

Highlights from the 2019 Consumer Protection Conference in Nashville, TN

By John C. Drake

John Drake is a litigation associate in the St. Louis office of Greensfelder Hemker & Gale, P.C., where he is a member of the class action and appellate practice groups. John has experience defending clients in a wide range of consumer protection matters, including actions arising under the Missouri Merchandising Practices Act and other states' consumer-protection statutes. He also has a broad business litigation practice handling contract and other disputes for clients in the energy, financial services, telecommunications, and construction industries.

Federal Trade Commission Chairman Joseph Simons served as keynote speaker at the ABA Section of Antitrust Law, 2019 Consumer Protection Conference in Nashville, Tennessee on February 5, 2019. During his keynote address, and during remarks as part of a cross-border panel of government regulators, Chairman Simons explained to attendees that the FTC was seeking broader authority from Congress to respond to ever-growing consumer issues affecting privacy, advertising, and other consumer protection issues.

Attendees heard from more than two dozen regulators, law firm practitioners, in-house counsel, and a jurist on emerging issues in consumer protection law. The conference included a reception at the Noelle hotel and networking lunch at the Blake Shelton-owned Ole Red Conference Center and Restaurant on Broadway in the center of Nashville's downtown music district.

Chairman Simons was joined on a panel by his Canadian counterpart, Matthew Boswell, Interim Commissioner of Competition of the Competition Bureau of Canada. The panel was moderated by Patricia A. Conners, Chief Deputy Attorney General of Florida.

Chairman Simons noted that the FTC is seeking additional authority to enforce privacy laws in the nonprofit sector. The Chairman commented that the FTC was also seeking authority for stronger remedies for deceptive advertising claims, especially "Made in USA" claims. He suggested that the FTC should have authority to require refunds to be issued to consumers where there was evidence that deceptive claims were linked to an increase in sales for the offending company. Turning to the self-regulatory process, Chairman Simons said the FTC appreciates and pays attention to referrals from the National Advertising Division of the Council of Better Business Bureaus, Inc. (NAD). Robocalls continue to be the top complaint received by the FTC, accounting for two-thirds of the approximately 500,000 complaints the agency receives monthly; Chairman Simons said many illegal robocalls involved fraud and deception and originated overseas. Despite those challenges, Chairman Simons touted successes in addressing the problem, including a \$23 million settlement obtained by the FTC in December 2018 involving robocall claims.

Interim Commissioner Boswell discussed Canada's enforcement priorities and successes, describing settlements over claims of "drip-pricing," where a company advertises a low price that ends up being bloated with mandatory fees after the customer has already interacted with the advertisement. Other advertising issues drawing the attention of Canadian regulators are "Made in Canada" claims and health performance claims. Interim Commissioner Boswell said the Canadian Competition Bureau was looking to begin seeking preliminary injunctions to enforce Canadian consumer protection laws for the first time, although they have traditionally been difficult to obtain in Canada. Such preliminary injunctions would safeguard consumers (e.g., regulators could take action rather than wait until consumer harm has already taken place). In Florida, Chief Deputy Attorney General Conners said the attorney

general's office has aggressively investigated and prosecuted internet scams targeting the elderly and military servicemembers.

Privacy issues and the impacts on consumers and marketers of the recently enacted EU General Data Protection Regulation (GDPR) and California Consumer Privacy Act of 2018 (CCPA) were extensively discussed by presenters at the conference. The conference occurred as businesses doing cross-border marketing along with their outside and in-house counsel are in the throes of developing and implementing compliance programs in light of these changes in the privacy regulatory environment. Broadly speaking, the GDPR compels digital marketers to allow consumers to opt-in to e-mail and other digital marketing, tightens limits on how digital marketers can collect consumer data, and requires advertisers to protect personal and personal-identifiable information they obtain from consumers, among other changes. The CCPA requires that digital advertisers permit consumers to opt out of the sale of their personal information to third parties. While the CCPA is to be formally effective as of January 2020, it will have some retroactive application, so lawyer-attendees and presenters commented on ongoing compliance work with clients. Presenters explained that the implications of the new laws on businesses doing inter-state and cross-border sales and marketing online are broad and profound in a regulatory space that had already been undergoing rapid change.

Privacy lawyer Thomas F. Zych, a Partner and the Chair of the Emerging Technologies practice at Thompson Hine in Cleveland, Ohio, said it was important for counsel to advise their clients that engage in cross-border business about the overlay of the various state, federal and international regulatory regimes in the context of the manner in which the companies use information. Further, Zych commented that counsel must be mindful of

clients' individual cultures and how their existing models can be modified to satisfy the GDPR and the new California statute in a way that does not harm the company's business. Perhaps more important than the creation of any particular privacy compliance program at a company is inculcating a general culture of compliance, Zych opined.

Ilunga Kalala, privacy counsel in Atlanta, GA for Turner Broadcasting System, Inc., shared the in-house perspective on implementation of the new privacy requirements. The company owns CNN, Bleacher Report, and dozens of other properties with online services impacted by the existing and emerging privacy laws. Kalala explained that digital publishers that rely on advertising for revenue may need to re-visit third-party agreements to ensure that service providers adequately protect consumer data and honor consumer data rights requests.

A powerhouse panel of in-house counsel from Uber Technologies, Inc., Walmart Stores Inc., and Herbalife Nutrition were joined by Laura Brett, director of NAD, and Crowell and Moring LLP Partner Christopher A. Cole to discuss approaches for and challenges with corporate compliance programs for consumer protection. Brett described the benefits of self-regulation through programs like NAD as a pathway to corporate compliance. Successful self-regulation, she explained, requires clear standards, independence, transparency and accountability.

Pamela Jones-Harbour, Senior Vice President Global Member Compliance & Privacy at Herbalife, described the company's training program for its independent members. In particular, each member may have individual sales and marketing approaches but must not run afoul of state and federal prohibitions on deceptive advertising. Herbalife's training includes professionally produced web-based training portals that offer examples of proper and

improper claims about the financial benefits of becoming an Herbalife member and glossy pamphlets outlining best practices for the collection and use of personal information of customers and leads.

Uber Technologies Chief Compliance and Ethics Officer Scott Schools described the company's approach to gaining compliance with various and rapidly changing regulatory regimes as the ride-hailing company expanded around the world at, what he called "the speed of now."

Closing out the panel, Cole described an outside counsel approach to guiding companies through development of a compliance program, including assistance with development and dissemination of appropriate policies and procedures, investigation of gaps in existing programs and considerations surrounding internal investigations. Cole explained that a good compliance program can provide some defense to a regulatory enforcement action.

Other panels focused on a series of historic FTC hearings that took place throughout 2018, described a multi-state opioid investigation led by state attorneys general, and discussed whether consumer protection law and enforcement had kept up with the pace of change in mobile marketing. The Honorable Jon S. Tigar, U.S. District Judge for the Northern District of California, moderated a panel on the state of the law with respect to whether tangible harm is required to open a consumer protection case and how federal courts have approached the issue since the U.S. Supreme Court's 2016 *Spokeo* decision on tangible harm.

You're Invited! ABA Programming

How Much Is It? Global Enforcement of "DRIP Pricing"

**May 9, 2019 5:00 pm ET
(May 10, 2019 9:00am Australia time)**

"DRIP" pricing -- advertising part of the full price in the headline price -- is an emerging issue subject to enforcement around the world, particularly digital platforms. How has enforcement developed in active jurisdictions, including the US, Canada and Australia? How is consumer harm assessed? What are strategies for minimizing risk and defending challenges? Please join us for a discussion of these issues.

Moderator:

- Alysha Manji-Knight, Davis Ward Phillips & Vineberg LLP

Speakers:

- Charles Coorey, Gilbert + Tobin
- Richard Lawson, Manatt Phelps & Phillips LL
- Christian Warren, Competition Bureau (Canada)

FREE: Antitrust Section Members, Government, Non-profit Employees, Students

\$25 Other Non-Members

Click [here](#) for more information and to register.