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Consumer Protection Regulation To Watch In 2014

By **Gavin Broady**

Law360, New York (January 01, 2014, 10:08 AM ET) -- As congressional efforts to expand protections for American consumers are expected to remain mired in gridlock in 2014, all eyes will be on federal regulatory agencies and state legislatures to address pressing consumer issues ranging from food labeling and robocalls to debt collection practices and "patent trolls."

Attorneys in the consumer protection field expect to see the century-old U.S. Federal Trade Commission continue to expand its authority as the newcomer Consumer Financial Protection Bureau more aggressively flexes its own muscles to drive through reforms aimed at helping consumers navigate the ballooning complexities of the e-commerce age and the lingering chaos of the financial crisis.

“There’s an awful lot of cataloguing of authority going on right now,” Dickstein Shapiro LLP partner Brian Finch says. “There are a lot of statements from agencies saying, ‘We’re not going to regulate until we’re sure of our authorities.’ Those things could pop up at any given moment. It’s going to be a very busy year.”

Here are some of the issues consumer protection attorneys will be watching in 2014.

Hanging Up On Robocalls

Attorneys say that if Congress is going to pass any legislation in 2014 addressing consumer protection issues, one likely candidate would be the fight against telemarketing companies that harass consumers with unwanted robocalls.

“It’s exactly the sort of thing that could break through the gridlock,” Hunton & Williams LLP partner Jamillia Ferris says. “It’s an easy issue for constituents. Nobody wants their constituents to be telemarketed through a robocall.”

Late 2013 saw a flurry of activity on that front, with Sen. Charles E. Schumer, D-N.Y.**,** rolling out a new bill in November that would double the fine for making unsolicited calls with an automated dialing machine to $20,000 per call and make the offense a felony punishable by up to 10 years in prison.

Consumer protection attorneys will also be keeping an eye on legislation promised by Sen. Claire McCaskill, D-Mo., in December that would add to the arsenal of federal regulators seeking to stem the tide of illegal robocalls, which she noted were behind 200,000 complaints to the Federal Trade

Commission each month.

Debt Collection Overhaul

Experts agree that congressional stasis means most action in the consumer protection field will occur on the regulatory front, and point to debt collection reform as a key area to watch.

The CFPB signaled in a November rulemaking notice that it intends to tweak the Fair Debt Collection Practices Act to create new consumer safeguards combatting debt collection tactics that were unthinkable when the act passed in 1977, including collection efforts carried out over mobile phones, email and other modern technologies.

“I think the CFPB won’t be alone in looking at that as a topic moving forward,” Benjamin Diehl of Stroock & Stroock & Lavan LLP says. “It’s a topic of concern because it’s one of the relics of the financial crisis and the debts that were incurred then, and continuing to sort through that aftermath is one of the remaining pieces.”

While the FDCPA allows for regulation only of third-party debt collection firms, CFPB officials have suggested any new rules are likely to expand the reach of the act to first-party debt collectors, including banks and other consumer credit issuers that collect their own debts.

Crowell & Moring LLP partner Cheryl Falvey agrees that debt collection reform will be an area of “continued focus and aggressive activity,” and notes that the CFPB and the FTC appear poised to tackle a number of consumer privacy implications raised by the flow of information through the debt collection process, a topic raised at a joint agency roundtable in May.

Attorneys say they will also be keeping an eye on state-level reform efforts like the new rules proposed in July by New York Department of Financial Services requiring debt collectors to disclose the information consumers get when debt collection begins.

FDA (Non)regulation Of Food Labeling

Attorneys will also be watching to see whether the FDA maintains its hands-off approach to judicial requests for clarification as to whether products with genetically modified ingredients can be properly labeled as “natural” or “all natural," an ambiguity that has spurred a deluge of false-labeling class actions.

“I suspect the FDA will continue to decline issuing a formal definition of what is natural, which is really more of an inaction by a regulatory body that will likely promote additional litigation,” Squire Sanders LLP partner Adam Fox says. “Litigation tends to put pressure on regulatory bodies, however, or at least indicate where it might be helpful.”

Diehl suggests that the FDA’s inaction in light of that mounting wave of labeling litigation will spur other sectors of the government to act.

“I don’t know that there would be momentum to pass something at the federal level given the inertia in Congress on topics such as that, but we might see something in states with activist legislatures like New York and California,” Diehl says.

Divonne Smoyer, a partner in the state attorneys general practice at Dickstein Shapiro LLP, says to keep an eye on state-based efforts to wrangle with GMO labeling on the heels of recent attempts that have been met with mixed success. She points specifically to Vermont, where GMO labeling bill H.112 passed in the House in May, and Washington state, where voters rejected a ballot measure in November that would have required companies to label genetically engineered fruits, vegetables and other agricultural goods.

Getting Tough on Financial Advertising

The CFPB and the FTC have both voiced concern over advertising directed at consumers about financial products, and CFPB director Richard Cordray's public comments in November expressing concern over the "staggering" gap between consumer financial education efforts and the money spent on financial advertising have several experts anticipating further agency action.

Cordray noted that the financial services industry shells out around $17 billion in financial advertising annually, against only $670 million spent by nonprofits, local, state and federal governments, and financial institutions on consumer education about financial products.

"With $25 being devoted to advertising for every $1 spent on financial education, the agency is likely to scrutinize the effects that advertising has on consumer perceptions and where they may need to step in to avoid deceptive practices," Falvey says.

Falvey also says attorneys will be watching how the FTC responds to its expressed concern over how advertisements are presented to consumers through sponsored content and blended formats that "combine news, online blogs and information with product placement."

'Patent Trolls' Become a Consumer Protection Issue

Experts also have their eye on a number of emerging issues in consumer protection law, most notably efforts to fight patent assertion entities, or "patent trolls," which are businesses dedicated to buying up patents and asserting them.

Smoyer says that in 2014 patent trolls are likely to find themselves in the crosshairs of state legislators and attorneys general, who increasingly view purportedly abusive litigation mounted by such companies through a consumer protection lens.

"It's an issue that's really hot right now that state AGs would consider a consumer protection concern," Smoyer says. "More and more, patent trolls are enforcing these patents against small businesses and mom-and-pop shops, which is the consumer protection angle."

In May, Vermont passed a pioneering bill allowing companies to sue patent owners who allegedly bring claims in bad faith under consumer protection statutes, and state attorneys general across the nation have mounted litigation under state consumer protection laws.

Ferris notes that the FTC is also increasingly looking into patent trolls under their deception and unfairness powers. The agency launched a probe into the tactics of the entities in September, using its subpoena power to seek information from dozens of companies about how they operate and assert the patents they own.

Data Security and the "Internet of Things"

The FTC is also expected to continue its push to protect consumers from the privacy concerns raised by the booming "big data" industry and the proliferation of mobile devices and web-enabled consumer products.

"You see the FTC really pivoting toward data security and privacy matters in a big way," Chris Cole of Crowell & Moring LLP says. "They're concerned with disrupting the economic function of the Internet as we know it. On the other hand, they're also concerned consumers don't have any real choice in terms of opting out if they want to use the Internet in a meaningful way."

The agency signaled its increased focus on safeguarding consumer privacy in December with the announcement that it would hold a series of seminars to probe the privacy implications of mobile device tracking and increasingly prevalent information collection technologies.

"This comes up in a variety of contexts, and the 'big data' bucket is where you'll see a lot of agency activity," Ferris says. "Similarly, the FTC continues to focus on how companies disclose to consumers what's going on when they're doing mobile activity tracking via apps and things like that."

One major area where the FTC is expected to make a regulatory push is into the "Internet of Things," referring to devices ranging from cars to home appliances that can create unique consumer benefits — like the Web-connected fridge that can sense consumers nearing a grocery store and warn them that the milk is running low — but in doing so could reveal consumer behavioral patterns that those consumers would rather keep private.

"Everybody's selling a connected device at this point," Finch says. "I think you're going to see more investigations into companies that build in wireless capabilities — what exactly are they collecting, and what are they doing with the data they collect?"

--Additional reporting by Kurt Orzeck and Evan Weinberger. Editing by Rebecca Flanagan.
