FPF Privacy Legislation Series

● **Goal:** Providing independent resources to legislative staff and policy experts working on legislation, in support of a baseline, comprehensive privacy law in the United States

● **FPF’s Mission:** Bridging the policymaker-industry-academic gaps in privacy public policy; developing privacy protections, ethical norms, & responsible business practices.

**Previous Sessions:**

● Covered Data
● Research
● Federal Preemption
● Child Privacy
● ... send us your ideas!

[www.fpf.org/legislative-resources](http://www.fpf.org/legislative-resources)
Introduction

- represents clients in complex litigation, including the defense of class action lawsuits
- has represented clients in matters involving federal privacy statutes, constitutional privacy rights, consumer protection laws, intellectual property, laws affecting online gaming, contractual disputes, and federal and state securities laws
- assists clients in responding to formal investigations and informal inquiries from federal and state regulators
- Advises service providers facing demands for user data from law enforcement and private litigants

Nick Jackson
ZwillGen
Introduction

Private Right of Action (PRA)
- Access to justice
- Access to information (discovery)
- Strong compliance incentive
- Judicial review
- (EU adequacy?)

Federal Agency (FTC)
- Legal Uniformity
- Legal Certainty
- Agency Expertise
- Policy Adaptability
- “Anti PRA” arguments (litigation costs, incentives to settle meritless cases)
# Webinar Agenda: Enforcement

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1. Government Enforcers
Federal Trade Commission (FTC)

- Civil law enforcement agency
- “Common law” of privacy and security - § 5 of the FTC Act
- Investigative tools:
  - “civil investigative demands” ("CIDs"); 6(b) authority; ability to conduct wide-ranging studies
- May initiate an enforcement action using either an **administrative** or **judicial** process;
  - If a company violates a final order, it is liable for a civil penalty for each violation.
  - Can refer to U.S. Dep’t of Justice for criminal penalties
- Rulemaking authority (some)

https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority
Considerations for FTC as an Enforcer

- Consider: FTC as the locus of enforcement vs. FTC’s **Section 5** enforcement
- Keep existing “unfair” and “deceptive” standards?
  - Act/practice “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves & not outweighed by countervailing benefits to consumers or to competition.” 15 USC 45(n)
- Addition of:
  - State Attorneys General (or other local entities) as additional enforcers who can bring actions as *parens patriae*?
  - Civil penalties or other consumer redress in the first instance of a violation?
  - Mandatory complaint resolution?
  - Broad or targeted rulemaking?
  - Funding and staff
Notable recent enforcement by State Attorneys General ("AGs") under e.g. the Children’s Online Privacy Protection Act ("COPPA")

Local enforcers could include: city attorneys, state consumer protection officers, etc.

Interaction between state/local enforcers and FTC:
- Notice period to the FTC;
- Consolidation of complaints by several State AGs;
- Intervention (by Right);
- Prohibiting AGs from instituting actions during the pendency of an ongoing FTC action against the same defendants;
- Requiring AGs to explicitly seek approval from the FTC to bring civil actions.
2. Non-Government Enforcers
**Individuals, Classes, and Nonprofits**

- **Individuals**: a federal privacy law may permit individuals to sue on behalf of themselves or others (parent/guardian relationships).

- **Class certification** is available under Rule 23 of the Federal Rules of Civil Procedure (unless otherwise modified in the law).

- **Organizations & nonprofits** are in some cases able to sue, for example on behalf of their members, if they can meet Standing requirements.

- **A federal law could**:
  - default to existing rules for organizational standing;
  - establish a framework for nonprofits to challenge violations of the law - either by creating standards or processes for qualification, or creating an open-ended authorization (allowing any 501(c)3 nonprofit to sue); or
  - defer this process to the FTC or State AGs, or require them to appoint nonprofits.
Anyone challenging a violation of the law in federal court must meet the Constitution’s minimum standing requirements, demonstrating that they have:

- (1) suffered a specific injury; that is
- (2) traceable to the defendant; and
- (3) that will likely be redressed by a favorable decision.

Unsettled area of law for privacy violations (Spokeo v. Robins)
- A “bare violation” will likely not suffice
- However, specific injury might include violations of core legally protected interests (e.g. trespass), or unfair profit. (See: Amicus Brief by Restitution Scholars in Spokeo)
3. Nature of Enforceable Violations
Harm Standard

Options:

● All violations are actionable
  ○ Subject to constitutional minimum

● Heightened “harm” standard - a plaintiff must demonstrate that the law has been violated and that they have experienced some “harm”
  ○ Could meet or exceed the constitutional minimum
  ○ For example: physical or financial harm; unfair discrimination; emotional injury; violations of core rights
Intent Standards

A new privacy law could tie enforcement (or remedies) to various heightened standards of intentionality by companies regarding violations of the law: e.g. mere negligent violations, willful or intentional violations, or violations evincing recklessness or knowing disregard.

Statutory Models

- **Driver’s Privacy Protection Act ("DPPA")**: permits civil actions against entities that “knowingly” obtain, disclose, or use personal information from a motor vehicle record in violation of the law, from any individual to whom the information pertains.

- **Privacy Act of 1974**: violations that are “willful or intentional” can give rise to compensatory damages, while violations that do not meet this standard can only provide a basis for injunctive relief.

- **Fair Credit Reporting Act ("FCRA")**: permits actual damages within a set range when a company “willfully fails to comply with any requirement” of the law, while higher penalties exist for “obtaining a consumer report under false pretenses or knowingly without a permissible purpose.”
4. Judicial Remedies (and Other Forms of Individual Redress)
Judicial Relief

- **Equitable Relief**
  - Injunctions: stop the disputed activity
  - Specific Performance: perform a specific action

- **Statutory Penalties**
  - Treble damages for greater intent standards

- **Actual Damages**: monetary compensation tied to harm

- **Punitive Damages**

- **Restitution or Disgorgement**

- **Judicial discretion** - for example to increase where heightened intent standards are met
Considerations for Individual Redress

1. Immunities, Complete Defenses, and Safe Harbors

2. Grace Periods (Notice & Cure)
   a. e.g. with internal appeals or regulatory reporting requirements

3. Heightened Pleading Standards / Early Dismissal

4. Preferred or Mandatory Venue
   a. Good for legal certainty and building a body of expertise in a particular circuit; challenging for consumers

5. Mandatory Complaint Resolution (or, Exhaustion of Agency Remedies)
Questions?

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