PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14-3514

FEDERA 3514

Argued March 3, 2015

Before: AMBRO, SCIRICA, and ROTH, Circuit Judges

(Opinion filed: August 24, 2015)

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OPINION OF THE COURT

AMBRO, Circuit Judge

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U.S.C. § 45(a). In 2005 the Federal Trade Commission began bringing administrative actions under this provision against companies with allegedly deficient cybersecurity that failed to protect consumer data against hackers. The vast majority of these cases have ended in settlement.

On three occasions in 2008 and 2009 hackers

computer systems. In total, they stole personal and financial information for hundreds of thousands of consumers leading to over \$10.6 million dollars in fraudulent charges. The FTC

conduct was an unfair practice and that its privacy policy was deceptive. The Di dismiss, and we granted interlocutory appeal on two issues:

whether the FTC has authority to regulate cybersecurity under the unfairness prong of § 45(a); and, if so, whether Wyndham had fair notice its specific cybersecurity practices could fall short of that provision. We affirm the District Court.

I.

of third-party vendors to its network and the servers of Wyndham-branded hotels. Id. at ¶ 24(j). For example, it did o specified IP addresses or grant[] Id.

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Id. at ¶ 24(h).

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Id. at \P 24(i). The hackers used similar methods in each attack, and yet Wyndham failed to monitor its network for malware used in the previous intrusions.

Although not before us on appeal, the complaint also raises a deception claim, alleging that since 2008 Wyndham has published a privacy policy on its weT6(1)-119(p)els. a 0(weT6(ovls.) rstates)] TJET

the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce.... It concluded that... there were too many unfair practices to define, and after writing 20 of them into

added)). The takeaway is that Congress designed the term as FTC v. Bunte

Bros. development . . 381 U.S. 357, 367 (1965).

Atl. Ref. Co. v. FTC,

ds of

consumers, see, e.g., FTC v. Raladam Co., 283 U.S. 643 (1931), Congress inserted an additional prohibition in § 45(a)

Ier-Lea Act, Pub. L. No. 75-447, § 5, 52 Stat. 111, 111 (1938).

For the next few decades, the FTC interpreted the unfair-practices prong primarily through agency adjudication.

unfair or deceptive advertising and labeling of cigarettes, 29 Fed. Reg. 8324, 8355 (July 2, 1964), which explained that the following three factors governed unfairness determinations:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes

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substantial injury to consumers (or competitors or other businessmen).

Id. Almost a decade later, the Supreme Court implicitly approved these factors, apparently acknowledging their applicability to contexts other than cigarette advertising and labeling. Sperry, 405 U.S. at 244 n.5. The Court also held that, under the policy statement, the FTC could deem a practice unfair based on the third prong substantial consumer injury without finding that at least one of the other two prongs was also satisfied. Id.

During the 1970s, the FTC embarked on a

through the unfair-practices prong of § 45(a). At the request of Congress, the FTC issued a second policy statement in 1980 that clarified the three factors. FTC Unfairness Policy Statement, Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Senate Comm. on Commerce, Sci., and Transp. (Dec. 17, 1980), appended to ter Co., 104 F.T.C. 949, 1070 (1984) [hereinafter 1980 Policy Statement]. It explained that public policy considerations are relevant in determining whether a particular practice causes substantial consumer injury. Id. at 1074

Harvester Co., 104 F.T.C. at 1061 n.43; 1980 Policy Statement, supra relied on [this factor] as an independent basis for a finding of unfairness, and it will act in the future only on the basis of the

... can be

Statement, supra

Id. Indeed,

B. Plain Meaning of Unfairness

Wyndham argues (for the first time on appeal) that the three requirements of 15 U.S.C. $\S 45(n)$ are necessary but

Wyndham points to no subsequent FTC policy statements, adjudications, judicial opinions, or statutes that would suggest any change since Sperry.

Next, citing one dictionary, Wyndham argues that a practice i

theories here. The FTC argued in the District Court that consumers could not reasonably avoid injury by booking with another hotel chain because Wyndham had published a

broader than that involving deception, and the standards for its exercise are correspondingly more stringent....
[U]nfairness is the set of general principles of which deception is a particularly well-established and streamlined

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21 (emphasis in original). It offers no reasoning or authority for this principle, and we can think of none ourselves. Although unfai

may also be brought on the basis of likely rather than actual id. at 1061 n.45. And the FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs. 15 U.S.C. § practice] causes or is likely to cause

conduct was not the most proximate cause of an injury generally does not immunize liability from foreseeable harms. See

likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act[,] whether innocent, negligent, intentionally tortious, or criminal[,] does not prevent the actor Westfarm

, 66 F.3d 669,

found even

where the conduct of the third party is . . . criminal, so long as the conduct was facilitated by the first party and reasonably foreseeable, and some ultimate harm was reasonably

that the cybersecurity intrusions were unforeseeable. That would be particularly implausible as to the second and third attacks.

Finally, Wyndham posits a reductio ad absurdum, he FTC also has the authority to

ly Br. at 6.

The argument is alarmist to say the least. And it invites the

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substantive authority to the FTC in the cybersecurity field would be inexplicable if the Commission already had general substantive authority over this fiel Citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000), Wyndham concludes that Congress excluded

enacting these measures.

We are not persuaded. The inference to congressional intent based on post-enactment legislative activity in Brown & Williamson was far stronger. There, the Food and Drug Administration had repeatedly disclaimed regulatory authority over tobacco products for decades. Id. at 144. During that period, Congress enacted six statutes regulating tobacco. Id. at 143 44. The FDA later shifted its position, claiming authority over tobacco products. The Supreme Court held that Congress excluded tobacco-related products nacting the statutes. As tobacco

regulatory authority, any interpretation to the contrary would contradict congressional intent to regulate rather than ban tobacco products outright. Id. 137 39; Massachusetts v. EPA, 549 U.S. 497, 530 31 (2007). Wyndham does not argue that recent privacy laws contradict reading corporate cybersecurity into § 45(a). Instead, it merely asserts that Congress had no reason to enact them if the FTC could already regulate cybersecurity through that provision. Wyndham Br. at 25 26.

We disagree that Congress lacked reason to pass the recent legislation if the FTC already had regulatory authority over some cybersecurity issues. The Fair Credit Reporting

which to rest an interpretation of a prior statute when it concerns.. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990).

Act requires (rather than authorizes) the FTC to issue regulations, 15 U.S.C. § Commission . . . shall issue final regulations requiring . . . (emphasis added)); id. § other agencies] shall jointly . . . prescribe regulations requiring each financial institution . .

id.

prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce . . . and shall be subject to enforcement by the [FTC] . . . irrespective of whether that person is engaged in commerce or meets any

Gramm-Leach-Bliley Act similarly requires the FTC to promulgate regulations, id. § establish appropriate standards for the financial institutions subject to [its] jurisdiction . . .

burdensome § 45(n) requirements for declaring acts unfair, id. §

. . to protect against unauthorized access to or use of . . . records . . . which could result in substantial harm or inconvenience to any customer Ch

issue regulations and empowered it to do so under the procedures of the Administrative Procedure Act, id. § 6502(b) (citing 5 U.S.C. § 553), rather than the more burdensome Magnuson-Moss procedures under which the FTC must usually issue regulations, 15 U.S.C. § 57a. Thus none of the

already had some authority to regulate corporate cybersecurity through § 45(a).

Next, Wyndham claims that the of §

Wyndham Br. at 28. Yet again we disagree. In two of the

statements cited by Wyndham, the FTC clearly said that some See

Consumer Data Protection: Hearing Before the Subcomm. on Commerce, Mfg. & Trade of the H. Comm. on Energy & Commerce, 2011 WL 2358081, at *6 (June 15, 2011) (statement of Edith Ramirez,

unfair... acts.. ... failure to employ reasonable security measures causes or is likely to Data Theft Issues:

Hearing Before the Subcomm. on Commerce, Mfg. & Trade of the H. Comm. on Energy & Commerce, 2011 WL 1971214, at *7 (May 4, 2011) (statement of David C. Vladeck, Director, FTC Bureau of Consumer Protection) (same).

In the two other cited statements, given in 1998 and 2000, the FTC only acknowledged that it cannot require See.

FTC, Privacy Online: Fair Information Practices in the Electronic Marketplace A Report to Congress 34 (2000) [hereinafter Privacy Online]; Privacy in Cyberspace: Hearing Before the Subcomm. on Telecomms., Trade & Consumer Prot. of the H. Comm. on Commerce, 1998 WL 546441 (July 21, 1998) (statement of Robert Pitofsky, Chairman, FTC). These policies would protect consumers from far more than

In addition to imposing some cybersecurity requirements, they would require companies to give notice about what data they collect from consumers, to permit those consumers to decide how the data is used, and to permit them to review and correct inaccuracies. Privacy Online, supra at 36 37. As the FTC explained in the District Court, the primary concern driving the adoption of these policies in the late 1990s was ies... were capable of collecting enormous amounts of information about consumers, and people were

thus could not require companies to adopt broad fair information practice policies because th collecting th[e] information, and consumers [were not]

Id.; see also

Motion to Dismiss, No. 9357, slip op. at 7 (Jan. 16, 2014) [hereinafter LabMD Order or LabMD from the 1998 and 2000 reports . . . simply recognize that the

the FTC failed to give fair notice of the specific cybersecurity standards the company was required to follow.⁷

A. Legal Standard

The level of required notice for a person to be subject to liability varies by circumstance. In Bouie v. City of Columbia

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347, 354 (1964) (internal quotation marks omitted); see also Rogers v. Tennessee, 532 U.S. 451, 457 (2001); In re Surrick, 338 F.3d 224, 233 34 (3d Cir. 2003). The precise meaning of United

States v. Lata, 415 F.3d 107, 111 (1st Cir. 2005), but we and our sister circuits frequently use language implying that a conviction violates due process if the defendant could not reasonably foresee that a court might adopt the new interpretation of the statute.⁸

7

argume

The fair notice doctrine extends to civil cases, particularly where a penalty is imposed. See Fox Television Stations, Inc., 132 S. Ct. at 2317 20; Boutilier v. INS, 387 U.S. 118, 123 (1967).

allowed in civil cases because the consequences are smaller than in the criminal context. San Filippo v. Bongiovanni, 961 F.2d 1125, 1135 (3d Cir. 1992). The standards are especially lax for civil statutes that regulate economic activities. For those statutes, a party lacks fair notice when the relevant

into a false sense of security, giving him no reason even to suspect that his conduct might

(emphases added)); In re Surrick, 338

reject [the] contention that ... nothing in the history of [the relevant provision] had stated or even foreshadowed that reckless conduct could violate it. Indeed, in view of the

> standard of notice afforded to litigants about the meaning of the statute is not dissimilar to the standard of notice for civil statutes generally because the court, not the agency, is the

> The second context is where an agency exercises its authority to fill gaps in a statutory scheme. There the agency is primarily responsible for interpreting the statute because the courts must defer to any reasonable construction it adopts. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Courts appear to apply a more stringent standard of notice to civil regulations than civil statutes:

conduct is legally required by the regulation. See Chem. Waste Mgmt., Inc. v. EPA, 976 F.2d 2, 29 (D.C. Cir. 1992) (per curiam

promulgated EPA regulation fails fair notice principles); , 769 F.3d 1173, 1183 84

recently promulgated OSHA regulation fails fair notice principles).

The third context is where an agency interprets the meaning of its own regulation. Here also courts typically must defe

the statutory meaning a court should consider in reaching its own judgment sadded)).

11 See Auer v. Robbins Because the salary-regulations, his interpretation of it is... controlling unless plainly erroneous or inconsistent with the regulation. (internal quotation marks omitted)); Decker v. Nw. Envtl. Def. Ctr.

and several of our sister circuits have stated that private

Beverly Healthcare

... deference from validating the application of a regulation that fails to give fair AJP Const., Inc., 357 F.3d at 75 (internal quotation marks omitted).

A higher standard of fair notice applies in the second and third contexts than in the typical civil statutory interpretation case because agencies engage in interpretation differently than courts. See Frank H. Easterbook, Judicial Discretion in Statutory Interpretation, 57 Okla. L. Rev. 1, 3

shift in interpretive method, not just a shift in the identity of the decider, as if a suit were being transferred to a court in a

regulations, courts generally adopt the best or most reasonable interpretation. But, as the agency is often free to adopt any reasonable construction, it may impose higher legal obligations than required by the best interpretation.¹³

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 & n.15 (2012) (second alteration in original, internal quotation marks omitted) (citing Dravo, 613 F.2d at 1232 33

¹³ See Servs.

ruction is reasonable.

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differs from what the court b1dpls48004705(f)-9(rois96(the 670045004C>8005700560

Furthermore, courts generally resolve statutory ambiguity by applying traditional methods of construction. Priva

by applying the same methods. In contrast, an agency may also rely on technical expertise and political values. ¹⁴ It is harder to predict how an agency will construe a statute or regulation at some unspecified point in the future, particularly

to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous

(internal quotation marks omitted)); Auer, 519 U.S. at 462 63

be narrowly construed against . . . employers . . . is a rule governing judicial interpretation of statutes and regulations,

ambiguities in his own regulations. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by

¹⁴ See Garfias-Rodriguez v. Holder, 702 F.3d 504, 518 (9th Cir. 2012) (rejecting the applicability of the judicial retroactivi

supra work forswear the methods that agenc

-benefit studies . . .

and the other tools of policy wonks...

question that the FTC is asking the federal courts to

rulemaking.¹⁹ More importantly, the Ninth Circuit was reviewing an agency adjudication; it was not interpreting the meaning of the FTC Act in the first instance.

opinion, which concluded that the FTC has stated a claim under § 45(a) based reference to LabMD or any other agency adjudication or

¹⁹ To the extent Wyndham could have raised this argument, we do not read its briefs to do so. Indeed, its opening brief appears to repudiate the theory. Wyndham Br. at 38 39

would arise from investment in stronger cybersecurity. We acknowledge there will be borderline cases where it is unclear

legal threshold. But under a due process analysis a company is not entitled to such precision as would eliminate all close calls. Cf. Nash v. United States, 229 U.S. 373, 377 (1913)

his estimating rightly, that is, as the jury subsequently

here as long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute.

claim must be reviewed as an as-applied challenge. See United States v. Mazurie, 419 U.S. 544, 550 (1975); San Filippo, 961 F.2d at 1136. Yet Wyndham does not argue that its cybersecurity practices survive a reasonable interpretation of the cost-benefit analysi286(revie/F5 12.96 Tf1 0 le)-83(interqdl5 Tm[J(Yet)-27(W)-9)

-applied challenge is even weaker given it was hacked not one or two, but three, times. At least after the second attack, it should have been painfully clear to Wyndham that a court could find its conduct failed the cost-benefit analysis. That said, we leave for another day whether

issue the parties did not brief. We merely note that certainly after the second time Wyndham was hacked, it was on notice of the possibility that a court could find that its practices fail the cost-benefit analysis.

Several other considerations reinforce our conclusion

issued a guidebook, Protecting Personal Information: A Guide for Business, FTC Response Br. Attachment 1 [hereinafter FTC Guidebook]

Id. at 3.

The guidebook does not state that any particular practice is required by § 45(a),²¹ but it does counsel against many of the specific practices alleged here. For instance, it recommends

that is stored on [a] computer network...[, c]heck... ebsites regularly for alerts about new vulnerabilities, and implement policies for installing vendorld.

firewall to protect [a] computer from hacker attacks while it is

of what 1001397.75.02 eTc[(GA10014

²¹ For this reason, we agree with Wyndham that the nable

the firewall and what they will be allowed to see . . . to allow only trusted employees with a legitimate business need to Id.

password[] and other easy-to
Id. at 12. And id. at

immediately and tak[ing] steps to close off existing id. at 23.

As the agency responsible for administering the

Wyndham determine in advance that its conduct might not survive the cost-benefit analysis.

Before the attacks, the FTC also filed complaints and entered into consent decrees in administrative cases raising unfairness claims based on inadequate corporate cybersecurity. FTC Br. at 47 n.16. The agency published

Lachman, 387 F.3d 42, 57 (1st Cir. 2004) (noting that fair notice principles can be satisfied even where a regulation is

regulation); Beverly Healthcare-Hillview, 541 F.3d at 202 (citing Lachman and treating an OSHA opinion letter as a Gen. Elec. Co..

53 F.3d at 1329. That the FTC commissioners who must vote on whether to issue a complaint, 16 C.F.R. § 3.11(a); ABA Section of Antitrust Law, FTC Practice and Procedure Manual 160 61 (2007) believe that alleged cybersecurity practices fail the cost-benefit analysis of § 45(n) certainly helps companies with similar practices apprehend the possibility that their cybersecurity could fail as well.²³

careful general counsel you do pay attention to what the FTC

that it needs to look at complaints and consent decrees for no examples. Id.

at 52. But Wyndham does not appear to argue it was unaware of the consent decrees and complaints; it claims only that they did not give notice of what the law requires. Wyndham

materials on its website and provides notice in the Federal Register, moreover, is immaterial the problem is not that Wyndham lacked notice of the consent decrees [which

²³ We recognize it may be unfair to expect private parties back in 2008 to have examined FTC complaints or consent decrees. Indeed, these may not be the kinds of legal documents they typically consulted. At oral argument we asked how private parties in 2008 would have known to

Wyndham next contends that the individual allegations in the complaints are too vague to be relevant to the fair notice analysis. Wyndham Br. at 41 42. It does not, however, identify any specific examples. And as the Table

alleged § 45(a) vial/leged §

Did not use readily available security measures to limit access between computers on its network and between those computers and the Internet, CSS at ¶ 6(5).

Did not use readily available security measures, such as firewalls, to limit access

property management systems, the Wyndham network, and the Internet, Compl. at ¶ 24(a).

theory it did not meaningfully raise and that we strongly suspect would be unpersuasive under the facts of this case.