

Facebook Sheds User Tracking MDL For Third And Final Time

By **Allison Grande**

Law360, New York (November 17, 2017, 10:21 PM EST) -- A California federal judge on Friday tossed for the third and final time sprawling multidistrict litigation accusing Facebook of unlawfully tracking users' browsing activity after they signed off, ruling that plaintiffs had failed to identify an actual contract that prohibited the social media site's behavior.

The ruling came in response to Facebook's bid to ax the third amended consolidated complaint, which Facebook users Perrin Davis, Cynthia Quinn, Brian Lentz and Matthew Vickery filed in August after U.S. District Judge Edward Davila nixed the majority of their claims while granting them leave to amend their allegations for breach of contract and breach of the duty of good faith and fair dealing.

The Facebook users argued that they had each entered into a contract with the site that consisted of its statement of rights and responsibilities, its privacy policy and relevant pages from its help center. They also said the social media giant had made both explicit and implicit promises in its privacy policy and on its help center pages that it would not track the web browsing activity of logged-out Facebook users on third-party websites.

But Judge Davila rejected the plaintiffs' definition of the contract at issue, finding that while the statement of rights and responsibilities on its own formed a valid contract, that document made no mention of the tracking of logged-out users, and the remaining two policies couldn't be tied into the statement of rights and responsibilities in the way that the Facebook users argued it should be.

"Plaintiffs have not identified contractual provisions that prohibited Facebook from tracking logged-out users in the manner plaintiffs allege," Judge Davila concluded in dismissing the breach of contract and breach of duty claims for good.

When it came to Facebook's privacy policy, Judge Davila shot down the argument that the terms were incorporated by reference into the statement of rights and responsibility, or SRR. In the privacy policy, Facebook states that among the data it receives when users visit a third-party site with a Facebook feature, such as a social plugin, are user IDs "if you are logged into Facebook." The plaintiffs contended that this statement "implicitly promises to the average user that Facebook will not receive [a user-identifying] cookie when the user is not logged in."

But Judge Davila found that the version of the privacy policy that contains this language about not collecting logged out users' IDs was published in September 2011, more than four months after the

publication of the latest version of the SRR that the plaintiffs relied on when mounting their claims.

"As Facebook points out, the SRR does not use the term 'Data Use Policy' and does not contain any other references to the Data Use Policy." Judge Davila said, using another name for Facebook's privacy policy. "Nor could it, since the Data Use Policy plaintiffs cite and rely on did not exist until several months after Facebook published the most recent version of its SRR that plaintiffs attach to their complaint."

The judge reached a similar conclusion with respect to the help center pages that the plaintiffs claimed contained promises not to track logged-out users, finding that neither the SRR nor the privacy policy contained any direct references to these pages.

"Plaintiffs appear to argue that the individual help center pages are subparts of a single 'broader document,'" Judge Davila noted. "This argument finds little factual support. The help center pages exist independently at different URLs, as underscored by the fact that plaintiffs attached help center pages as separate exhibits to their [third amended complaint]. No evidence suggests that a Facebook user who reads one help center page has also read, or is even aware of, any of the others."

Facebook's associate general counsel Natalie Naugle said in a statement Friday that the company was "pleased with the court's well-reasoned ruling."

A representative for the plaintiffs did not immediately respond to a request for comment.

The dismissal of the contract claims without leave to amend marks the final chapter in an MDL that dates back to 2012 and at its inception sought more than \$15 billion in damages and injunctive relief for Facebook's allegedly knowing interception of users' internet communications and activity after logging out of their Facebook accounts.

Judge Davila first trimmed the suit in 2015, when he ruled that the plaintiffs hadn't proven that they had suffered economic damage or shown Facebook violated privacy laws including the federal Wiretap Act, the Stored Communications Act, California's Invasion of Privacy Act and California consumer protection law.

However, the judge granted the Facebook users leave to amend their claims, leading to a second amended complaint that Judge Davila again axed in a July ruling. In that decision, the judge concluded that plaintiffs had failed to fix the standing and pleading deficiencies that had previously plagued their wiretap, fraud and scores of other allegations, although he did grant them leave to amend their breach of contract and good faith allegations.

Judge Davila allowed no further tweaks to the suit in Friday's decision, ruling that since the plaintiffs' amendments to their contract claims had failed to cure the defects the court identified in its last ruling, their claims should be dismissed without leave to amend.

The users are represented by Stephen G. Grygiel of Silverman Thompson Slutkin & White LLC and Frederic S. Fox, David A. Straite, Laurence D. King and Mario Choi of Kaplan Fox & Kilsheimer LLP.

Facebook is represented by Matthew D. Brown, Michael G. Rhodes, and Jeffrey M. Gutkin of Cooley LLP.

The case is In re: Facebook Internet Tracking Litigation, case number 5:12-md-02314, in the U.S. District

Court for the Northern District of California.

--Editing by Pamela Wilkinson.

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