

Extracted from *Law360*:

## Privacy Cases To Watch In 2014

By **Allison Grande**

Law360, New York (January 01, 2014, 10:08 AM ET) -- While a pair of challenges to the [Federal Trade Commission's](#) authority to regulate data security are likely to hog the spotlight in 2014, attorneys say cases against companies such as Hulu LLC, the Los Angeles Lakers and [Google Inc.](#) will also have a significant impact by testing the strength of dated privacy statutes and novel injury theories.

Following an active year on the litigation front, 2014 promises to lend some clarity to not only the FTC's bid to become the federal government's dominant privacy regulator, but also a push by plaintiffs to use privacy statutes such as the Video Privacy Protection Act and the Telephone Consumer Protection Act to overcome long-standing injury hurdles and capitalize on the potential for large paydays.

"The whole issue of what level of damages is needed to support a privacy case will be interesting to watch in 2014," [Keller & Heckman LLP](#) partner Sheila Millar told Law360. "The ability of plaintiffs to pursue these types of cases has been limited because ... plaintiffs have had difficulty showing damages, but now there are efforts to promote statutory damages and construct new theories of what constitutes damages."

Here are some of the cases privacy attorneys will be keeping their eye on in 2014.

### Challenges to FTC's Data Security Authority

The top item on most privacy attorneys' watch list is how judges will respond to novel arguments advanced by [Wyndham Worldwide Corp.](#) and LabMD Inc. that the FTC lacks the authority to establish data security standards for the private sector under Section 5 of the FTC Act.

"As soon as regulators hear about a breach these days, they are very interested in immediately looking to see what level of data security was in place for the information," [Alston & Bird LLP](#) partner Kim Peretti said. "The cases will be very important in determining the scope of the FTC's authority to regulate data security."

A New Jersey federal judge **expressed skepticism** over Wyndham's contention that the agency lacks the proper statutory authority to dictate "reasonable" data security practices during a November hearing, and is poised to issue her ruling on the pivotal issue in the coming weeks.

Even if the judge rules against Wyndham, the FTC is still facing a parallel challenge to a similar administrative complaint that it filed against LabMD in September.

In its Nov. 12 **motion to dismiss**, the medical testing laboratory not only seized on the lack of statutory authority argument, but also advanced a contention not available to the hotel chain: that the commission cannot regulate protected health information because the Health Insurance Portability and Accountability Act gives the U.S. [Department of Health and Human Services](#) the sole authority to set and enforce rules for securing medical information.

"There is some fuzziness at the outer edges about who is covered as a business associate under the recently updated HIPAA rule," [McDermott Will & Emery LLP](#) partner Jennifer Geetter said. "The FTC getting involved is a recognition that even those at the outer boundary of the business associate community collect sensitive health information that needs to be protected, and that could result in the FTC's reach being enormous."

Wyndham is represented by Jennifer A. Hradil and Justin T. Quinn of [Gibbons PC](#), Eugene F. Assaf and K. Winn Allen of [Kirkland & Ellis LLP](#) and Douglas H. Meal of [Ropes & Gray LLP](#).

LabMD is represented by Reed Rubinstein of [Dinsmore & Shohl LLP](#) and Michael D. Pepson of Cause of Action.

The cases are Federal Trade Commission v. Wyndham Worldwide Corp. et al., case number [2:13-cv-01887](#), in the U.S. District Court for the District of New Jersey, and In the Matter of LabMD Inc., docket number 9357, before the Federal Trade Commission.

## Hulu Privacy Litigation

The FTC won't be the only plaintiff fighting to hold companies accountable for alleged privacy violations in 2014. A putative class of Hulu users will also be forging ahead with a closely watched suit that has the potential to spur a new flood of class actions under the Video Privacy Protection Act.

"The Hulu case is really key to seeing if using the VPPA as a vehicle for maintaining behavioral tracking class actions is going to become the new cash cow for plaintiffs or if the argument is a one-time-only shot," Alston & Bird partner Dominique Shelton said.

Following a rare victory by the plaintiffs on a motion to dismiss their claims that Hulu violated the VPPA by disclosing their viewing history to third parties, the California federal court held oral arguments on Hulu's [summary judgment motion](#) on Dec. 19. A magistrate judge denied the company's bid to nix the suit the following day, finding that the plaintiffs did not need to show harm beyond the alleged statutory violations.

Besides clarifying the disputed issue of whether the VPPA allows plaintiffs to recover damages for intangible privacy violations, the case is also likely to shine significant light on what information can be considered personally identifiable, according to plaintiffs' attorney Jay Edelson of [Edelson LLC](#).

"In these days, where unique identifiers in isolation or in combination with other identifiers can be used to determine who an individual is, we expect some interesting rulings on this issue, through the Hulu courts and others," he said.

The plaintiffs are represented by David C. Parisi and Suzanne Havens Beckman of Parisi & Havens LLP; Scott A. Kamber, David A. Stampley and Grace E. Tersigni of KamberLaw LLC; and Brian R. Strange and Gretchen Carpenter of Strange & Carpenter.

Hulu is represented by Robert M. Schwartz, Steven M. Dunst, Katherine M. Robison and Victor Jih of [O'Melveny & Myers LLP](#).

The case is In re: Hulu Privacy Litigation, case number [3:11-cv-03764](#), in the U.S. District Court for the Northern District of California.

## Emanuel v. Los Angeles Lakers

While the Hulu case has the potential to raise the profile of the VPPA, the Telephone Consumer Protection Act has already been established as a potent tool for overcoming standing obstacles, and attorneys expect plaintiffs to continue to wield the statute in 2014.

Practitioners will particularly have their eyes trained on a Ninth Circuit case challenging the dismissal of a text-spamming class action against the Lakers that has the ability to stem some of the growing tide of litigation.

"The case is an important one because it's in a closely watched circuit, it involves a name brand entity, it involves a pretty weak claim [involving contact initiated by the plaintiff], and it has the ability to limit the filing of TCPA cases by way of the court's decision on what constitutes an automatic telephone dialing system," said Martin Jaszczuk, [Locke Lord LLP's TCPA](#) class action litigation section head.

TCPA class actions have exploded in recent years, fueled by plaintiffs' desire to capitalize on uncapped statutory damages of between \$500 and \$1,500 per violation and unclear statutory language, and the growth is expected to continue, especially given recent changes to the statute that tighten consent requirements.

The Ninth Circuit could help slow the influx by siding with the Lakers' contention and ruling that plaintiffs need to make a plausible case that an automatic dialing system was used to send the alleged text messages, an outcome that [Twitter Inc.](#) and Path Inc. also pushed for when [they intervened in the suit](#) in November in an attempt to limit plaintiffs' ability to wield the statute as an "extortionist club."

"Companies are really starting to realize that at some point in time, unless the TCPA is somehow checked, it's going to bite everybody," Jaszczuk said.

On the final day of 2013, the Lakers fan threw a wrench in the plan to make the case the posterchild for TCPA class actions by informing the Ninth Circuit that he and the team [had settled the suit](#). The parties intend to present their resolution to the court within 45 days.

Emanuel is represented by S. Abbas Kazerounian, Jason A. Ibey and Matthew M. Loker of the [Kazerouni Law Group APC](#) and by Joshua B. Swigart of Hyde & Swigart.

The Lakers are represented Perrie M. Weiner, Joshua M. Briones and Esteban Morales of [DLA Piper](#).

The case is David M. Emanuel v. The Los Angeles Lakers Inc., case number [13-55678](#)">13-55678, in the U.S. Court of Appeals for the Ninth Circuit.

## Google Gmail Litigation

The plaintiffs' bar will also be eager to seize on the Electronic Communications Privacy Act to quash standing difficulties, although the effectiveness of the argument is likely to hinge on the outcome of Google's challenge to a [September ruling](#) that some of its business practices are not covered by a statutory exemption, according to attorneys.

"The statute lay dormant through most of the 2000s, [but] the Google Wi-Fi case may signal a shift in how courts view these cases," [Orrick Herrington & Sutcliffe LLP](#) counsel Eulonda Skyles said. "Courts are now willing to fill in the blanks of ECPA to find liability for new technologies that weren't contemplated when the act was written in the 1980s."

In a ruling that conflicts with other jurists, including a [colleague in the same court](#), Judge Lucy Koh concluded that Google's practice of analyzing content in Gmail accounts without obtaining consent is not covered by the "ordinary course of business" exemption to ECPA.

Google has asked Judge Koh for permission to appeal the decision to the Ninth Circuit, which the judge has taken under advisement.

"The case is on everyone's radar because its outcome could help shape the law regarding companies' responsibilities towards their customers and noncustomers when performing automated analyses on their data," Edelson said.

The plaintiffs are represented by Wyly-Rommel PLLC, [Kerr & Wagstaffe LLP](#), [Cory Watson Crowder &](#)

[DeGaris PC](#), [Golomb & Honik PC](#), [Slocumb Law Firm LLC](#) and [Goldenberg Heller Antognoli & Rowland PC](#), among others.

Google is represented by Michael G. Rhodes, Whitty Somvichian and Kyle C. Wong of [Cooley LLP](#) and Kathleen M. Sullivan of [Quinn Emanuel Urquhart & Sullivan LLP](#).

The case is In re: Google Inc. Gmail Litigation, case number [5:13-md-02430](#), in the U.S. District Court for the Northern District of California.

## Data Breach Litigation

While plaintiffs' attorneys have had less success at sustaining claims over data breaches due to the lack of relevant federal statutes, a recent spate of favorable settlements and the advent of creative damages theories is fostering a more positive outlook for 2014, according to attorneys.

"Several cases are raising creative damages theories like benefit of the bargain, under which plaintiffs argue that a certain portion of what they paid should have gone to data security protections which they didn't revive," [Reed Smith LLP](#) data security, privacy and management practice leader Mark Melodia said.

Melodia specifically pointed to a pair of California class actions involving breaches at [Sony Corp.](#) and [Blizzard Entertainment Inc.](#) that included these types of claims. A California federal judge also **recently ruled** that plaintiffs challenging Google's aggregation of user data could establish standing by alleging direct economic injuries through battery and bandwidth consumption, despite ultimately nixing their ECPA claims.

The creative damages theory also made its way into a **recent settlement of claims** related to a data breach at [AvMed Inc.](#) The novel agreement, which is still pending the district court's approval, for the first time allows plaintiffs who did not suffer identity theft to claim funds based on the theory that a portion of the insurance premium that customers paid to the company was supposed to be used to improve security.

"Data breach litigation will continue to increase, and thus data breach precedence will continue to become established," Edelson said. "The settlement awaiting final approval in AvMed is illustrative on this point."

The plaintiffs in the AvMed case are represented by Jay Edelson, Ari J. Scharg and Benjamin S. Thomassen of Edelson LLC.

AvMed is represented by John J. Delionado and Paulo R. Lima of [Hunton & Williams LLP](#).

The case is Resnick et al. v. AvMed Inc., case number [1:10-cv-24513](#), in the U.S. District Court for the Southern District of Florida.

--Editing by Katherine Rautenberg.