

Cybercriminals, Politicians
& Bureaucrats:
What Could Possibly Go
Wrong?

TEAM
PLAYBOOK

TOP SECRET

FTC

FOR YOUR EYES ONLY
TOP SECRET



IMMULITE 1000

Schubert

Immune Assay
1000

Immune Assay
1000



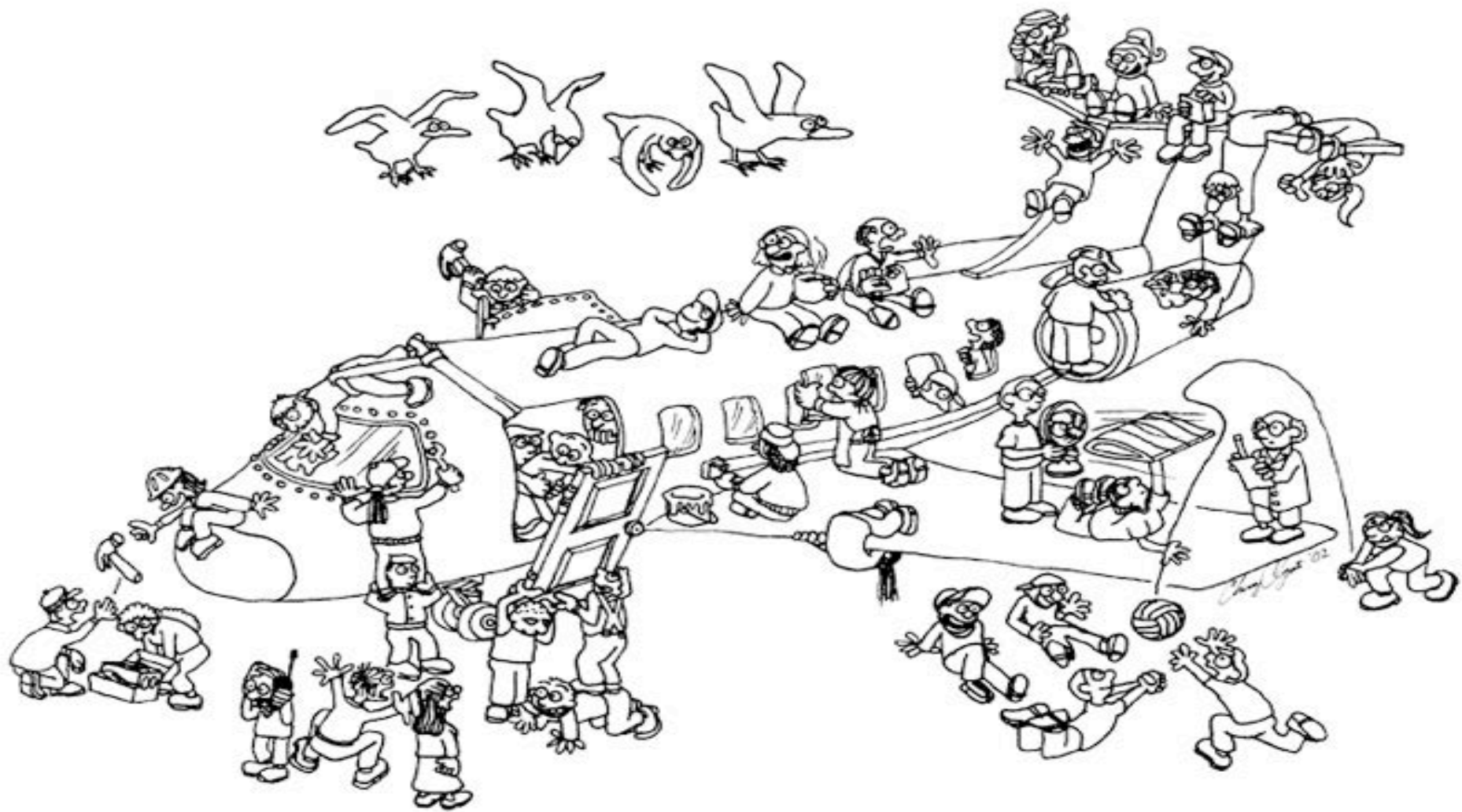
DPC



700,000







SALEM WITCH TRIALS



- The most renowned mob mentality
- When faced with something extreme,
- People tend to "wig out"
- This created the giant witch scare in Salem.
- Created by the majority mentality

QUIETLY ASSUMED "MAYBE GUILTY"
UNTIL PROVEN INNOCENT...GOODBYE!!!!





I
WONDER
WHERE
THAT'S
GOING

BLAME

AUGUST 1, 2016

FTC Overturns Their Judge and Issues Sweeping New Opinion

Under Section 5 of the FTC Act
“vulnerable” or “exposed” data is now
considered to be an unfair business
practice

The FTC has determined it can rule a
company’s security practices were
unreasonable or likely to harm
consumers even without *tangible* harm







2008 – 2009: Hacked!!!

2010 – 2013:

FTC Investigation

2014 -2015:

Admin Trial/Congress

2016-2017: FTC overturns/

U.S. Court of Appeals



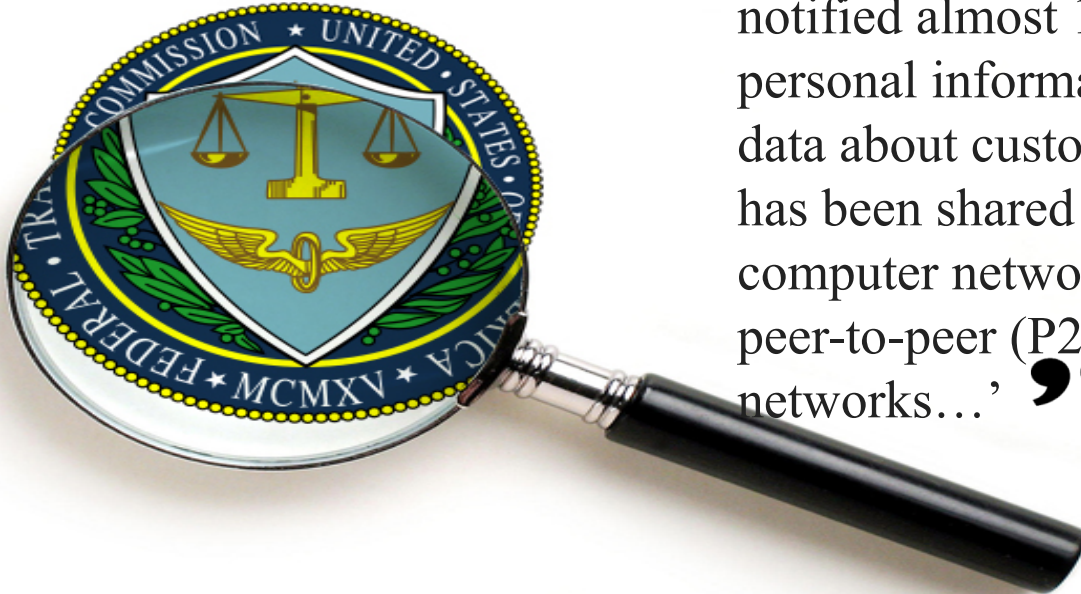
THIS ONE
CONCERNS
ME.



For release February 22, 2010

“ ‘Widespread Data Breaches Uncovered by FTC Probe.’

‘FTC Warns of Improper Release of Sensitive Consumer Data on P2P File-Sharing Networks’ ‘The Federal Trade Commission has notified almost 100 organizations that personal information, including sensitive data about customers and/or employees, has been shared from the organizations’ computer networks and is available on peer-to-peer (P2P) file-sharing networks...’ ”



FTC Section 5 Official Agenda

Protecting the Consumer from Unfairness and Deception

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







Executive

Judicial

Executive



House **Judicial**



Executive

Senate

House

Judicial

Executive







Separation of Powers
Eliminated, Power
Centralized



Bureaucrats have scant experience in the worlds they regulate.



**Medicine and Technology
have a common burden**





If you want to understand the shocking power of a government agency then read this. Congress created the beast. The Courts strengthened it. This is best explained by Boston University law professor Gary Lawson, in his 1994 Harvard Law Review article "The Rise and Rise of the Administrative State."

"The Federal Trade Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law."

Villainy wears many masks



None more dangerous than
the mask of virtue







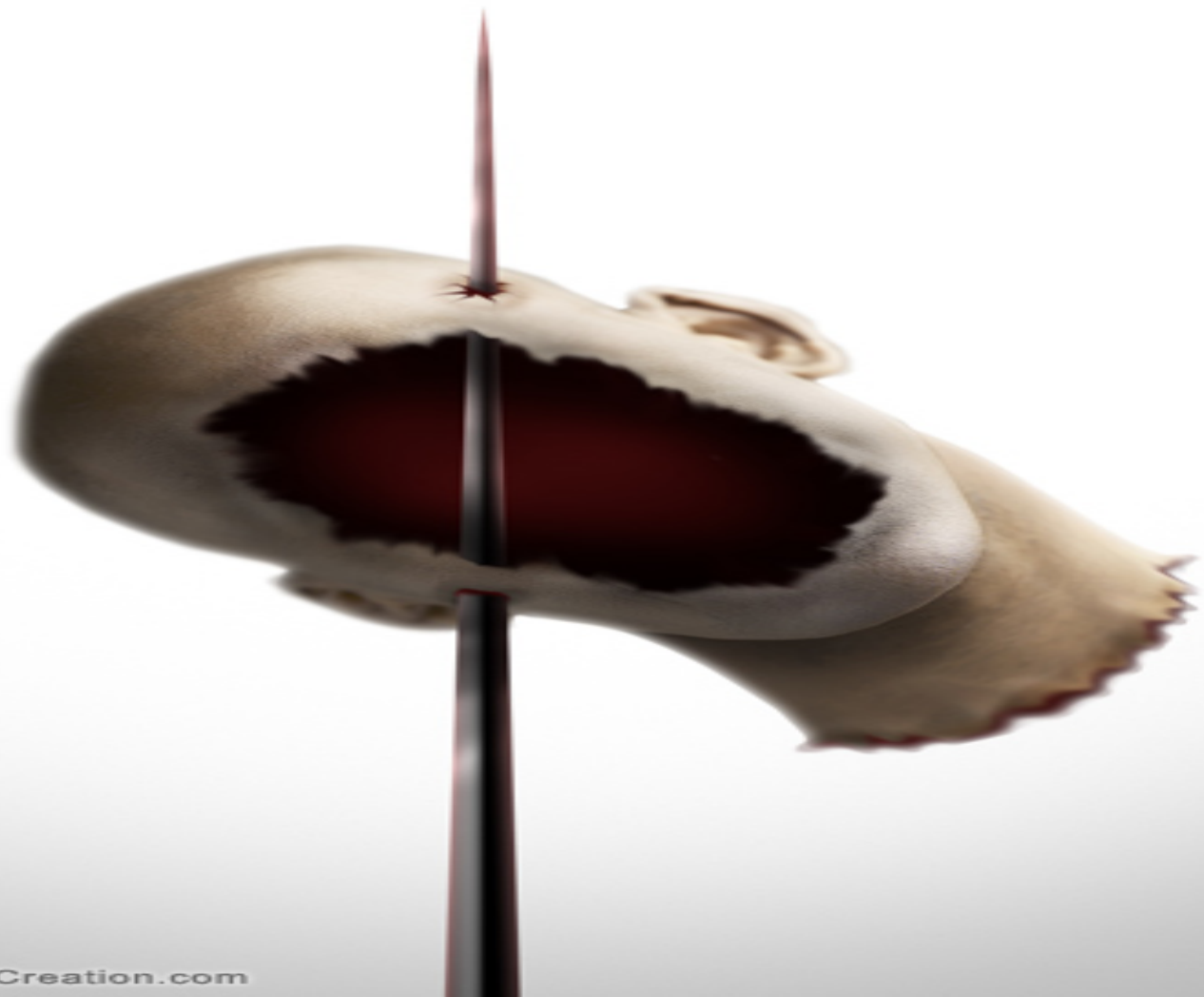
Please assume the position

A photograph showing a man in a blue shirt bowing low to a man in a white shirt. The man in the white shirt is standing upright, and the man in the blue shirt is bowing deeply, almost touching the ground. The background is a plain, light-colored wall.

and we'll get
along just fine

Bury You in Procedures and Data





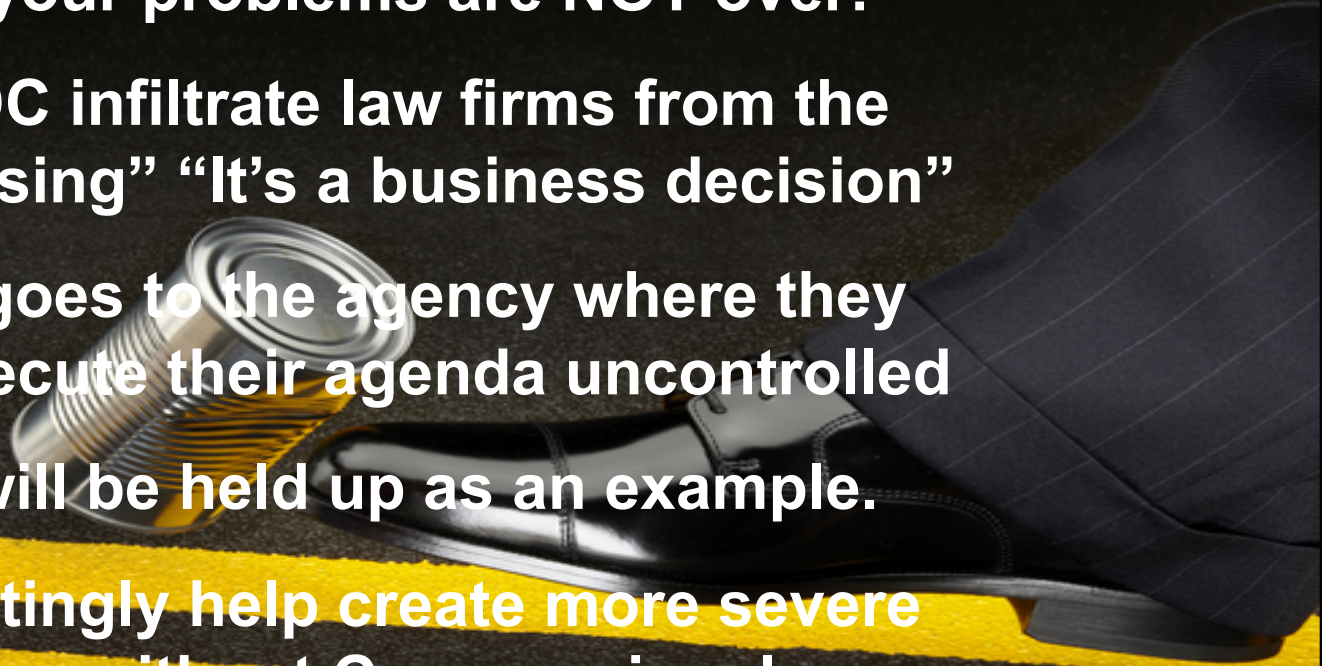
Kick the can down the road to make them go away....but your problems are NOT over:

Lawyers in DC infiltrate law firms from the agencies “advising” “It’s a business decision”

Your money goes to the agency where they continue to execute their agenda uncontrolled

Your name will be held up as an example.

You will unwittingly help create more severe regulations without Congressional involvement.



BACKDOOR





STANDARDS



SEND IN THE CLOWNS



THE HOUSE

THE SENATE











EXHAUST
YOU INTO
SUBMISSION
SO YOU'RE
OUT OF
RESOURCES
BEFORE
YOU GET TO
A FAIR AND
IMPARTIAL
COURT





Tiversa Boasts:

300 million to 1.8 billion searches per day

4.5 million workstations worldwide

13.8 million files downloaded

And they turn put the LabMD file up in front of House Oversight as an example



Shakedown



Ben Wright, SANS



A "breach" is not a breach





Steve Lawrence
koolenayreflections.com

Lambs Are Easy
to Slaughter





Persecution through Process

A person in dark climbing gear is seen from behind, ascending a steep, snow-covered mountain slope. The sky is a clear, deep blue. The overall scene conveys a sense of arduous effort and high altitude.

The Long Slog Up Justice Mountain

**IGNORED BY
LAW
GOVERNMENT
MEDIA &
BUSINESS**

The FTC is Creating Common Law

- 1) Get the consent decree
- 2) Build the Precedent
- 3) Avoid the Courts
- 4) Mislead and Stonewall Congress
- 5) Play hero to the press





21ST CENTURY TORTURE CHAMBER

Congress and the Courts hold back while the Agency
extorts your confession so you'll avoid:

Press Releases, Twitter Attention Spans, Diversion
from Business, Negative Financial Impact, Insurance
Claims, Law Firms, and the Hall of Shame

The Regulatory Hierarchy

The U.S. Supreme Court



The U.S. Court of Appeals

No Congressional or Judicial Intervention Below This Line

Five FTC Commissioners

3-2 Executive Branch Majority



Administrative Law Judge



Consent Decree (The Secret Road to Common Law)



FTC Lawyers are Investigators with Immunity

FTC Litigation Strategy

OPTION 1

Federal Court In Your
Location

OPTION 2

DC Stopover in FTC's
Administrative Court

- Drain You Dry
- Don't participate in Fed Rules
- Allow Hearsay
- Attorneys Are Privileged
- Win 100% Time
- Reputation Assassination
- Psychological Warfare
- Cooperative Press
- Damage Operations
- Chevron Deference

Identifying the Section 5 Problem

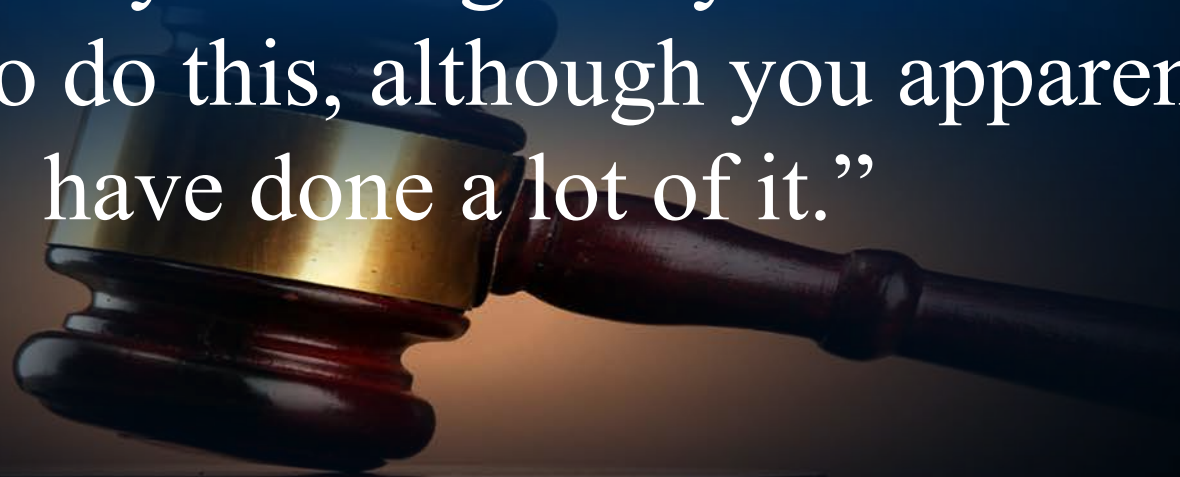
- **Uncertainty surrounding scope of Section 5 is exacerbated by the administrative process advantages available to the FTC**
- **In the past nearly 20 years, FTC has ruled in favor of Staff on appeal in 100% of cases**
- **Win rate for antitrust plaintiffs appealing from district court is closer to 50%**



2012

The Court:

“Nobody really has litigated your authority in this area to do this, although you apparently have done a lot of it.”



“ In light of the ‘sharply limited role of a district court in a proceeding to enforce an administrative subpoena,’ the Court finds the CIDs are required to be enforced because there is a plausible argument for the exercise of jurisdiction by the FTC...’ ”





A word cloud centered around the word "Bullying". The word "Bullying" is the largest and most prominent, written in a bold, black, sans-serif font. Surrounding it are various other words in different sizes, colors (black, red, blue, and grey), and orientations. The words include: Assault, Bystander, Destroying Things, Exclusion, Embarrassment, Kicking, Intimidation, Name-Calling, Pinching, Mean Looks, Stealing, Threats, Teasing, Shoving, Rumors, Harassment, Mean Notes, Hitting, and Cyberbullying.

Bullying

Assault
Bystander
Destroying Things
Exclusion
Embarrassment
Kicking
Intimidation
Name-Calling
Pinching
Mean Looks
Stealing
Threats
Teasing
Shoving
Rumors
Harassment
Mean Notes
Hitting
Cyberbullying

OOH

I'M TELLING





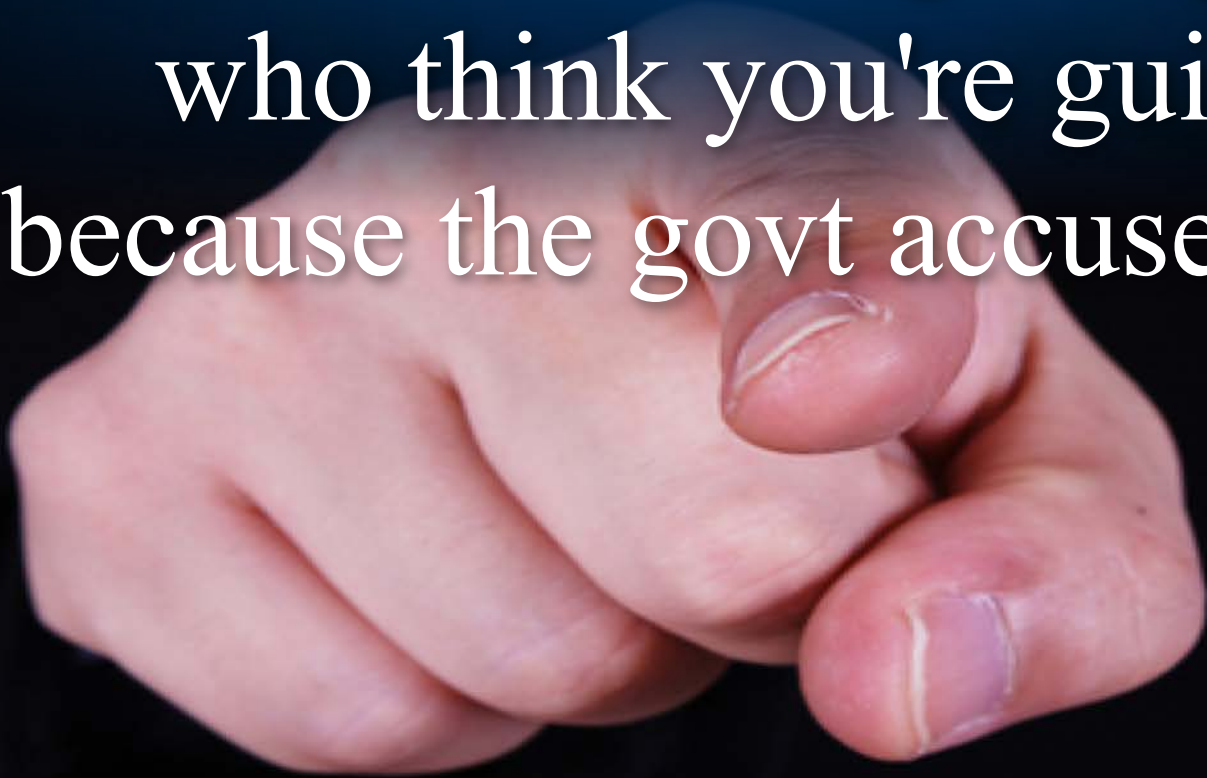
THE
DEVIL INSIDE
THE BELTWAY

MICHAEL J. DAUGHERTY

““ FTC Files Complaint Against LabMD for Failing to Protect Consumers’ Privacy. The Commission Alleges Exposure of Medical and Other Sensitive Information Over Peer-to-Peer Network.””



There is no shortage of people
who think you're guilty
because the govt accuses you



Shock and Awe





September, 2013

FTC: “There is nothing out there
for a company to look to.”



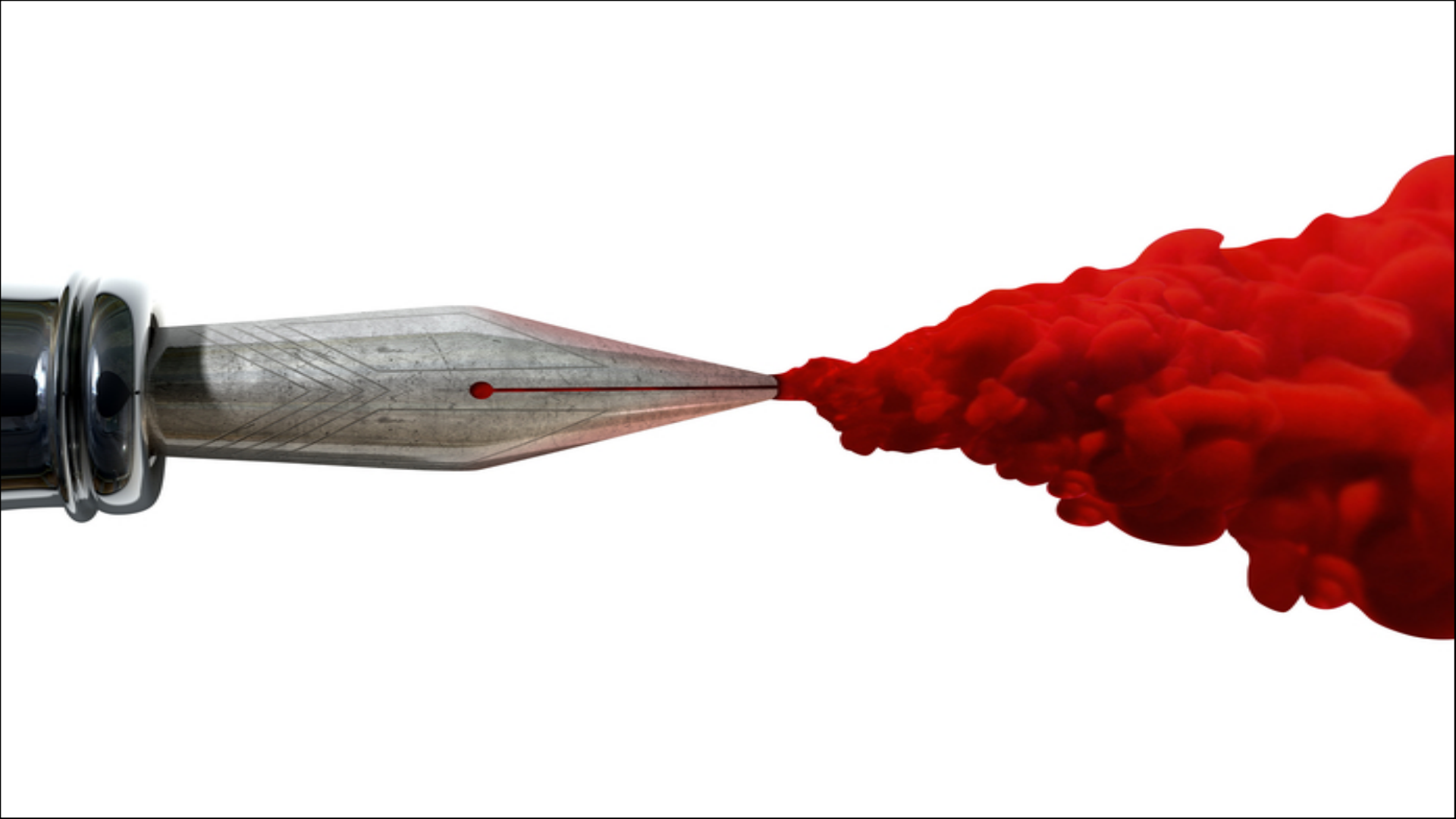


[HHS] decided not to join FTC in their investigation of these p2p sharings and we did not independently receive complaints. This was pre-HITECH, so there was and is no obligation on LabMD with respect to our breach notification requirements — whether any exist under state law would be for the state to determine.

LabMD DOA January 14, 2014



NAME
EXPIRED
CAUSE OF DEATH



Whistleblower







Funnel secrets





“According to a whistleblower, Tiversa told the media and Feds 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”



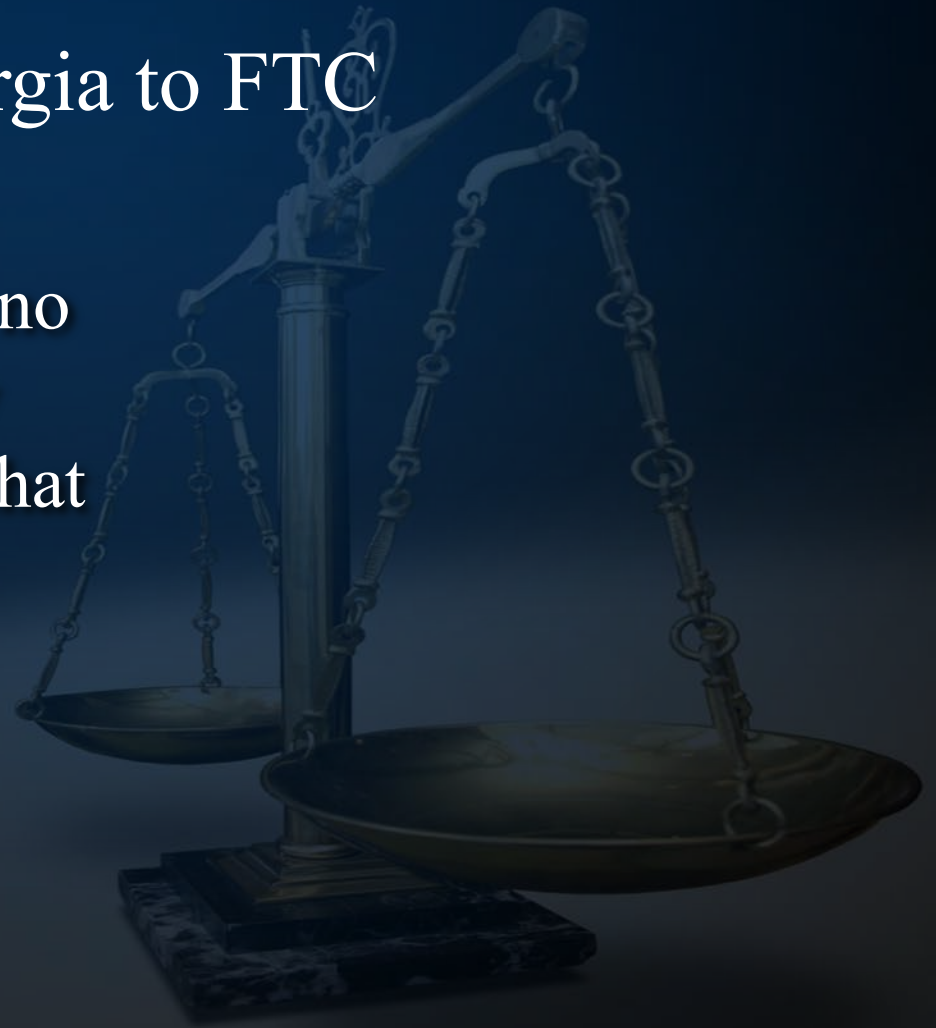
Shhhh...



Northern District of Georgia to FTC

THE COURT: So you have no information to establish how (evidence) was obtained; is that right?

FTC: That's correct, Your Honor.



Northern District of Georgia to FTC



THE COURT: So you don't know where the (evidence) 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 certain individuals were damaged by documents, the source of which you don't even know?

FTC: Yes, Your Honor.

THE COURT: Holy cow.

**How does any company
in the United States
operate when they are
trying to focus on what
HIPAA requires and to
have some other agency
parachute in and say,
well, I know that's what
they require, but we
require something
different?**

**Northern District of
Georgia
Judge William Duffey**



DO
FIRST
ABLOGITIZE
LATER

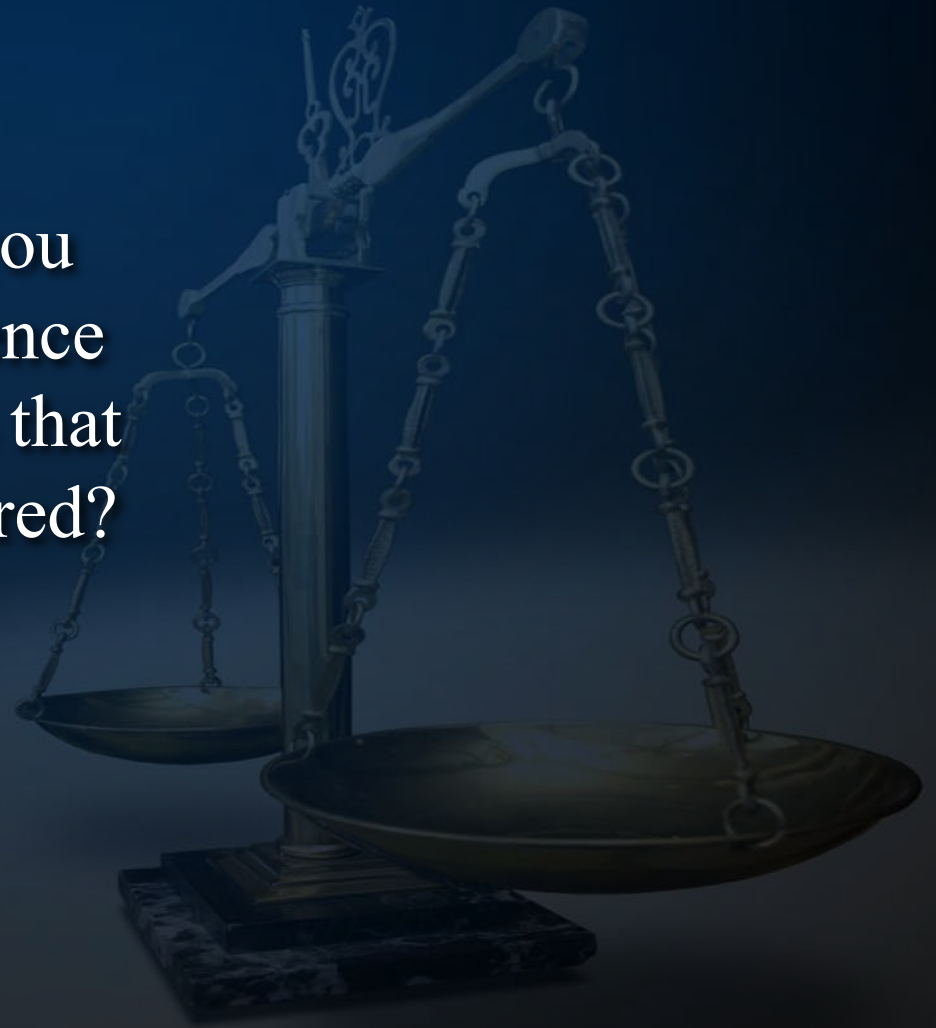




FTC Court May 2014

Judge: Hang on a second...you don't plan to introduce evidence of harm, but your position is that doesn't mean no harm occurred? Is that what you said?

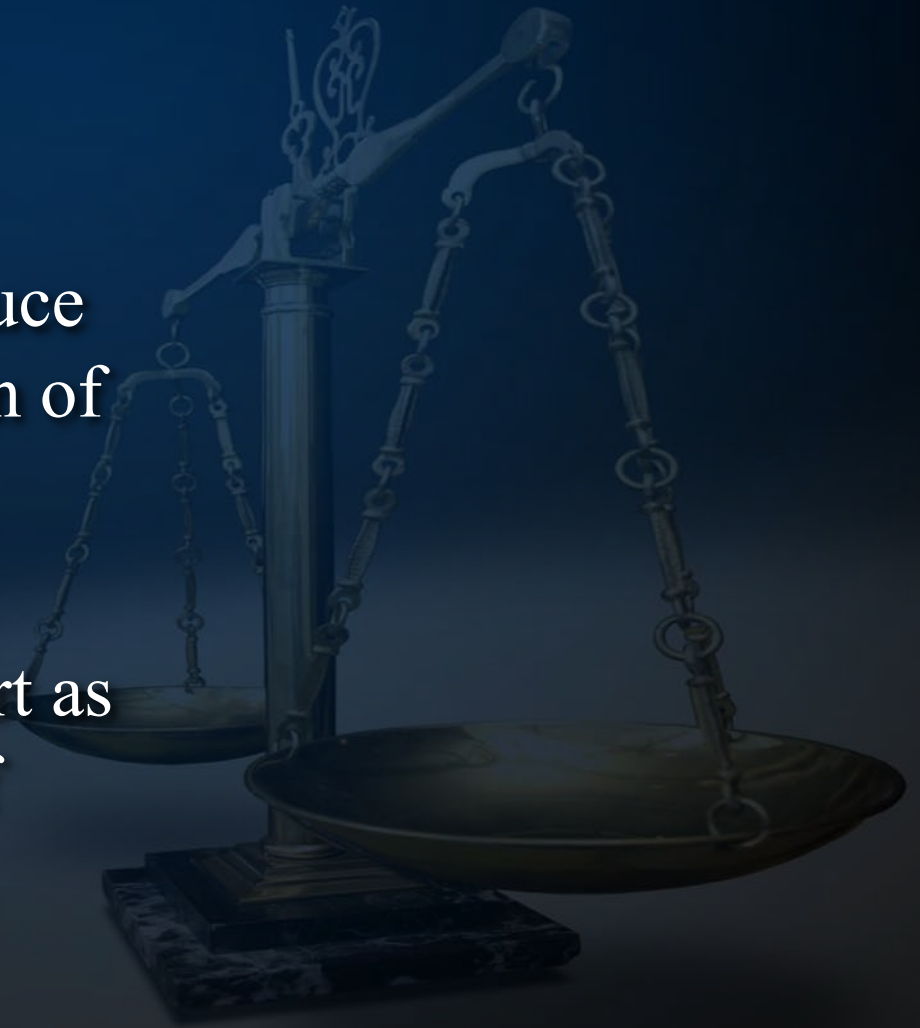
FTC: That's correct.



FTC Court May 2014

Judge: Do you plan to introduce evidence of actual penetration of the network?

FTC: We are not going to introduce evidence of that sort as we are unable to determine if that happened.



FTC lawyer: "The Court's order provides that (LabMD) 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."



Really?





Plead the Fifth





Immunity

Susanne Sachsman Grooms



Sen Jay Rockefeller



Rep Elijah Cummings



Don't look so you
won't find





NEVERMIND





MIA







The FTC's Quid Pro Quo Relationship with Tiversa

Tiversa → FTC
Companies to chase and
prosecute

FTC → Tiversa
Information on companies
to close



FTC COURT CLOSING ARGUMENT

JUDGE CHAPPELL: So just so I'm clear, the government's position is a mere breach is all that's required for the section 5 violation.

FTC: Your Honor, a breach is not (required).



FTC COURT CLOSING ARGUMENT

JUDGE CHAPPELL: How many have you identified that said they were harmed? How many did you bring forward?

FTC: We did not present a consumer witness in this case.



Wallace Testimony

- Q. What is that document?
- A. That is a list of IP addresses that was created in the November 2013 time frame of Bob came to me and basically said that him and LabMD are having it out, there's -
- I didn't really follow the whole legal proceedings, but I knew that there was some bad water there. And Bob said that under no circumstances can the insurance aging file appear to have come from a 64 IP or in the Atlanta area. These IPs that are used here, these are all identity thieves that were provided from me to Bob.





A close-up photograph of a baby with light brown hair and blue eyes, wearing a green long-sleeved shirt. The baby has a slightly furrowed brow and a small frown, looking directly at the camera with a confused or questioning expression. The baby is holding a small, light-colored object in their right hand. The background is a blurred outdoor setting, possibly a beach or park, with light-colored sand and a hint of greenery.

WE

WON!

?

THEY'RE ON TO US.



**TIME TO MOVE THE
GOALPOSTS!**



No Parking
→

WHITE CAR
KENTUCKY







THE COURT: Doesn't that underscore the importance of or the significance of rulemaking? Otherwise, you're regulating data security on a case-by-case basis like that.

MR. HOFFMAN: We *are* regulating data security on a case-by-case basis, and that's exactly what the Supreme Court says in *Bell Atlantic* and *Chenery*, that the agency is entitled to do –

THE COURT: And it doesn't matter whether the -- the subject has any notice at all.

MR. HOFFMAN: CORRECT. CORRECT.

THE COURT: All right. Notice becomes irrelevant.

MR. HOFFMAN: You can adopt new rules in an adjudication. The Supreme Court's made that very clear.

THE COURT: I appreciate your concessions.





The Eleventh Circuit's Decision

- In a unanimous opinion, the Eleventh Circuit agreed with and adopted LabMD's argument that the FTC's Order is unenforceable. The court reasoned that the remedy that the FTC seeks "must comport with the requirement of reasonable definiteness." In that regard, the court held that a fundamental flaw with the Order entered against LabMD is that it "does not instruct LabMD to stop committing a specific act or practice." The FTC did not seek to address the one-off vulnerability of the patient file through a narrowly drawn, easily enforceable order, such as one commanding LabMD to eliminate the possibility that employees could install unauthorized programs. Instead, the Order mandates a complete overhaul of LabMD's data security program and says little about how this is to be accomplished, effectively charging a district court with managing the overhaul. The Order's command to LabMD to "overhaul and replace its data-security program to meet an indeterminable standard of reasonableness" is, the Eleventh Circuit concluded, unenforceable.

The court also recognized important limitations on the agency's authority to declare an act "unfair" in the first place. The panel stated that an unfair act or practice "is one which meets the consumer-injury factors . . . and is grounded in well-established legal policy." That is, pursuant to Section 5(n) of the FTC Act, the FTC must allege and prove actual or likely substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits. And in addition, the FTC must also find that "[t]he act or practice alleged to have caused the injury [is] unfair under a well-established legal standard, whether grounded in statute, the common law, or the Constitution." The court thus rejected the FTC's recent position that it may "bring suit purely on the basis of" actual or likely "substantial consumer injury." The court did not need to, and therefore did not, assess the legality of LabMD's data security practices under this standard. But the court called out that LabMD did, in fact, maintain a data-security program that included a compliance program, training, firewalls, network monitoring, password controls, access controls, antivirus, and security-related inspections.

The Eleventh Circuit's decision has significant implications both for the FTC's privacy and data security program and for other regulatory and private litigation contexts, which in many instances borrow from the FTC regime.

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