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Today's News

LabMD May Struggle at 11th Circuit, Positioning Itself for Supreme Court, Lawyers Say

Long in a holding pattern, LabMD's case challenging the FTC's data security authority is set to move forward in the appellate courts. But LabMD's stalled FTC administrative proceeding and ongoing congressional and FTC inspector general investigations will likely hamper the company's chances at the 11th U.S. Circuit Court of Appeals, lawyers told us in interviews. "If we didn't think there were merits to our argument, we wouldn't waste our time," said Reed Rubinstein, counsel to LabMD and senior vice president-litigation government accountability advocate for Cause of Action. "We believe it's appropriate, given all the circumstances in the case, to have another pair of eyes reviewing what the FTC has done."

Long odds haven't stopped LabMD thus far. After refusing to settle the FTC's data security complaint against it, LabMD went to the district courts in D.C. and Atlanta with its case (WID May 20 p1). The case even convinced House Oversight Committee Chairman Darrell Issa, R-Calif., that the FTC might have mishandled evidence in the case, leading to a hearing, the dual investigations and the suspended ALJ hearings (WID July 25 p6).

With its appeal, LabMD, a medical testing facility, is leaning on two novel arguments on top of its well-trod line that the FTC can't regulate healthcare data security and has not given fair notice of its data security expectations. Those two newer arguments — regarding the First Amendment and federal court jurisdiction over administrative proceedings — could position the case to go to the Supreme Court and potentially have far-reaching implications for administrative law, lawyers told us. Few expect the 11th Circuit to buy it. "It's really an uphill battle," said Zoë Wilhelm, a Drinker Biddle lawyer following the case.

In its briefing to the 11th Circuit, LabMD argued the appeals court has authority to rule before the ALJ proceedings are over because the conclusion is foregone — the FTC always wins. "If you look at the stats, [the ALJ] is sort of a futile undertaking," Rubinstein told us. FTC Commissioner Josh Wright and numerous lawmakers have echoed Rubinstein's claims, arguing the FTC issues too few complaints and will simply overturn the rare ALJ ruling not in its favor (WID Nov 18 p2).

Absent an ALJ ruling, however, "it's hard for a court to say that LabMD has a case to bring to them," Wilhelm told us. Despite chastising the FTC handling of the case, the U.S. District Court in Atlanta essentially said the same thing when it dismissed LabMD's case (WID May 14 p13). Rubinstein thinks the court erred. "It doesn't make sense to deny judicial review in cases where the administrative agency has already determined the case."

"The implications" of the appellate court siding with LabMD "are destabilizing toward what you think about administrative law," said Gautam Hans, policy counsel at the Center for Democracy & Technology. Hans worried such a ruling could create "instability" among regulatory agencies. "A prudent judge would be very cautious about doing that," he said.

LabMD also shoehorned a First Amendment argument into its brief. The FTC's heavy-handed investigation and monitoring stifled LabMD CEO Michael Daugherty's free speech rights, the company argued. "FTC staff's decision to pursue an enforcement action three days after Mr. Daugherty announced his intention to write a book critical of their actions constitutes retaliation," the briefing said. "It's just not the norm," Rubinstein told us.

Lawyers told us constitutional arguments make cases more appealing to appellate courts. "I think the reason they're focusing on the constitutional argument is to try and force the court to hear the case on merits," Wilhelm said. Hans said the argument is "totally out there," but is a savvy move to position the case for the Supreme Court, which has heavily favored First Amendment arguments in recent rulings. "They may find it somewhat persuasive," he said.

With oral arguments set for the week of Dec. 8, LabMD's case is on a timeline similar to another case challenging the FTC's data security authority — *Wyndham v. FTC*. Wyndham, a hotel chain, had a motion to dismiss refused at the district court level (WID April 9 p1) before turning to the 3rd U.S. Circuit Court of Appeals (WID July 16 p1).

Lawyers differed on the role a *Wyndham* ruling might have on the 11th Circuit decision. "In both cases, a core position of the companies is that their due process rights are being violated," said Goodwin Procter data security lawyer Gerry Stegmaier. "And both are questioning the agency's jurisdiction to even prosecute them in the first place." Though Wyndham's case has sat at the 3rd Circuit since July, suggesting its ruling might come first, the case is proceeding slowly — Wyndham has until Oct. 5 to file its initial brief, Hans said.

Differences in the two cases will also decouple the two rulings, lawyers told us. LabMD, as a medical facility, is arguing it should be subject to Health Insurance Portability and Accountability

Act data security standards, which the FTC does not oversee, Hans said. Additionally, since the FTC didn't pursue Wyndham through the ALJ process, "there aren't the same questions about whether the federal courts can hear the case," Wilhelm said. "Because of that the merits of the case can actually be considered."

But those merits are different enough that a ruling in *Wyndham* first would likely have minimal effect on LabMD, Wilhelm and others agreed. "I think the situations are significantly divergent that it would be hard for the 11th to point to what the 3rd did and use that to dispose of this case," Rubinstein said.

Meanwhile, the ALJ waits while the House Oversight Committee and FTC inspector general conduct their due diligence. Issa's office and FTC Acting Inspector General Kelly Tshibaka said they can't comment on ongoing investigations. LabMD reports on the investigations to the ALJ every Wednesday, Rubinstein said. But for the past few months, the report has been the same: "There's no change," Rubinstein said. "At this point that's all we know." — ***Cory Bennett*** *(cbennett@warren-news.com)*

Advisor Selection Criticized

Clear ICANN Accountability Process Needed Before IANA Transition, Say INTA, ccNSO Council

ICANN groups reaffirmed the need to solidify the nonprofit's accountability process before moving forward with the Internet Assigned Numbers Authority (IANA) transition, in public comments last week (http://bit.ly/1ncHROw). The Internet Committee of the International Trademark Association (INTA) criticized the ICANN community's lack of agency in choosing experts and advisors for the nonprofit's accountability review (http://bit.ly/1rypVxQ). The Country Code Names Supporting Organization (ccNSO) Council doubted that ICANN's proposed "community working group" would serve the accountability process any better than the "cross community working group" (http://bit.ly/1rklirP). Stakeholders have asked whether ICANN is intent on developing an accountability process that holds the nonprofit accountable to itself or to the community it serves (WID Aug 27 p1).

The 21-day accountability comment period responded to questions at the recent Internet Governance Forum (WID Sept 3 p13) and a letter from ICANN's major constituencies and groups (WID Sept 5 p16). ICANN CEO Fadi Chehade and board Chairman Steve Crocker submitted answers to the stakeholder and constituency groups' questions Sept. 18. The Public Experts Group (PEG) for ICANN's accountability process extended its deadline to choose seven advisers for the process (http://bit.ly/1vdRn3j), from Sept. 10 to Sept. 30 (http://bit.ly/1mZr3EP) (WID Sept 11 p4). ICANN cited the accountability comment period's Sept. 27 deadline as the reason for the extension. NTIA Administrator Larry Strickling is one four members of PEG, which is asking for community input on the seven advisors. Chehade selected the four PEG members.

ICANN shouldn't put the PEG on the accountability coordination group, because it "could constitute a conflict of interest in violation of the neutral facilitator role that the NTIA has requested ICANN to assume," INTA said Thursday. "Supportive resources" should be provided to the coordination group at the group's "initiative and request," it said. INTA was troubled that the accountability

cross-community working group will have "no say" in the selection of the seven advisors by the PEG. It's "inadequate" to limit participation on the coordination group to one representative per Generic Names Supporting Organization stakeholder group, said INTA. That threshold wouldn't "ensure the participation of business interests and/or brand-owners through the Business Constituency or the Intellectual Property Consistency," it said. INTA said the IANA transition should proceed only after the approval of ICANN's accountability process.

The "community working group" proposed by ICANN doesn't offer any "benefits or advantages" compared to the "trusted" cross-community working group model, said the ccNSO Council Thursday. The reasoning behind the proposed former group "appears to be ensuring the inclusion of persons in the process, who consider themselves either not affiliated with a Supporting Organization or Advisory Committee or a 'newcomer,'" it said. "Serious thought needs to be given to how to enable these persons to engage in the process as a whole effectively and in a way that does not undermine the existing engagement structure," the council said. The cross-community working group and other coordinating bodies should work with ICANN to identify accountability mechanisms that "must be in place" before the IANA transition, it said.

The seven advisors are expected to work in an "open and transparent" manner, Chehade and Crocker said, in response to 20 questions related to the accountability process from ICANN stakeholder and constituency groups. The advisors aren't expected to be experts on the full range of topics related to ICANN accountability, and it's "important that the Coordination Group not be overpopulated by external experts," they said. The goal is to "obtain external expertise to bring in best practices" from the advisors, they said. If members of the coordination group find a need for "additional independent input or expertise, the advisors may seek this additional input through the Public Experts Group or their own networks," they said. — ***Joe McKnight*** *(jmcknight@warren-news.com)*

'Inquiries' on Rise

Beware 'Stringent' Rules on Batteries for Commercial Drones, Group Warns

Navigating the Federal Aviation Administration for an exemption may well not be the only challenge for companies or groups seeking permission to operate commercial drones. A day after the FAA's chief issued a sweeping call that his agency "is open to receiving petitions from anyone" seeking an exemption like those granted Thursday to filmmakers to operate commercial unmanned aircraft systems, an industry group representing major battery suppliers issued a stern advisory warning that "companies should be aware of the stringent transportation regulations applicable to the lithium ion batteries that power virtually every" commercial drone.

"Major companies" like Amazon and Google, and several industries, "are discovering ways to maximize the commercial viability of small unmanned aircraft," said PRBA-The Rechargeable Battery Association, Thursday in an advisory (http://bit.ly/1CtOhfr). With the FAA expected to release a rulemaking later this year on commercial operations of small drones, lithium ion batteries, the "engine" of virtually all commercial drones, "are already stringently regulated by the FAA as hazardous materials," said the PRBA. "Failure to comply with these regulations can result in significant civil penalties levied against companies whose employees are found to be in violation of these regulations."