Common Enterprise Liability: "All for One, One for All"

To most businesses and individuals outside the reach of the tentacles of the Federal Trade Commission, the common enterprise doctrine has little, if any, significance. If, however, you are subject to enforcement by the FTC, then take note of this powerful weapon in the FTC's unlimited war chest.

A finding of "common enterprise" may subject ***all*** included defendants to joint and several liability for the tortious acts of their co-defendants. "Where one or more corporate entities operate in common enterprise, each may be held liable for the deceptive acts and practices of the others." *FTC v. Think Achievement*, 144 F. Supp.2d 993, 1011 (N.D. Ind. 2000), *rev'd in part on other grounds*, 312 F.3d 259 (7th Cir. 2002).

In determining the existence of a common enterprise, the following factors are taken into account: "common control, the sharing of office space and officers, whether business is transacted through a maze of interrelated companies, 'the commingling of corporate funds and failure to maintain separation of companies, unified advertising, and evidence which reveals that no real distinction existed between the Corporate Defendants.'" *FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760, 1996 WL 812940, *7 (S.D. Fla. 1996). In other words, a common enterprise will be found where two companies "[do] not operate as arm's length entities, but instead [are] so interrelated" so as to render them virtually indistinguishable from one another. *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451, 463 (D. Md. 2004).

Historically, the "common enterprise" doctrine in the context of a violation of the FTC Act first arose in the Second Circuit case of *Delaware Watch Company v. Federal Trade Commission*, 332 F 2d 745 (2d Cir. 1964), in which the Court held that one corporation may be liable for the acts of another entity when the two engage in a common enterprise. In that action, Delaware Watch Company appealed an FTC order requiring it to cease and desist from unfair and deceptive trade practices in connection with the failure by another entity to disclose the true metallic content of certain watchcase parts. Although the Delaware Watch Company itself did not violate the Act, the Court affirmed the finding that Delaware Watch Company was engaged in a common enterprise with the violators of the Act. Accordingly, the Court held that it was properly enjoined under the order from committing deceptive trade practices.

Courts have subsequently used the "common enterprise" doctrine to hold one entity jointly and severally liable for the acts of another entity which is also part of that same enterprise. *See, e.g., FTC v. J.K. Publications. Inc.*, 99 F. Supp. 2d, 1176 (CD. Cal. 2000) (finding corporate defendants to be a common enterprise where they were under common control, shared office space, employees and

officers, and conducted their business through a maze of inter-related companies purportedly operating the same website.).

Obviously, in the absence of a common enterprise with a direct violator of the FTC Act, a defendant cannot be held liable for the violations of another entity. *FTC v. Kuvkendall*. 371 F.3d 745, 759 (10th Cir., 2004) ("Neither the court nor the FTC pointed us to any evidence that any corporate defendant other than DMS engaged in any of the conduct outlined above . . . nor has our review of the record revealed any", and therefore, those other corporate entities could not be held liable for the acts of the entity that actually violated the Act.).

Other relevant case law suggests that a defendant must have *numerous* and *significant* ties to its co-participants and their unlawful practices in order to be considered a part of the common enterprise. *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142 (9th Cir. 2010). In *FTC v. Network*, a case that is also referenced in the Motion for Preliminary Injunction, "common enterprise" was established where the companies in question had "pooled resources, staff, and funds; they were all owned and managed by [Defendant] and his wife; and they all participated to some extent in a common venture to sell internet kiosks" (the product-basis of the scheme). *Network* at 1143.

In yet another case, *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116-17 (S.D. Cal. 2008), the Court found "common enterprise" liability where defendants did not dispute that they "shared office space, employees, payroll funds, and other expenses." They also engaged in unified advertising for the products at issue in that case. And the companies were both controlled by the same officers. *Id*. at p. 1116. In reaching its conclusion that the defendants were a common enterprise, the Court stated that defendants' "operations, finances, employees, physical infrastructure, and business strategy were tightly interwoven." *Id*.

The above cases, and many others, illustrate the substantial involvement necessary for a finding of "common enterprise" liability. The most frightening part, however, is yet to come: extent of liability.

"To determine the appropriate amount of damages in deceptive advertising cases, courts apply a burden-shifting scheme." *F.T.C. v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010). FTC bears the initial burden of providing "a reasonable approximation of damages," which may be established by gross receipts, net customer loss, or other comparable evidence. *Id*. If FTC meets this burden, "the defendant has an opportunity to demonstrate that the figures are inaccurate." *Id.*; *F.T.C. v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008) (stating that "if defendants thought that their profits for these years were below $16 million, they should have produced their own figures-for once the FTC produces a

reasonable estimate, the defendants bear the burden of showing that the estimate is inaccurate").

Once the FTC establishes the amount of consumer injury, under the common enterprise doctrine, each defendant can be held liable for the total amount of consumer injury caused by all of the defendants—not just the amount received by that particular defendant. *FTC v. Grant Connect, LLC*, 2011 U.S. Dist. LEXIS 123792 (D. Nev. Oct. 25, 2011) (holding all defendants jointly and severally liable for $29 million in consumer injury); *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 392 (D. Conn. 2009) (the individual defendants and the corporate defendant "collaborated in the deceptive advertising scheme and are jointly and severally liable for the full restitution amount of $1,942,325.").

As the foregoing demonstrates, the common enterprise doctrine is a powerful weapon that, essentially, side-steps many aspects of the general laws of joint and several liability. Corporations and individuals should beware of these pitfalls when pooling resources, in light of the potential exposure to liability beyond the amount of one's own enrichment.

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