

DATA SECURITY & PRIVACY ALERT

THIRD CIRCUIT UPHOLDS FTC'S AUTHORITY TO POLICE PROTECTION OF CONSUMER DATA

Companies that allegedly fail to provide customers with reasonable protections against theft of online data can be sued by the Federal Trade Commission, a federal Appeals court ruled on August 24, 2015.

The U.S. Court of Appeals for the Third Circuit affirmed a New Jersey federal trial judge's holding that the Federal Trade Commission can proceed with a lawsuit alleging that hotel company Wyndham Worldwide Corp. failed to adequately protect consumer data when three separate hacker intrusions into its network occurred within two years, allowing hackers to steal more than 600,000 credit and debit card numbers.

In 2012, the FTC initiated an enforcement action against Wyndham alleging unfair and deceptive consumer practices. The Complaint alleged that Wyndham had failed to adequately safeguard consumer data under its control and had misrepresented the protections provided. Wyndham filed in Motion to Dismiss the FTC's Complaint, arguing primarily that: (1) the Federal Trade Commission Act did not give the FTC authority to regulate in the area of data security; and (2) in any event, the FTC had failed to promulgate any regulations providing a standard of conduct for companies concerning data protection.

In April of 2014, the New Jersey District Court denied Wyndham's motion to dismiss, holding that the FTC was empowered to bring regulatory enforcement actions regarding data security and need not provide regulatory guidance before doing so. The trial judge specially certified its decision for immediate appeal to the Third Circuit Court of Appeals before allowing the enforcement action to proceed.

During oral argument, members of the Third Circuit panel appeared to be skeptical of the FTC's authority to regulate concerning data security issues, fueling speculation among commentators that the appeals court might conclude that the FTC had overreached. However, on August 24, 2015, the Third Circuit affirmed the trial court's denial of Wyndham's dismissal motion, thereby confirming the FTC's power to police corporate cybersecurity at a time when Congress hasn't yet passed comprehensive data-security legislation.

The FTC has filed more than 50 enforcement actions concerning data security in the past decade, most of which have resulted in settlements. The Commission typically targets larger companies and higher profile breach incidents. However, the Third Circuit's decision could lead to an increase of FTC regulatory activity, including more actions against medium-sized or smaller companies that are involved in data breach incidents.

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Notably, while awaiting the Third Circuit's decision, the FTC did issue a guidance document, "[Start with Security: A Guide for Business](#)." This document contains a number of general recommendations for data security practices but is not a formally adopted regulation. Nonetheless, it provides some perspective on what factors and practices the FTC is likely to scrutinize in determining whether an enforcement action is warranted.

The case is *Federal Trade Commission v. Wyndham Worldwide Corp. et al.*, case number 2:13-cv-01887 in the U.S. District Court for the District of New Jersey.

*This **Data Security & Privacy Alert** is intended to keep readers current on developments in the data security & privacy world and in the law, and is not intended to be legal advice. If you have any questions, please call Sandy B. Garfinkel, Chair of the firm's Data Security & Privacy Group, at 412-566-6868.*

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