Press Release

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Third Circuit to Hear Argument Tomorrow on FTC's Consumer Data Protection Authority

(FTC v. Wyndham Hotels and Resorts LLC)

"The FTC's 'catch-as-catch-can' approach to regulatory enforcement under § 5 is not only deeply unfair to the business community, it also falls far short of satisfying the constitutional standard for fair notice." —Cory Andrews, Senior Litigation Counsel, Washington Legal Foundation

WASHINGTON, DC—Tomorrow, Tuesday March 3, 2015, at 10 a.m., the U.S. Court of Appeals for the Third Circuit will hear oral argument in Philadelphia in a consumer data protection case, *Federal Trade Commission v. Wyndham Hotels and Resorts LLC*, after the U.S. District Court of New Jersey refused to dismiss the lawsuit on April 7, 2014. The court will decide if the Federal Trade Commission (FTC) has the authority to regulate companies' data-security practices after the agency claimed that the hotel and hospitality service company engaged in "unfair trade practices" by allegedly failing to prevent unauthorized hackers from breaching its data defenses.

Wyndham, which suffered from three separate criminal hacking intrusions between April 2008 and January 2010, challenges the fundamental legal authority the FTC claims to protect consumer privacy, including the "unfair practice" provision of the FTC Act. Wyndham also states that it received no indication that any hotel customer experienced a financial loss as a result of the attacks and hence claims that the FTC failed to meet the legal text of proving "substantial" consumer injury that would support a finding of unfair practices.

On October 14, 2014, WLF filed a brief asking the court to review the district court ruling, arguing that because the FTC has never promulgated data-security standards, neither Wyndham nor any other member of the business community could have prior knowledge of what the FTC considers to be "unreasonable" data-security measures. WLF argues that the FTC's enforcement-by-consent-decree approach fails to satisfy the constitutional requirement that defendants be given fair notice of conduct that can subject them to punishment before they are found liable.

WLF also demonstrated that the FTC's prior consent decrees and online data-security advice for businesses are not entitled to Chevron deference. The Supreme Court only defers to relatively formal agency documents promulgated via notice-and-comment rulemaking, such as regulations. Because the FTC's prior consent decrees and online guidance brochure did not contain reasoned analysis of the FTC's interpretation of the law, they do not deserve deference.

WLF issued the following statement ahead of argument by Senior Litigation Counsel Cory Andrews:

"The FTC's 'catch-as-catch-can' approach to regulatory enforcement under § 5 is not only deeply unfair to the business community, it also falls far short of satisfying the constitutional standard for fair notice."

WLF is a national public interest law firm and policy center that regularly litigates to oppose overreaching regulation by federal agencies.