Podcast Transcript

AD Nauseam – It's My Life: Individual Liability

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Corbett: 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 Connor Corbett, your new host of AD Nauseam, and you're 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 explore the topic of individual liability as it relates to FTC cases and the importance of listening to complaints and responding appropriately from the start. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel for this week's episode on individual liability.

Mudge: And welcome back to AD Nauseam to all of our beloved ad law listeners. Here at AD Nauseam, it is now fall. I can't believe it, actually. But that is always our very busy conference season. Our team went recently to the National Advertising Division annual conference that was held in D.C. We're getting ready for the upcoming ANA conference that will be held back in Chicago this year.

Kaufman: I remember my very first ANA conference, which actually was also in Chicago. I had to sub in for a commissioner who had other plans or better things to do maybe, and was really shocked when I got there and realized the luncheon keynote was a big deal, an enormous venue in front of hundreds of attendees, and I was not psychologically ready for that. I remember my speech well because my colleague and good friend Molly Crawford helped draft it. And we worked in, and she worked in, I should say, on my behalf, a number of Walking Dead references, which were spot on at the time. But no, it is a great event. And Amy, what Baker swag is in store for attendees?

Mudge: Daniel, I cannot give away our swag. That is a giant trade secret. All attendees rush to the _____ to see what awesome free stuff they can get, probably so they can bring it home to their kids and call them special presents. But our listeners are just going to have to wait for that. I do think we've got a few cool things in store though.

But hey, what our listeners won't have to wait for is knowing that we will once again be doing a quote, unquote live episode of AD Nauseam. And by live, I mean not at all a taped podcast. So, you'll have to be there to experience it. ANA is, we call it the big game, the advertising prom. The show, if you will, for advertising lawyers and for in-house counsel. I'm glad we're back in Chicago this year. It is the classic venue for this. But hey, that brings us to a great question for the day. Daniel, what are your favorite movies and shows where Chicago plays an important role?

Kaufman: So, I'm going to start with movies because I have a bit of an out-of-the-box movie that I haven't thought of in a long time, and that is The Fugitive with Harrison Ford. Totally takes place in Chicago. Lots of cool scenes, a St. Patrick's Day parade, very much a Chicago movie. And, of course, Harrison Ford in his heyday. As for TV shows, of course, can't not mention The Bear, which is center about Chicago. But I will throw out one other TV show that I thought was very Chicago, Married… with Children. Amazing show in its heyday, very entertaining, and very Chicago-forward.

Mudge: And very bawdy humor, Daniel. I thought you were a little bit more buttoned-up than that. Interesting.

Kaufman: That is not true at all.

Mudge: It is the mystique, Daniel, I'm trying to perpetuate for our listeners.

Kaufman: At some point, we can do a session talking about John Waters movies, and then I will make it very clear how bawdy I am, but how about _____ Amy?

Mudge: How long do you have for John Waters and beloved Baltimore? But thank you for mentioning Fugitive, I have not seen in years. I think I will put that back on my watch again list. TV shows, I'll say Shameless. But for movies, it is an embarrassment of riches. Almost all of the John Hughes movies were made there. Well, not all of them. But we had Home Alone, we had Ferris Bueller, of course, Breakfast Club, Sixteen Candles, and Uncle Buck.

Kaufman: We should do a total sightseeing tour of the best of Chicago film and TV when we are there in a few weeks. Okay, before we go into a food coma, though, from thinking about Chicago deep dish pizza, let the topic at hand. I mean, it is not really a pizza, it is like a casserole. But we got a tough topic today, and it is one we certainly hope our listeners aren't going to have to tackle. But it is really important, and it is the question of individual liability at the FTC. Particularly, when and how does the FTC go after individuals as well as the companies they either work or own?

Mudge: Yeah. It is really important, Daniel, and I'll do a food. Let's bite into it like a good Chicago hot dog with the pickles and all that other awesome stuff. But look, it is bad enough when your company is subject to an FTC investigation. Incredibly stressful, incredibly expensive, both in money and time. But certainly, one of the things you're going to have to evaluate early on and frequently is whether the FTC targets may go beyond the company and may actually land on some high up executives as well.

Kaufman: Certainly, when we think about this historically, looking back, the general concept was that the FTC would name individuals when it was needed to get complete relief. So, if you had a small, closely held company, then the FTC would pretty much routinely also name the individual owner or owners, in part in order to prevent easy avoidance of the order. For example, shutting down the company and opening up a new one just to avoid the order.

Mudge: Absolutely. And that for decades was what we expected individual liability would be limited to. Those really closely held company type cases and cases where the allegations really involved either fraud or something tantamount to fraud. But since those times the agency's evolved, maybe they've just expanded this concept. And whether to name individuals or not can be a bit of a hot topic, particularly when we're looking at large companies, even large publicly held companies. Those types of companies are certainly not shutting down, reinventing themselves just in order to invade an order. But we are seeing, we have seen, situations where the FTC has gone after individuals, either at the top of the corporate food chain or certainly in high up in relevant positions in very large, very prestigious companies.

Kaufman: And I guess the starting point for us has to be the legal standard. And that is where it gets somewhat tricky, because candidly, the legal standard for individual liability under the FTC Act is relatively low, which can make things really challenging. Now, the precise standard can vary based upon which circuit you're in and whether the agency is seeking money, but generally speaking, the FTC can go after you for individual liability for injunctive relief if the individual

participated directly in the challenge practices or had authority to control the corporate entity's practices. And there is a real range of practices that can be used to demonstrate authority to control, such as involvement with day-to-day affairs, policymaking, overseeing other employees, signing corporate documents, and a lot more. There is no need to demonstrate any ultimate control or decision making, by the individual when the agency is just seeking injunctive relief.

Mudge: It is not just broad, but honestly, it seems unlimited for higher level managers. I mean, authority to control, that seems insanely broad. But things are a bit different when the FTC is seeking money. And to be clear, this is a pre-AMG standard. And things differ in 2025, but older cases generally held that standard for money is actual knowledge or a new or should have known standard that the conduct at issue violated the law. Sometimes it is also phrased in terms of reckless indifference. But generally, it is going to require a more robust showing than the authority to control standard for injunctive relief.

Kaufman: Yeah, with a standard like this, there is just a lot of prosecutorial discretion. So let's talk commissions a little bit. We know that the prior FTC under Chair Khan was certainly getting more and more aggressive on this issue of individual liability. And there were times that we saw some partisan splits among the commission, with the Dems being far more inclined to name individuals and the Republicans at times raising concerns about going too far there. I definitely remember a case or two where Commissioner Slaughter, for example, issued statements complaining about instances where a CEO was not named. And certainly, Commissioner Chopra raised some similar concerns.

Mudge: Well, thus far, the new commissioners haven't talked too much about individual liability. But before we talk about a recent case, let's talk about a few statements, fiery statements, should I say, that we saw from former Commissioner Wilson. There was one case, *IT Media*, where the FTC named a bunch of individuals, including the general counsel, in an action that involved lead generation that allegedly collected sensitive information from consumers who were seeking loans and then allegedly sold that information to entities that were not in the business of providing loans. And Commissioner Wilson did concur in the case generally, but she noted that the FTC should exercise carefully its prosecutorial discretion when deciding whether to name individuals. And she really emphasized the need to be even more cautious when going after an attorney and not to chill frank discussions between lawyers and company leadership that might even undermine compliance efforts. It could disincentivize qualified lawyers from assuming in-house roles, and that in turn might undercut the whole attorney-client privilege.

But ultimately, she agreed to name the attorney because he was allegedly frequently acting in a business capacity as opposed to providing legal advice, such as being responsible for some day-to-day operations. But at the end, she said, given his alleged participation in the challenge conduct as a business manager rather than as a lawyer and his ongoing business roles with affiliates of IT Media, she concluded that individual liability was both warranted and necessary to achieve the effective relief.

Kaufman: And we have individual liability as an active issue in some pending FTC litigations. And let's be clear, the fact that the FTC has not dropped the individuals does send a pretty clear signal that the current FTC under Chairman Ferguson seems comfortable with some assertions of individual liability. In one such case that recently settled, the FTC had named three individuals with a very large, well-known company, and these were not CEOs, but rather we had a senior vice president and a vice president who were allegedly involved in the practices challenged in the case. And before the case settled, the court did issue a very interesting summary judgment opinion.

Mudge: Well, let's just say the case went pretty well for the FTC. The court, on the issue of individual liability, looked at the agency's evidence and showed two of the individuals had authority to control the challenge practices were involved in the practices and purportedly had knowledge or something close to knowledge of the issues. And sole responsibility was not the standard. And the fact that many others were also involved didn't change things. So, to the extent that the company would be found liable, the individuals were appropriately named.

Kaufman: But as for the third individual named, the court held that there were issues of fact that did present questions of fact as to whether it was appropriate to name this third individual. So summary was denied there. And for the ultimate settlement, the FTC seems to have quietly dropped this third individual, and the settlement just involved the first two that you were talking about, Amy.

Mudge: Yeah, the issue, individual liability is also quite significant in the FTC's ongoing litigation against FleetCorp and its CEO. The FTC generally alleged the company engaged in a range of deceptive and unfair practices regarding savings on fuel costs. And that case is still going on. There is an appeal that is pending in the 11th Circuit. But in the district court level case, again, the case went very well for the FTC on summary judgment and individual liability issues.

Kaufman: Yeah, the decision came out a couple of years ago, and there is a lot of interesting stuff in the decision on claim interpretation, the adequacy of disclaimers and what constitutes substantial injury. And I think I remember us blogging about this a couple years ago. But on the issue of individual liability, the court discussed the liability of the CEO, who was also the chairman of the board, and let's just say the court did not have a hard time finding liability there.

Mudge: Yeah, it is a rough district court decision for the company and the individual. And the court there emphasized that the CEO was the ultimate decision maker and had final say on decisions for the fuel car business. He approved some of the decisions that were relevant to issues in the lawsuit, and the court said he could have, quote, nipped the offending activities in the bud. In a footnote, where lots of times the good stuff is hidden, the court even notes that, quote, employees who disagree with the CEO too frequently are removed. The court just didn't buy the Defendant's argument that the CEO's authority and oversight were only high level, and thus his position was insufficient to establish his authority to control Fleet Court's unlawful practices.

Kaufman: And I should note that an appeal of this decision is still pending, but for the second prong, showing some knowledge of the practices, the FTC very much came to court with literal receipts, including emails, internal studies, and public reports about the challenged practices. The court finds he had knowledge of, or at a minimum, reckless indifference to the unlawful practices.

Mudge: And, you know, I come back again to Commissioner Wilson. Often she was troubled not just about naming GCs, but also about naming CEOs. In a case involving Drizly related to data security practices, the settlement included the CEO with allegations that the company, presumably at the direction of the CEO, had not hired a CISO or a CTO to button up data security practices. But Wilson said, and I think rightly, CEOs have hundreds of issues and numerous regulatory obligations to navigate. And really, it is companies. not federal regulators, who are better positioned to evaluate what risks require the regular attention of the CEO versus what risks more appropriately be delegated.

Kaufman: Yeah, and Amy, this issue of individual liability or not individual liability can also continue after an FTC action. As we all well know, Facebook paid about $5 billion to the FTC a number of years ago to settle allegations in connection with privacy practices. And there was follow-on shareholder lawsuits that allege that the company paid too much money in order to allegedly not have the CEO of Facebook be named specifically in the complaint. So that case settled recently. I'm not saying anything about whether or not that was accurate, but this issue can have a life above and beyond the FTC action.

Mudge: Absolutely. I mean, there are real questions as to whether there is horse trading that goes on between company liability and individual liability and if that is appropriate.

Kaufman: Amy, any closing thoughts from you on this? What should we make of this? What should folks think about? What is going on? Tell me everything.

Mudge: Well, at the outset, keep in mind that in almost every FTC investigation, the FTC staff will evaluate the company and will also evaluate whether there are individuals who should also be _____. That is just simply part of the case investigation 101. And while individuals might not be their initial focus, at some point, as the case develops, there will be discussions about potential individual liability.

It is also worth emphasizing that the standard for individual liability is, as we've discussed today, far easier to meet than you might anticipate. And just because, for many years, the agency has really exercised restraint in its enforcement discretion doesn't mean they need to do this. And this may not be particularly partisan either. Chair Ferguson and his deputies refer often to being cops on the beat. And once they believe the law has been violated, it might make sense to seek justice broadly from companies and from their leaders. So, I think we should harken back to one of the frequent issues that we raise here, and that is listening to complaints and responding to them appropriately. If the record shows a broad awareness of consumer complaints followed by an action, well, that is just, that is

not great. And at times, with complaints comes knowledge, and that can lead potentially to individual liability.

Now also, to be clear, in most cases, the individual and the company have interests that are aligned and where the individuals are acting in a manner that is consistent with the company's interests and expectations. But there can also be times where it may be appropriate to have different firms, in the course of an investigation, represent any named individuals in the company. And this might come at a cost for the company to hire more additional lawyers for its executive. In our experience, often having different voices advocate for the individuals to focus on their particular issues is often a benefit. So just something to think about and examine if this issue arises.

Kaufman: And with that, we are looking forward to seeing many of our listeners in Chicago at the ANA. And thank you again for joining us here at AD Nauseam.

Corbett: 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 ADventures in Law blog at www.adventures-in-law.com. And check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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