Consumer Protection Cases To Watch In 2016

By **Emily Field**

Law360, New York (December 24, 2015, 8:38 PM ET) -- In the coming year, lawyers will turn their attention to California, where a massive litigation unleashed by theVolkswagen emissions scandal has been centralized and the Ninth Circuit is preparing to rule on important class action questions raised by two food labeling cases.

And with a pair of very eagerly awaited consumer suits before the U.S. Supreme Court, there will be several cases lighting the consumer protection attorney's radar in 2016.

Spokeo Inc. v. Robins

Against the wishes of the federal government, the Supreme Court in April decided to take up Spokeo Inc.'s appeal of a Ninth Circuit order that breathed new life into a Virginia man's proposed class action accusing the people search engine of violating the Fair Credit Reporting Act by publishing false information about him.

Thomas Robins claims Spokeo falsely reported that he was wealthy and had a graduate degree, when he was actually struggling to find work. The case has broad implications for establishing standing under statutes like the FCRA.

"It really goes to questions of injury and what constitutes sufficient injury or harm under the FCRA," said Christie Grymes Thompson, chair of Kelley Drye & Warren LLP's advertising and marketing and consumer product safety practice. "Companies routinely use information reported under the FCRA ... it could certainly direct how companies rely on that information, or in some cases provide that information to the credit reporting agencies."

A federal judge tossed Robins' case five years ago, finding the man didn't have standing because there was no actual injury. But the Ninth Circuit reversed in February 2014 on the grounds that Spokeo's alleged FCRA violations amounted to an injury and provided Robins with a cause of action.

Spokeo has maintained its position that Robins hasn't alleged any concrete harm, while he has told the high court that Spokeo's claim that he lacks standing because he didn't suffer a real-world injury "flies in the face of centuries of case law."

While the government has thrown its support behind Robins, companies like Facebook Inc., Google Inc. and Yahoo Inc. have rallied behind the people search engine, arguing in amicus briefs that the Ninth Circuit's decision would result in a flood of "no injury" class actions.

The case is Spokeo Inc. v. Robins et al., case number 13-1339, in the Supreme Court of the United States.

Campbell-Ewald Co. v. Gomez

The Supreme Court will also release its highly anticipated decision in early 2016 on the issue of whether defendants can strategically offer individual plaintiffs the relief necessary to make them whole at the outset of the litigation, to avoid a long court battle or a potential multimillion-dollar class settlement down the line.

The justices considered the settlement-offer quandary during oral arguments in October in the context of the TCPA, which longtime government contractor Campbell-Ewald Co. is accused of violating by sending naval recruitment messages to about 100,000 people in 2006 through a subcontractor.

"A holding in favor of Campbell-Ewald could drastically limit the types of class actions plaintiffs can pursue in federal courts," said Martin Jaszczuk, who heads Locke Lord LLP's TCPA class action litigation section.

However, a ruling in favor of plaintiff Jose Gomez — whom Campbell-Ewald offered $1,503 for each unsolicited text message he allegedly received, or more than three times the statutory, $500 per violation — would help to further swell already padded

class action dockets, attorneys say.

"Given the unlimited liability that companies face under statutes such as the TCPA, it makes a big difference if businesses can pick off plaintiffs," said Scott Vernick, Fox Rothschild LLP's privacy and data security practice leader.

VW's Mounting 'Dieselgate' Suits

In December, the U.S. Judicial Panel on Multidistrict Litigation sent more than 500 suits accusing Volkswagen AG of cheating emissions standards to California federal court, the latest development in a scandal that has enveloped the automaker since early September.

Since the U.S. Environmental Protection Agency and California Air Resources Board accused Volkswagen of installing software designed to skirt federal emissions standards in 2.0-liter diesel engine cars, the automaker has been flooded with litigation and government fraud investigations worldwide.

Jonathan Selbin, a partner at Lieff Cabraser Heimann & Bernstein LLP, said the case illustrates that economic loss class actions aren't just trumped-up, "no injury" claims, an idea often put forth by the defense.

"And they pretend that no corporation would ever knowingly act to defraud its consumers or deprive them of their bargain," Selbin said. "The significance of VW, to me, is it belies all that in terms everyone can plainly understand."

"Because the truth is that some companies do sometimes knowingly lie to their consumers about the products they sell them, and class actions are the only way to keep them honest in a system like ours that lacks real government oversight with teeth on the front end," Selbin said.

Volkswagen has admitted to using the software in about 11 million vehicles globally, and two company CEOs have stepped down since the scandal broke. Hundreds of VW drivers have hit the automaker with proposed class actions nationwide, many of whom claim damages for the loss of value of their cars.

The carmaker said on Dec. 10 that it installed the software because it initially concluded that meeting the U.S.' strict emissions standards was "impossible."

The case is In re: Volkswagen Clean Diesel Marketing, Sales Practices and Products Liability Litigation, case number 2672, before the U.S. Judicial Panel on Multidistrict Litigation.

Kosta v. Del Monte Foods Inc. and Jones v. ConAgra Foods Inc.

The Ninth Circuit is considering some important class certification issues that particularly impact food labeling lawsuits, to address whether labeling differences between accused products can doom a proposed class and other questions.

In the Del Monte appeal, lead plaintiffs Michael Kosta and Steve Bates are challenging a California federal court's denial of class certification in their suit against processed-food maker. They claim Del Monte Corp. used labels that misled consumers into thinking that its canned tomato products contained antioxidants and that its canned fruit was fresh.

In refusing certification, U.S. District Judge Yvonne Gonzalez Rogers found that there were too many differences in the at-issue products' labeling and that the plaintiffs would have to rely on potential class members' memories about the specific labels on the products they purchased.

In the pending ConAgra appeal, customers allege the company's Hunt's, Pam and Swiss Miss products are falsely labeled. A California federal judge in June 2014 denied class certification, ruling that there was a "lack of cohesion" among the class members as the products' labeling changed over time.

"I think on the class certification issues, these Ninth Circuit cases will have a real impact on these suits because there are so many cases pending in California," said David Biderman of Perkins Coie LLP. "And many of these suits involve questions around major components of Rule 23 of the Federal Rules of Civil Procedure," he added, referring to the rule that guides the certification of class actions.

The cases are Kosta et al. v. Del Monte Foods Inc., case number 15-16974, and Jones et al. v. ConAgra Foods Inc., case number 14-16327, both in the U.S. Court of Appeals for the Ninth Circuit.

Arbitration Clauses in Fantasy Sports Cases

Arbitration clauses in litigation against FanDuel Inc. and DraftKings Inc. will also stir up the consumer protection sphere, attorneys say. The JPML next month is set to hear arguments on whether the dozens of proposed class actions against one or both fantasy sports companies should be consolidated and where.

If arbitration clauses are enforced, then what could be an enormous class action would split into individual cases, noted Jonathan Shub of Kohn Swift & Graf PC.

DraftKings and FanDuel offer contests in which players pick imaginary teams of real-life athletes; the winners are determined by the actual performances of those athletes in games. The contests cost anywhere from less than a dollar to thousands of dollars to enter, with prizes ranging up to $1 million.

At least 50 civil lawsuits have been filed in a number federal courts against the companies, individually or together, bringing a range of consumer protection-related claims over advertising, the integrity of the games and even their legality under state

and federal laws.

The New York attorney general also has the companies in his crosshairs, having hit them with cease-and-desist letters and legal actions alleging their daily fantasy sports contests are forms of illegal gambling under state law.

Earlier this month, a state appellate court issued an interim stay of a preliminary injunction sought by New York Attorney General Eric Schneiderman to immediately shut down their operations in the state, just hours after it was granted by a state judge.

If the stay is lifted, users may also have difficulty getting their money back from the companies, said Douglas Bohn partner at Cullen & Dykman LLP.

“It’s not like the money goes directly to a bank account of these companies; it goes to a clearinghouse. And if the clearinghouse is enjoined or unwilling to facilitate getting some of the money back and there is an arbitration clause, [a consumer] would likely be bound by arbitration clause,” Bohn said.

The cases are In re: Daily Fantasy Sports Marketing and Sales Practices Litigation, case number 2677, In re: DraftKings Inc. Fantasy Sports Litigation, case number 2678, and In re: FanDuel Inc. Fantasy Sports Litigation, case number 2679, before the U.S. Judicial Panel on Multidistrict Litigation.