector involvement in screening for terrorist threats was opaque. In the current pandemic, however, the private sector is actively teaming with government (at every level) in overt partnership. Lee posited that this more "brazen" approach to data sharing increases the potential for abuse of consumer data. According to Rich, although current processes may be justified on an emergency basis, they will likely be institutionalized, lingering well beyond the

pandemic.

Offering a perspective from a current enforcer, Mithal observed the delicate balance between consumer privacy and public health and safety. Because the harm-based model limits notice and choice, we are left with use limitations as a means of curbing the possible abuse of consumer data.

Rich agreed that policymakers should consider use limitations. Challenges arise when data can be de-identified, however. If data is no longer associated with a specific individual, additional questions surface: Can a consumer still consent? Is consent even viable under those circumstances?

Although consumer privacy typically features front-and-center for advertisers, Pepper noted a shift in priorities as her member organizations grapple with the economic threats facing the hundreds or thousands of small businesses struggling to survive.

Pivoting from these economic concerns, the panel discussed how the pandemic has exposed the fault lines and limitations created by American federalism. While the legislative issues were at the federal level after 9/11, cities and states generally exercise their own police powers during a public health crisis. The nature of this piecemeal decision-making results in a patchwork of responses, which is a stark contrast from the type of comprehensive, coordinated response that might offer clarity, certainty, and uniformity in comprehensive privacy legislation.

Faced with these varied concerns, the panelists identified several key takeaways. The most common theme involved practical limitations on how information can be used. According to the panel, policymakers should pass legislative guardrails around the use and reuse of consumer data. It remains uncertain what guardrails might be erected during a pandemic and an election year, but until Congress passes comprehensive privacy legislation, Mithal aptly pointed out, "The issue is here to stay."

## **What to Expect in FTC Consumer-Protection Enforcement**

Kay Lynn Brumbaugh (Giact Systems LLC) moderated a lively panel discussion featuring Serena Viswanathan (FTC Bureau of Consumer Protection), Thomas F. Zych (Thompson Hine LLP), Christie Grymes Thompson (Kelley Drye & Warren LLP), and Terrell McSweeney (Covington & Burling LLP).

The panel focused on the FTC's current and anticipated enforcement activity related to (1) the COVID-19 global pandemic, (2) consumer privacy concerns, (3) data security issues, (4) advertising and marketing challenges, and (5) financial-technology developments. Viswanathan also provided an update on the FTC's continued use of Section 13(b) to obtain monetary relief, notwithstanding the U.S. Court of Appeals for the Seventh Circuit's decision in *FTC v. Credit Bureau Center LLC*.

The panel initially discussed the likelihood that enforcement activity would increase as a result of the COVID-19 pandemic. Viswanathan explained that "every crisis appears to bring out bad actors" and noted that the FTC is working closely with the FDA to send out warning letters and pursue enforcement actions against companies making unsubstantiated and deceptive claims related to coronavirus cures or treatments.

Zych, Thompson, and McSweeney added that they are regularly counseling their clients on consumer-protection risks that are likely to be more prevalent during the country's response to the pandemic, including best practices for information security, the mail-order rule, and recent state-level rules and regulations pertaining to price gouging.

Addressing consumer privacy and data security issues, Viswanathan explained that the FTC published a detailed report on its 2019 data privacy and security efforts and reiterated that the FTC will continue to focus on data

portability issues, finding ways to incentivize (through consent orders and education) C-suite accountability for important data security concerns. Viswanathan also explained that the FTC's enforcement decisions focus on reasonableness, and she noted that the pandemic will play a role in determining what is reasonable with respect to data privacy and data security issues.

McSweeney and Zych explained that while there have been developments in legislation surrounding data privacy and data security, legislative momentum for comprehensive reform has stalled. Although the panelists anticipate some form of legislation, McSweeney and Zych said that they continue to counsel clients on such issues on the basis of not only changes contained in FTC consent orders but also quickly changing state laws.

The panel briefly touched on issues related to fintech, and Viswanathan explained that the FTC is taking a more active role in the online lending space. The panel then focused on enforcement activities in the advertising and marketing spaces. Thompson reminded the audience that the FTC is seeking public comment for its proposed rules on advertising endorsements and highlighted increased enforcement interest in "Made in the USA" claims. Viswanathan reiterated that she expects the FTC to increase its focus on false and unsubstantiated medical claims (including those addressing serious diseases, aging, and the benefits of CBD products) due in part to the impact of the pandemic.

The panel concluded with a brief discussion of the FTC's reaction to the Seventh Circuit's decision in *FTC v. Credit Bureau Center*, which held that Section 13(b) of the Federal Trade Commission Act does not contain an implied right to restitution. Viswanathan explained that the FTC has sought a writ of certiorari to reverse the court's decision and that the FTC is still seeking and obtaining equitable relief (including restitution).

Read the entire virtual ABA Antitrust Law Spring Meeting recap series:

[Part 1: Federal and State Antitrust Enforcement Takeaways](#)

[Part 2: Merger Enforcement Takeaways](#)

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## Authors



### [Eric J. Weiss](#)

Partner

[EWeiss@perkinscoie.com](mailto:EWeiss@perkinscoie.com) [206.359.3456](tel:206.359.3456)

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