

FTC Informational Injury Workshop
December 12, 2017
Segment 1: Opening Remarks
Transcript

SPEAKER 1: For informational injury now. I've chosen to focus on consumer informational injury for two key reasons. First, in making policy determination injury matters. Although the free market is a powerful institution for improving human welfare, consumers can and do suffer injury from some business practices.

Government does the most good with the fewest unintended side effects when it focuses on addressing actual or likely substantial consumer injury instead of expending resources to prevent trivial or purely hypothetical injuries. We need to understand consumer injury to weigh effectively the benefits of intervention against its inevitable costs. Tom Leonard in his comment for the Technology Policy Institute argued this point quite nicely noting that privacy benefits us because it reduces harms from information misuse. But if there are no harms, then data use restrictions impose only costs and no benefits.

Policy makers and enforcers, therefore, need to understand how and how much consumers are injured by various practices involving the collection, use, and disclosure of consumers' information. More precisely, we need a framework for principled and consistent analysis of consumer injury in the context of specific privacy and data security incidents. The FTC's deception and unfairness statements provide such frameworks for thinking about consumer injury generally, but it's worth exploring more deeply how those frameworks apply in the specific setting of privacy and data security.

Now speaking of unfairness, the second reason I've chosen to focus on consumer injury is because it is a key part of our section 5 unfairness standard. The focus of our discussion today is on defining consumer informational injury as a descriptive and economic matter, but I hope that what we learn today can help guide the future application of the unfairness standard substantial injury prone. As for why hold the workshop now, as I've mentioned, the FTC has been a very active privacy and data security enforcer. In many of our cases, appropriately focused on the most egregious low hanging fruit were the harms were obvious to the affected consumers-- the FTC-- and often the defendants. For example, we have a series of cases such as LePE Labs, Sequoia One, and the recent Blue Global case that involved data providers who sold sensitive credit and payment information when they knew or should have known that the buying party was a fraudster who was going to misuse that information.

There were other types of cases involving direct financial loss for consumers. For example, the Wyndham data breaches allegedly resulted in identity theft and fraudulent charges to consumers. In the recent taxpayer case, the breach tax return information allegedly resulted in fraudulent tax filings, delaying consumers receipt of their tax refunds. But as technology and business models continue to evolve, we have and are likely to continue to face more challenging scenarios that involve harms other than financial loss. For example, we took action against AccuSearch for selling illegally obtained personal telephone records of individuals where we had evidence that stalkers and abusive former spouses used this information to surveil and harass individuals.

We also brought a case against the operator of a revenge porn website whose posting of highly sensitive intimate photos and personal information generated threats to and harassment of victims. And consider also the news reports of at least one suicide associated with the data breach at infidelity promoting website Ashley Madison. A strong framework for assessing consumer injury in such cases will serve two purposes.

First, it will help us think critically as we monitor new technologies and data uses for potential consumer injury. Second, it will help establish criteria by which we can judge if privacy and data security enforcement is the proper tool to address a practice. Or if other mechanisms-- perhaps either other agencies, institutions, or laws would be better equipped to address any particular negative outcome. I believe our discussion today will help ensure we have such a framework.

First, we need to examine more thoroughly the range of injuries that can occur from privacy and data security incidents. We're generally familiar with the direct financial injuries from identity theft for example. We've also seen examples of unwarranted health and safety risk and intrusion into seclusion.

In our first panel today, we'll talk about the different kinds of injuries suffered by consumers because of privacy incidents and data security breaches. Second, we need to understand the key factors that matter in assessing injury from privacy and data security violations. Some obvious ones are the type of data involved, the magnitude of harm and the distribution of the injury, but what else?

And are the same factors relevant in both the privacy and data security context? What is the relationship between risk and injury? Finally, when is the FTC intervention appropriate?

Our second panel will tackle these issues. Third, we can benefit from learning about how companies weigh the potential benefits and costs of collecting and using information and how this affects the decisions they make about protecting or restricting such information. Similarly, how do consumers weigh the benefits and costs of sharing information? And our third panel will dig into those issues.

Finally, we seek a better understanding of how to quantify consumer informational injury. Now, there's an old saying often attributed to management expert Peter Drucker-- what gets measured gets managed. If we want to manage privacy and data security injuries, we need to be able to measure them. Our fourth panel will discuss the challenges of quantifying informational injury and how we can tackle those challenges.

At the end of the day, Andrew Stivers, deputy director of our Bureau of Economics, who has already done valuable work on these issues will provide some closing remarks. This workshop is the next step in an ongoing conversation about consumer informational injury and how we can address it effectively-- both here at the FTC and the marketplace. This is going to be a fascinating discussion. And I again thank all of you for joining us, and I look forward to starting the first panel. So thank you very much.