

LabMD Ruling Puts FTC In Driver's Seat On Data Security

By **Allison Grande**

Law360, New York (May 13, 2014, 8:41 PM ET) -- A Georgia federal judge's Monday refusal to disrupt a Federal Trade Commission administrative proceeding against LabMD Inc. solidifies the agency's authority over companies' data security practices, allowing the regulator to tackle even the most novel or controversial privacy issues before any court can weigh in.

The district court's ruling responds to a complaint that LabMD filed in March challenging the FTC's authority to undertake an administrative proceeding accusing the medical testing laboratory of failing to prevent unauthorized access to protected health information.

The case has generated significant interest and debate, especially after the FTC commissioners affirmed the agency's authority to bring the suit in January. U.S. District Judge William S. Duffey Jr. threw out the suit Monday, finding that district courts are in no position to interfere with ongoing administrative enforcement actions.

"The ruling makes clear that courts want the process to play out within the realm of the Administrative Procedures Act and that parties should be held to standards that are well-settled, rather than [allowing] emerging and cutting-edge issues like cybersecurity and data security to take the case outside of those guidelines," Christopher Nucifora, the co-chairman of Kaufman Dolowich & Voluck LLP's information security and privacy practice, told Law360.

The court's refusal to take up the case also strikes down the latest threat to the agency's increasingly aggressive crusade to hold companies liable under the unfairness prong of Section 5 of the FTC Act for failing to employ reasonable data-security practices.

"The ruling shuts down any other avenues that may have been open for LabMD to challenge the FTC's data-security authority," Nucifora said. "Being able to keep it within the FTC and let it play out there is a win for the FTC."

While the FTC has brought more than 50 data security cases in the past decade, they have traditionally been met with little resistance by companies willing to enter into consent decrees that often require them to implement a comprehensive data security plan that will be monitored for the next 20 years.

But Wyndham Worldwide Corp. bucked the trend in June 2012, when it became the first company to push back against the commission's statutory authority to regulate consumer information security as a potentially unfair practice under Section 5. LabMD followed suit by choosing to fight back against similar

claims leveled by the regulator in August.

The FTC so far has found success in defending its data security authority. Shortly after the commissioners affirmed the regulators' data-security authority in the LabMD case, a New Jersey federal judge in April rejected Wyndham's argument that the FTC had overstepped its statutory authority in its attempt to regulate private companies' data security.

While Wyndham has asked the judge for permission to appeal the determination immediately to the Third Circuit, the challenge lodged by LabMD in district court marked the best hope for companies to get a ruling in the immediate future that would curb some of the agency's seemingly expansive data security powers, a prospect that was dashed by Monday's ruling.

"The FTC will likely continue to be aggressive in their data privacy and security enforcement efforts, and this dismissal of the LabMD suit doesn't do anything to affect that," Baker Donelson Bearman Caldwell & Berkowitz PC shareholder Bradley Clanton said.

The LabMD case has been of particular interest to health care companies, given that federal health regulators already have the authority to police their data security practices under the Health Insurance Portability and Accountability Act and the Health Information Technology for Economic and Clinical Health Act.

"The case is incredibly important for the health care industry in determining what federal agencies have the power to regulate them and assess fines and penalties with respect to data security," Nixon Peabody LLP privacy and data protection group leader Linn Freedman said. "The [Monday] ruling doesn't give the FTC any more rights or power than what they have today, but the FTC has taken a very broad view of what it has jurisdiction over with respect to data security."

Meanwhile, although Monday's ruling foreclosed the possibility of an immediate resolution, attorneys noted that it left the door wide open for the medical testing laboratory to continue its fight once the enforcement proceedings are completed.

"We can expect LabMD to pursue this federal court option in the future, assuming the FTC's administrative decision is not favorable to LabMD," Kirk Nahra, Wiley Rein LLP's privacy practice chairman, said.

Whether the company will be able to prevail on the merits is still to be determined, although Judge Duffey seemed skeptical of LabMD's prospects in his ruling, writing in a footnote that "the likelihood of a favorable jurisdictional or merits outcome for LabMD is slight."

But although the ruling marks a setback for LabMD, the decision could have a silver lining for the company and the industry by both encouraging the FTC to refrain from delaying resolution of the administrative proceeding and giving other defendants a potential roadmap for challenging troubling agency actions, according to attorneys.

"Despite LabMD's loss on procedural grounds, the ruling could embolden others to say that they don't have to fold to the FTC on this," Clanton said. "Up until now, no one had really challenged the FTC's data security authority, but now with LabMD and Wyndham, businesses are seeing that it's not a frivolous legal argument, which could encourage more businesses to make it."

LabMD is represented by Ronald L. Raider, Burleigh L. Singleton and William D. Meyer of Kilpatrick Townsend & Stockton LLP and by Reed D. Rubinstein of Dinsmore & Shohl LLP.

The FTC is represented by Adreienne E. Fowler and Lauren E. Fascett of the U.S. Department of Justice, Civil Division.

The case is LabMD Inc. v. Federal Trade Commission, case number 1:14-cv-00810, in the United States District Court for the Northern District of Georgia.

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