Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Consumer Protection Cases To Watch In 2021

By **Emma Whitford and Diamond Naga Siu**

Law360 (January 3, 2021, 12:02 PM EST) -- The coming year will bring major U.S. Supreme Court fights focused on consumer protection, including one regarding Federal Trade Commission financial penalties, another concerning standing for damages in class actions, and an impending decision meant to clarify the definition of the Telephone Consumer Protection Act.

Consumer protection attorneys and experts also are anticipating new class actions stemming from COVID-19 products such as masks and hand sanitizer, and all eyes are on New York as the state prepares to implement a new law strictly regulating automatic subscription renewal terms.

Here are some cases and trends to watch in 2021.

Supreme Court to Consider Monetary FTC Penalties

Attorneys are eagerly awaiting Supreme Court arguments scheduled for Jan. 13 in a case that could jettison the Federal Trade Commission's long-claimed power to seek monetary restitution for bad marketplace behavior.

The high court in July agreed to take up a case related to the FTC's practice of seeking monetary injunctions in the form of disgorgement, or the return of so-called ill-gotten funds, under Section 13(b) of the Federal Trade Commission Act.

From the Ninth Circuit, AMG Capital Management LLC et al. v. FTC challenges allegations that payday loan companies controlled by pro race car driver Scott Tucker and associated with Native American tribes engaged in predatory practices.

The FTC initially won $1.3 billion from Tucker in a 2016 ruling out of Nevada federal court.

Stephen Calkins, a professor at Wayne State University Law School and former FTC general counsel, told Law360 that AMG Capital Management is the "most important FTC court case in a very long time," because "for decades, the FTC has been in the business of winning disgorgement and consumer redress from bad actors — all using 13(b). Should the FTC lose this case, all that will end."

Though the federal agency maintains that the FTC Act allows it to seek disgorgement, critics have said this view of the law is overly expansive and puts pressure on companies to settle in order to avoid steep fines.

Andrew Lustigman, partner with Olshan Frome Wolosky LLP, told Law360 that disgorgement is an "enormous hammer" for the FTC, noting that a monetary fine equal to sales of a targeted product does not take into account a company's other expenses, such as taxes and advertising.

"There's no setoff," he said. "They're saying you have to give up everything you took in."

In a December brief to the Supreme Court, the FTC argued that nothing in the FTC Act explicitly limits the power of the courts to award this sort of financial remedy.

The Supreme Court weighed in on a similar question in June, finding in Liu et al. v. Securities and Exchange Commission — which involved a visa scheme that defrauded Chinese investors — that the SEC can continue collecting disgorgement, albeit with stricter limitations such as the deduction of "legitimate expenses."

"In a way, it's helpful to the FTC that disgorgement was limited in Liu," Calkins told Law360. "Now the justices will be considering a more restrained type than they might have been considering before."

"But realistically, this is a very conservative Supreme Court with a clear majority of very aggressively textualist justices," he added. "There's no question but that FTC has a real challenge before it."

The case is AMG Capital Management LLC et al. v. FTC, case number 19-508, in the U.S. Supreme Court.

Coronavirus Class Actions

The year ahead could see an increase in allegations against companies that make products that supposedly prevent coronavirus infections, such as hand sanitizer and protective face masks, in the wake of the U.S. Food and Drug Administration's decision to ease regulation of such products during the coronavirus pandemic.

"Heading into 2021, I think there's going to be pressure internally among these companies to distinguish their products from other products on the market," said Chalana Damron of Crowell & Moring LLP. "We may see the claims start to get a bit more bold and come pretty close to claiming either explicitly or implicitly that the products prevent or treat COVID-19."

She said such assertions could prompt not only the FDA and FTC to investigate, but also spur plaintiffs lawyers, who are closely watching such product representations, into action.

Damron said products that advertise they are handmade, made in small batches, all-natural or antimicrobial — suggesting that the products kill coronavirus or are better at warding it off — are "low-hanging fruit" for legal action.

"Consumers could claim, one, these products didn't work as advertised, or two, that they paid a premium for a product that didn't actually perform as advertised," she said, highlighting how companies may be sued if consumers contract COVID-19 while using their protective products.

But Damron added that being asymptomatic or having only minor symptoms after using products that promised protection might not be enough to sustain a suit.

"Plaintiffs may be faced to prove that it was serious injury — merely testing positive for COVID-19 may not be enough," she said, noting the many COVID-19 suits targeting the luxury cruise industry. Several such cases were dismissed together in a California federal court in August, but many others remain open.

"Those lawsuits have been giving us a bit of a look at how courts in the future may deal with claims related to COVID-19 or COVID-19 exposure" by highlighting how vastly the plaintiffs differed in their COVID-19 symptoms and how their experiences with the virus affected legal decisions, Damron said. "It's been very interesting seeing different types of plaintiffs, and I think that can certainly be instructive as we move toward 2021 and the next phase of COVID-19, which may be very active in the litigation space."

Cases to watch include Archer et al. v. Carnival Corp. and PLC et al., case number 2:20-cv-04203 and Juishan Hsu et al. v. Princess Cruise Lines Ltd., case number 2:20-cv-03488, in the U.S. District Court for the Central District of California.

Supreme Court Considers Harm Standard for Class Actions

The high court on Dec. 16 granted a petition for certiorari by the credit reporting agency TransUnion in a class action dating back to 2012 that could narrow the types of consumer classes that can seek damages.

In the class action filed in February 2012, class representative Sergio L. Ramirez said he was prevented from buying a car in 2011 because TransUnion told lenders that he potentially matched two entries in the U.S. Department of the Treasury's Office of Foreign Assets Control's database of criminals and terrorists.

In the years since, the parties have debated what qualifies as a legitimate class in such a case, with TransUnion arguing that Ramirez lacks proof that his fellow proposed class members were injured in the same way he was. Many of the class members cannot prove that they were actually harmed because there's no evidence that a third party ever saw the inaccurate credit reports linked to them, TransUnion has claimed.

The case is the first time the Supreme Court will consider the question raised in Spokeo Inc. v. Thomas Robins et al. as it applies to an entire class. In Spokeo, the high court ruled that concrete injuries are necessary to establish Article III standing, or the ability to bring claims in federal court.

The TransUnion case is "addressing a question that was not ruled upon by Spokeo, but is a very natural next iteration of Spokeo because it involves a class," Troutman Pepper partner David Anthony told Law360, calling it "one of the most significant cases in the context of consumer protections class actions in the last five to 10 years."

Jim Francis of Francis Mailman Soumilas PC, counsel for the class, said that the case could establish a new hurdle for consumer classes.

"If TransUnion prevails, consumers across the United States will face another hurdle in holding large corporations accountable for violating the law," Francis told Law360. "So our hope is that the high court addresses the harm that these widespread credit practices inflicts on a class-wide basis."

The case is TransUnion LLC v. Sergio L. Ramirez, case number 20-297, in the Supreme Court of the United States.

New York's Next Move on Automatic Renewals

Automatic renewal laws, or ARLs, regulate how companies present subscription renewal terms to consumers and are intended to prevent unwanted charges.

Looking ahead to 2021, retail attorneys have their eyes trained on New York. The state is poised to enact a strict ARL mirroring California's, which took effect in 2010 and is, to date, one of the strictest such laws.

"This new one that's going to take effect in [New York in] February is sweeping and a huge change," Stephanie A. Sheridan, a retail and e-commerce partner at Steptoe & Johnson LLP, told Law360. "It's nearly identical to California's, so we expect the same plaintiffs lawyers who have been suing in California will pick up shop and start suing there, because they've already got the playbook down."

The New York and California laws have multiple key things in common, including that they both require companies to receive affirmative consent from a customer before setting up an automatic renewal. The subscription category is expansive, but examples include magazines and newspapers, weight loss programs and recurring shipments of groceries or toiletries.

One major question for attorneys is whether New York courts will interpret the new ARL as having a private right of action, meaning an individual can bring a case under the law, not just government enforcers such as district attorneys and attorneys general.

Though neither law has explicit private right of action language, California plaintiffs have succeeded in bringing their own cases over the years. Sheridan said she is watching a case out of California state court, Mayron v. Google LLC, in which a proposed class of Google Drive users accused Google of failing to fully outline its data storage fee policies.

In September, a California appeals court ruled in Mayron that private attorneys can't bring cases under the state's ARL unless the plaintiff can demonstrate that they didn't understand they were signing up for a subscription.

"That's a new and important hurdle," Sheridan told Law360. "Say there's a disclosure that doesn't comply with California's ARL's really strict technical requirements. Now a plaintiff won't be able to state a claim if she understood she was signing up for a subscription."

However, Mayron is on appeal and attorneys will be disputing its implications going into the new year, Sheridan said. In New York, plaintiff's attorneys will likely file cases absent a Mayron-like decision setting the parameters for private right of action.

While it "shouldn't surprise anyone that California would have an extreme statute on this issue," said Michael P. Daly of Faegre Drinker Biddle & Reath LLP, it is "hard to overlook New York. And it is reasonable to expect that other states will follow suit."

Meanwhile, attorneys say that the pandemic has given automatically renewing subscriptions new relevance, as consumers turn to them for products like toilet paper and other home goods.

Cases to watch include Mayron v. Google LLC, case number H044592, in the Court of Appeal of the State of California, Sixth Appellate District and Morrell v. WW International, Inc., case number 1:20-cv-09912, in the U.S. District Court for the Southern District of New York.

Clarification on TCPA Protections

In early December, the Supreme Court heard oral arguments over what defines automatic telephone dialing systems, which are prohibited under the Telephone Consumer Protection Act. The justices will rule on Facebook v. Duguid early this year, and experts are watching the case closely because of its potential to limit or expand protections under the law.

The TCPA makes using autodialers unlawful if the equipment can "store or produce telephone numbers to be called, using a random or sequential number generator," and circuit courts are split on their interpretations.

In this case, the social media giant argues that equipment that dials from preexisting lists of numbers is legal under the TCPA, while the plaintiff says the "random and sequential" phrasing covers any equipment that can automatically dial numbers.

If the social media giant prevails, the number of class actions brought under the TCPA would drastically decrease due to the act's reduced scope.

Gary A. Kibel of Davis & Gilbert LLP, who focuses on technology and privacy, told Law360 that TCPA class actions are a "significant thing" that many more companies could face due to widespread uncertainty about key statutory terms drafted nearly 30 years ago.

The potential for plaintiffs to recover uncapped statutory damages is between $500 and $1,500 per violation.

"It was actually a fairly narrow issue of what's an automatic dialer," Kibel told Law360. "And back in 1991 everyone probably thought that was a fancy-schmancy computer that could dial numbers quickly. Now we all walk around with what could be considered automatic dialers in our pockets every day."

Kibel said companies' marketing practices could change if TCPA interpretations narrow after the Supreme Court ruling, though he added that there could be more marketing methods without fearing TCPA liability.

Daly of Faegre Drinker, who has experience drafting privacy policies, telemarketing policies and procedures, told Law360 that several justices seemed uncomfortable with a blanket interpretation of the law. After watching the justices ask "hard questions" to each side, he said he expects the court will side with Facebook.

"But several seemed uncomfortable with reading the statute in a way that would apply to any smartphone, and unconvinced that Duguid had found a limiting principle that would avoid that result," Daly told Law360, noting that regardless of the result, it will have a large impact on callers and consumers alike.

"Some species of TCPA claims will no doubt continue to be filed no matter how the court rules. But the statute's restriction on automated dialing has been read in a way that Congress could not have imagined, let alone intended," he added.

The case is Facebook Inc. v. Duguid, case number 19-511, before the U.S. Supreme Court.

--Editing by Alanna Weissman.
