

Department of Common Sense - Why Optics Matter

by **Rachel Hirsch**

Clients often ask their lawyers: What does it take to get into trouble with a government regulator like the FTC (Federal Trade Commission)? The response generally involves advice geared toward making compliance a priority for the client's business. But often times, clients forget that it is not only how they conduct themselves in business that matters, but also how they conduct themselves in their personal lives.

Take for example the marketer who posts pictures of himself on a public Facebook page posing beside luxury vehicles, each one more expensive than the next. Or, take for example, the marketer who posts pictures on social media of his seven-figure wedding, boasting about the exorbitant cost of the affair. While it's true that no one likes a show off, to a government agency like the FTC, this type of "showiness" is fodder to support its Request for TRO (Temporary Restraining Order) and for Asset Freeze in an enforcement proceeding. To the extent this affiliate marketer's business practices fall short on compliance, the FTC would justify the imposition of an asset freeze by, among other things, pointing to these public displays of wealth as evidence of the affiliate marketer's "lavish lifestyle" — a favorite term used by FTC in many TRO motions.

When a government agency like the FTC or a State Attorney General decides to bring an enforcement action against a marketer, one of the considerations the agency often undertakes is whether the enforcement action can recover assets sufficient to satisfy consumer redress. The measure of damages in an FTC case can be consumer losses. Under relevant case law, consumer loss can be defined to include more than those



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consumers who complained about a product or who were deceived by the marketing practices of the defendant. Rather, consumer loss is often defined to extend to all consumers affected by the alleged fraudulent practices, even those consumers who did not complain and seemingly used the product or service without issue.

Given this broad definition of loss, a defendant's recoverable assets in a case become that much more important. Why give a regulator even more ammunition against you by publicly flaunting your wealth? Being successful comes at a price, and when it comes to settling with an agency like the FTC, that price is paid in terms of assets, sometimes even those you thought were protected. Case in point — in May, the FTC issued a press release announcing that it had obtained a court order requiring a defendant to surrender his Florida home — normally protected by homestead laws — which was purchased with ill-gotten gains from the underlying fraudulent activity that led to the FTC enforcement action.

The lesson to be learned here is that optics matter. At the end of the day, how you live your life and present yourself to the world makes a difference. Adopt some common sense — conduct your business compliantly and protect your image publicly. And, to be safe, maybe drive a Honda. **RF**