

FTC Privacy Suit Tests Agency's Regulatory Authority

By **Lesli Esposito, Amy Pimentel and David Saunders**

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Every parent out there knows the line and the tone: "Don't push it."

The message is clear: You got away with the conduct to this point. We've put up with it, but do it again or try to go farther, and you might not like what comes next.

Now might be the time that someone needs to use that tone and line with the Federal Trade Commission before it finds itself with less authority to regulate privacy than ever before.

On Aug. 29, the FTC filed a lawsuit[1] against Kochava Inc. in the U.S. District Court for the District of Idaho, alleging[2] that Kochava engaged in unfair and deceptive practices by selling the precise location information of consumers.

This suit comes on the heels of the FTC's announcement[3] earlier this month that it would crack down on commercial surveillance practices and July's warning[4] that the agency would be exercising its enforcement authority against the illegal use and sharing of sensitive consumer data.

The FTC alleges that Kochava amassed a large amount of sensitive data by tracking the mobile advertising IDs from hundreds of millions of mobile phones, and that such data could be used to track people visiting abortion clinics, domestic abuse shelters, places of worship and other sensitive locations.

The FTC then said that Kochava sold that data without first anonymizing it, allowing anyone who purchased the data to use it to track the movements of the mobile device users.

The FTC wants to not only block Kochava from selling such data, but also require them to delete and destroy it. In its complaint, the FTC relied on the Federal Trade Commission Act's general prohibition against unfair and deceptive acts or practices, and alleged that the company unfairly sold the sensitive data.

Kochava, which beat the FTC to the courthouse and preemptively filed a lawsuit[5] against the FTC prior to the FTC's complaint, asserted that all of the location data came from third-party data brokers who



Lesli Esposito



Amy Pimentel



David Saunders

obtained the information from consenting consumers.

Despite the alleged consent, Kochava says it is in the process of implementing steps to remove health services location data from its database.

Kochava argued that the litigation was the outcome of the FTC's failed attempt to implement a vague settlement that had no clear terms and made the problem a moving target.

Testing the Scope of FTC Authority

The Kochava suit brings to the forefront several competing policy considerations, the determination of which could shape the scope of the FTC's enforcement authority for years to come.

The first and foremost issue that the Kochava suit raises is whether the FTC has the authority to effectively impose a consent-based regime for the sale of sensitive consumer information when no federal law enforced by the FTC — other than the Children's Online Privacy Protect Act, which applies to data collected about children under 13 — expressly provides for that requirement.

While it is not uncommon for the FTC to take expansive views of its enforcement authority, that authority has been successfully challenged in recent years. See the U.S. Supreme Court's ruling in *AMG Capital Management LLC v. FTC* in 2021[6], which held that the FTC does not have the statutory authority to seek equitable monetary relief under Section 13(b) of the FTC Act.

Now, Kochava will test the FTC's authority to regulate in the privacy space — and the FTC may not like the result.

In the unlikely event that Kochava were to litigate against the FTC all the way to the Supreme Court, Kochava might find a receptive audience.

Using their 2015 *West Virginia v. Environmental Protection Agency* ruling as precedent,[7] the Supreme Court could conclude that Congress did not grant the FTC authority to regulate privacy issues because the FTC Act does not expressly mention privacy regulation as being within the ambit of the FTC's authority.

Indeed, the standard under *West Virginia* is that the FTC would have to point to "'clear congressional authorization'" for the power it claims." At the risk of understating the issue, this would be a big problem for the FTC.

The FTC Act was adopted in 1914 at a time when privacy law was not even yet in its nascent stages. It is therefore unsurprising that the act does not grant to the FTC any explicit authorization to enforce violations of privacy.

The Kochava litigation thus comes at a precarious time for the FTC, which has visions of engaging in formal rulemaking[8] on privacy and data security. If litigated to its endpoint, and given the current composition of the Supreme Court, the FTC could very quickly find itself without a seat at the privacy regulation table.

It is, of course, possible for Congress to amend the FTC Act and grant the FTC that authority. However,

given the inability of Congress to agree on a federal data privacy bill, that outcome seems, at best, unlikely.

One very real potential outcome of the Kochava litigation for the FTC may therefore be the end to its delusions of grandeur to fill the regulatory gap of federal consumer privacy left by the inaction of Congress.

Separation of Powers in the Post-Dobbs Era

Weighing in favor of the FTC's complaint is the fact that the FTC appears to be cracking down on the precise types of privacy concerns that the public has been focused on in the wake of the Supreme Court's June ruling in *Dobbs v. Jackson Women's Health Organization*.^[9]

Since *Dobbs*, we've seen companies and private citizens go to great lengths to protect the need for increased sensitivity and privacy for the information regarding a person's visit to an abortion clinic.

The FTC argues that this is exactly that type of sensitive geographic information that it seeks to protect, no doubt acting on President Joe Biden's executive order following *Dobbs*, which instructed the FTC to take action to protect consumer privacy regarding reproductive health.

While Biden's executive order may give those marching orders to the FTC, it does not expand the FTC's legal authority nor give them new powers.

And so not only does the Kochava litigation present an interesting question of the FTC's authority to regulate privacy, it also brings up an interesting separation of powers question.

Can the president authorize executive agencies to act in spaces where Congress has not expressly authorized them? Was the president's executive order an overreach?

The FTC could elect to argue that the Chief Executive of the United States directed the FTC, an executive agency, to engage in the precise regulatory authority at issue.

The separation of powers question may be too enticing for this particular Supreme Court to pass up. If reigning in the executive branch's authority were not attractive enough already for this particular Supreme Court, the opportunity to limit presidential authority may also be appealing, including to the more liberal wing of the Supreme Court.

In short, the Kochava case, if it were litigated to the Supreme Court, poses a significant threat to executive agencies well beyond the FTC. All the more reason that the FTC may look to settle.

The Kochava action is clearly consistent with the FTC's view of its own enforcement authority in the privacy space, but pits an issue of great public concern against the hard and fast statutory limits of the FTC's authority as granted by Congress and the ability of the president to authorize executive agency action.

While the likeliest outcome is a settlement that does not adjudicate that the FTC has the authority to regulate issues of privacy, Kochava is nonetheless worth watching. Even a settlement will be instructive, because it will set the floor for how the FTC will expect to resolve similar disputes in the future.

A settlement may also further embolden the FTC to act in the privacy space. However, at some point, some party will likely take the scope of the FTC's authority to the Supreme Court, which could end up hamstringing the FTC's regulatory actions in the future.

Of course, if that were to happen, it might be the exact catalyst that Congress needs to finally pass a federal privacy bill.

Lesli Esposito is a partner and head of the consumer protection practice at McDermott Will & Emery LLP.

Amy Pimentel is a partner at the firm.

David Saunders is a partner at the firm.

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[1] <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-kochava-selling-data-tracks-people-reproductive-health-clinics-places-worship-other>.

[2] https://www.ftc.gov/system/files/ftc_gov/pdf/1.%20Complaint.pdf.

[3] <https://www.ftc.gov/legal-library/browse/federal-register-notice/commercial-surveillance-data-security-rulemaking>.

[4] <https://www.ftc.gov/business-guidance/blog/2022/07/location-health-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal-use>.

[5] <https://d1198w4twoqz7i.cloudfront.net/wp-content/uploads/2022/08/31175634/Kochava-Inc.-v.-FTC-court-document.pdf>.

[6] https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

[7] https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

[8] <https://www.mwe.com/insights/the-ftc-seeks-public-comments-following-introduction-of-federal-privacy-bill/>.

[9] https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.