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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

\$33M Apple Pact Ushers In Broad New FTC Disclosure Standard

By **Allison Grande**

Law360, New York (January 15, 2014, 8:48 PM ET) -- The [Federal Trade Commission](#) on Tuesday signed a \$32.5 million settlement with [Apple Inc.](#) to resolve claims that the company unfairly billed parents for in-app purchases their kids had made without their permission, an authority-stretching move that will force many companies to rethink their disclosure practices.

In its administrative complaint, the regulator **accused Apple** of violating the unfairness prong of Section 5 of the FTC Act by billing parents for their children's activities in apps without obtaining their express informed consent. The purchases were made possible by an App Store feature that allows a user to make unlimited in-app purchases for 15 minutes after an initial purchase has been authorized — a policy the FTC claims Apple failed to disclose clearly to parents.

To resolve the claims, Apple agreed to enter into a consent order that is binding on the company for 20 years and requires it to ensure it has obtained “express, informed consent” from consumers before charging them for items sold in mobile apps. Apple must also pay a minimum of \$32.5 million to provide full refunds to consumers for unauthorized purchases, according to the consent order, which the commission approved in a 3-1 vote.

The groundbreaking pact establishes a new bar for mobile disclosures, while providing the latest indication that the FTC won't hesitate to stretch the limits of its unfairness authority to pursue companies that have instituted practices that it believes pose a substantial risk to consumers of all ages, according to attorneys.

“The settlement is an absolute clear warning by the FTC that the standard that it is going to look at for companies' disclosures is going to be very robust, and I suspect that this is the first step in the FTC's increased enforcement over how disclosures are being made in all apps across the board,” [Loeb & Loeb LLP](#) consumer protection defense practice chair Michael Mallow told Law360.

The FTC has stepped up its enforcement efforts in the technology space in recent years, as the explosion in the use of mobile devices, the development of more sophisticated online tracking methods, and other advances have brought to light novel consumer protection and privacy issues.

The agency's action against Apple provides companies valuable guidance about what the regulator may focus on in future actions, according to attorneys.

“The FTC is sending a message to everyone that it's really looking at the way that shopping in general

is being done in this new age,” [Kaufman Dolowich & Voluck LLP](#) managing partner Christopher Nucifora said. “Any company on the forefront of technology needs to pay attention and have really tight policies in terms of their billing procedures going forward.”

The settlement also makes clear that companies must take steps to make sure consumers are actually aware of their policies, according to Torin A. Dorros, the managing attorney of Los Angeles-based boutique firm Dorros Law.

Companies can also learn from the commission's rationale for bringing the action, based in large part on the tens of thousands of complaints Apple had received about unauthorized in-app purchases by children, which the company allegedly failed to adequately address.

“Other app stores and app developers would be wise to consider what types of complaints they received and what steps they can take to adjust their disclosure practices to minimize potential consumer complaints, given that the FTC could certainly bring additional enforcement actions in this area that require companies to provide refunds if they haven't taken corrective action,” said [Arnall Golden Gregory LLP](#) partner Kevin Coy.

But the Apple case shows that not just any response will be adequate, Mallow pointed out. The commission acknowledged that it had decided to take action against Apple even though the company had adjusted certain screens and offered refunds in response to the consumer complaints.

“Generally, if a company responds to customer complaints in a diligent way that is not recklessly indifferent, the commission really has not gone after them,” Mallow said. “But with this action, the commission seems to be saying that even if the company has initiated a response, it can still go after them if it's not the response that it sees as sufficient — and it's questionable whether the FTC is in a position to do that.”

The FTC's action fuels the raging debate over how and when the commission should be allowed to characterize a business practice as “unfair,” an authority currently being contested in a pair of closely watched [data security cases](#) pending against [Wyndham Worldwide Corp.](#) and LabMD Inc.

“The most notable aspect of the action is that it is a further signal that the majority of the commission sees a greater role in the use of unfairness authority and a greater sensitivity to consumer harm in conducting the cost-benefit analysis required under the current unfairness doctrine,” said Alan Friel, chairman of [Edwards Wildman Palmer LLP's](#) media and technology licensing and transactions practice.

Commissioner Joshua Wright made the issue the basis for his decision to vote against the Apple agreement, saying in a 17-page dissent that he felt the case did not support a finding of unfairness because the allegedly wrongful conduct had impacted “an extremely small — and arguably diminishing — subset of consumers.” Wright said the commission should have conducted a more thorough economic analysis to demonstrate whether the injury at issue justified the new case precedent and the high monetary remedy.

“These are well-articulated points that will no doubt continue to be discussed in the ongoing debate about the FTC’s use of its unfairness authority, and raise for businesses that may become FTC targets what type of evidence might be helpful to [assist in] evaluating such cost-benefit decisions if the FTC does not undertake to prepare such analysis itself,” [Kelley Drye & Warren LLP](#) partner Alysa Hutnik said.

But regardless of how the fight over the FTC's unfairness authority plays out, attorneys agree that the unique and massive monetary settlement produced in the Apple case makes clear that the regulator won't be backing off from these issues anytime soon.

“The FTC has been very active in monitoring the use of technology by minors, and I would not be surprised to see other retailers besides Apple contacted about their practices and controls to limit unauthorized purchases by minors, if that has not already happened,” said Al Saikali, the co-chair of [Shook Hardy & Bacon LLP](#)'s data security and privacy group.

Apple is represented by M. Sean Royall of [Gibson Dunn](#).

The case is In re: Apple Inc., case number 122-3108, before the Federal Trade Commission.

--Editing by Kat Laskowski and Philip Shea.

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