Podcast Transcript

AD Nauseam: What is This Unfairness Thing You Keep Talking About?

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Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Leah Brave, and you are listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing and Digital Media team. Together they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel do a deep dive into the FTC's authority to go after and regulate unfair practices. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Thanks, Leah. Yes, welcome to AD Nauseam. We are going to be talking about something a little academic today. But before we dive into that, Daniel, I am so happy to report AD Nauseam has fans.

Kaufman: Okay, stop the presses. Stop the presses.

Mudge: I will. I wanted to tell you, I actually got two fan letters. People dropping in my DMs. I've always wanted to say that. The first one was a friend of my teenage son who had an unpaid social media marketing internship, and he was sent to find stuff about influencers on the Internet. And he was like, hey, Mrs. Mudge, heard your podcast. Cool. Alright? And then the next one, I had a reach-out from an actual lawyer. And this lawyer said that our CBD cast, with our one-and-only Jack Ferry, was fantastic, and he said he finally understands the CBD landscape. I was thrilled about that, except this guy is a patent lawyer, so I wasn't quite sure why he needed to understand.

I feel like I just wanted a reminder that if there are folks who listen to us, one, we're so thrilled, but please reach out if there is stuff we can do different, better, if there is topics you want us to hit on, if there is topics we've hit on but you want us to do a deeper dive, if you don't give a hoot about what kind of eighties music we want, you can tell us that. We'll probably ignore you, but we really, really do want to hear from you.

Kaufman: So, that is great to know people are listening to us, Amy. So, we've got a little bit of an unusual episode today. What are we doing? We're talking all about unfairness, right?

Mudge: It is so unfair, but yes, we're going to talk about unfairness. Now you know, I'm the deception queen. This is not about misleading ads, not about interpreting ads, not about fraud. This is when you're doing something to your customer that just feels not right. It is not a lie or a stretch of the truth. It is just unfair. But, Daniel, why are we doing this? Why are we doing this now?

Kaufman: So, we are doing this now because unfairness is really important in 2023. It is really important to the current FTC leadership, and look, there are times 10 years ago where we certainly did not need to have a special discussion on unfairness. But unlike deception, unfairness is a very flexible tool that really can allow the FTC to go after practices writ large in the economy that they're concerned about. Now, we're going to talk more about sort of very rigorous standards associated with it. But unlike deception, where it is a little more cabined, it is a little bit harder to run amok under deception theories, unfairness, there is definitely the potential for going long, going deep, and just really broadening the concept of what is unfair.

Mudge: And this FTC doesn't like boundaries so much, so I can see them wanting to push on, and we've talked about this before, using every tool in their toolbox. That makes, and might I just add, the unfairness policy statement and the deception policy statement are really required reading. I think as you told me, Daniel, you read them once a year. At least once a year? And I'd like to also add that these are two additional fabulous things that came out of the 1980s.

Kaufman: Yeah. They are, look, they're required reading for anyone who practices in this area. And every time I read it, I see something new, or I'm reminded of something new that is very relevant to something I'm working on. So, they are statements that have really borne the test of time and are really important for any practitioner.

Mudge: But I've always thought of unfairness as kind of the bastard redheaded stepchild. Or I make fun of it. Like when I think of unfairness, I think of a case, the nineties was also a good decade. From 1998, there was a case that Ad Practices brought against a beer company, Beck's Beer, saying it is unfair to air on TV a beer ad where people are sailing in a boat. Well, before we get into this, Daniel, I'm now thinking about being on a boat with beer, perhaps a yacht on a summer day. What would you drink if you were on a boat? Would it be beer or something else?

Kaufman: So probably not beer but look, for me it would be either margaritas or a gin and tonic. And I'm not a big gin and tonic drinker, but on a boat, sunshine, it seems like a lovely drink to have. What about you, Amy?

Mudge: Well, I'd say frosé all day, but I know that I'm an Aperol Spritz kind of gal.

Kaufman: Okay.

Mudge: That is my story and I'm sticking with it. Well, hey, I know you love to talk about movies. What is your favorite boat movie, Daniel Kaufman?

Kaufman: So, if we're looking at movies where boats are pretty heavily involved, I'm going Jaws, classic seventies.

Mudge: What?

Kaufman: That boat takes a beating, that is for sure.

Mudge: I would not know you were a horror guy. Really.

Kaufman: Oh, I love horror movies, sci-fi, all that stuff. How about you?

Mudge: _______ sci-fi, horror… Okay…

Kaufman: Is it Titanic? Are you gonna give me a Titanic for your favorite boat movie? Amy, I'm afraid of that.

Mudge: No, no, I'm not. I'm going to actually go rogue, and I'm gonna go not a movie. I'm gonna go Bravo's Finest Below Deck. I know it is a television show, but there should be a movie and I'm very confident now that the writers' strike is over, it is coming, and I will be there for the opening weekend. Back to unfairness. Daniel. Professor Kaufman. Set the stage. What is unfairness?

Kaufman: Okay, so unfairness, it is in the FTC statute. It is defined as a practice, and the FTC can challenge as unfair, a practice that, three-part test. Causes or likely causes substantial injury that is not reasonably avoidable by consumers and that is not outweighed by benefits to consumers or competition, that the harms are not outweighed by those benefits. Basically, a cost-benefit analysis. So, the FTC can take a practice and allege that it is unfairness if they can meet that three-part test. So, when you think about deception, where it is primarily about a representation, maybe an omission, there is only so much you can do with that. But when you talk about unfairness there becomes a much broader world of potential things that you can focus on. So not just claims, practices. That is really a core difference.

Mudge: Alright, give me an example. Give me a classic example not involving beer.

Kaufman: Not involving beer or boat. So, look, the seminal case probably on unfairness is *International Harvester*, again from the eighties. So, *International Harvester* involved, it is a company that sold tractors to lots and lots of people. There was an issue with the tractor where if you remove the fuel cap while it was on, something like that, it would undergo what is called fuel geysering, which is not a good thing. Fuel exploding. Bad things could happen if you sort of undid the cap, and a few people were seriously injured by that practice. So, the FTC, by the fuel geysering, they were injured, so the FTC alleged that it was an unfair practice to fail to disclose information to consumers about that. It is, and that is really an interesting thing here. The FTC didn't say that selling a tractor with this issue was the unfair practice. It was failing to let people know that this was a real concern and warning them about that potential hazard. So, when you look at unfairness, it really is important to look at what is the precise issue because the *International Harvester*, it is not the fuel geysering, that is the unfair practice. It is failing to warn people, hey, don't mess around with the fuel cap while the tank is on.

Mudge: Alright, so seems unfair to have a fuel geysering situation when you're driving a tractor. Not a situation I can see myself in, but I can imagine it. But to me, why they have to go to unfairness, this feels like a material omission. Like, there is some implied warranty that you're selling a tractor. It is going to work, and it should be generally safe. Why wouldn't material omission be the place you go?

Kaufman: So, it is interesting that Commission decisions specifically talks about the issue and that is their first focus. Like, why isn't this a deceptive omission? I thought I was gonna get a good tractor, but it had this issue. Well, the issue isn't the tractor. It is about lack of warning on the notice label. And the Commission says, look, this is not a case where there was some sort of triggering representation, some sort of half-truth. This is what unfairness was designed to get at. These kinds of practices. So, it is discussed in the *International Harvester* decision, but I do think that line of what is a deceptive omission and what is an unfair omission, it is fuzzy, I would say, but generally if you're not focusing on a triggering representation, you can end up in the universe of unfairness.

Mudge: Okay. Well, alright, I get it. You buy a tractor, and it blows up on you, there is probably some harm there. Let's go back to beer for a minute. In the beer case, people on boats, they're drinking beer. They don't have their life jackets on. Okay, that is unfair. What is the harm there? Do we really think that the Commission actually think that people were out in droves buying their beer and hopping on their yachts and engaging in this unfair behavior? It doesn't seem like that is a harm that needs to be remedied, even if it is maybe not a great idea.

Kaufman: Yeah. Look, when you look at a case like that, I understand the theoretical harm there. Other people are going to see this commercial and perhaps they will go in their sailboat and drink a lot of beer and people won't wear their life jackets. But, like, I get that it is a theoretical harm. But look, is that an ideal case involving unfairness? I don't think so, because it has to be likely to cause substantial injury, and there is a lot of detail in the FTC's unfairness statement about what does that mean, and it is not supposed to be trivial harm. It is not supposed to be theoretical harms. It is supposed to be primarily financial, let's be clear that they do say that in the unfairness statement, but it can also be issues of safety and harm and in some extreme cases, emotional distress. But this focus on harm is really pivotal to how the FTC is approaching unfairness issues right now.

Mudge: Emotional distress? Okay, how about my emotional distress when the Internet gives me way too many ads because they know me, for stuff that I really don't need, but I got to go out and buy. Is that unfair?

Kaufman: That is you supporting the American economy, Amy. That is…

Mudge: Oh. I'm doing my part. I'm doing my part.

Kaufman: But if you look at the targeted advertising issue, and I know we're gonna dig into this, but let's say you were targeting ads to a particularly vulnerable population for something that they were particularly vulnerable about. For people who were lacking in funds, and you were targeting them with ads for a ne'er-do-well financial assistance program. You can cobble together an unfairness theory, I think, for something like that, but broadly targeting advertising, I don't think you could certainly allege that writ large is going to be an unfair practice. But the FTC seems to be heading in that direction a little bit.

Mudge: I'm a vulnerable audience for shoes, but anyway. Alright, before we get into, because I do want to now talk about how the FTC has more recently been grabbing this unfairness authority, you mentioned the Section 5 and we've talked about an unfairness policy. How are these things connected or are they in any way? Why is there a policy if unfairness is defined in the Act?

Kaufman: So, it is interesting. The policy statement came first. So, it was in the early eighties. *KidVid* happened in the late seventies. So, the FTC was looking to regulate kids advertising online using their unfairness theory, and they wanted to basically severely restrict the ability of ads to target children because of dental health issues. So huge issue in the late seventies. Congress got very upset about what the FTC was doing. At some point in the early eighties the FTC comes out with this unfairness statement explaining the contours of what is unfair because the statute up until that time had not defined unfairness. It had been developed through case law. So, the FTC puts out this statement and a few years later, Congress looks at the statement it says, yeah, that is it, and we're going to put that three-part test into the statute. So that is why we have that definition in the statute.

Mudge: Okay. Alright. I got you. So, *Kids*, I'm glad you mentioned that. I mean, I'm teasing about the beer. But *Kids* was the earliest manifestation that I do think of with unfairness. And it is in the context of showing kids in ads with that, biking without helmets or splashing around in a pool without parental supervision, and that thing laid the groundwork for the CARU guidelines as well. That, to me, I get is unfair. What are the other kind of more historical areas the FTC asserted on fairness jurisdiction in?

Kaufman: So, I would say, look before Chair Khan took over, I would say there is some key areas where you would generally see an unfairness count. If a company was billing consumers without their authorization. Lots and lots of FTC cases…

Mudge: Cramming, okay.

Kaufman: Exactly, about billing practices. The other issue that's became accepted in the mid-2000s was having poor data security. Data security program at the FTC started with deception. A company would represent in the privacy policy that they had good security. They didn't. That is an easy deception case, well, relatively easy. But what would happen if they had not made such a representation? You have to turn to unfairness at that point, and that is, in the mid-2000s the FTC started to allege that, look, we don't care if you're making a representation or not. If you have poor data security, that can be an unfair practice. So that is another area where we've seen lots and lots of cases alleging that poor security can be an unfair practice.

Mudge: Alright. I know you were at the Commission then. Actually, that seems smart and creative. If Congress hasn't given you a data protection statute, but have said, hey, FTC, you should be looking at this area, that is using your tools creatively in the toolbox. So, data security I get. Cramming, I get. Let's talk about this in emerging context. So, I know we've got the Commercial Surveillance Rulemaking that is in a state of play. And I don't think we know where the agency is heading, but I would bet that a good amount of what they're concerned about, as you mentioned earlier with behavioral advertising or targeting, is rooted in unfairness and not deception.

Kaufman: Totally agree. Look, could they do a relatively simple rule that you can't make a misrepresentation about your privacy practices or about your security? That would probably be a relatively easy rule to make, but I don't think that is what the FTC is looking to do there. That may be part of what they eventually do, but they're looking at definitely much broader practices that are going to sort of limit, restrict, particularly how data is used for advertising purposes. When you look at the Advanced Notice of Proposed Rulemaking, there is a huge focus on behavioral advertising and the use of data for advertising purposes. So, hard to see that not being some significant focus of what they eventually do on that rulemaking.

When the FTC does rulemaking, and this is really important, the rulemaking has to be premised on deception or unfairness. They can't just make a rule unless the practices are deceptive, unfair, and prevalent. So, when you look at unfairness and you think about how data is collected and used for advertising purposes, the FTC has to show that the practice they're talking about causes or likely causes substantial injury, it is not reasonably avoided by consumers, and then you have the cost-benefit test. It is not outweighed by benefit to consumers and competition. So, thinking about the enormous benefits of behavioral advertising to lots and lots of companies and the economy, really hard to imagine exactly how the FTC is going to approach this to fit within unfairness.

Mudge: Tell us about *Kochava*. I know you've been following this case. It is one of your favorites. How does that play in?

Kaufman: *Kochava* is this really interesting case. It is in litigation. *Kochava* is a data broker that geo information about millions of consumers from third parties and sales or transfers that data or shares that data with other people, other companies that want to purchase it, and the FTC alleges that this practice is unfair because you can look at this data, eventually, you can pinpoint it to people and that data may show that individuals were going to, whether it is healthcare clinics, houses of worship, things of that nature, and the FTC is now alleging that it is an unfair practice. So, Kochava filed the motion to dismiss and the court, it is a really interesting decision on the motion to dismiss. The court dismisses the case, and we'll get to where it is right now, dismisses the case because the FTC basically had not adequately shown the harm. They had not shown the likelihood of harm was significant. They had theoretical examples of how consumers may get harmed, but the court is putting them to the test. This is unfairness. You have to meet, at least in your complaint, you have to show how you're gonna meet the three-part test. Couple of other interesting things about the decision. The decision does say that the invasion of privacy, if it is substantial enough, can be unfair. So, even though the FTC loses in this initial decision in the case, huge win for them on the statements from the Court about how privacy can dovetail with unfairness.

So, the court does give the FTC the ability to amend the complaint. The FTC has amended the complaint. It is filed under seal. The seal has not been lifted, so we don't yet know how the FTC is addressing the issue. We do know that Kochava has actually already filed the motion to dismiss that complaint, and there's been a lot of motions practice back and forth. That is going to be a very adversarial case. But look, it is interesting because you've got this, *Kochava* court makes it clear, it is hard to bring an unfairness case. You've u got to prove it up. It is not an easy thing to do, and yet the FTC keeps talking writ large about all the things it can do with this unfairness authority. So, there is this tension between what we're seeing in the courts and what the FTC is saying. That said is really, it is interesting, it is exciting, but unfairness is not easy. It is a difficult test to meet.

Mudge: Let's get to the so what. And I think that is the key. Lot of uncertainty about unfairness. Lot of questions as to the extent of the FTC's jurisdiction, but clearly lots of indication that they intend to push these boundaries. And most of our clients, friends of our clients, want to avoid litigating. It is not winning a case. It is avoiding a case. So, what do we think are some best practices for companies to consider?

Kaufman: So, look, I think the first one is look carefully at issues involving kids and teens. As you mentioned, Amy, a robust area for potential unfairness because of the nature of kids and their inability to make smart decisions. So, I do think looking at your practices, how kids are treated on your platform or whatever the service might be, are there things there that could be problematic beyond deception? But look, it is a hard analysis to take because it could cover virtually anything. But I do think kids and teens has to be a focus. And I do think anytime you're looking at sort of potentially risky practices, high profile practices that may draw attention, how would that be approached on an unfairness analysis? But look, this is why I do think sometimes it is helpful to talk to people who have sort of deep knowledge on FTC issues because it is a weird tool, and it can be interpreted and used in a lot of unusual ways.

Mudge: So, I think we'll end by saying vulnerable audiences, kids, other folks. If any of your practices have a disproportionate effect or focused on these vulnerable audiences, to take a close look at that. If there is something that you're doing or thinking about doing that just makes you go, oh, I don't know about that. That is the territory that we're getting into with unfairness. You should take a hard pause and you should go through these unfairness factors to see, if I had to defend this practice, how would I defend this practice? Because, really, those factors are more than theoretical. They really do form the framework about what the FTC is going to have to prove in an unfairness case be it an…

Kaufman: Yeah.

Mudge: …old-school cramming type one or a newer novel use.

Kaufman: Yeah. And another interesting thing, just to flag as we wrap this up, is the FTC is looking at discrimination under unfairness theories also. So, they've alleged in a case recently that discrimination can be an unfair practice. And again, when you look at the standards, it may be. Now, the District Court in Texas just came to a different decision on a Consumer Financial Protection Bureau case, but it is just a good example of unfairness may be able to cover a lot of conduct you wouldn't necessarily think about at the outset.

Mudge: Emotional harm. Discrimination. Yeah. These are not typically words that we mention in the same breath with the FTC, but it is a whole different world out there, Daniel.

Kaufman: What a wonderful tour on FTC history this has been, Amy. Thank you for shepherding this one.

Mudge: And that is another episode for us of…

Both: …AD Nauseam

Brave: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in AD law, visit our AD-ttorneys Law Blog at www.

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