LabMD Says FTC Shifting Args On Data Security Lapses

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Law360, New York (March 10, 2017, 10:12 PM EST) -- LabMD on Thursday stepped up its opposition to a ruling by the heads of the Federal Trade Commission that declared the company's data security practices were inadequate to protect against unauthorized disclosures, telling the Eleventh Circuit the agency keeps shifting its arguments to fit a conclusion it reached long ago.

In a reply brief, LabMD Inc. shot back at a **brief filed by** the FTC last month, which urged the appellate court to uphold a **July ruling** in which the heads of the agency overturned their own administrative law judge and concluded that the company's failure to employ "basic" security precautions led to an unauthorized disclosure of sensitive medical data that caused "substantial" harm to consumers, in violation of the unfairness prong of Section 5 of the FTC Act.

The FTC had argued in its February brief that the company's failure to take standard precautions like training staff about data security and using inexpensive monitoring tools caused actual harm in the form of invasion of patient privacy. But LabMD countered Thursday that not only was the conclusion incorrect, it was a predetermined judgment that none of the lab's arguments could alter.

"The FTC's response brief confirms that this is a paradigmatic case where 'the Commission clearly made its decision before it considered any contrary conclusion,'" the lab said. "Just as in the proceedings below where the Commission ignored evidence favorable to LabMD and shifted its theory of injury once its 'evidence' of harm was shown to be fabricated, the Commission's response now ignores many of LabMD's arguments demonstrating the opinion's flaws and instead ... resorts to new theories that are not in the opinion."

LabMD added that the commission in its response brief also "repeatedly mischaracterizes" both the commissioners' opinion and "the flimsy record upon which it was based" in order to "falsely paint LabMD in a bad light."

Specifically, the lab contended that the FTC claimed the leaked patient data file at the heart of the case was exposed to "millions" of Limewire users who had "unfettered access to it" when "in truth only a small fraction of users could have searched for it and their access was quite 'fettered'"; that the commission had falsely asserted that the file contained patients' diagnoses; and that the agency misrepresented that the lab affirmatively "disclosed" the file to cybersecurity firm Tiversa.

Tiversa, which is currently embroiled in separate litigation with the lab over the data exposure and is under investigation by the FBI for its dealings with federal regulators, claims that it discovered the file on Limewire, while LabMD has countered that Tiversa stole the file and gave it to the FTC after the lab had refused to purchase its security services.

However, LabMD noted in its recent motion that even if these points were presented accurately, they still wouldn't be enough to justify upholding the commissioners' decision, which the lab argued went far beyond the authority that Congress had bestowed upon the commissioners to police unfair

practices under Section 5(n) of the FTC Act.

"Each interpretation of Section 5(n) that the FTC now asserts is directly at odds with Congress' clear intent and is, in any event, unreasonable," the lab argued.

LabMD pointed out that in its response brief, the commission "walked away" from the commissoners' assertion in their July ruling that the exposure of the patient data file could have caused the nearly 10,000 consumers whose information was contained in the document embarrassment or reputational harm, and instead for the first time contended that "the wholly conceptual 'privacy harm' referenced in the opinion constitutes 'substantial injury' under Section 5(n) because it is 'concrete.'"

"Even if the court could consider it, this newfound position is no more reasonable than the FTC's original theory," the lab argued, adding that both the plain meaning and legislative history of the unfairness prong foreclose the finding of a "substantial injury" based on intangible harms such as privacy invasion.

In a statement provided to Law360 Friday, LabMD CEO Michael Daugherty urged the examination of two points: "that all commissioners, including Acting Chairwoman [Maureen] Ohlhausen, participated in willful blindness by ignoring very contrary evidence that proves LabMD had data security practices the FTC bellows we did not" and "that FTC expert witnesses themselves state they were told by the FTC to assume as a given that LabMD's data security practices were unreasonable."

"When and where is the outrage and fury directed toward these bureaucrats who stacked the deck with lies and willful blilndness against a cancer facility. Have they no shame?" Daugherty added. "Why are they still working in the Trump administration? Health care will never recover with regulators like this knocking on our door as Congress looks the other way."

LabMD is represented by Doug Meal, David Cohen, Michelle Visser and Douglas Hallward-Driemeier of Ropes & Gray LLP.

The FTC is represented by staff attorneys Joel Marcus, Theodore Metzler and Michael Hoffman.

The case is LabMD Inc. v. Federal Trade Commission, case number 16-16270, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Philip Shea.