



American Bar Association v. Federal Trade Commission

636 F.3d 641 (D.C. Cir. 2011)

Topics Covered: Regulatory Burdens

Outcome: Favorable

Issue

The issue in this case is whether the Federal Trade Commission (FTC) “Red Flags Rule” (identity theft) regulations should apply to physicians.

AMA Interest

The AMA opposes government regulations that burden physicians but do not improve health care.

Case Summary

Pursuant to the Consumer Credit Protection Act, the FTC and several other federal agencies promulgated regulations that require “creditors” to make systematic efforts to search for “red flags” that would indicate their customers are being victimized and then take appropriate steps to prevent further identity theft. The FTC announced that its red flags regulations apply to any person who regularly provides services to consumers without requiring full payment for those services before or at the time they are rendered. Since many attorneys defer payment until after their services have been rendered, this would mean, according to the FTC, that these attorneys are creditors and must comply with the FTC regulations.

The American Bar Association (ABA) sued the FTC to prevent enforcement of the Red Flags Rule regulation against attorneys, to the extent such enforcement would have been premised on the attorneys’ practice of law. The lawsuit argued that attorneys should not be deemed creditors under the federal statutes simply because they are not paid in full at the time they render their services. With rare exceptions, attorneys are not in the business of extending credit to their clients, and nothing would be gained by requiring them to incur the expense and inconvenience of complying with these bureaucratic formalities. The United States District Court for the District of Columbia entered summary judgment for the ABA, and the FTC appealed.

On September 7, 2010, the AMA and the Medical Society of the District of Columbia, acting for themselves and the Litigation Center, along with the American Osteopathic Association, several specialty medical societies, and several osteopathic societies, submitted an *amicus* brief in the District of Columbia Circuit to support the ABA.

In December, 2010, Congress enacted the Red Flag Program Clarification Act. This new law clarified that professionals, such as physicians and lawyers, would not be subject to the Red Flags Rule merely because they may not require payment in full at the time they render their services. On March 4, 2011, the court of appeals held that the new law mooted the lawsuit, and it ordered that the trial court order of summary judgment be vacated and the case be dismissed.

Litigation Center Involvement

The Litigation Center filed an *amicus* brief in support of the ABA.

United States Court of Appeals for the District of Columbia Circuit brief