

Consumer Protection Cases To Watch In 2017

By **Shayna Posses**

Law360, New York (January 2, 2017, 1:03 PM EST) -- The coming year will likely be a big one for consumer protection attorneys, with ongoing litigation accusing major players such as Wells Fargo and Volkswagen of shady business practices and rulings that could mean big changes for the Consumer Financial Protection Bureau and the Federal Trade Commission seemingly poised to land before the U.S. Supreme Court.

It's a lot to take in, so Law360 turned to consumer protection pros to find out the must-watch cases of 2017.

Wells Fargo's Arbitration Efforts

After it came to light that Wells Fargo Bank NA employees created scores of accounts for existing customers without consent, the CFPB and other regulators hit the bank with \$185 million in civil penalties in September.

The process that led to the settlement began with a series of stories in the Los Angeles Times and, in May 2015, Los Angeles City Attorney Mike Feuer brought suit over the scheme.

Consumers took their grievances to federal court soon after the settlement was announced, lodging separate actions in several jurisdictions. But Wells Fargo quickly claimed in New Jersey and Utah federal court that litigation was the wrong approach, seeking arbitration in at least two suits in November based on provisions in agreements the consumers signed when opening bank accounts.

The argument worked for the bank last year in similar litigation over phony accounts filed in the Northern District of California days after Feuer brought suit, and attorneys are watching closely to see how the courts react this time.

The arbitration provision in question is open-ended, claiming to cover any dispute a customer has with Wells Fargo, McCuneWright LLP partner Richard D. McCune said. How the courts interpret that kind of arbitration clause and whether it applies to another account opened without permission is going to be important, he said.

"It seems pretty clear, and it's pretty egregious, that that use of arbitration clauses is far above and beyond simply using it to expedite resolution of cases, so I think it's one of the most important cases out there," he said.

The CFPB was on its way to banning arbitration clauses in consumer-finance contracts, having conducted a study and requested comment in recent months, Kohn Swift & Graf PC shareholder Jonathan Shub said, “but the Trump election and his appointees have put that very much in doubt.”

The suits are *Blanchard v. Wells Fargo Bank NA et al.*, case number 1:16-cv-07509, in the U.S. District Court of New Jersey; and *Mitchell et al. v. Wells Fargo Bank NA et al.*, case number 2:16-cv-00966, in the U.S. District Court for the District of Utah.

What’s Up With The CFPB?

The future of the CFPB is a huge question going into 2017, in part because of the D.C. Circuit’s October decision that the agency’s single-director structure left its top official without any check on its authority, attorneys say.

A three-judge panel agreed with an argument PHH Corp. advanced in its appeal of a \$109 million penalty applied by the bureau, namely that the structure Congress gave the CFPB in the 2010 Dodd-Frank Act was unconstitutional. But rather than shutting down the agency until the flaw was fixed, the panel said giving the president the authority to fire the director at will would address the accountability question.

The agency has asked the entire court to review the ruling, saying it sets up possibly the “most important separation-of-powers case in a generation.”

Christopher A. Cole, co-chair of Crowell & Moring LLP’s advertising and product risk management group, explained that the CFPB’s structure was aimed at avoiding political influence, but many Republicans have advocated for a commission-type structure.

“I think it’s pretty likely we’ll see a change in that structure. It may not happen immediately because I think there’s a fair amount of litigation yet to play out, but if Congress has its way, I’m sure that will happen,” Cole said.

He added that the PHH suit seems likely to end up before the Supreme Court, where a new Republican justice will make it a close call.

The suit is *PHH Corp. et al. v. Consumer Financial Protection Bureau*, suit number 15-1177, in the U.S. Court of Appeals for the District of Columbia Circuit.

VW Emissions Fallout

Volkswagen’s \$14.7 billion deal stemming from its emissions cheating scandal scored final approval in October, requiring the German automaker to buy back or repair nearly half a million VW and Audi 2.0L diesel vehicles that contain so-called “defeat devices” and invest in environmental efforts.

The approval came roughly a year after VW admitted to using the software to cheat emissions standards in about 11 million vehicles globally, triggering litigation by consumers and the government and inspiring investigations worldwide.

The quick settlement resolves claims brought by certain consumers and regulators in hundreds of suits consolidated into California federal court multidistrict litigation. But VW isn't out of the woods yet.

In late December, VW reached a tentative deal with regards to about 80,000 VW, Audi and Porsche 3.0L cars implicated in the scandal, a deal the Environmental Protection Agency estimated to be worth around \$1 billion. But the figure doesn't include the "substantial compensation" U.S. District Judge Charles Breyer said the class would be entitled to, and, according to the EPA, the settlement doesn't resolve pending claims for civil penalties and Federal Trade Commission allegations, nor does it address potential criminal liability.

Meanwhile, the auto giant still faces actions domestically, like suits brought by states including Minnesota, New York and Pennsylvania, and internationally, like securities suits pending in Germany.

This leaves plenty for attorneys to keep an eye on in 2017, but experts say they'll also be watching other defeat device actions spawned by the scandal to see if claims against manufacturers like Mercedes-Benz USA LLC and FCA US LLC stick.

"It'll be interesting to see whether [this will become] a cottage industry against car manufacturers or whether the courts think the VW case was unique," Shub said.

The MDL is In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, case number 3:15-md-02672, in the U.S. District Court for the Northern District of California.

Still Reeling From Spokeo

The U.S. Supreme Court's landmark decision that plaintiffs must allege concrete harm to bring statutory claims has made waves since it was handed down in May, leaving lower courts to ponder what the ruling means for litigants pursuing suits under consumer protection and privacy statutes.

The answer still isn't clear seven months after the justices revived Thomas Robins' claims that Spokeo violated the Fair Credit Reporting Act by publishing false information about him. But attorneys say that will likely change in the coming months.

"I think we're going to have a lot more clarity at the end of the year than we do now about the standards a plaintiff needs to meet in a variety of consumer protection cases to be able to survive a motion to dismiss," said Jeffrey S. Jacobson, who co-chairs Kelley Drye & Warren LLP's class action and securities litigation and enforcement practice groups.

The high court held in Spokeo that consumers must allege a concrete injury and cannot rely solely on mere statutory violations to establish Article III standing. However, the justices stopped short of applying their reasoning to Robins' allegations, opening the door for both plaintiffs and defendants to claim a win and inspiring a slew of divergent decisions from lower courts.

As a result, many defendants have raised standing and concreteness issues to try to dispose of cases, something O'Melveny & Myers LLP partner Carlos M. Lazatin said he expects to see more of going forward. But the attorney thinks Spokeo might have an even greater impact on class certification.

"The focus of Spokeo was on the need to show concrete harm, which I think inevitably in a lot of these

cases is going to be very individualized,” he said. “I think that’s going to impact the predominance analysis in a lot of these types of cases and frankly make it more difficult to certify cases.”

Attorneys will continue grappling with these issues going into 2017, all the while keeping their eyes trained on the Ninth Circuit, which is hearing the Spokeo dispute again on remand. What the appellate court ultimately decides is anyone’s guess, but regardless, it’s going to be a big deal, attorneys say.

The case is Thomas Robins v. Spokeo Inc., case number 11-56843, in the U.S. Court of Appeals for the Ninth Circuit.

FTC’s Common Carrier Woes

Also before the Ninth Circuit is the U.S. Federal Trade Commission’s data-throttling action against AT&T Mobility LLC. The agency has asked for rehearing after a three-judge panel struck down the action in August, taking a broad view of the common-carrier exemption to the FTC’s enforcement authority in a move that effectively placed telecoms outside the regulator’s reach.

The suit alleged that the company violated the FTC Act by failing to properly inform unlimited-data customers of its program to reduce internet speeds for those who went above a certain data threshold in any given billing cycle.

But the appellate panel held that the telecommunications giant is a common carrier exempted under the act, a decision the agency said may leave companies only minimally engaged in telecom services immune to regulatory scrutiny.

That’s an enormously important decision that may end up before the Supreme Court, Cole said.

“It has major ramifications because if the telecoms, which are all diversifying, are exempt from FTC jurisdiction, there’s a whole lot of activity that the FTC can’t reach anymore,” he said.

The suit is Federal Trade Commission v. AT&T Mobility LLC, suit number 15-16585, in the U.S. Court of Appeals for the Ninth Circuit.

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