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Consumer Protection Cases & Policy To Watch In 2022

By **Allison Grande**

Law360 (January 3, 2022, 12:03 PM EST) -- The Federal Trade Commission's response to a recent U.S. Supreme Court decision that curtailed its restitution powers and cases challenging mandatory arbitration clauses will grab the consumer protection spotlight in 2022, along with continuing debates over what conduct is covered by robocall laws and whether a controversial Big Tech liability shield should be scrapped.

Here's a look at some of the cases and regulatory developments that consumer protection attorneys say they'll be keeping a close eye on in the new year.

FTC to Get Creative in Combating Loss of Restitution Powers

The Supreme Court dealt a blow to the FTC's consumer protection enforcement efforts in April when it **issued a ruling** that gutted the commission's power to seek federal court orders forcing bad marketplace actors to pay restitution.

Since then, the FTC — under the leadership of Democratic Chair Lina Khan, who took over the reins in June — has been aggressively wielding different strategies, including launching new rulemakings and sending out scores of warning letters, in a bid to claw back some of its previous powers.

"The FTC has made it clear that it's going to use all the arrows in its quiver to try to redress injuries to consumers," said John Villafranco, a partner at Kelley Drye & Warren LLP.

With the FTC seemingly "attempting an end-run around" the high court's decision, the big question going into 2022 will be whether the FTC has "found a loophole to address its lack of authority to seek monetary penalties," according to Andrew Lustigman, chair of the advertising, marketing and promotions group at Olshan Frome Wolosky LLP.

One major tactic being employed by the FTC is rulemaking. The commission has announced its intention to seize on a seldom-used authority under the Magnuson–Moss Warranty Act, which requires the commission to go through a more rigorous rulemaking approval process than most other federal agencies, to review nearly two dozen existing rules and guides and to develop multiple new rules on topics such as surveillance, data security, unfair methods of competition, algorithmic discrimination and impersonation fraud.

These procedures are likely designed to allow the FTC to wield its authority to seek consumer redress and recoup civil penalties when it's enforcing a rule, a power that wasn't affected by the Supreme Court's opinion, attorneys noted.

"This rulemaking push is a very interesting, unique and aggressive approach to give the FTC more teeth to go after companies in the absence of Congress giving them more authority," said Gary A. Kibel, a partner in the digital media, technology and privacy practice group at Davis & Gilbert LLP.

The FTC is also expected to pay close attention to "dark patterns" that websites use to trick consumers into making unintended choices. The commission this past year held a workshop to explore the issue and warned that it would be ramping up enforcement against the use of this tactic, noted Catherine Zhu, special counsel with Foley & Lardner LLP.

"This trend ... is expected to continue next year, and businesses should be aware of this," Zhu added. "It will likely impact product design, user engagement and other important considerations for tech

companies."

Another tactic that's being deployed by the FTC is to put companies on notice of a potential violation of a previous FTC administrative order, which would allow the commission to seek redress down the line. In October, the FTC relied on another little-used authority to fire off notice of penalty offense letters to roughly 1,800 companies regarding potential influencer, endorsement and testimonial violations, and an additional 1,100 received warning letters over alleged unsubstantiated money-making claims.

This strategy is likely to spark court challenges to whether a company "can be held liable for violating conduct in an administrative order to which it is not a party," Lustigman said.

"This would seem to be quite a stretch and raises significant due process concerns," he added.

While the courts are expected to play a vital role in determining the parameters of the FTC's powers, as legal challenges mount to the FTC's more expansive enforcement, attorneys say they'll also be watching to see whether Congress moves to restore the commission's lost restitution powers or enhance its civil penalty authority in the consumer protection realm in some other manner.

Momentum has stalled since the U.S. House of Representatives over the summer **approved a bill** that would give the FTC explicit authorization to seek money from scammers and antitrust violators directly in court, although Sen. Mike Lee, R-Utah, reinvigorated these efforts in December when he **introduced a bill** that would similarly allow the FTC to seek restitution in federal court while adding stronger due process protections for businesses accused of wrongdoing.

"There was an opportunity for the FTC to go to Congress after the Supreme Court's ruling and say that they really needed this authority, and there has been some support for that," said Maureen Ohlhausen, a partner at Baker Botts and former acting Republican chair of the FTC. "But given some of the positions the commission has taken since then and some of its rhetoric, that has raised concerns about giving the FTC open-ended authority to get monetary address in all cases and increased interest in having guardrails in place."

In the absence of congressional action, the FTC is also likely to look to partner more with state attorneys general, who weren't impacted by the Supreme Court's ruling and can still seek monetary injunctive relief in consumer protection and privacy matters.

"The FTC started that before the Supreme Court's decision came down, and they're going to ramp that up now, especially since they don't know what's going to happen with respect to getting more power from Congress," said Kyle Dull, an attorney at Squire Patton Boggs LLP and former Florida assistant attorney general.

This enhanced coordination could mean more uncertainty for businesses in figuring out how various laws and regulations apply to them, noted Lindsey Tonsager, co-chair of the data privacy and cybersecurity practice at Covington & Burling LLP.

"When companies are dealing with FTC staff who have been working on an issue like children's privacy for decades, they sort of know what to expect," Tonsager said. "But when they're dealing with a multistate attorneys general group, there can be a variety of opinions on how the law is interpreted and applied."

Attorneys are also expecting an uptick in consumer protection enforcement to spill out of the regulators' offices and into the courts.

Covington partner Cortlin Lannin forecasted an increase in the number of cases alleging that companies engaged in deceptive or misleading conduct by failing to follow the letter of "technical and sometimes esoteric" U.S. Food and Drug Administration regulations, while fellow Covington partner Ashley Simonsen predicted a continued focus on alleged misrepresentations related to environmentalism and sustainability claims.

"These [environmental] lawsuits will be important to keep an eye on given the broad use of these types of claims by consumer products companies, and the growing importance of these issues to

consumers," Simonsen said.

The Future of Mass Arbitration

Amazon turned heads in July when it **took the rare step** of bucking a popular requirement for consumers to arbitrate their legal claims, after the e-commerce giant was hit with thousands of individual arbitration claims over its allegedly improper collection of consumers' communications through its Alexa voice-activated speakers.

Jay Edelson, founder of prominent plaintiffs class action firm Edelson PC, told Law360 that he and his colleagues believe that "companies will increasingly abandon arbitration clauses as firms continue to push to bring mass arbitrations."

One case that should be "instructive" on this front is Doty v. ADT, a putative class action that Edelson filed in Florida federal court against ADT after a technician was allegedly found to have accessed in-home security cameras to secretly watch customers, according to the plaintiffs' attorney.

ADT successfully compelled arbitration to be done on an individual basis against both those who contracted with the company and anyone in their respective households, but when Edelson's firm "started bringing individual arbitrations, ADT switched course and (just) filed a motion trying to get the court to ignore its own contractual language and create some sort of consolidated proceedings so the cases would proceed collectively."

"Without a hint of irony, they are arguing that individual arbitrations would be unfair to them because of the costs," Edelson said.

Michael Daly, a partner at Faegre Drinker Biddle & Reath LLP, said another important arbitration case to watch in 2022 will be Viking River Cruises v. Moriana. After rejecting prior requests for review in other cases, the Supreme Court **agreed in December** to consider whether the Federal Arbitration Act preempts a California state law that prevents individual arbitration of representative claims under the Private Attorneys General Act.

The high court's ruling in the matter "could send a slew of disputes to individual arbitration and send other states' legislatures back to the drawing board," Daly said.

The cases are Doty v. ADT, case number 9:21-cv-80645, in the Southern District of Florida, and Viking River Cruises Inc. v. Angie Moriana, case number 20-1573, in the U.S. Supreme Court.

Robocall Litigation Shows No Signs of Abating

Consumers continued to flood the courts with litigation under the Telephone Consumer Protection Act in 2021. While the U.S. Supreme Court delivered some relief to companies in April, when **it unanimously ruled** in Facebook v. Duguid that the law narrowly applies only to random-fired calls and texts, plaintiffs attorneys have seized on other unresolved statutory questions to mount significant challenges that courts will need to grapple with in the new year.

"Even after the Supreme Court confirmed in Facebook that the TCPA's autodialer restrictions only apply to equipment that generates numbers randomly or sequentially, the statute is still top of mind for businesses that call consumers — and for the cottage industry that has taken to targeting them," said Daly, the Faegre Drinker Biddle partner.

Court decisions analyzing and applying the Supreme Court's ruling on what qualifies as an autodialer, or ATDS, will be one important area of developing case law to keep an eye on in 2022, attorneys say.

"Although Facebook endeavored to answer the question of what constitutes an ATDS, it left many other questions unanswered and raised others," said David Anthony, a partner at Troutman Pepper. "These questions include whether a plaintiff may nevertheless survive the pleadings stage on the ATDS question, or whether the device used to place the call need only have the 'capacity' to use a random and sequential number generator or must actually make 'use' of one."

Additionally, confusion over the Supreme Court's explanation of how numbers can be "stored" using a random or sequential number generator has sparked a debate over whether an ATDS is in use anytime a system uses a randomizer or number generator to determine the sequence in which phone numbers are dialed from a stored list, noted Eric J. Troutman, a Squire Patton Boggs LLP partner who specializes in TCPA defense work.

"The plaintiffs bar believes these number generation functionalities are present in most off-the-shelf dialers these days and are bringing test cases to prove it," Troutman said. "It's a brave new (TCPA) world."

The Supreme Court's autodialer ruling also has led plaintiffs attorneys to turn their attention to other aspects of the statute in their quest to recoup damages of between $500 and $1,500 per violation, including novel questions over whether minors can provide valid consent for companies to call or text their cellphones.

This issue is **at the center of** Hall v. Smosh Dot Com, a lawsuit filed in California federal court in October that alleges that minors can never provide the prior express written consent required by the TCPA, an assertion courts have yet to hash out.

"There is currently no case law addressing whether a minor can provide valid consent under the TCPA," Anthony said. "If the court accepts the plaintiff's theory, this could create a difficult compliance challenge for companies engaged in telemarketing that obtain consent via the internet, where it is difficult or impossible to ensure that the individual providing consent is not a minor."

Separately, the Ninth Circuit is set to tackle the issue of whether courts can certify and award hefty statutory damages to classes of consumers that have no injury or actual damages, in a case involving a $925 million award that was handed down after a federal jury found health supplement maker ViSalus had placed nearly 2 million unsolicited robocalls.

"The threat of astronomical aggregate statutory damages can create hydraulic pressure to settle even marginal claims. But it can also afford arguments for remitting damages on due process grounds or denying certification on superiority grounds," Daly said. "When and how to resolve these questions have split the circuits and are on a trajectory toward the Supreme Court — whether in this case or one of the many others like it."

Another issue that could be heard by the Supreme Court in 2022 involves the ongoing debate over the constitutionality of the statute. Electric and gas supplier Realgy asked the Supreme Court **in December to review** a Sixth Circuit ruling that the high court's July 2020 decision to cut down an unconstitutional debt collection exemption added to the TCPA in 2015 didn't free Realgy and other companies not seeking to collect debts backed by the federal government from liability for placing unwanted robocalls to cellphones while the flawed carveout was in place.

"If that case is taken up, it will force the Supreme Court to grapple with the uncertainty left by their fractured decision," which severed from the TCPA an exemption that the justices found unfairly favored government debt collectors over other callers while permitting the rest of the statute's sweeping ban on autodialed calls to cellphones stand, said Mark Eisen, partner and co-chair of the class action practice at Benesch Friedlander Coplan & Aronoff.

Additionally, litigators expect the coming year to bring an uptick in robocall claims filed under state laws, particularly a new Florida law that broadly defines what qualifies as an autodialer to include any system that determines the sequence in which numbers will be called and covers anyone with a Florida area code.

"The Florida 'Mini TCPA' has driven a huge quantity of litigation already — and it was just passed into law on July 1, 2021," Troutman said.

He added that increased attention is also being paid to a Washington state law that regulates all commercial texts and not just those sent using autodialers, as well as Virginia's "robust" do-not call protections and Texas registration requirements for autodialers and marketers, which allow for consumers to sue.

"So the gloves are really coming off at the state level," Troutman added.

Some of the major TCPA cases to watch are Lindenbaum v. Realgy LLC et al., case number 21-866, in the U.S. Supreme Court; Hall v. Smosh Dot Com Inc., case number 2:21-cv-01997, in the U.S. District Court for the Eastern District of California; and Wakefield v. ViSalus Inc., case number 21-35201, in the U.S. Court of Appeals for the Ninth Circuit.

'**The Year for Section 230**'

U.S. lawmakers have been debating for years over whether they should tweak or strongly curb Section 230 of the Communications Decency Act, which broadly shields websites from liability for content posted by third parties.

The1996 law is widely considered to have been essential to the rise of the modern internet, in part by ensuring that platforms like Facebook, Twitter, YouTube, Yelp and Reddit are not hindered by lawsuits over user-posted content. But legislators on both sides of the aisle have suggested making a slew of changes to the law, ranging from requiring tech firms to more clearly explain their content moderation practices to significantly rolling back Section 230 protections.

While these proposals have yet to advance, mounting concerns with how Big Tech companies are policing users' activities and handling consumers' data are continuing to fuel the debate, and the push for such reform is likely to carry into the new year.

"I think 2022 is going to be the year for Section 230 of the CDA," said Edelson, the plaintiffs attorney. "From debates in Congress to increased public awareness to some major lawsuits that will really bring Section 230 into focus, the question will be whether the CDA will be significantly curtailed."

A case that Edelson's firm has brought against Facebook over the Rohingya genocide is likely to be "pivotal for the debate," he said.

In the suit, the firm is **attempting to apply** Myanmarese law, as opposed to U.S. law, to prop up claims that the social media giant "encouraged and facilitated" the genocide carried out by the Myanmar regime against the Rohingya minority, since Myanmar "has no corollary to the CDA," Edelson said.

Parallel class action claims have also been filed in the U.K., under English law, over Facebook's conduct and similar allegations are about to be lodged in Canada, according to Edelson.

"These cross-border suits will really hammer home the ultimate point: Current U.S. law is being used to shield bad actors from the most egregious acts of our day," Edelson said. "The United States should be the North Star when it comes to protecting against genocide or systematic abuses of people. Instead, we have become a safe haven to the tech companies that have accelerated some of the worst behavior of modern times."

The case is Jane Doe v. Facebook, case number 21-CIV-06465, in the Superior Court of California, County of San Mateo.

--Editing by Bruce Goldman.