

*Internet***Google Cookie Suit Crumbles as SCOTUS Nixes Review of Web Browser Tracking Case**

Tech companies may have dodged a bullet as the U.S. Supreme Court Oct. 3 denied review to consumers upset about Alphabet Inc.'s Google's and third party advertisers' alleged practice of placing cookies that evade web browser privacy settings (*Gourley v. Google, Inc.*, U.S., No. 15-1141, review denied 10/3/16).

The consumers argued that the case raises important issues on the scope of the Electronic Communications Privacy Act (ECPA), under which the Wiretap Act and the Stored Communications Act (SCA) reside, that could allow sweeping warrantless government surveillance.

The plaintiff-petitioners said the U.S. Court of Appeals for the Third Circuit wrongly affirmed the dismissal of the case and that the federal statutes and the courts that interpret them are woefully behind in dealing with advanced technology (188 PRA, 9/28/16).

Peter Karanjia, Washington- and New York-based partner and co-chair of the appellate practice at Davis Wright Tremaine LLP, told Bloomberg BNA Oct. 3 that applying the Wiretap Act—a 1968 statute that was updated in 1986 by ECPA—to the modern internet “poses challenging and difficult questions.”

This is yet another case that “highlights the challenges of applying a decades-old law to modern technology,” he said.

According to the consumers, when a consumer using Apple Inc.'s Safari Web browser or Microsoft Corp.'s Internet Explorer browser visited a website using third-party tracking cookies from Google, Media Innovation Group LLC, WPP Plc and Vibrant Media Inc., those tracking cookies circumvented the consumer's internet browsers settings that blocked the cookies. The defendants responded that they never hacked into the browser privacy settings.

Even though Google gave its name to the case, it reached a settlement in principle with the consumers and didn't respond to the petition. This wasn't the first time that Google was accused of trickery involving cookies.

Google previously agreed to pay a \$22.5 million civil penalty to settle similar Federal Trade Commission claims (154 PRA, 8/10/12) and a California federal court

approved that settlement in December 2012 (223 PRA, 11/20/12).

According to Karanjia, any company that circumvents cookie blockers are doing so at their own peril. At a minimum, this type of practice creates “significant risk,” he said.

Petitioners' Arguments. In the case at hand, the federal trial court threw out most of the case because it held that the consumers had failed to show how they were injured.

The Third Circuit affirmed, holding that a party using third-party cookies is immune from the Wiretap Act as an actual party to the communication between internet users and the websites (218 PRA 218, 11/12/15).

Seeking Supreme Court review, the plaintiff-petitioners said the Third Circuit ruling creates a split with two other federal circuit courts on the application of the Wiretap Act.

According to Karanjia, however, there wasn't a genuine circuit split on the application of the Wiretap Act. The Third Circuit's holding seems “in line” with other cases, he said.

The petitioners also argued to the Supreme Court that the Third Circuit incorrectly held that a party using third-party cookies is immune from the Wiretap Act as an actual party to the communication between internet users and the websites. The appeals court's opinion could allow law enforcement to use the same exceptions to allow placement of cookies to permit warrantless searches, the petitioners said.

In addition to their Wiretap Act arguments, the petitioners said that the Third Circuit filed to address whether web browsers are “facilities” under the Stored Communications Act.

The respondents told the high court that the consumers had failed to raise the issues in the court below, so they shouldn't be allowed to raise them now.

Bartimus, Frickleton and Robertson PC represented the consumers. Vibrant Media was represented by Venable LLP. Media Innovation Group and WPP were represented by Ropes & Gray LLP. Google was represented by Wilson, Sonsini, Goodrich & Rosati PC.

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List of granted and denied petition for a writ of certiorari is available at <https://www.supremecourt.gov/>

orders/courtorders/100316zor_9ol1.pdf.