

Facebook Health Site Tracking Legal, 9th Circ. Says

By **Ben Kochman**

Law360 (December 7, 2018, 7:50 PM EST) -- A Ninth Circuit panel has found that a lower court rightly dismissed a suit brought by Facebook users who claimed the company illegally scraped data about their visits to medical websites, finding the users consented to the tracking by agreeing to Facebook's privacy policy.

The three-judge panel said Thursday that a California district court was right to toss the case against Facebook, American Cancer Society Inc., American Society of Clinical Oncology Inc. and five other health care organizations.

The appeals court disagreed with the users' argument that their browsing history on the health websites, which had installed a Facebook plug-in that sent the data back to the social media giant, was in a "qualitatively different" class from other data and thus not covered by Facebook's terms of service.

"We do not agree that the collected data is so different or sensitive," the panel wrote in a ruling it said should not be applied as precedent for future cases. "The data show only that plaintiffs searched and viewed publicly available health information that cannot, in and of itself, reveal details of an individual's health status or medical history. Moreover, many other kinds of information are equally sensitive."

The appeals court also nixed the plaintiffs' argument that Facebook could not have obtained consent because the health care websites pledged in their privacy policies not to share data with third parties.

"Facebook's terms and policies make no such assurance, and Facebook is not bound by promises it did not make," the judges wrote.

Facebook and the health care groups first shook the suit in May 2017, when U.S. District Judge Edward J. Davila tossed claims that they violated the Wiretap Act, the California Invasion of Privacy Act and a host of other laws and duties. The district court ruled both that the users had consented to the tracking and that the websites didn't have enough of a connection to California.

In October, an attorney for the plaintiffs argued at oral arguments before the appeals court in San Francisco that the lower court had erred by reading Facebook's consent provisions in isolation, without considering "the entirety of the circumstances."

Attorney Jay Barnes of Barnes & Associates argued that the users' consent to the company's terms was

essentially meaningless because they'd relied on Facebook's promise that "privacy is important to us." He cited the Ninth Circuit's recent decision in *Fober v. Management and Technology Consultants LLC*, saying it held that "in every case, the scope of consent must be determined upon the facts of the situation on which the person gave consent."

Counsel for the users and Facebook did not immediately respond to requests for comment sent on Friday.

U.S. Circuit Judges Sidney Runyan Thomas and Susan Graber and U.S. District Judge Robert S. Lasnik sat on the panel.

The users are represented by Jay Barnes of Barnes & Associates.

Facebook is represented by Lauren R. Goldman of Mayer Brown LLP.

The case is *Smith et al. v. Facebook Inc. et al.*, case number 17-16206, in the U.S. Court of Appeals for the Ninth Circuit.

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