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Antitrust Risk In Agreements Restricting Online Advertising

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Your company launches a new online marketing initiative, pouring time and money into the campaign and website revamp. Launch day arrives, and you type your company's name into Google — excited for your latest ads and website to appear. Much to your dismay, the first result that appears is a competitor's ad. It turns out the competitor purchased the right to have its ads displayed on Google whenever someone searched for your company's name. You wonder if you have any recourse, or if you can at least negotiate with the competitor and agree to limitations on online advertising.

The Federal Trade Commission's Nov. 7, 2018, decision in In re 1-800 Contacts Inc. is instructive. The commission held that 1-800 Contacts' marketing agreements with competitors that restricted competitors' online advertising violated Section 5 of the FTC Act.[1] FTC Chairman Joseph J. Simons authored the decision, holding that the agreements unreasonably restrained trade by harming consumers and competition in two distinct ways: (1) in the online sale of contact lenses and (2) in paid search advertising, by harming price competition in search advertising auctions.

The commission stressed that the impact of its decision stretched beyond the contact industry to "the very manner in which substantial parts of price competition will occur throughout consumer markets today and tomorrow."[2] Below, we discuss the decision and key takeaways for companies concerned about their competitors' online advertising.

Paid Online Search Advertising

The 1-800 Contacts marketing agreements at issue concerned paid online search advertising. For background, consumers create queries in a search engine, which then employs algorithms matching the query with relevant content. The search engine then displays likely responsive links to webpages on the search engine results page. The SERP contains both organic links and advertisements, also known as sponsored links. Sponsored links are displayed above, below or to the side of the organic links. Unlike organic links, which cannot be purchased, advertisers pay search engines to have their sponsored links appear on the SERP. To determine which sponsored links get displayed when, search engines hold an

auction where advertisers bid on keywords or phrases that, when matching a user's search query, trigger the display of ads on the SERP. Other factors in addition to a company's bid, such as the advertisement's quality and relevance, also impact whether and where an advertisement is displayed on a SERP.[3]

The nuances of the bid process were critical to the FTC's decision. Advertisers can bid on different designations of keywords. For Google, companies bid through "AdWords." On AdWords, a company may designate a keyword as a "broad match," "negative match," "exact match" or "phrase match." If a company designates a keyword as a broad match, the company's ad may appear in a search containing that specific keyword or any of the keyword's synonyms, similar phrases or plural forms. With a negative match, a company ensures that its ad does not appear when a user performs a search for a selected word or phrase. When a company designates a keyword as an exact match, the company's ad only appears in a search containing that specific keyword. With a phrase match, an ad may appear when a search contains a keyword with additional words before or after.[4]

The 1-800 Contacts Marketing Agreements

1-800 Contacts entered into agreements limiting its competitors' abilities to engage in the paid search advertising bid process. Almost all of these agreements resulted from litigation settlements. 1-800 Contacts sued its competitors when a competitor's sponsored link appeared on a SERP for queries involving 1-800 Contacts' trademarks.[5] In plain terms, if a consumer searched "1-800 contacts cheap" and a different online contact retailer's advertisement appeared as a sponsored link, then 1-800 Contacts sued the online retailer. 1-800 Contacts' allegations included trademark infringement, unfair competition, trademark dilution and unjust enrichment.

1-800 Contacts settled almost all of these disputes, entering into 13 settlement agreements between 2004 and 2013.[6] 1-800 Contacts consistently enforced these settlement agreements to prevent prohibited advertisements from appearing on a SERP.

Although the 13 agreements were not entirely identical, each agreement contained provisions prohibiting the parties from using the other party's trademarks and variations of the marks as search advertising keywords. Moreover, and importantly, the agreements required parties to employ negative keywords — preventing a party's advertisements from appearing whenever a search included the other party's trademarks. Unlike phrase, broad and exact match designations where a party purchases the ability to appear, with negative keywords, a party agrees to never appear as a sponsored link when certain keywords are in a consumer's query. The following example demonstrates the power of negative keywords: If a consumer searched "1-800 Contacts cheaper competitors," due to the settlement agreements' negative keywords provision, the search results would only include 1-800 Contacts sponsored links — not its lower priced competitors. The settlement agreements did not prohibit any party from bidding on generic keywords, such as "contacts," so long as the party employed negative keywords.[7]

The FTC's Analysis

Two factors, coupled together, persuaded the FTC that 1-800 Contacts' agreements violated Section 5 of the FTC Act. The first factor is what information was limited as a result of these agreements. The FTC explained that the 1-800 Contacts agreements prevented any and all relevant advertisements from being displayed to the consumer as a sponsored link on a SERP. Rather than relabeling, or causing a company to include a disclaimer, or remove inaccurate information, 1-800 Contacts prohibited all truthful advertisements — leaving consumers without the opportunity to digest the information. The absolute

prohibition of information helped persuade the commission that the agreements violated antitrust law because they "restrict[ed] the ability of lower cost online sellers to show their ads to consumers" and resulted in "anticompetitive effect on customers and markets."[8]

Also critical to the FTC was when and where the advertisements could have been displayed, if not for the 1-800 Contacts agreements. The agreements prohibited the display of information at a crucial moment — the exact moment "when consumer is more likely to be looking to buy" the product.[9] When a consumer searches in a search engine and views the SERP is when the advertisement is most important. The 1-800 Contacts agreements halted the flow of information at the essential time and place for the consumer.

Taken together, the 1-800 Contacts agreements prevented the consumer from viewing any competitive advertisements, at the most crucial time in their decision to purchase, from the place at which the consumer is most likely to look for information. As the FTC stated, each settlement agreement "effectively eliminate[s] an entire channel of competitive advertising at the key moment when the consumer is considering a purchase."[10] These factors compounded together to persuade the FTC that the agreements violated antitrust law.

Key Takeaways

The 1-800 Contacts decision provides several key takeaways for companies concerned about the effect of competitors' online advertising.

First, bidding on a competitors' trademarked words or phrases is typically not trademark infringement, so agreements that restrict online advertising cannot be justified on the ground that they are necessary to protect a trademark. The FTC rejected 1-800 Contacts' arguments that the agreements limiting its competitors online advertising were reasonable efforts to protect the company's intellectual property, noting that courts do not consider bidding on trademark keywords to constitute trademark infringement.[11] Additionally, the FTC pointed out that one trademark infringement case brought by 1-800 Contacts that proceeded through litigation resulted in summary judgment in favor of 1-800 Contacts' competitor, which was later upheld by the Tenth Circuit.[12]

Second, agreements between competitors to limit online advertising are not immune from antitrust liability, even if they arise from a litigation settlement. The FTC flatly rejected 1-800 Contacts' argument that its conduct was immune under the U.S. Supreme Court's ruling in FTC v. Actavis.[13] The FTC explained that in Actavis the Supreme Court "did not state a general rule that removes settlement agreements from antitrust scrutiny, but rather characterized two specific types of settlements as commonplace, and made it clear that the form of the settlement alone is not what subjects an agreement to antitrust scrutiny."[14] The FTC also rejected 1-800 Contacts' contention that the agreements were pro-competitive because they allowed the companies to avoid the cost of trademark litigation, which 1-800 Contacts contended would have inevitably been passed on to consumers.[15]

Third, the FTC is focused on competition in the online advertising space. The commission wrote that "this case grapples with issues of enormous import," and compared online searching to a modern day "Main Street." Shopping for goods online has replaced looking at "price tags on window displays or wandering through the aisles of retail establishments comparing prices on shelves and product characteristics written on packages."[16] At stake in the dispute, the commission wrote, is "the very means by which and conditions under which retail price competition takes place in the 21st century internet economy. These are matters vital to the interests of consumers and producers in our evolving marketplace economy."[17]

Fourth, companies may enter agreements with competitors that limit online advertising so long as the agreements are narrowly tailored to protect the asserted trademark right under trademark law principles — for example, they should only limit confusing and deceptive advertising.[18] One option approved by the FTC is to require disclosure statements ensuring the identity of the rival seller is clearly disclosed.[19] Such disclosures provide consumers with more information, rather than less.

Finally, companies should not agree to employ negative keywords. Such agreements harm competition because they prevent consumers from obtaining information that would permit price and service comparisons. As the FTC explained, "Whereas a typical trademark non-use remedy affects how a product may be labeled or what language may be used in the text of an ad, the non-use restriction [imposed by negative keywords] limits the number of times competitor ads are shown and insulates some 1-800 Contacts' consumers from becoming aware of its rivals."[20]

1-800 Contacts has publicly indicated that it plans to appeal the FTC's decision. That appeal will likely be closely watched and will have broad implications for certain types of online marketing. In the meantime, companies concerned about their competitors' online advertising strategies would be well-served to carefully consider their response strategies in light of the 1-800 Contacts decision.

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[1] 1-800 Contacts, Inc., Docket No. 9372, Opinion of the Commission (F.T.C. Nov. 14, 2018).

[2] Id. at 2.

[3] Id. at 5.

[4] Id. at 5-6.

[5] Id. at 7.

[6] Id. at 8.

[7] Id. at 9.

[8] Id. at 21.

[9] Id. at 20.

[10] Id. at 9.

[11] Id. at 38.

[12] Id. at 8 (citing 1-800 Contacts, Inc. v. Lens.com, 755 F. Supp. 2d. 1151 (D. Utah 2010), affirmed by, 722 F.3d 1229 (10th Cir. 2013)).

[13] Id. at 12.

[14] Id. at 13.

[15] Id. at 37.

[16] Id. at 1.

[17] Id. at 2.

[18] Id. at 25.

[19] Id. at 27.

[20] Id.