Behind the Mask

The Agenda, Tricks, and Tactics of the Federal Trade Commission as they Regulate Cybersecurity
Who is Mike Daugherty and LabMD?
I ALWAYS CARRY A LITTLE CRAZY WITH ME... YOU NEVER KNOW WHEN IT'S GOING TO COME IN HANDY.
Clang the Warning Bell
Focus on the Facts not the Fury
Villainy wears many masks

None more dangerous than the mask of virtue
Shatter your assumptions about the rights you think you have
Unfair Acts or Practices

An act or practice is unfair where it
- Causes or is likely to cause substantial injury to consumers,
- Cannot be reasonably avoided by consumers, and
- Is not outweighed by countervailing benefits to consumers or to competition
Bureaucrats Live in a Bubble of Arrogance and Superiority
Government Lawyers believe in unicorns because truth is irrelevant.
GASLIGHTING
Just doing my job and it's legal
No Rules
No Standards

Congress set the stage by allowing FTC their own courts, policing and rulemaking. Don't like the court ruling? Overturn it.
Collaborative vs Punitive Regulatory Practices
Medicine and Technology have a common enemy
You are messing with health
and you are costing lives

because you are willing to mess
with what you know nothing about
Culture of Contempt
Do as I say and not as I do....
thy name is FTC
Please assume the position and we'll get along just fine.
THEY WANT YOU TO BE AFRAID
Bury You in Procedures and Data
There is no shortage of people who think you're guilty because the govt accuses you.
Ooh

I'm telling
This arrangement creates a petri dish for corruption to grow

...and grow it does
You must prove yourself innocent
And the price is money, time and reputation
Excuse me stewardess, but I speak DC Lawyer
When the FTC calls you're not in discussion, you're not under investigation.... you're under attack
FTC Litigation Strategy

OPTION 1

Federal Court In Your Location

OPTION 2

DC Stopover in FTC’s Administrative Court

- Drain You Dry
- Make The Rules
- Allow Hearsay
- Attorneys Are Privileged
- Win 100% Time
- Reputation Assassination
- Psychological Warfare
- Cooperative Press
- Damage Operations
The FTC PR machine...

Spin, Intimidate & Dominate
The Court:
Nobody really has litigated your authority in this area to do this, although you apparently have done a lot of it.
Overkill and Overreach
Avoiding Congress and the Courts by Creating Common Law

We are just pawns
The FTC has created “secret law”
FTC lawyer: "The Court's order provides that Respondent may not discover the legal standards the FTC has used in the past and is currently using to enforce Section 5 in data security cases."
It's always best to keep your adversaries docile via keeping a bag over their heads.
FTC
Judge, Jury and Prosecutor

and they’re
getting away with it
EVERY DAY I GET TO WORK WITH THE BEST INTENTIONS AND THE RIGHT ATTITUDE...

Jan 2010

...THEN IDIOTS HAPPEN.
You thought all would be fine if you just signed the decree?
THE DEVIL INSIDE THE BELTWAY

Michael J. Daugherty
Investigation without Anesthesia
The Long Slog Up Justice Mountain
FTC STACKS THE DECK

CAUSE OF ACTION
Advocates for Government Accountability
Shock and Awe
Tiversa Boasts:
300 million to 1.8 billion searches per day
4.5 million workstations worldwide
13.8 million files downloaded
And they turn over to the FTC...
86
BLOWHARD
GASLIGHTING
There's already a history of acrimony and I think on behalf of the agency the exertion of authority in a mean-spirited way.
FTC: The FTC attorneys that are handling the administrative proceeding in that hearing, they I'm assuming definitely know these details. They are not present. They are not here today. We are just -- we were just brought in from DOJ to represent this complaint in this action. So that's part of why we don't have these facts. But we represent the FTC here and we can get these facts for you.

THE COURT: So where are those lawyers? Are they too busy to come to Atlanta today? Is that one of them sitting back there in the gallery?

FTC: No, she's a U.S. Attorney here in Atlanta, unrelated.

THE COURT: How about this other fellow back there, is he an FTC lawyer too?

MR. MARCUS: Your Honor, we have a gentleman here from the FTC.

THE COURT: Are you involved in this investigation?

MR. MARCUS: I am personally not involved in the investigation.

THE COURT: Okay. So you are off the hook. So far I have got four lawyers here and none of them are involved in the investigation.

MR. MARCUS: We do have are a lawyer who is involved in the investigation.

THE COURT: And what's your name?

MR. SCHOSHINSKI: Good morning, Your Honor. Robert Schoshonski. I'm assistant director in the Division of Privacy and Identity Protection.
11th Circuit to FTC

THE COURT: All right. So in this case, what investigation has been made as to the source of the documents that the police department out in California found?

MR. SCHOSHINSKI: Your Honor, the complaint counsel, so that is the FTC counsel who is litigating the complaint in the administrative action, noticed the depositions of the two individuals who pled no contest to identity theft. One they could not serve because she was just simply not findable. The other one was in jail.

THE COURT: Did you try to find her?

MR. SCHOSHINSKI: Yes, we did, Your Honor. We hired several process servers. They made many attempts to try to find her but were unable to serve her.

THE COURT: And when did you first try to serve her?

MR. SCHOSHINSKI: Your Honor, I don't have the exact dates, but -THE COURT: Well, give me an approximation.

MR. SCHOSHINSKI: Your Honor, I would say late 2013, early 2014.
THE COURT: So really late in the game, you finally decided that it made sense to go and find out with respect to one of the allegations that's the basis of your investigation that's been ongoing for months, because the CID was something I dealt with some months ago, that you finally decided -- or not you, but your lawyers finally decided that maybe it would be good to try to find the people who actually had the information to determine where they got it?

MR. SCHOSHINSKI: Yes, Your Honor.

THE COURT: Does that strike you as odd?

MR. SCHOSHINSKI: Your Honor, it doesn't strike me as odd.

THE COURT: Does it strike you as late?

MR. SCHOSHINSKI: Your Honor, it strikes me as the normal course of the investigation.
THE COURT: Boy, that's a sad comment on your agency, that you would wait until months before a hearing and months after you instituted an investigation on a principal claim that you are asserting, that you have not even taken any effort to interview the people that you claim had the documents that underlie the charge of a security breach. That strikes me as almost being unconscionable. And how much money -- how much activity was there before you served those subpoenas trying to get the information from LabMD with respect to a security breach that you don't even know how it occurred? How much activity
MR. SCHOSHINSKI: Your Honor, how would you like me to estimate?

THE COURT: Let's start in months.

MR. SCHOSHINSKI: Well, Your Honor, I believe the investigation began in January of 2010.

THE COURT: Okay. So three years before you tried to subpoena them? I'm sorry, two and a half years?

MR. SCHOSHINSKI: Your Honor, the knowledge of this incident didn't occur until after the CID enforcement hearing up here in Atlanta. That's when we were notified that this incident had occurred, in October of 2012.

THE COURT: So you found out about the -- the incident you are talking about is the California police incident?

MR. SCHOSHINSKI: That's correct, Your Honor.

THE COURT: All right. And how soon after you found out about the incident did you try to contact the police authorities in California to find out what they knew about the source of the information?

MR. SCHOSHINSKI: Immediately.

THE COURT: And what did they tell you?

MR. SCHOSHINSKI: They told us that they did not know.

THE COURT: And then what did you do next, and how soon did you do it?
11th Circuit to FTC

MR. SCHOSHINSKI: We shared the information with LabMD concerning the -- what we found out once we were able to confirm that it was LabMD's information, and we then attempted to find out further from the California police department what they knew about the source of this information.

THE COURT: And what did they tell you they knew about the source?

MR. SCHOSHINSKI: They told us they were not able to get the source from the defendants in the case.

THE COURT: So sitting here today, you have no idea where the documents came from, whether they came from LabMD or some other source? Is that a fair thing to say?

MR. SCHOSHINSKI: No. We believe they were LabMD's documents.

THE COURT: Well, they might have been LabMD's documents, but you don't know how they got into the possession of the two individuals that you tried to contact United States District Court that pled guilty to this offense?

MR. SCHOSHINSKI: That's correct, Your Honor

THE COURT: So you have no information to establish how those documents were obtained; is that right?

MR. SCHOSHINSKI: That's correct, Your Honor.
THE COURT: And you are still proceeding on this claim?

MR. SCHOSHINSKI: Yes, Your Honor, because the claim is not concerning that incident alone.

THE COURT: All right. But are you still proceeding on that claim?

MR. SCHOSHINSKI: We are proceeding on that evidence, Your Honor.

THE COURT: And that evidence relates to other claims, because you have other documents that were found in other places?

MR. SCHOSHINSKI: That evidence relates to the potential injury suffered by consumers as a result of exposure of this information.

THE COURT: Are you serious about that last response?

MR. SCHOSHINSKI: Yes, Your Honor, I am.

THE COURT: So you don't know where the documents came from, you don't know how these people got the possession of it, you don't know whether they originated from LabMD or some other place, but you are going to use that to show that, because they committed identity theft, that certain individuals were damaged by documents, the source of which you don't even know?

MR. SCHOSHINSKI: Yes, Your Honor.

THE COURT: Holy cow.
11th Circuit: The FTC is going to go into the business of monitoring and investigating and regulating security breaches and they have decided I think to do that within what they believe is their administrative authority, because I think they went to Congress and Congress wouldn't authorize that for whatever reason, whether it's politics or not. But I think there has been no amendment to Section 5 to specifically allow that. But they are taking the position that they have the authority to do that.

MR. RUBINSTEIN: That is correct.

11th Circuit: I think that there is a significant question about whether Section 5 allows that, but I'm not sure I can decide that based upon my jurisdictional limitations, perhaps.
PLEASE TAKE YOUR SEATS

FACEBOOK COURT IS NOW IN SESSION
Amateur Hour at Federal Level

We have spoken on panels.
We have conducted workshops.
We have published guidance for businesses just like LabMD about our view that data security practices can be enforceable under Section 5 if they become unfair or deceptive in some form or fashion.
Rather than the cyber “white knight” Tiversa purports to be, the company often acted unethically and sometimes unlawfully in its use of documents unintentionally exposed on peer-to-peer networks.
At least one Tiversa employee, under the direction of CEO Robert Boback, provided intentionally false information to the United States government on more than one occasion.

Boback later provided false testimony about fabricated documents to the U.S. House of Representatives.
According to a whistleblower, Tiversa fabricated that an Iranian IP address downloaded and disclosed the blue prints for the President’s helicopter, Marine One

Tiversa allegedly did so in order to receive press attention for the company

The Committee found that statements made by Tiversa under oath about this matter could not be substantiated
After obtaining information on HIV/AIDS patients at a clinic in Chicago, Tiversa employees called the patients, purportedly in an attempt to get the clinic to hire Tiversa.

When the clinic refused to hire Tiversa, the company gave the information to a lawyer that worked with the company who filed a class-action lawsuit that eventually settled for a substantial amount of money.
Tiversa had information about a breach at the House Ethics Committee exposing information about investigations into Members of Congress. Tiversa did not return this information to the Ethics Committee and instead appears to have sought publicity for the leak.
Tiversa’s co-founder claims the company is in possession of a greater quantity of sensitive and classified information than NSA-leaker Edward Snowden
Information provided by Tiversa to the FTC through a shell organization known as the Privacy Institute was only nominally verified but was nonetheless relied on by the FTC for enforcement actions.
Tiversa obtained non-public, advanced knowledge of FTC enforcement actions from which it attempted to profit
Caught in the web...

and the only way out is patience, perseverance and money
Big Biz sees companies as a school of fish willing to sacrifice a few so the rest can swim free. That "freedom" is an illusion. The FTC is a shark attacking at random.
Lambs Are Easy to Slaughter
A "breach" is not a breach
FTC ALJ: Has the commission issued guidelines for companies to utilize to protect this information or is there something out there for a company to look to?

MR SHEER: There is nothing out there for a company to look to.
FTC’s administrative Process appears to be rigged against respondents. For nearly the past twenty years, in 100% of the cases where the ALJ ruled for FTC, the commission affirmed, but in 100% of the cases where the ALJ ruled for respondent, the commission reversed. In other words, FTC never loses.
REMEMBER WHEN I CARED?

ASKED NO HONEY BADGER EVER!
Whistleblowers have it rough
Don't look so you won't find
THE RED HERRING

I'm here to distract you
Freedom of Information Act
Persecution through Process
Do You Think Other People Will Find Out?
Hear the screaming silence
BOY, I SAY BOY..

YOU'RE ABOUT TO EXCEED THE LIMITATIONS OF MY MEDICATION.
No Courage
THAT MOMENT WHEN YOU WITNESS
KARMA IN IT'S FULL, GLORIOUS SPLendor
The US government has the wrong people with the wrong skills overseeing cybersecurity...

and it's costing us all a fortune
The LEFTOVERS
We have a cybersecurity problem

and the FTC is not the solution
Busyness + Short Attention Span = Rollover
Power + ego - knowledge =
Loss of Health, Safety and Welfare
A Century of Letting a Them Eat Cake
To know a person ... watch what they do, not what they say.

Danny Santagato
THE TRUE AGENDA OF THE FTC IN CYBERSECURITY REGULATION

- Become the main US Privacy and Data Security Regime while lacking Congressional Authority
- Expand FTC jurisdiction into Medicine, Technology, and Finance via president and not Congressional Approval
- Build a portfolio of consent decrees that will become Common Law circumventing Congresss and the Courts
- Build a reputation of fear and relentlessness so organizations will roll over, avoiding litigation that will limit the self-appointed power of the FTC
- Convince the Courts that this is legal via creating false anxiety about dire alternatives
You are the key... not the Feds