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InfoLaw

This periodic service from Graydon Head's Media, Communications & Information Industry Group provides quick updates on what's happening in the worlds of E-Commerce, Communication, Information, and IP Law.

What Congress Meant v. What Congress Said

Innovative Marketing, Inc. and several of its high level executives recently got some bad news from a federal appellate court. The court upheld a trial court's order awarding damages in the amount of $163,167,539.95 based on the company's deceptive advertising practices. The appellate court rejected the argument that the Federal Trade Commission – which had brought the suit – lacked statutory authority to recover money damages.

It appears Innovative Marketing may have been a little too "innovative." According to the FTC, Innovative operated "a massive, Internet-based scheme that trick[ed] consumers into purchasing computer security software," referred to as "scareware." The advertisements would advise consumers that a scan of their computers had detected a variety of dangerous files, like viruses, spyware, and "illegal" pornography. In reality, no scans were ever conducted.

Kristy Ross, an Innovative Vice President, hired counsel and defended against the suit. The other defendants either settled or had default judgments entered against them.

The trial court concluded that Ross had actual knowledge of the deceptive marketing scheme, or was "at the very least recklessly indifferent or intentionally avoided the truth" about the scheme. It entered judgment against her in the amount of $163,167,539.95, and it enjoined her from engaging in similar deceptive marketing practices.

Ross argued the Federal Trade Commission Act – which authorizes the Commission to sue in federal district court so that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction" – does not permit the Commission to recover a monetary award. The statute says "injunction" and that should be the only remedy.

But the appellate court found that what the statute **says** and what the statute **means**, may be different matters. According to Supreme Court precedent, when Congress authorizes a district court to exercise its equitable jurisdiction, that jurisdiction includes the full "power to decide all relevant matters in dispute and to award complete relief[.]" In the appellate court's view, by authorizing the district court to issue a permanent injunction, Congress implicitly authorized the district court to exercise the full measure of its equitable jurisdiction. Which means the court had sufficient statutory power to award "complete relief," including "monetary consumer redress."

Ross no doubt wishes the court would have been a little more literal, given the sheer size of the award. But in this case, the implication prevailed.

Everything You Always Wanted to Know About Fraud

Well, maybe not **everything**. But the Federal Trade Commission just released the Consumer Sentinel Network Data Book report on calendar year 2013. The Consumer Sentinel Network is a secure online database of millions of consumer complaints filed with the FTC as well as with 16 state law enforcement agencies. The annual report sheds some light on where the action is in the world of consumer fraud.

And there is plenty of action. Since 2009, CSN has collected over 9 million complaints. In 2013, there were 2 million consumer complaints collected. And that total doesn't even include "Do Not Call" complaints, which CSN compiles separately. Since 2009, there have been 13 million do not call complaints registered. That probably speaks as much as anything to the sheer persistence of the typical telemarketer.

The FTC puts the reported complaints into 30 different categories, depending on the substance of the complaint. And it may come as no surprise that the number one category for 2013 was "identity theft." It accounted for 14% of the overall number of complaints. "Debt collection" came in second at 10%, with "banks and lenders" winning the bronze medal at 7%.

Government documents\benefits fraud (34%) was the most common form of reported identity theft, followed by credit card fraud (17%), phone or utilities fraud (14%), and bank fraud (8%). Other significant categories of identity theft reported by victims were employment-related fraud (6%) and loan fraud (4%).

One half of the registered complaints had something to do with fraud, and consumers got swindled out of $1.6 billion in the aggregate. In the reports that listed the initial method of contact, telephone led the way, with 40% of the complaining consumers noting that they were first contacted via telephone. In 33% of the cases, e-mail was the initial method. Further demonstrating the demise of snail mail, only 5% of the consumers cited the mail as the initial contact point.

Florida had the highest per capita rate of reported fraud, followed by Nevada and Georgia. I suppose Florida will not change its name from the "Sunshine State." "Gullible State" just doesn't have the same ring.

So, the lesson seems clear – if you're in Florida and you get a phone call about government benefits, hang up. You don't want to be another statistic.

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Bet Somebody's Grounded

Full of Yourself

Too Big to Nail?

If you have any questions about any of the information contained in this email, please contact Jack Greiner at 513.629.2734 or jgreiner@graydon.com.

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