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Frontier Says FTC Suit Sidesteps Justices' Restitution Ruling

By **Khorri Atkinson**

Law360 (July 21, 2021, 8:03 PM EDT) -- Frontier Communications Corp. derided the Federal Trade Commission's lawsuit accusing the telecom company of offering customers DSL internet service slower than advertised, telling a California federal judge Tuesday the agency "manufactured" the case "in a misguided attempt to sidestep" the U.S. Supreme Court gutting its restitution power.

The FTC, joined by Arizona, California, Indiana, Michigan, North Carolina and Wisconsin, alleged in its May 19 complaint that Frontier nationally advertised internet speeds it is incapable of delivering, and that the company's salespeople offered and sold internet speed tiers to customers that wouldn't be available at their addresses.

But the telecom rebutted in its dismissal motion that not only does the court lack personal jurisdiction over the defendants, the plaintiffs also did not allege a plausible theory that a reasonable consumer would be deceived by the challenged advertising or billing in the manner the complaint claimed.

The filing insists the plaintiffs sued in the wrong court and that the states "have nothing to do with this district (much less California) or federal law" because the alleged false advertising and billing would only affect residents outside the Golden State.

"Why would states with no connection to this district file a lawsuit in this district on claims with no connection to this district? The answer is that the FTC manufactured this lawsuit in the wake of — and in a misguided attempt to sidestep" the Supreme Court's April 22 decision in AMG Capital Management LLC v. Federal Trade Commission, according to Frontier.

In AMG, which concerns a $1.3 billion restitution award the commission secured over a payday lending scheme, the justices unanimously concluded that the FTC doesn't have the authority to secure monetary remedies via preliminary injunctions under Section 13(b) of the Federal Trade Commission Act.

This is a practice the agency has long used to seek restitution for victims of consumer scams and antitrust violations in federal court. Instead, it must pursue monetary sanctions via its lengthy in-house administrative process, the Supreme Court said.

The high court's decision has already been invoked in cases by various parties around the country. The agency has also warned that the ruling will hobble its enforcement power and been pushing lawmakers to undo it with legislation.

In the instant case, Frontier said the FTC had been pressuring it to pay a monetary penalty before the AMG decision. Less than a month after the justice's ruling, the agency designed this case to overcome what it perceives as the Supreme Court's grave error, the telecom alleged.

"In ostensible compliance with AMG, the FTC seeks only injunctive relief for itself, but it has recruited six states to join its lawsuit so that the complaint can include — under the respective laws of those states — demands for money that the FTC cannot seek directly," the company added. "But the FTC's attempted work-around results in a case joining together parties and claims over which this court lacks jurisdiction."

Other than the plaintiffs' "irregular work-around" the AMG ruling and suit's "jurisdictional defect," Frontier further contended, they have sued the wrong defendants.

The complaint has also named Frontier Communications Parent Inc., Frontier Communications Intermediate LLC and Frontier Communications Holdings LLC as defendants. Frontier argued that the four firms are only holding companies that do not engage in the activity challenged, whether in the six states or otherwise.

"And plaintiffs fail to sue the actual stand-alone Frontier entities that do, each of which is domiciled in each of the respective states and owns the equipment and operates the internet services that plaintiffs challenge," the motion added.

This lawsuit isn't Frontier's first brush with the law over its advertising practices. The company agreed in 2015 to invest $150 million in its West Virginia high-speed internet as part of a broader agreement settling allegations that its download rates were far less than promised. Since then, Frontier has also settled with the attorneys general of New York, Nevada, Pennsylvania, Washington and Minnesota over deceptively advertised internet speeds.

"Despite these settlements, Frontier has failed to remedy its practices, and consumers continue to be harmed nationwide," the FTC and the states said in their complaint.

But Frontier maintained in Tuesday's filing that the lawsuit failed to allege a claim for false or misleading advertising relating to internet speed, as confirmed by the Ninth Circuit's 2011 holding in Maloney v. Verizon Internet Services Inc.

The company noted that its advertisements characterize the representations of DSL internet speed with the words "as fast as," and that this phrase means "no particular speed is promised. So, no particular speed should be expected." It added that the mail advertisement the plaintiffs include in their complaint contains many other disclosures along these lines. These include, "Service speed is not guaranteed and will depend on many factors"; "Includes max speeds as fast as 12 Mbps"; and "Maximum service speed is not available to all locations and the maximum speed for service to your location may be lower than the maximum speed in this range."

Moreover, Frontier emphasized, the mailer makes it clear that DSL services are subject to the applicable Frontier terms and conditions, and the Ninth Circuit's Maloney ruling suggests that the terms and conditions should be considered in the consumer deception analysis.

"Frontier's terms and conditions repeat in clear language that a consumer should not expect a particular internet speed, and that no particular speed is guaranteed," the filing said. "On this same record and for the same reasons, the derivative claims relating to billing and collecting for higher internet speed than actually provided ... also collapse. Because consumers are billed for services as advertised, there is no false or irregular billing."

A spokesperson for the FTC did not immediately reply Wednesday to a request for comment on the dismissal motion.

A Frontier spokesperson reiterated that the lawsuit is without merit.

The FTC is represented in-house by James Reilly Dolan, Robert J. Quigley, Barbara Chun and Miles D. Freeman.

Frontier is represented by Dale J. Giali, Keri E. Borders, Robert S. Harrell and Kathryne M. Gray of Mayer Brown LLP.

The case is FTC et al. v. Frontier Communications Corp. et al., case number 21-cv-04155, in U.S. District Court for the District of California.

--Additional reporting by Kelcee Griffis and Bryan Koenig. Editing by Jay Jackson Jr.