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## **Eight Observations on the FTC's GoodRx Case**

On February 1, 2023, the Federal Trade Commission filed a stipulated order for a permanent injunction against GoodRx, a company that supposedly helps consumers find better prices for prescription drugs. See <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising>.

What the Commission alleged, and what the company did not dispute, is that GoodRx engaged in unfair and deceptive practices by selling personal health information about consumers despite clearly stating on its website that the company did not share that information. The Commission also alleged that the company violated the Health Breach Notification Rule by disclosing information without the consent of its customers. GoodRx agreed to stop selling consumer data, to establish a meaningful privacy program, and to have a privacy assessment by a third party. I offer eight observations about this case.

1. The facts in this case are stunning. GoodRx engaged in overt, willful, and intentional deception. The company told consumers that it would protect the privacy of their data, but the company sold identifiable data out the back door to Google, Facebook, and others. It is hard to imagine a more egregious example. The company's original SEC filings hinted, perhaps, that its business plan was to ignore privacy laws. A 2020 prospectus identified as a risk the company's "actual" failure to comply with privacy laws. That statement may make it harder for disgruntled shareholders to sue management over losses because of the privacy violations. Management can say that they told investors that the company might fail to abide by privacy laws. On the other hand, the prospectus also repeatedly referenced the importance of consumer trust in the company's business model. Maybe there's a shareholder suit here after all.

2. Overall, it may be fair to conclude that the company's management may not be, umm, exemplary. The company hasn't made a nickel in any year since it went public in 2020. The stock price went from over fifty dollars a share in late 2020 to around five bucks today. Strangely, perhaps, on the day the FTC issued its decision, the stock price went up more than 5%, and more than 3% the next day. Go figure. It's not like the company's cost of cleaning up its mess will be minor.

3. The Commission brought the case under its traditional unfair and deceptive standard. There is certainly no question about deception here. The agency also found a violation of its health breach notification rule. What's interesting is that this was the first FTC case under that rule. Those in Congress looking to give the FTC more authority over privacy might take note at how long it took for the Commission to utilize its breach rule. The rule dates back to 2009, and the first case under the rule comes in 2023. It's hard to believe that no one else violated the breach rule in all those years. Still, it is fair to ask how much consumer data GoodRx sold in the

three years that it took for the FTC's case to reach a conclusion. Why the Commission didn't seek an injunction against the sale of consumer data earlier during those three years is a mystery.

4. For me, the most stunning part of the case is the \$1.5 million-dollar civil penalty. The fine here is barely a slap on the wrist. The stock may be down 90%, but its market capitalization is still 2 billion dollars. Last quarter, the company's balance statement showed about 750 million dollars in cash and cash equivalents. In any event, during the three years that the FTC worked on this case, the company probably paid its lawyers more than the amount of the fine. What exactly does a company have to do to warrant a meaningful fine?

5. A concurring opinion by Commissioner Christine Wilson (a Republican!) skewered some other commissioners and the staff because the fine was so small. She cites numerous earlier statements of other commissioners (especially Democratic Commissioner Rebecca Kelly Slaughter) complaining about the need for stronger penalties. The fine in this case is not likely to deter anyone engaged in similar privacy violations.

6. The fine and the message in this case suggest that any company should just wait until the FTC finds you and brings an actual case against you. Then maybe you will get off with a token fine, especially if your lawyer is a former FTC staffer. After all, current FTC lawyers have an incentive to see to it that there is a market for their services when they leave the Commission and enter private practice.

7. I have one more shot to take at the result. The stipulation calls for the company to undertake a privacy "assessment" by a third party. Requiring assessments in privacy cases is standard practice at the Commission. However, an assessment is not an audit and does not have the rigor of an audit. What's the difference? An assessor takes your word that there's \$125 dollars in the cash register. An auditor counts the money. We need privacy audits, not privacy assessments.

8. Much credit for exposing the original violation belongs to Consumer Reports, which first reported on the sale of consumer data by GoodRx in February 2020. This is a good example why consumer advocates are essential elements in policing privacy and other consumer protection laws. Another tip of the cap goes to my colleague Pam Dixon of the World Privacy Forum. The Commission dinged the company for stating that it is "HIPAA Compliant." For any organization like GoodRx that is not subject to HIPAA, that phrase deceives consumers into thinking that the information they share is protected by the federal health privacy rules. Dixon has been publicly complaining about the misuse of "HIPAA Compliant" since 2010. Sometimes, persistence pays off.

Don't get me wrong here. I'm happy to see that the Commission brought this case. I just don't think that this a model result or that it enhances the argument that the Commission is an ideal privacy enforcement authority.