THE NATIONAL LAW JOURNAL

JUNE 13, 2011

An ALM Publication

Will the real Mr. Rescue please stand up?

By taking on the state of Florida, a former prosecutor may have inspired companies to fight back.

BY RICHARD ACELLO

When the state of Florida came after Alltel Communications Inc. alleging unfair trade practices, the company might have settled—that's what most companies in that situation would have done, said litigator Marcos Daniel Jiménez.

"These cases are brought by [attorneys general] all over the country, and what you end up seeing a lot is that companies don't want to go to trial because they're afraid of adverse publicity," Jiménez said.

Verizon Wireless Inc., which acquired Alltel in 2008, didn't take that route. It hired Jiménez, managing partner of the Miami office of Kasowitz, Benson, Torres & Friedman, to defend the action.

The trial centered on a roadside assistance program for cellphone customers called "Mr. Rescue" devised by Alltel. Following a three-year investigation, former Florida Attorney General Bill McCollum charged Alltel in 2006 under the state's deceptive and unfair trade practices act; his beef was that the company signed up customers for the service unless they opted out. The state sought $20 million in restitution for more than 400,000 customers and hundreds of millions of dollars more in statutory penalties.

On July 20, 2010, Jiménez won final judgment on all counts after the trial judge determined that the state failed to show that the company engaged in widespread deceptive or unfair practices. The judge said the practices at issue were not inherently deceptive or unfair and that the state "failed to introduce sufficient evidence of a widespread practice of deception."

According to George LeMieux, a former state deputy attorney general and U.S. senator now in private practice in Gunster, Yoakley & Stewart's Fort Lauderdale office, the case marked only the second time in a decade that a lawyer had taken the Florida attorney general's office to trial and won. "Marcos is an extraordinary attorney," LeMieux said. "It's always difficult when you're facing the AG in court, because there's a tremendous sympathy by juries on cases brought by the AG. And, of course, Tallahassee is the state capital, where there are a lot of state employees on the jury panel."

Assistant Attorney General Keith Vanden Dooren, lead counsel for the state, was unavailable for comment.

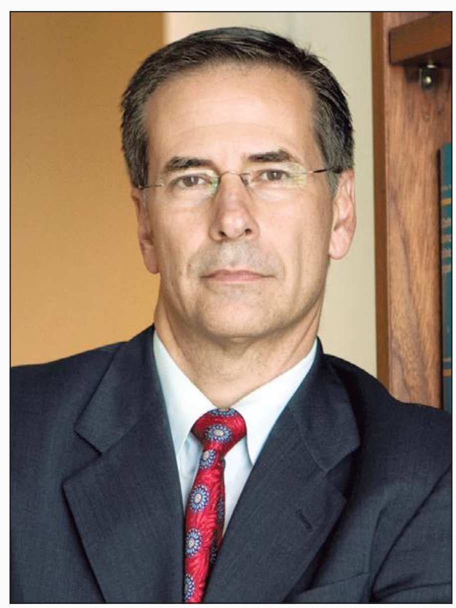
Jiménez certainly had the credentials to undertake the challenge. As U.S. attorney in Miami from 2002 to 2005, he ran one of the largest federal prosecution teams in the country in cases involving national security; health care; securities, corporate and consumer fraud; and narcotics trafficking. At Kasowitz, he handles complex commercial litigation, corporate internal investigations and white-collar criminal cases.

RISKY STRATEGY

Coming into the case in 2009, Jiménez immersed himself in the details of Alltel's billing, particularly for a subset of customers who were inadvertently overcharged due to a computer programming error. These customers

MARCOS DANIEL JIMÉNEZ

| MCDERMOTT, WILL & EMERY



CANDACE WEST

RISK-TAKER: "Reimbursing a sub-set of customers 'was a risky move on our part, but we thought it was the right thing to do.'"

would become a linchpin of his trial strategy.

"We made a strategic decision to carve out that subset of customers and reimbursed them around $1.6 million," Jiménez said, including interest on their overpayments. "It was a relatively small percentage, but the charges were not attributable to human error since it was a computer error. So we said, 'Let's just carve those out and reimburse them.' It was a risky move on our part, but we thought it was the right thing to do."

The risk was that the payments would be seen as an admission of guilt, but they had another, more beneficial, effect: They narrowed the class of consumers the state sought to protect.

"I think the class issue was the most important, since it drove everything else," Jiménez said. "Clearly, some customers should not have been charged, so the question was: Could the state use a very small subset of the overall group to establish classwide damages?"

Jiménez also had to confront what he called "bad facts"—unfavorable testimony by a disgruntled former employee. "We were very hard on that witness, put her statements into context, and that helped the judge understand our position," he said.

The case went to trial in May 2010 in Leon County, Fla., Circuit Court in Tallahassee. Judge John Cooper heard testimony from 21 live witnesses, including economics experts for each side, and heard or reviewed the deposition testimony of 31 additional witnesses.

The case came down to the level of proof required when the attorney general seeks damages on behalf of a large class of consumers with differing experiences at the point of sale. The state sought to apply the facts relating to a few dozen consumers to recover classwide damages and penalties relating to hundreds of thousands of people.

Jiménez argued that Florida could not do that. "The charges that were disputed depended on the interaction between the customer and the sales representative, and the factual circumstances varied greatly," he said. "We thought they needed more than an extrapolation to prove their case."

The case never reached a jury. The attorney general's office originally sought a jury trial, Jiménez said, but changed its mind about six months before trial, when officials realized how complicated the case would be.

Jiménez received "great assistance" from Verizon's in-house legal staff, he said, including Mary Coyne, the company's chief for litigation, and Patricia Sunar. Jiménez's litigation team included Kasowitz partner Ann St. Peter-Griffith. Los Angeles-based Munger, Tolles & Olson provided support on briefs.

Jiménez called it a "team win" that might make companies more willing to litigate when confronted with similar claims—or to offer "voluntary refunds in the right situations."

Richard Acello is a freelance reporter in San Diego.

TRIAL TIPS

Know the case inside and out, as nothing can replace thorough preparation.

Be up-front about your case's weaknesses and put them in the best possible light—preferably before the other side does.

Have fun, since being in court is what it's all about.