

Privacy Cases To Watch In 2013

By **Allison Grande**

Law360, New York (January 01, 2013, 3:10 PM ET) -- Privacy attorneys expect 2013 to provide much-needed clarity to a developing area of case law, with the U.S. Supreme Court set to consider several suits that could drastically alter the ability of plaintiffs to bring challenges to data collection practices, and a district court preparing to define the limits of the Federal Trade Commission's enforcement authority in the area.

Here are some of the cases that privacy attorneys will be keeping an eye on in 2013.

Clapper v. Amnesty International

An upcoming U.S. Supreme Court decision addressing private citizens' ability to challenge a federal surveillance law is poised to transform the privacy litigation landscape, attorneys say.

"Anyone interested in privacy has to be watching out for the Supreme Court's decision, because it goes to the heart of the standing issue in virtually every privacy litigation," Salazar Jackson LLP partner Luis Salazar said. "Privacy cases — especially class action cases — routinely get dismissed because consumers cannot show actual harm. A firm ruling from the court could completely alter the privacy litigation landscape."

In the high court battle, which came before the justices for oral arguments on Oct. 29, the federal government is seeking to overturn a Second Circuit ruling that a coalition of lawyers, journalists and other private citizens have standing to challenge 2008 amendments to the Foreign Intelligence Surveillance Act, which lets federal agencies intercept international communications without individual warrants.

The government contends that challengers can't establish standing under Article III of the Constitution because they lack proof that the government was actually conducting, or was planning to place, surveillance on them, while the groups counter that the imminent risk of this surveillance has caused them harm.

"The extent to which the Supreme Court decides that standing could exist for the amorphous fear of injury will impact the privacy litigation landscape dramatically," Morrison & Foerster LLP partner Reed Freeman said.

The plaintiffs are represented by Charles S. Sims and Matthew J. Morris of Proskauer Rose LLP; Jameel Jaffer, Steven R. Shapiro, Alexander A. Abdo and Mitra Ebadolahi of the ACLU; and Arthur N. Eisenberg and Christopher T. Dunn of the New York Civil Liberties Union Foundation.

The case is James R. Clapper Jr. et al. v. Amnesty International USA Inc. et al., case number 11-1025, in the U.S. Supreme Court.

FTC v. Wyndham

Wyndham Hotels and Resorts LLC's decision to mount a rare challenge to the Federal Trade Commission's allegations that the company failed to protect the personal information of its guests could significantly limit the agency's ability to regulate data security issues, attorneys say.

"It was an aggressive action on behalf of the FTC to bring an action against a company that was the victim of a hacking incident," Fenwick & West LLP attorney Tyler Newby said.

The FTC filed its complaint in Arizona federal court against the hotel chain in June, alleging that its failure to institute proper data security measures led to three breaches and millions of dollars in losses.

But instead of settling these charges privately with the regulator, Wyndham took the unusual step of challenging the claims in court. This move sets up the potential for the first fully litigated privacy case under Section 5 of the FTC Act, which gives the regulator the power to police practices it deems unfair or deceptive. A ruling against the agency could also hamper its ability to force companies to adopt certain data security standards.

"Wyndham is essentially challenging the FTC's authority to regulate security in the way that it does now," Morgan Lewis & Bockius LLP partner Reece Hirsch said.

The court is currently considering Wyndham's August motion to dismiss the suit, which contended that the FTC's suit oversteps its Section 5 authority.

Wyndham is represented by David B. Rosenbaum and Anne M. Chapman of Osborn Maledon PA, Eugene Assaf and K. Winn Allen of Kirkland & Ellis LLP and Douglas H. Meal of Ropes & Gray LLP.

The case is Federal Trade Commission v. Wyndham Worldwide Corp. et al., case number 2:12-cv-01365, in the U.S. District Court for the District of Arizona.

Driver's Privacy Protection Act Litigation

The Supreme Court in 2013 is set to hear one case, and potentially a second, involving the Driver's Privacy Protection Act that could determine how attorneys, municipalities and other entities can use personal data.

"These cases not only involve big data sets and what can be done with them, but it's also important because the Supreme Court has rarely spoken on privacy in a civil litigation context and this is the first time that the court is reaching this statute at all," Reed Smith LLP partner Mark Melodia said.

In the case that the high court has agreed to hear, a proposed class is challenging the Fourth Circuit's April decision to affirm a district court ruling nixing their claims that a group of attorneys illegally obtained personal data from the state Department of Motor Vehicles in order to troll for clients. Oral arguments are slated for Jan. 9.

The second case, which the justices were asked to consider in November, pits the village of Palatine, Ill., against a resident who claims that the Chicago suburb has been violating the DPPA by printing personal information on tickets issued to vehicles parked illegally.

A decision by the justices to review the Seventh Circuit's finding that the village violated the statute would further delineate the limits of what can be done with personal information, Reed Smith partner Paul Bond added.

"The Palatine case involves how broadly the statute's categories of exceptions should be read, so that could have an impact on all sorts of permitted uses of personal information," Bond said.

The petitioners in the case granted cert are represented by Philip N. Elbert, James G. Thomas and Elizabeth S. Tipping of Neal & Harwell PLC. The attorneys are represented by M. Dawes Cooke Jr. and John William Fletcher of Barnwell Whaley Patterson & Helms LLC.

The Illinois village is represented by James R. Griffin and Robert C. Kenny of Schain Burney Banks & Kenny Ltd. and Brandon Lemley of Querrey & Harrow Ltd. The resident is represented by Martin J. Murphy.

The case granted cert is Edward F. Maracich et al. v. Michael Eugene Spears et al., case number 12-25, in the U.S. Supreme Court. The case being considered is Senne v. Village of Palatine, Ill., case number 10-3243, in the U.S. Court of Appeals for the Seventh Circuit.

California ZIP Code Litigation

Following its 2011 ruling that classified ZIP codes as personal information under the Song-Beverly Credit Card Act of 1971, the California Supreme Court is poised to revisit the issue and potentially spur a flurry of litigation over whether online credit card transactions are exempt from the statute's ban on collecting personal information.

"The ruling could have a pretty significant impact on online marketers, since a lot of online-only transactions when collecting credit card information asks for ZIP codes," said Jenner & Block LLP privacy and information governance practice group head Mary Ellen Callahan.

During oral arguments in the case on Nov. 7, Apple Inc. urged the state high court to reverse a ruling that the law bars merchants from collecting consumers' ZIP codes, addresses and other personal information during online credit card transactions.

Affirming this decision would harm both consumers as well as online retailers by removing a vital tool for preventing credit card fraud, since online retailers don't have the ability to inspect a credit card or photo identification during the transaction, according to Apple.

"It seems to me that if you're running an online business and processing transactions, you have to have information that allows you to ship the goods and to help deter fraud," Newby said. "It's very different from the brick-and-mortar environment."

The plaintiff is represented by Eric Schreiber, Edwin Schreiber and Ean Schreiber of The Law Offices of Schreiber & Schreiber Inc.

Apple is represented by Paul Cane Jr., David Walsh and Adam Sevell of Paul Hastings LLP and Daniel Kolkey, S. Ashlie Beringer, Austin Van Schwing, Timothy Loose and Mary Cutler of Gibson Dunn & Crutcher LLP.

The case is Apple v. S.C. (Krescent), case number S199384, in the California Supreme Court.

Standard Fire Insurance Co. v. Knowles

The Supreme Court has also agreed to weigh a case that could deplete plaintiffs' ability to maintain privacy cases in state court using the tactic of agreeing to cap their damages at the \$5 million threshold set by the Class Action Fairness Act, attorneys say.

"If this waiver is not enforceable, then a lot of state court privacy cases are going to end up in federal court," Melodia said.

The case, which is slated for oral arguments on Jan. 7, could also impact the swell of challenges over the unlawful placement of Flash cookies, which are pieces of data that websites store on computers to improve functionality and track activity.

While federal court litigation over this technology has been mostly settled or dismissed, plaintiffs are continuing to push the litigation in states such as Missouri and Arkansas due to particularized pleading requirements that make the advancement of these suits easier.

"State courts bring a different level of tension to issues that end up stopping federal courts in their tracks, especially the standing issue," Bond said. "In state court, standing depends on the state's constitution and how high the bar is set, so plaintiffs have been deliberately choosing states to avoid certain requirements."

A victory in a state court case in 2013 could signal the "opening salvo to national litigation," since "once they get a strike somewhere, plaintiffs are going to look to replicate it in other places," Bond added.

Standard Fire is represented by Theodore Boutrous Jr., Theane Kapur, Joshua Lipshutz and Amir Tayrani of Gibson Dunn & Crutcher LLP; Stephen Goldman and Wystan Ackerman of Robinson & Cole LLP; and Lyn Pruitt of Mitchell Williams Selig Gates & Woodyard PLLC.

Knowles is represented by Jonathan Massey of Massey & Gail LLP.

The case is The Standard Fire Insurance Co. v. Greg Knowles, case number 11-1450, in the U.S. Supreme Court.

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