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A Conversation With FTC Chairman Andrew Ferguson: Enforcement Priorities and Practical Advice for Companies

SPEAKERS

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In this must-listen episode of *Regulatory Oversight*, FTC Chairman Andrew Ferguson joins Ashley Taylor and Graham Bryant to reflect on Ferguson's path from clerking for Justice Thomas and serving as Virginia's solicitor general to leading the FTC. Ferguson discusses the agency's enforcement priorities and how the FTC works alongside state attorneys general to maximize consumer redress. He closes with candid advice for companies and counsel navigating matters with the FTC: cooperate early; come prepared with substantive written advocacy well ahead of meetings; and understand that although the FTC prefers to resolve matters cooperatively, it remains prepared to litigate when needed.

Transcript

Podcast: *Regulatory Oversight*

Episode: A Conversation With FTC Chairman Andrew Ferguson: Enforcement Priorities and Practical Advice for Companies

Hosts: Ashley Taylor and Graham Bryant

Guest: Andrew Ferguson

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Ashley Taylor (00:04):

Welcome to another episode of *Regulatory Oversight*, a podcast that focuses on providing expert perspectives on trends that drive regulatory enforcement activity. I'm Ashley Taylor, one of the hosts of the podcast and the co-leader of our firm's State Attorneys General practice and team. This podcast features insights from members of our practice group as well as guest commentary from business leaders, regulatory experts, and current and former government officials. We cover a wide range of topics affecting businesses operating in highly regulated areas.

Before we get started today, I wanted to remind all of our listeners to visit and subscribe to our blog at regulatoryoversight.com so you can stay up to date on developments and changes in the regulatory landscape.

Today, my colleague Graham Bryant and I are joined by the chairman of the Federal Trade Commission, Andrew Ferguson, as we discuss his career path to the FTC, his approach to enforcement priorities, and the thoughts he'd like to share for companies and counsel working with the agency today. Chairman Ferguson was first sworn in as

an FTC commissioner in April 2024, following his nomination by President Biden. He was designated by President Trump as chairman and has served in that role since January of 2025. He previously served as solicitor general of Virginia, chief counsel to Senate Republican leader Mitch McConnell, and Republican counsel on the Senate Judiciary Committee. He holds his undergraduate and law degrees from the University of Virginia and clerked for Judge Karen Henderson on the D.C. Circuit and for the United States Supreme Court Justice Clarence Thomas. Chairman Ferguson, thank you for joining Graham and I today, and Graham is going to start our conversation with our first question.

Graham Bryant (01:43):

Again, thank you very much for joining us today, Chairman Ferguson. Want to start with something that Ashley had just mentioned about your background. Your career has taken you from clerking for Justice Thomas to working on judicial nominations in the Senate, to becoming solicitor general of Virginia, and now serving as Chair of the FTC. I, of course, met you when you were solicitor general of Virginia, and for people like me that may be a little bit more familiar with your appellate background, can you tell me a bit about how antitrust fits into your story? What's the through line there?

Andrew Ferguson (02:13):

Sure. Very happy to be on. It's good to talk with you again, Graham. I took antitrust in law school with Tom Nachbar, who at the time was the only guy at UVA who was teaching antitrust, and really liked it. And after my first clerkship, I went off to big law. I started my career at Covington a long time ago, and from everything that I had seen and learned in law school, antitrust seemed like it was probably the least boring big law practice for a young associate. And I would say that the things in law school, the classes I had most enjoyed, were antitrust, Fed courts, and con law. And Fed courts being a species of constitutional law, more or less.

One of the things that had most interested me about antitrust is that, like constitutional law, it rewards creativity because most of the principles in antitrust are pretty generally stated, and then your ability to win cases depends on, often, on the cleverness of your argument, which can be true in constitutional law, as opposed to a lot of the sort of areas of law that are governed by law codes. So it interested me for that reason. And then one of the cool things about antitrust, and this was true in my private sector practice, is you have to learn a lot about one industry very quickly. Whether you're doing a deal or a conduct case, you have to figure out how some market or industry works. You have to figure it out very quickly, and you have to figure it out pretty in-depth. And then you work on that case for as long as it lasts. In the case of a merger, that can be six months to 18 months. In the case of a conduct case, that can be many years. And then you move on to a completely different market and industry, and the variety was very interesting. So my introduction to the practice of law was in antitrust. And then after my clerkships, when I went back to big law, it was all antitrust, both deal work and litigation. So that was my introductory experience to antitrust.

Graham Bryant (04:13):

You mentioned just now how antitrust really rewards federal courts and constitutional law, the cleverness of the arguments that you bring. And certainly in your three years as solicitor general of Virginia, a very exciting three years, you led one of the most active state AG's offices, and you did it in a notoriously purple state. I was there for some of the really creative things that we put together. So how has that experience shaped the way that you have approached this chairman role, particularly when it comes to coordinating with state attorneys general when it comes to enforcement matters?

Andrew Ferguson (04:46):

It's affected it a number of ways. Number one, I learned from being solicitor general about the importance of consumer protection law. Most big law practices have, if they have consumer protection practice, it's a part of their competition practice. And when I was coming up, it was the redheaded stepchild of antitrust. It was often limited to some FTC work, some false claims work, although a lot of the false claims work is handled by the Medicare or Medicaid practice at the law firm, and then some state AG work. But it was considered sort of the less rigorous version of antitrust. It was the less rigorous form of consumer protection law or of consumer law. And then product liability was sort of its own thing, super litigation focused as opposed to litigation and regulatory, consumer protection.

And then when I was state SG, I realized pretty quickly two things. One, consumer protection work is intensely popular. It puts money back in people's pockets. And I don't think people feel a stronger sense of vindication or justice from how their government executes the laws, apart from criminal law enforcement when a bad guy goes to jail, than they do from consumer protection where a bad guy has to pay back what he took. So that was the first, is it's intensely popular. And second, given that the laws are pretty broad, there's a fair amount of good work that can be done if you focus on consumer protection and if you're clever and careful with your arguments. And when I became a minority commissioner and then chairman, the first Trump administration and the Biden administration had brought a series of big monopoly cases on the antitrust side against big tech firms. President Trump launched one against Google, launched one against Meta. President Biden launched one against Google and one against Apple, and then another against Amazon. And I thought several of those cases were righteous. I litigated one of the Google cases alongside the Biden administration, and then I inherited President Trump's Meta case from his first term, which was careening toward trial when I became chairman. But the upshot of most of these cases, at least the three that were litigated to judgment in the district courts, is even if the government demonstrates that a monopoly exists, it's very difficult for the government to get a sort of weighty remedy. They can get important remedies, but courts are just not doing structural remedies in monopoly cases and haven't for many decades.

And I watched this happen and sort of thought, well, if the government spends these incredible resources on these righteous cases, but the litigation can take half a decade or more such that the market that you're litigating over has changed pretty dramatically by the time a judge is returning judgment, and then at the end is a remedy that isn't necessarily what the government was trying to get, I began to wonder, are there ways that we can protect consumers from big business abuses that don't entail five to seven years of litigation, a somewhat dissatisfying remedy at the end, and dramatic market changes in the middle that can lead one to wonder whether, had you known the market was going to change dramatically between when the complaint was filed and when judgment was issued, you would have issued the case? But consumer protection law can get results far more quickly. It can drive right at the abusive practice. Rather than having to convince a judge or a jury about grand market structural questions, all you have to do is explain to a judge or jury they lied or what they did was indefensibly unfair. And those sort of cut at moral principles that everyone intuitively understands in a way that big structural antitrust cases don't necessarily.

So I made a decision early on that we weren't going to lose focus on antitrust. We brought four major new cases last year to litigation, in addition to bringing and then subsequently settling more than half a dozen other multi-billion dollar cases, including, I think, one of the most important antitrust cases in the last 25 years against the ad companies for having engaged in a concerted refusal to deal against certain types of advertising platforms. But I made a decision very early on that we were going to supercharge our consumer protection work with the goal of

trying to recover as much wrongfully taken money as we possibly could for consumers, put it back in their pockets, restore justice to the market, restore citizens' faith in their government's ability to right wrongs. And we have. We recovered more than \$2 billion in our first year of the second Trump administration, which is far more than the Biden administration obtained in four. Just last week, we recovered \$325 million in two major cases in a single day for consumers. \$325 million worth of consumer redress in a single day. We are well on pace to clear a billion dollars again this year.

And three weeks ago, we brought a case against Amazon, along with 22 state attorneys general of both parties, accusing Amazon of having rigged the auction system for its lucrative advertising market for many years to the tune of probably more than \$20 billion that cost American businesses, including hundreds of thousands of small and medium-sized American firms that are trying to advertise their goods on Amazon, billions of dollars. So we haven't lost our focus on antitrust, but I have very intentionally tried to supercharge the consumer protection work at the FTC and am very, very pleased with the success of the agency over these last 20 months and its ability to really do core consumer protection work at scale and at high volume, very, very competently and effectively.

Ashley Taylor (10:35):

Chairman Ferguson, your comments about your experience as Solicitor General and your perspectives on consumer protection makes a nice segue into the long history that the FTC and the state AGs have in working collaboratively. A lot of our listeners may hear that, but really not understand what that means at a practical level. So what does it mean when you pick up the phone, literally or figuratively, to work with AGs? What does that mean as a practical matter?

Andrew Ferguson (11:05):

Generally, it can mean one of two things. The classic example is that the FTC is investigating something and alerts our state partners to the investigation and the fact that, at the stage of the investigation where we're alerting the state AGs, we believe that consumers in those states suffered injuries that the state AGs may want to participate with us in vindicating. And so there's a process by which we basically send a lengthy confidentiality agreement to the states where we offer to share, consistent with the FTC Act, materials that we are obtaining in the course of the investigation so that the states can investigate with us. And we do that on both sides of the house at the FTC, both our competition and consumer protection cases, many of them. And on the consumer protection side, every major case has state AGs with us.

And we do that for a variety of reasons. One is that it's helpful to have state AG perspective. That is particularly true when we are pursuing a case that affected in a unique way a smaller group of states. The classic example of this on the consumer protection side are car dealership cases. We brought a lot of car dealership cases in the last 20 months aimed at primarily one issue, and we think it's the issue that is most infecting the car retail industry, which is the lack of price transparency where advertised prices don't match the prices offered on the lots, or inventory claims in advertisements don't match the inventory actually available on the lots. But generally, car dealership cases are local or limited to a region of states, and so we really like to work with the states on those cases.

On the competition side, we are the nation's principal hospital merger enforcer. But hospitals, not always, certainly not always, but hospital mergers often have local and regional effects. And so I have made it not a hard and fast policy, but a strong preference of mine is if we're going to pursue a hospital merger case, we like to do it

with the state AG, who often will have an even better sense than we will from Washington, at least at the beginning, about the likely competitive effects of a merger. And then one of the other reasons that we do it is Congress has not, and I think this was a mistake and continues to be a mistake, and it's a mistake I hope Congress corrects, has not given the FTC authority to obtain monetary relief in first-time Section 5 violations. Subsequent Section 5 violations, yes. Violations of orders, yes. Violations of our rules, yes. But if someone is violating Section 5 and they're doing it for the first time, even if they took billions of dollars from consumers, Congress has denied the FTC authority to pursue redress for standalone Section 5 violations.

Almost every single state, however, has a baby FTC act and has consumer redress authority for any violation of that act. And so partnering with states allows us to aid the states and to use our resources and our expertise and experience to aid the states in recovering consumer redress for their consumers, which means that consumer redress can be part of a joint FTC-state case in a way that it may not have been for a standalone FTC case. And this began after a Supreme Court case in 2021 called AMG, where the Supreme Court quite correctly interpreted Section 19 not to allow consumer redress for Section 5 cases after the FTC had been acting like it had that authority for nearly four decades. And so part of what we had to do at the FTC was figure out what other lawful paths do we have to obtaining consumer redress in these cases, and partnering with the states is a really powerful way for us to combine our resources to help the states max out the amount of consumer redress they can get for their citizens.

Graham Bryant (15:15):

And in talking about marshaling the limited resources between states and the FTC, FTC has many resources, but there are also many ways to target them. And as you've discussed, you've been active across a lot of different fronts all at the same time. You've had merger review, AI-enabled deception, personalized pricing, fake reviews, junk fees, automobile dealer costs. How have you prioritized enforcement priorities when the landscape's evolving this quickly?

Andrew Ferguson (15:43):

I set out at the beginning to focus on a couple of markets especially and a couple practices. Markets that every American has to participate in where costs continue to go up, and practices that Americans, I think, uniformly find quite loathsome, and try to focus our resources on those. So big tech, done a lot of big tech work. We have more big tech work coming down the pike. Healthcare markets, every American participates in them. Costs continue to rise in healthcare, prices continue to rise, higher than costs in healthcare. And our markets are such an almost impenetrable morass of government and private sector interrelation, they can sometimes be very difficult to figure out why costs are rising, why prices are rising. Healthcare also has been one of President Trump's principal priorities across the entire federal government. And so we have done a lot of work on healthcare and have a lot more coming. And then food and groceries. So we have an outstanding rulemaking requiring price transparency for grocery and food delivery apps. Without teasing too much, we have a major grocery consumer protection case that will be coming out in the next two months.

And then in terms of practices that we focused on, price transparency is the main one. We have two price transparency rules out. We have been working with the car industry, both bringing cases, but also trying to get them to come along on their own to promote price transparency, which we think is the problem that has most afflicted the car markets. And then we have some healthcare price transparency work that we will be announcing soon. And then on personalized pricing or surveillance pricing, depending on how you call it, we have the

outstanding policy statement. We have a couple of other major announcements on that coming in the coming months.

And again, that is just another pricing transparency principle that we've been espousing, which is the law doesn't necessarily say how you have to make your pricing decisions, at least not all the time, sometimes it does, but not all the time, but you at least need to be telling consumers how you are making those pricing decisions so that consumers know that they might want to shop somewhere else or they might want to turn on a VPN or all sorts of ways that they might not want their personal information being used to set their prices. And then subscription traps, we've brought a ton of subscription trap cases since I became chairman. We're going to keep bringing those. We have the negative option rulemaking is now, at least the NPRM was out for comment. So I would say big tech, healthcare, and food are the markets, and then price transparency, subscription traps, and live ticketing. Of course, we have our gargantuan case against Ticketmaster that we filed about nine months ago that thus far is proceeding very successfully in litigation. Those have been our core focuses, the markets that everyone participates in and the practices that consumers have really come to hate and that interfere with the proper functioning of the markets.

Graham Bryant (18:30):

And as we wrap up our conversation today, I'd like to turn to some key takeaways. Many of our listeners are companies that fall under the FTC's jurisdiction and the lawyers who counsel them. So while we have this opportunity, what do you most want these people, these companies, these attorneys that represent them, to understand about how the FTC operates today? And what's your advice for how we can work most effectively with the FTC?

Andrew Ferguson (18:54):

We are an aggressive agency, but we take extraordinarily seriously our obligation to the law. We don't want companies that are subject to an investigation to be in the dark because we don't see business as our enemy. We do see abuse as our enemy. We see the mistreatment of consumers as the enemy. But we don't think of a business that we think has violated the law as being top to bottom evil. We want to correct the abuses, we want to punish the wrongdoing, and we want to undo the unjust enrichment and return it to consumers. But we can be worked with in the sense that if a case can be settled in a way that is a win for consumers, we're willing to settle cases, we're willing to negotiate on that. But if it's not, we'll sue. And so if you are subject to investigation at the FTC, first of all, you should cooperate with the investigation because if you don't, I'm not going to let CID non-compliance be a cause for delay. And sometimes I will, and we have, and we're still willing to litigate failure to comply with CIDs. But if we can get the information and data that we need from other sources, I won't wait for your CID compliance. I'll sue you for violating the law, and I'm not going to allow a CID fight to drag on for months.

But if you cooperate and you come in and you're willing to accept true injunctive relief that will fix the problem and you're willing to make consumers whole, there's no need to litigate. But at the same time, I mean, I think you can tell from the number of litigations that we've brought on both sides of the house, if you don't cooperate or if we can't reach an agreement that will make consumers whole, I'll let a court decide. And I said this at a roundtable involving online scams, and I say it again, if your company has a problem and you're mistreating consumers, we can fix it together or we can fix it in a courtroom, but we are going to fix it. So let's work to stay out of a courtroom because if we get in a courtroom, the FTC is going to fight tooth and nail to fix the problem. And I think you'll find

us still open to discussion once we've filed a complaint, but a lot less willing to settle on the terms that we might have been willing to settle on before the complaint got popped. And then when you're meeting with me, get your advocacy into me well in advance of the meeting. I tend to treat meetings with the chairman like an oral argument, and so your opportunity to try to convince me is in a white paper well in advance that I have sufficient time to read, digest, discuss with my extremely talented office, and then come in and I'm going to ask questions of the lawyers. If you bring your business executives, I will be respectful and fair, but I'm probably going to ask them a fair number of questions too. But those meetings can be very productive, and I have been convinced to alter my views on things if I have time to engage with the work beforehand. Sending me a slide deck the night before is useless. You might as well not do it at all. You should send me written material with enough time for me to have considered it, thought about it, and to engage with you on it in the meeting.

Ashley Taylor (21:59):

Chairman Ferguson, thank you again for joining us today. This was a fantastic conversation, and I know our audience is the better informed for it. As to our audience, thank you all for tuning in, and if you enjoyed this episode, be sure to subscribe to *Regulatory Oversight* on whatever platform you use. And don't forget to visit regulatoryoversight.com for the latest on regulatory developments. We look forward to having you join us next time. Thank you again, Chairman.

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