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ALERT

FTC Releases Text of Warranty Warning Letters; Implications for Device Lifecycle Management

May 7, 2018

On April 9, the Federal Trade Commission (FTC) sent warning letters to "six major companies that market and sell automobiles, cellular devices, and video gaming systems in the United States." In its April 10 press release, the FTC did not identify the specific companies to which it sent the letters. In the last few days, in response to Freedom of Information Act (FOIA) requests, the FTC released those letters, which were sent to ASUSTeK, HTC, Hyundai, Microsoft, Nintendo, and Sony Computer Entertainment. Those letters provide the warranty clauses the agency's staff believes may violate federal law.

The FTC's press release and the released letters describe three types of warranty-voiding clauses the FTC believes violate the Magnuson-Moss Warranty Act: (1) terms that state that the use of approved repair parts is required to maintain the warranty; (2) terms that suggest that the product may only be used in combination with approved accessories; and (3) terms that suggest that opening the product or breaking a "warranty seal" sticker to open the product will void the warranty.

The FTC's letters are quite forceful. While each of the letters is careful to not directly allege a violation of the Warranty Act, each letter states that FTC staff believe each above warranty practice violate the Warranty Act, and provides selected text from the receiving company's warranty about which FTC staff "has concerns." The letters also suggest that the companies consider changing their practices to avoid the possibility of an enforcement action.

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That the first two practices are objectionable to the FTC should not be a surprise to industry. The Warranty Act's language states that a warrantor may not "condition [a] written or implied warranty ... on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name." 15 U.S.C. § 2302(c). While a company can obtain a waiver of this requirement from the FTC, such waivers are rare and the FTC has long been consistent that "tie-in" provisions in warranties are not allowed. 16 C.F.R. § 700.10. And, numerous FTC guidance documents over the years have confirmed these prohibitions. These issues may deserve increased scrutiny as consumers confront increasingly sophisticated and connected devices that will need security updates and lifecycle management. It is important to consider how companies can help consumers maintain the security of their devices and prevent unintended vulnerabilities and risks.

However, the FTC's objection to the use of warranty-voiding stickers is the first time the agency has publicly opined about this sort of practice. These warranty-voiding stickers are prevalent throughout the electronics industry, and consumers have objected to these stickers by arguing that the stickers illegally "tie" the consumer to only obtaining product "service" at an authorized repair center. Some manufacturers argued that the stickers did not explicitly tie consumers to an identified repair service, merely prohibited the consumer from opening the product themselves. But, it appears the FTC now agrees with the consumer advocates that these stickers are not allowed under the service "tying" prohibition in the Warranty Act.

The FTC's actions will likely draw comparisons to the significant state legislative activity regarding "right to repair" bills which were considered in 19 states this year. These bills generally require equipment manufacturers to make available a product's diagnostic and repair information, software, tools, and parts to independent repair facilities and product owners. How such repairs may impact warranties are addressed in some of the bills that were introduced (e.g., Illinois HB4747), but not all. The FTC's position certainly will be incorporated into the state-level debates surrounding these bills, and may impact how those bills need to be drafted.

The FTC's position is significant. Under the Warranty Act, including prohibited terms can render a warranty "deceptive" and expose the warrantor to a suit by the FTC or Attorney General to seek injunctive relief or to a suit from a consumer, or class of consumers, seeking damages (including attorney fees). 15 U.S.C. § 2310(c) and (d).

Each letter begins by summarizing the FTC's position that a specific provision in the company's warranty uses one or more of the above warranty practices, which are prohibited by the Magnuson-Moss Warranty Act. Each letter states that "Staff has concerns about certain representations your company is making regarding its warranty coverage." The letter continues that "Staff similarly would be concerned about any additional representations made by [the company] that state or imply that its warranty coverage requires a consumer to purchase an article or service identified by [the company] or another brand, trade or corporate name. Furthermore, staff would be concerned if [the company], in practice, denied warranty coverage based on the warranty provisions quoted above or any similar provision." Each letter concludes by stating "[t]his letter places you on notice that violations of the Warranty and FTC Acts may result in legal action."

The specific warranty provisions identified in the six letters which the FTC suggests violate the Magnuson-Moss Warranty Act are:

[The warranty] applies to firmware issues but not to any other software issues or customer induced damages or circumstances such as but not limited to:
(a) The Product has been tampered with, repaired, and/or modified by non-authorized personnel;
. . .
(c) The warranty seals have been broken or altered;

EVEN WITH RESPECT TO THE PRODUCT OR ACCESSORY YOU PURCHASED, THIS LIMITED WARRANTY SHALL NOT APPLY: 1. if ... the warranty seal (void label) has been removed, erased, defaced, or altered; or is illegible; ... 7. to unauthorized modifications or connections, unauthorized opening, repair by use of unauthorized spare parts, or repair by an unauthorized person or location.

The use of . . . Genuine Parts is required to keep your . . . manufacturer's warranties and any extended warranties intact.

[Company] is not responsible and this warranty does not apply if Your [Product] or Accessory is ... (f) repaired by anyone other than [Company].

THIS WARRANTY SHALL NOT APPLY IF THIS PRODUCT: (a) IS USED WITH PRODUCTS NOT SOLD OR LICENSED BY [COMPANY] (INCLUDING BUT NOT LIMITED TO, NON-LICENSED GAME ENHANCEMENT AND COPIER DEVICES, ADAPTERS, SOFTWARE, AND POWER SUPPLIES)

THIS WARRANTY DOES NOT APPLY IF THIS PRODUCT: ... (B) is USED WITH PERIPHERALS [COMPANY] DOES *NOT* LICENSE OR SELL, INCLUDING NON-LICENSED GAME ENBANCEMENT DEVICES, CONTROLLERS, ADAPTORS .AND POWER SUPPLY DEVICES ("NON-LICENSED PERIPHERALS"); .... (G) HAS HAD THE WARRANTY SEAL ON THE [PRODUCT] SYSTEM ALTERED, DEFACED, OR REMOVED.

Other companies and product manufacturers should take note of the FTC position, and would be well advised to review their warranty provisions to evaluate whether any similar warranty statements comply with the Warranty Act. We anticipate that even if the FTC does not seek its own enforcement action, the named companies and others with similar clauses may well see a flurry of class action suits in the coming months from consumers who claim that they were impermissibly denied warranty coverage. The FTC's letters will certainly not help any company's defense.