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Consumer Protection Cases To Watch In 2012

By **Allison Grande**

Law360, New York (January 01, 2012, 12:00 AM ET) -- Following a year that featured two game-changing consumer protection decisions, the U.S. Supreme Court is slated to issue another pair of rulings that could severely limit plaintiffs' ability to pursue remedies under several vital consumer protection statutes, according to attorneys.

And in the coming year, the lower courts will consider cases that seek to limit "all natural" advertising claims and behavioral advertising tactics, as well as the application of the high court's landmark Concepcion ruling, attorneys say.

Here are some of the cases that consumer protection attorneys will be keeping an eye on in 2012.

First American Financial v. Edwards

This dispute before the U.S. Supreme Court specifically concerns the question of whether homeowners can bring suit under the Real Estate Settlement Procedures Act in the absence of a direct economic injury. But the high court's ruling has the potential to transcend those particulars and more broadly impact plaintiffs' constitutional standing to bring suits under a slew of similar consumer protection statutes.

“Since the Supreme Court accepted certification of this case, I viewed it as the sleeper of the term that could have truly dramatic ramifications and really bring about a sea change in a host of consumer protection laws,” Weil Gotshal & Manges LLP partner Walter Zalenski told Law360.

The high court agreed to take up this putative class action in June, after the Ninth Circuit found that plaintiff Denise P. Edwards had standing under Article III of the Constitution to pursue her claims that First American Financial Corp. unlawfully paid kickbacks to title insurance providers for the closing of mortgage loans even though she did not challenge the fairness or quality of the title insurance she received.

If the Supreme Court, which heard oral arguments in the case on Nov. 28, reverses this holding and concludes that plaintiffs must prove particularized personal injury instead of merely a statutory violation, consumers' ability to collect damages under not only RESPA but also a host of other similar statutes — including the Truth in Lending Act, the Fair Credit Reporting Act, Fair Debt Collection Act, the Electronic Fund Transfer Act, the Credit Repair Organizations Act and the Telephone Consumer Protection Act — will be severely hindered, attorneys say.

“Proving actual damages is extremely hard, so the majority of litigation under these statutory schemes would be undercut if the Supreme Court rules in favor of First American,” Zalenski said, adding that out of the “thousands” of TILA cases that have been filed since the statute took effect in 1968, the number of cases for which actual damages have been established “can be counted on one hand.”

A ruling that consumers must prove particularized injuries to collect damages could also make it easier for the defense to get class actions dismissed due to a lack of common facts, according to Zalenski.

“The fact that the Supreme Court accepted cert. without a strong split and from an interlocutory appeal suggests that they may be looking to overturn the Ninth Circuit decision,” Zalenski said.

First American is represented by Aaron M. Panner of Kellogg Huber Hansen Todd Evans & Figel PLLC.

Edwards is represented by Jeffrey Lamken of MoloLamken LLP.

The case is First American Financial v. Edwards, case number 10-708, in the U.S. Supreme Court.

Mims v. Arrow Financial

The jurisdictional reach of the Telephone Consumer Protection Act will be at the center of another upcoming Supreme Court decision prompted by plaintiff Marcus Mims’ challenge to a nonprecedential Eleventh Circuit finding that his dispute against Sallie Mae unit Arrow Financial Services LLC did not belong in federal court.

“The Supreme Court ruling will have a definite impact on if consumers can file individual cases in federal or state courts,” Hinshaw & Culbertson LLP partner David Schultz said.

The TCPA, which regulates telemarketing, stipulates that consumers “may, if otherwise permitted by the laws or rules of court of a state” bring actions under the law in state courts but says nothing about whether they can also wield the TCPA in federal court.

Circuit courts have split on whether state courts have exclusive jurisdiction over TCPA fights, but the high court’s ruling should put an end to the debate over whether Congress meant for the statute to divest federal courts of their ability to hear these actions.

A ruling clarifying the jurisdictional bounds of this statute is especially important in light of the rise in TCPA cases filed during the past five years and recent Congressional efforts to amend certain features of the 1991 statute to take into consideration technologial advances in the communications marketplace since the original law's enactment, according to Schltz.

“The damages for these violations are tremendously onerous, and will continue to grow as technology advances,” Schultz said.

The high court's ruling may also shed light on jurisdictional requirements under the Class Action Fairness Act even though Mims' suit was not a class action, Schultz added.

Mims is represented by Scott L. Nelson of Public Citizen Litigation Group.

Arrow Financial is represented by Gregory Garre of Latham & Watkins LLP.

The case is Mims v. Arrow Financial, case number 10-1195, in the U.S. Supreme Court.

Concepcion Fallout

The Supreme Court's April 27 holding in AT&T Mobility LLC v. Concepcion sparked concerns over consumers' ability to maintain class actions in the future. It also spurred a new set of legal challenges trying to circumvent this ruling that will play out in various courts during 2012, according to attorneys.

"We're watching anything Concepcion-related, and have filed briefs in cases that test the boundaries of how this ruling impacts consumer class actions," Loeb & Loeb LLP Consumer Protection Defense and Unfair Competition Practice Group Chair Michael Mallow said.

Morgan Lewis & Bockius LLP class action group co-chair Scott Schutte identified several types of cases — including those that challenge the validity of online purchase arbitration clauses, the legality of agreements that aren't consumer friendly, the waiver of the right to pursue arbitration by failing to timely request this relief and the interplay between the high court decision and state law public policy against arbitration — that promise to gain traction in 2012 as lower courts look for reasons to not apply Concepcion.

"Many people thought Concepcion was going to mean the end of consumer class actions, but some jurisdictions, especially state courts, don't particularly like Concepcion and are reticent to the idea that consumers can't have class actions," Schutte said.

In support of a trend toward finding ways around Concepcion, Mallow pointed to an Oct. 27 California state appellate court decision in Sanchez v. Valencia Holding Co., which struck down an arbitration clause with a class action ban as unconscionable despite the high court's ruling.

"We're seeing a lot of activity in cases interpreting the impact of Concepcion, and this is a topic that is going to be highlighted in 2012," Mallow said.

Sanchez, the plaintiff in the California case that went against Concepcion, is represented by Hallen D. Rosner, Christopher P. Barry and Angela J. Smith of Rosner Barry & Babbitt LLP.

Valencia is represented by Christopher S. Maile and Soojin Kang of Tharpe & Howell.

The case is Sanchez v. Valencia Holding Co. LLC, case number B228027, in the Court of Appeal of the State of California, Second Appellate District.

'All Natural' and Behavioral Advertising Litigation

As advertisers continue to devise creative ways to reach their target base, consumers will launch more challenges to the legality of these methods, with disputes over companies' "all natural" claims and use of directed advertising expected to receive significant play in district courts during 2012, according to attorneys.

In recent months, plaintiffs' lawyers have hit major companies including Kellogg Co. and PepsiCo Inc. with lawsuits alleging that they falsely touted their products as all natural or nutritious even though they contain unhealthy ingredients such as high-fructose corn syrup.

And as more advertisers peddle products as nutritious and the U.S. Food and Drug Administration continues to decline to define "all natural" more precisely, these suits will continue to gain traction.

“Many companies like to use the 'all-natural' moniker because it's an effective marketing position to take, and I think that we're going to see more litigation testing the boundaries of what is and isn’t all-natural,” Mallow said.

Companies such as Facebook Inc., Apple Inc. and Pandora Media Inc. have also been faced with a growing number of suits in recent months alleging that they unlawfully track users online or through their cell phones to serve them with information or targeted advertisements.

“Companies today are on the cutting edge of new and innovative marketing strategies,” Winston & Strawn LLP partner Liisa Thomas said. “So what plaintiffs' class actions attorneys are filing in this area is very important to follow, because while these cases might settle or not result in much case law, they give us a flavor of what the risks are so that we can help our clients understand them.”

In maintaining both types of actions, the plaintiffs' bar has run into challenges proving that these allegedly unlawful practices have caused actual harm to consumers or that privacy agreements don't provide significant protection for these activities.

These requirements will continue to impede the progression of these suits, and attorneys say that they will be closely watching the developments on upcoming dismissal motions in both categories to see if and how the plaintiffs’ bar can overcome these substantial pleading hurdles.

--Additional reporting by Erin Fuchs, Dietrich Knauth and Alex Ortolani. Editing by Sarah Golin.