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ALERT

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Antitrust and Consumer Protection Roundup: Jail Time For Altering Documents and More Than a Dozen Consumer Settlements – Federal Trade Commission and Department of Justice Highly Active in May 2012

In one of its busiest months on record, the Federal Trade Commission (FTC) took action in May across the broad range of its regulatory powers in the consumer protection, advertising and antitrust arenas. The agency obtained fines and settlements in over a dozen cases involving a wide-ranging set of activities that ran the gamut from false advertising claims involving a 2011 Super Bowl ad featuring Kim Kardashian, to "last dollar" schemes, "cramming" and debt collection schemes. The FTC also secured several divestiture decrees in merger cases. Striking an even more sobering tone in the antitrust arena, for the first time the Department of Justice (DoJ) sent someone to jail for what is essentially a violation of the Hart-Scott-Rodino (HSR) Act, the antitrust law requiring pre-closing filing of certain documents concerning certain proposed mergers and acquisitions. This alert highlights some of these key developments.

Obstruction of Justice in Hart-Scott-Rodino (HSR) Violation: In a wholly unprecedented move, on May 3, 2012, the DoJ obtained a plea agreement sentencing a South Korean executive to five months imprisonment for alteration of documents required to be submitted with a HSR filing.[1] HSR requires pre-closing filing and review of transactions meeting a fairly low "size" threshold of $68.2 million and not otherwise qualifying for an exemption. Failure to abide by document requirements under Item 4 of the HSR rules has previously been the subject of fines reaching almost $3 million, but has never resulted in criminal sanctions until now. The executive apparently crossed a line by not simply failing to disclose documents, but instead physically altering documents that were submitted under Item 4, to reduce the appearance of a competitive impact from the transaction. This action was prosecuted as obstruction of justice, which carries a maximum criminal penalty for individuals of 20 years in prison and a $250,000 fine. The executive's corporate employer also pleaded guilty for its role and agreed to a $200,000 fine (for 2 counts), against potential exposure of $1 million ($500,000 per count).

The case is an important reminder that failure to abide by HSR's strict requirements – including as to Item 4, which was just expanded in 2011[2] – can be discovered in multiple ways, and have serious consequences. The fines imposed in this case were actually relatively low, given that penalties can run up to $16,000 per day of violation. In any event, the prospect of jail time for executives likely presents a far more significant deterrent against violations than the risk of fines.

"Last Dollar" Schemes: The FTC has been highly vocal about aggressively enforcing consumer protection laws against so-called "last dollar schemes" unfairly targeting financially distressed consumers. Consistent with this theme, the FTC celebrated May Day with a major victory in a case seeking $450 million from marketers of several "get rich quick" schemes focused on real estate and internet investing.[3] The court agreed with the FTC that the defendants unlawfully sold undisclosed "continuity" plans

[1] *United States v. Kyoungwon Pyo* (and employer Nautilus Hyosung Holdings Inc.), Case 1:12-cr-00118-RLW (D.D.C.); see also "Hyosung Corporation Executive Agrees to Plead Guilty to Obstruction Of Justice for Submitting False Documents In an ATM Merger Investigation" (http://www.justice.gov/atr/public/press_releases/2012/282873.htm).

[2] The 2011 changes were discussed by Antitrust Practice Group Co-chair Michael Jahnke in Hart-Scott-Rodino Overhaul, *The Deal* (July 8, 2011).

[3] *FTC v. John Beck Amazing Profits, LLC, et al.*, Civil Action No. 09-CV-4719, FTC File No. 072 3138 (C.D. California).

where buyers would be charged $39.95/month *ad infinitum* (until they noticed the charge and cancelled) for services marketed as "free".

In a similar vein, the FTC secured an injunction halting businesses that misled customers into investing thousands for websites they believed would earn "commissions" by being linked to major retailers like Wal-Mart and Starbucks that would pay for "click-throughs."[4] When customers called to redeem promises for "free" marketing expertise, the defendants instead provided additional sales pitches, designed to secure even higher investments in return for promises of higher profits. Eventually complaints mounted to the point that defendants shut down operations, but only to renew them under new business names (until the FTC intervened).

"Cramming": On May 8, the FTC sought return of over $52 million for "cramming" of unauthorized phone services by an intermediary/"billing aggregator" positioned between third-party vendors and the local phone companies.[5] Among the facts the FTC found compelling were (i) this being the fourth violation alleged against entities related to the defendant (in a record going back to 1998), (ii) that as many as nine crammed "enhanced services" were involved (three voicemail services, two identity theft protection services, two directory assistance services, one job skills training service and one streaming video service), (iii) that a major phone company had terminated a defendant's voicemail services on the basis of the high volume of complaints left unaddressed, and (iv) that many of the crammed services were entirely or largely unused by the consumers billed for them, with overwhelming evidence of this available to the defendants.

Debt Collection: Several debt collection practices ranging from the shocking to sadly familiar were targeted by a settlement reached May 15th.[6] Multiple defendants were alleged to have engaged in practices designed to collect debts they knew or should have known were invalid, based on the FTC's prior successes against the original sellers of those subscriptions. The practices included creating false caller ID information, claims to be Ed McMahon and allegations that magazine subscription debts were exempt from statutes of limitation, along with more traditional misrepresentations as to lawyer involvement and/or the ability to garnish wages. Several million dollars in fines were settled for far less, based on proof the defendants had no means to pay, subject to reinstatement of full penalties if the "pauper" information proved false.

Deceptive Advertising: Skechers USA, Inc. agreed to pay $40 million to settle charges that the company misled consumers by making unsubstantiated claims that Shape-ups would help people lose more weight, and better strengthen and tone their buttocks, legs and abdominal muscles, than regular fitness shoes.[7] The claims – which were also investigated by the attorneys general of 44 states and D.C. – were made regularly in print advertising and on the web, in prominent TV spots like a 2011 Super Bowl ad featuring Kim Kardashian, and more regular spots featuring celebrity spokeswoman Brooke Burke. In a somewhat novel move, the FTC provided links to the Kardashian and Burke spots and other examples on its website. Skechers was also found to have made unsubstantiated claims about other similar products (Resistance Runner, Toners, and Tone-ups) based on studies from which only positive conclusions were "cherry-picked".

Demonstrating an increased focus on energy-related claims, the FTC also approved a settlement against five window replacement companies based on findings that claims of energy efficiency and cost savings from the defendants' products were exaggerated and unsupported.[8]

Other Antitrust Actions, In Brief: The FTC and DoJ filed a joint amicus brief arguing that a direct purchaser has standing to seek damages for overcharges resulting from a monopoly obtained through the enforcement of patents secured through fraud (a "Walker Process" claim).[9]

The FTC also entered into several consent decrees imposing divestiture remedies on certain acquisitions. Based on concerns that Kinder Morgan's $38 billion acquisition of El Paso Corporation would be anticompetitive in several natural gas pipeline transportation and gas processing markets, the FTC required Kinder Morgan to sell three natural gas pipelines and other related assets in the Rocky Mountain region. Likewise, to settle charges that its acquisition of Liberty Dialysis Holdings, Inc. would be anticompetitive in 43 local markets across the country, Fresenius Medical Care AG & Co. KGaA agreed to sell 60 outpatient dialysis clinics.

[4] *FTC v. North America Marketing and Associates, LLC, et al.*, Case No. 2:12-cv-00914-DGC, File No. 102 3247 (D. Ariz.).

[5] *FTC v. Hold Billing Services, Ltd., et al.*, FTC File Nos. X98 0069; 982 3089 (W.D. Texas).

[6] *United States of America v. Luebke Baker and Associates, Inc., et al.*, Case No. 1:12-cv-1145, FTC File No. 082-3206 (C.D. Ill.).

[7] *FTC v. Skechers U.S.A., Inc., d/b/a Skechers*, FTC File No. 102 3069 (N.D. Ohio).

[8] *In the Matter of THV Holdings LLC*, FTC File No. 112 3057; *In the Matter of Winchester Industries*, FTC File No. 102 3171; *In the Matter of Serious Energy, Inc.*; FTC File No. 112 3001; *In the Matter of Long Fence & Home, LLP*, FTC File No. 112 3005; *In the Matter of Gorell Enterprises, Inc.*, FTC File No. 112 3053.

[9] *Ritz Camera & Image, LLC v. SanDisk Corporation*, No. 12-1183 (Fed. Cir.).

Other Consumer Protection Actions, In Brief: On May 30, the FTC held a full-day workshop to discuss proposed "best practices" for updating the "Dot Com Disclosure Guidelines" issued in 2000 to better fit the 2012 environment. (Click here to read our alert on the workshop.) There was a lively discussion, but as yet no proposed rule changes. Loeb & Loeb LLP will continue to monitor this initiative and provide further information as it develops.

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