

The FTC May Be Expanding Its Monetary Relief Toolbox

By **Nikhil Singhvi** (August 10, 2023, 4:34 PM EDT)

Last month, the Federal Trade Commission announced a case against crypto exchange Celsius Network Inc. in the U.S. District Court for the Southern District of New York, settling against the corporate entities and commencing litigation against three of its executives.[1]

In addition to being the agency's latest foray into the crypto arena, the matter presages a potential major expansion of the FTC's monetary relief toolbox.

On the surface, the action vividly depicts alleged material misrepresentations by the crypto platform to its customers, including that their deposits would always be safe, accessible and generate handsome returns.[2]

In fact, the agency alleges, most customers did not receive the promised earnings, they were unable to access their holdings for extended periods and, ultimately, their accounts appear to have been wiped out with the collapse of the platform.[3]

The FTC's monetary judgment amount is \$4.7 billion, but the corporate defendants, currently in bankruptcy, will pay zero based on their inability to pay.[4]

More noteworthy than the striking details in the complaint and the massive — but nominal — settlement amount, however, is a relatively nondescript Gramm-Leach-Bliley Act pretexting count in the complaint.[5]

The factual allegations supporting the GLB Act claim are largely duplicative of the familiar deception and unfairness claims. But, via two paragraphs sandwiched between the more salacious allegations, some innovative pleading by the agency reveals an attempt to significantly expand the FTC's authority to obtain monetary relief in ordinary matters regarding unfair or deceptive acts or practices.

Some context before we explore the details in the novel pleading: By now, those following FTC enforcement are keenly aware that, after the U.S. Supreme Court's 2021 decision in *AMG Capital Management LLC v. FTC*, the agency cannot directly seek monetary relief in stand-alone Section 5 cases.[6]

That said, the FTC has settled Section 5 cases with monetary relief, even without asserting additional FTC rules or statutes that specifically allow for monetary relief.[7]



Nikhil Singhvi

In settling with Celsius, the agency could presumably have followed this familiar path, especially given that it reached a settlement with the entities and no money is changing hands.

But presumably because litigation against the executives will continue to leave a marker for future cases, the agency strategically added a GLB Act claim that the defendants unlawfully obtained "customer information of a financial institution" relating to another person by making false, fictitious or fraudulent statements.[8]

This claim is born of the pretexting Subchapter 2 of the GLB Act,[9] which is less widely known and utilized than the disclosure requirements in Subchapter 1.[10] The pretexting provisions in Subchapter 2 of the GLB Act allow for the FTC to seek monetary redress and civil penalties; the disclosure safeguarding provisions in Subchapter 1 do not.[11]

Significantly, the commission's pre-AMG pretexting claims under the statute involve the defendants falsely posing as the customers of financial institutions to obtain those customers' financial information, including their account balances.[12]

In *FTC v. Richmond Capital Funding LLC*, the FTC filed an amended complaint in the Southern District of New York in 2021 after AMG was decided, adding a GLB Act count and alleging that the defendants used false and fictitious statements to convince small businesses to turn over access to their bank accounts.[13] The original complaint was pleaded under Section 5 only.

Specifically, the FTC's amended complaint alleged that the defendants, under the guise of providing funding to those small businesses, obtained and used the defendants' bank login credentials to access the victims' bank accounts and process payments to themselves that violated the terms of the parties' financing agreements.[14]

As the amended complaint alleged that the defendants misused bank login credentials to withdraw funds from the victims' accounts, this conduct was somewhat similar to that at issue in the prior series of cases.

There does not appear to be any analogous allegation in Celsius: Despite the seriousness of the misrepresentations set forth in the complaint, the platform is not alleged to have accessed consumers' bank accounts by impersonating those consumers.

Rather, the sum of the "customer information of a financial institution" allegations, paragraphs 69-70, appear to be that the defendants accessed information about consumers' bank accounts and crypto wallets to allow consumers to purchase and transfer crypto-assets to the Celsius platform.

Additionally, the FTC in *Richmond Capital* alleged that the defendants acted with specific knowledge of the GLB Act,[15] an allegation not made in Celsius.

In short, in a marked departure from *Richmond Capital* and the agency's prior pretexting claims, the Celsius GLB Act pretexting count appears to rest more heavily on general false statements about the underlying product and service — i.e., the safety, accessibility and profitability of the crypto holdings.

The disclosure of financial information at issue appears to be related to facilitating payments and the transfer of assets per the consumer's instruction, not false statements that would allow broader,

unauthorized access to a consumer's financial institution account.

Of course, anyone who accepts a personal check from another person thereby obtains the other person's bank account number. A bank account number, in turn, is information maintained by a financial institution and the financial institution's customer and is identified with that customer.[16]

The same might be said of a credit card transaction, pursuant to which the merchant receives the customer's credit card number, which is information maintained by a financial institution and which identifies the customer.

Thus, in its most expansive reading, the GLB Act pretexting provision could be understood quite broadly, exposing the merchant for any alleged false statement made in the course of a transaction where the merchant obtains the customer's financial account number via check, automated clearing house or credit card.

If the FTC's apparent attempt to take create wide-ranging authority to recover monetary relief from a seemingly narrow provision seems familiar, it should.

In the matter of MoviePass Inc. in 2021, the FTC expanded its interpretation of the Restore Online Shoppers' Confidence Act, the federal statute governing online autorenewing subscription agreements, to cover misrepresentations about the underlying service — the availability of "unlimited" movie admissions to MoviePass customers — as opposed to false statements about the terms of the subscription itself.[17]

In both Celsius and MoviePass, the agency strategically used defunct corporations without meaningful incentive to scrutinize the complaint and challenge a material shift in the agency enforcement landscape, and to reassert its ability to seek monetary relief over a broader range of alleged misconduct.

In MoviePass, then-Commissioner Noah Phillips dissented and was able to alert the marketplace to this development, disputing both the expansion of ROSCA liability and, importantly, the fact that it occurred in the context of a no-money settlement for a bankrupt defendant.[18]

Today, of course, the agency is ideologically uniform with only three Democrat-appointed commissioners, none of whom have sounded an analogous alarm here.

Going forward, does a merchant who misrepresents the qualities of a product or service and then accepts a check or credit card, revealing the consumer's financial account information, create GLB Act liability and exposure to monetary redress and civil penalties?

If so, the FTC can create such parallel claims in nearly all of its Section 5 cases, and it will have won back the ground it lost in AMG. This is a serious question that an unlitigated settlement with bankrupt companies for a fictitious settlement amount cannot answer.

Nikhil Singhvi is of counsel at Covington & Burling LLP. He was a staff attorney and an assistant director in the Bureau of Consumer Protection's Division of Financial Services from 2011 to 2022.

Disclosure: Singhvi was lead staff attorney for the FTC in the AMG matter in the district court proceeding. He was also lead staff attorney and then the supervisor for the FTC in the Tate's

Auto matter. Lastly, he was the supervisor for the FTC in the Richmond Capital matter.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-reaches-settlement-crypto-platform-celsius-network-charges-former-executives-duping-consumers>.

[2] Id.

[3] Id.

[4] Id.

[5] https://www.ftc.gov/system/files/ftc_gov/pdf/2223137celsiusnetworkcomplaint.pdf.

[6] AMG Capital Management, LLC v. FTC, 593 U.S. __ (2021).

[7] If the FTC first obtains a cease and desist order establishing liability for an FTC Act claim, Section 19 of the FTC Act authorizes the agency to seek monetary relief for that violation, if the Commission can establish in the Section 19 matter that the conduct was dishonest or fraudulent. 15 U.S.C. § 57b(a)(2). The FTC can avoid initiating consecutive actions by bundling the Section 5 and Section 19 claims in a single settlement. See, e.g., FTC v. Tate's Auto, (https://www.ftc.gov/system/files/documents/cases/192_stipulated_order_for_permanent_injunction_and_monetary_relief_as_to_individual_defendant_0.pdf).

[8] 15 U.S.C. § 6821(a). The statute further provides that "'customer information of a financial institution' means any information maintained by or for a financial institution which is derived from the relationship between the financial institution and a customer of the financial institution and is identified with the customer." 15 U.S.C. § 6827(2).

[9] 15 U.S.C. § 6821 et seq.

[10] 15 U.S.C. § 6801 et seq.

[11] The pretexting subchapter allows the FTC to enforce any false or fictitious statements "with the same power and authority" as under the Fair Debt Collection Practices Act (i.e., the availability of monetary redress and civil penalties for a trade regulation rule violation). See 15 U.S.C. § 6822(a); 15 U.S.C. § 1692l. There is no similar provision in the GLB Act "disclosure" subchapter, and the FTC thus cannot seek monetary redress or civil penalties for first-time violations of those provisions.

[12] <https://www.ftc.gov/news-events/news/press-releases/2001/04/part-operation-detect-pretext-ftc-sues-halt-pretexting>; <https://www.ftc.gov/sites/default/files/documents/cases/2001/04/pretextinginformationsearchcomplaint.pdf>; <https://www.ftc.gov/sites/default/files/documents/cases/2001/04/pretextingsmartdatacomplaint.pdf>; <https://www.ftc.gov/sites/default/files/documents/cases/2001/04/pretextingdiscreetdatacomplaint.pdf>.

[13] <https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-files-amended-complaint-seeking-civil-penalties-against-small-business-financing-providers>.

[14] <https://www.ftc.gov/system/files/documents/cases/x200045rcgamendedcomplaint.pdf> at ¶¶ 13, 15, 53.

[15] *Id.* at ¶ 15.

[16] See 15 U.S.C. § 6827(2).

[17] https://www.ftc.gov/system/files/documents/cases/192_3000_-_moviepass_complaint.pdf.

[18] https://www.ftc.gov/system/files/documents/public_statements/1590712/moviepass_statement_phillips_final.pdf.