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Podcast Transcript

AD Nauseam: False Advertising on Trial – Inside the Intuit Decision

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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 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 unpacked the Fifth Circuit's Intuit decision, which vacated an FTC cease and desist order and held that the FTC's administrative process violates constitutional separation of power principles and false advertising cases. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel for this week's episode.

Kaufman: Well, Amy, it looks like the long, cruel winter that we had has finally come to an end in D.C. I say that with a little bit of a question to my voice. But the sun shining, temperatures are way out of the single digits at least. Of course, because it is D.C., it is gone from the 20s to the 80s in the span of a few days. So how are you celebrating the change?

Mudge: Well, our dear listeners to AD Nauseam cannot see video. We keep meaning to add video to this program like the Kelsey Brothers have. I can look at you and I'm seeing you in a crisp white t-shirt. Nothing makes me happier when people begin just showing up outside, showing up to work in their crisp white t-shirts. But how am I celebrating the change? It is D.C. and cherry blossoms. We just had our peak cherry blossom season or viewing last week. Anyone who has not seen them in D.C., it really is something to behold.

But I have my own version of that at my house. I plant, my home has millions of tulips, and when they come up, they just make me incredibly, incredibly happy. And of course, spring also means, until it gets super hot out and I get super cranky, I walk my beloved littermate sister standard poodles both in the morning and the night. Good for them. Good for me. And I try to also go outside and enjoy our local restaurants and sit outside while, again, it is not freezing. In a couple weeks, it'll be too hot and we'll be complaining about that. But now everything is perfect.

Kaufman: Yeah, I know, we have that narrow window here where it is nice enough to eat outside but not boiling hot. I did the same thing this weekend, had a lovely meal outside. It was great. Just trying to spend as much time outdoors as possible, except, of course, when I'm recording AD Nauseam. Got to be inside for that. Amy, we haven't talked for a while about our streaming habits. What are you watching lately? Anything good to report on?

Mudge: Well, we are at the time when we should be seeing outside actual real life streams as opposed to inside. And maybe because it is just so nice outside, I'm grumpy. I don't have a lot of good shows. I watch some that I've been like, meh, except, I think I've said this on other episodes, obsessed with The Pit. So much so I might just ditch this law thing and go to medical school. I'd only want to practice medicine on the show The Pit, I don't think in actual real life. And what I hate so much is I'm caught up. So, I wait for an episode to drop every Thursday night to actually watch it in real time the way we did with old shows. And I feel really impressed by that, but I do do it.

Kaufman: Wow, no, that is a lot to be watching it real time. So, I am finally watching Lisa Kudrow's The Comeback, just middle of the first season. And I didn't realize the show started so many years ago, which I just couldn't believe. So, I'm really enjoying that. Gotta say, a little disappointed with K-Pop Demon Hunters that I finally tried watching it. And maybe I'm a little bit too old for that finally. I don't know. But I was a little, I was all excited. I'm like, I'm going to finally watch it. And I was like, okay, this is so not doing it for me.

Mudge: Daniel, I give it to you for diving in. I think when our age is going to be really problematic is when we go, we don't want to watch those K-Pop Demon Hunters. We at least are still interested in all flavors of pop culture. And we try. We try our best. But today, we have some really late-breaking and somewhat surprising FTC stuff to discuss. And it is just buckle up, dear listeners, because it is a lot. And this development, I'm somewhat of a drama queen, but this could be as momentous as the 2021 Supreme Court decision in AMG. You've heard us talk about that a lot, but it held unanimously that the FTC could not use its Section 13(b) powers to seek monetary relief in federal court for FTC violations.

So, in its place, we've seen the FTC resort to Section 19 of the FTC Act, which allows the agency to seek money in federal court for FTC violations after it obtains an administrative cease and desist order, what is commonly referred to as a two-step process. You got to get an administrative order, and then you got to go back to federal court with that order in hand and file a new Section 19 action to get money. It is basically, it is a lot of time and it is a lot of extra drama, but it is a way that the FTC can get money without needing to partner with the state or try to tack on a rule violation somewhere to a general deception case.

Kaufman: Yeah, and look, what we're going to focus on here is the general FTC Act violations, but a Fifth Circuit decision in the FTC case against Intuit has the potential to make that two-step process that you were talking about, all but impossible. But now let's rewind a bit and give a little bit of Intuit background. So back in 2022, the agency had some concerns with some advertising that Intuit was running for its TurboTax product. And the FTC at the time oddly filed two actions, one in federal court and one administratively. And in the federal court action, the FTC sought a preliminary injunction to stop the ads, but the court was unpersuaded, and that federal action fizzled away, leaving the FTC with just that administrative litigation.

Mudge: Well, and interestingly, in the interim, the company settled a multi-state action with all 50 states and D.C. to address many of the same issues that the FTC was focused on. But the FTC was not part of that settlement and continued its go it alone administrative action against Intuit.

Kaufman: So, time passes and eventually, the FTC has an administrative trial against Intuit in 2023. And in 2024, the commission issues a decision and order finding that the company had violated the FTC Act. And Intuit then files an appeal with the Fifth Circuit, which one is allowed to do after the administrative process, raising a whole bunch of issues and concerns, including the constitutionality of the FTC administrative process. And then we've got, again, radio silence for a while. Litigation is slow at times.

Mudge: Indeed it is. And I think people always roll the dice, try if there is any possible angle to throw in a constitutionality challenge. And a lot of times you roll your eyes and say, well, it is worth a shot. But finally, in March of this year, the Fifth Circuit issued a decision that vacated the cease and desist order that the FTC had issued against Intuit. And they held that in the context of a case alleging false advertising under the FTC Act, that the FTC administrative process violated the constitutional separation of powers.

Kaufman: So that is a very big deal.

Mudge: Seriously, mic drop.

Kaufman: But look, before we dig in, and we are going to dig in, we don't yet know what is going to happen next. Is the FTC going to move for reconsideration or seek cert or accept and adopt the decision? Time will tell and because this is a pretty significant decision that the FTC has to make, the next steps they take are real important. But at the moment, we've got a leading court putting a major damper into the FTC administrative process and therefore the ability of the FTC to get money for FTC Act violations. This, however, important caveat, should not have a real effect on rule violation cases or on ROSCA cases where the agency can seek money directly in federal court.

Mudge: Right. So, this is, we're talking run-of-the-mill basic FTC Act only stuff, but that is a lot of what the FTC does.

Kaufman: I know. We call it run-of-the-mill and you think administrative cases. This has been going on for decades and old advertising cases from the 50s and the 60s that are the foundation of advertising law, that is the stuff we're talking about.

Mudge: Yep, it is. But let's get this drama begins, or at least resets in 2022 with another U.S. Supreme Court case of *SEC v. Jarkesy*. And that case held that when the government brings...

Kaufman: I think it is Jarkesy, or is it, I've heard Jarkesy. I've heard Jarkesy. Let's just pick whatever pronunciation we want. I'm actually not sure. I've heard it multiple ways.

Mudge: I was going to just assume it was Jarkesy. It was good. And then I was like, Jarkesy, Jarkesy. We got this 2022 case with Jark-something versus the SEC. Alright. And that case the government brought, it was a traditional fraud case and it sought penalties. And the Constitution requires that the case be decided in federal court under those facts, not by the agency's own judge. Alright?. And the case was also a big deal. And folks wondered at the time how far that logic was going to go. And here, fast forward now, the Fifth Circuit in the Intuit case relied on the logic of the Jarkesy pace and found that deceptive advertising claims under the FTC Act involve private rights that likely require adjudication in an Article III court, not the FTC's administrative court.

Kaufman: And with respect to that specific case against Intuit, the court basically says, look, bring this in federal court. The administrative process, not appropriate here. Though the court, of course, makes it very clear it is deciding this one case and that its analysis extends only to false advertising cases brought under the FTC Act, which, of course, does beg that question of what exactly is a false advertising case? And one could probably make an argument that virtually any FTC Act deception case is a false advertising case to some degree.

Mudge: Yeah. I'm really hard-pressed. Maybe I'm having a lack of creativity, wanting to be outside in the spring weather. I don't see how you can come up with one.

Kaufman: The only one I've thought of is maybe a privacy policy case, if there was a deceptive statement in a privacy policy. But even then, like, look…

Mudge: Daniel, you were there at the FTC then. You helped create the idea that a privacy policy is advertising to some extent.

Kaufman: Exactly. Exactly.

Mudge: Keep trying, friend. Keep trying. But look, we have to mention the concurrences. There was a concurrence by Judge Ho as well, made it very clear that there are really deep-rooted concerns about what is sometimes viewed as an unaccountable or rogue agency. And drawing on sources reaching back to the founding era, the opinion invoked James Madison's warnings that, quote, the accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny, end quote. Judge Ho also even cited a 1789 admonition from the first Congress cautioning that such consolidations of authority could become, quote, a monster of a particular enormity with two heads, three heads, or four heads, or even without any head at all. Now, against that backdrop, I was trying to imagine myself with a big white wig, something else, to set the stage there.

Kaufman: If we do Vignale eventually, we'll do the white wigs.

Mudge: Alright, the white wigs. But now, no, no, leave that behind. The court then added a modern flourish. It likened the FTC's administrative structure to the three-headed beast from Harry Potter and the Sorcerer's Stone, observing that just as the creature could be subdued by music, all we need to do to restrain the FTC is to restore the Constitution.

Kaufman: So, okay. So, what does this mean for the FTC? Now, of course, if the agency appeals, that is going to be a strong signal that FTC leadership wants to maintain its ability to bring cases administratively. Though to be clear on the competition side, Chairman Ferguson recently stated that merger challenges would only be brought going forward to federal court. But needless to say, look, until this winds its way through the courts, virtually every administrative action is going to have to deal with collateral attacks in federal court. And this is a pretty major decision that folks are going to be able to cite now going forward.

Mudge: Yeah, and so if the agency pushes back, we'll have to see all these things develop. But certainly another option is that the agency adheres to the decision. Perhaps there is some universe of FTC Act cases that the FTC will get more creative than we've been able to and will state are beyond the false advertising analysis. As you said, I don't know, maybe privacy policy cases, but there is a possible scenario where the FTC will just call it quits on administrative litigation.

Kaufman: And if that is where we end up, it really does become, AMG Part 2, where there will be a further limiting of the remedies that the agency can get in consumer protection cases, basically with no path whatsoever for pure FTC Act violations. And the agency will only be able to get money in those cases with rule violations, or specific statutes like ROSCA. And that is a big deal. AMG made it a lot harder for the agency to get money for FTC Act violations, but *Intuit* has the potential to just slam that door shut. And barring statutory amendments, there is not much that the agency can do here.

Mudge: Well, certainly one of the reasons for the rulemaking push under the Biden FTC and Chair Khan was to address these, get their hand tied behind their back that was AMG. And, we are beginning to see, we've talked about it on some other AD Nauseam episodes of some rulemaking under Chairman Ferguson. But I guess we'd be surprised if there was significant push for more this year. But who is to say?

Kaufman: Yeah, and those rulemakings take a lot of time, of course, too. So, look, we are going to be watching this one closely. But for now, what is abundantly clear is that the FTC's longstanding administrative enforcement model, especially for false advertising cases, is on shakier ground than it had been in decades.

Mudge: Daniel, now, well, I want to say first, I don't really think the sky is falling here. I've been doing this long enough. I remember years ago that the FTC, it was pretty rare that the FTC would seek money, and they'd only really seek money in hardcore fraud cases. And there was a lot of deterrence for decent national advertisers. They didn't want to be before the FTC, and signing an injunctive-only order was a big deal. So, I still want to remind folks that an injunction limiting the way you can advertise going forward is a big deal. And people do, it is not an impotent agency. Even if this thing stands, I think it is important that folks hear that.

But there are a number of companies that have cases pending before the FTC right now. And that might be a company that has just gotten a CID. Alright? That might be a company that actually signed an order with money involved and it is waiting for that order to be finalized, to be signed off on by a federal judge. I'd love to hear, Daniel, what you think. What does that mean for companies that are engaged in this process?

Kaufman: Yeah, I mean, look, there is a lot to consider. In a first, in most FTC investigations, there is a clear, strong effort to find rule violations or a ROSCA violation or a COPA or something like that where money is easier. So again, there is this broad framework of other rules and things where the FTC often act.

But there is a small subset of cases where it is just FTC Act. And whether you just signed an order or you're being investigated, this does change the calculus. And look, there are some companies, they're not that concerned about the money. They are much more concerned about the injunction and what are they going to have to change going forward to deal with the FTC. So, it really requires taking a step back and thinking, how does this change the calculus in terms of the ability of the FTC to get money and how much money a company may be willing to pay just to get the process over with and to move forward.

I mean, look, the thought of going into federal court litigation with the FTC over an injunction, not particularly enjoyable either. It is going to take a few years. It is incredibly time-consuming, expensive, and it is not enjoyable process to go through. And injunctions are really serious things as well. But I do think it is important to, you put it really well, the sky is not falling, but it does change that calculus of how you assess what is the likelihood of the FTC getting X million dollars and maybe there is no path for getting any money. And it is going to be just an injunction. But again, the FTC tends to be a little bit aggressive in these areas. And we'll be watching closely to see what they say and how they act and use that information to help advise clients as best we can, of course.

Mudge: I laughed at you for years. You and Randy Shaheen, AMG this, AMG that, AMG. I was like, oh, when are we going to stop talking about this? Clearly now never. Okay? So, we've got this to watch out for. So, this is just yet one more reason to please keep staying tuned to AD Nauseam. We will keep you informed.

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.