

## Privacy Group Of The Year: Munger Tolles & Olson

By **Jess Davis**

*Law360, Dallas (January 20, 2016, 10:52 PM ET) --* Munger Tolles & Olson LLP's privacy and data security team defended ESPN and Disney Interactive from claims their apps violated user privacy, secured the end to class action suits against LinkedIn and wiped out privacy claims against a smartphone manufacturer, making it one of Law360's Practice Groups of the Year.



The Munger Tolles team also doubled down on an important precedent they set in a medical records breach suit against the University of California system, landing a victory for the University of California, Los Angeles in a \$1.25 million, seven-day trial that alleged UC regents were liable for a violation of California's Confidentiality of Medical Information Act.

"We work with a lot of different types of companies involving a lot of different technologies and different laws," the firm's Rosemarie Ring said. "I think we benefit, and so do our clients, from the fact that we have such a broad range of privacy cases and technologies at issue."

Kicking off 2015, a California federal judge in January dismissed claims in a multidistrict proposed class action against Munger Tolles client HTC Corp. alleging it and other device makers violated the Federal Wiretap Act, the Stored Communications Act and a litany of other federal and state consumer protection laws. The MDL, which consolidated almost 70 nationwide cases, involved allegations software on the phones unlawfully tracked user data.

Munger Tolles also brought home twin victories for ESPN Inc. and a Disney unit in two separate suits filed by consumers who used the companies' apps through Roku television boxes. In proposed class actions, consumers alleged the companies violated the Video Privacy Protection Act by sending Roku device serial numbers and video viewing history to an Adobe Systems Inc. analytics unit.

At the heart of both suits was an assertion the serial device numbers could constitute "personally identifiable information" under the act.

In the ESPN case, a Washington federal judge in May said personally identifiable information, as defined under the VPPA, pertains to information that specifically identifies an individual and doesn't include anonymous identification numbers or information. That ruling is on appeal to the Ninth Circuit.

And in the Disney case, a New York federal judge in October said applying the VPPA to serial number data would make the scope of information covered under the law "limitless" and that the court would not ascribe such an expansive intent to Congress in enacting the VPPA.

Ring said plaintiffs in privacy cases are pushing the envelope in trying to expand the definition of certain terms or broaden the scope of statutes that were written long before the invention of the technology used in their lawsuits, like the VPPA and Wiretap Act.

When plaintiffs resurrect long-dormant statutes in litigation — what Ring likens to pushing round pegs into square holes — she said the firm doesn't get caught up in big policy arguments but instead finds success by going "back to the basics" and focusing on the text of the statutes and what Congress intended when it passed them.

"If you go back to what was intended, courts understand plaintiffs are trying to stretch the law in ways that are not appropriate," she said.

In June and August, the firm's privacy practice brought to an end two proposed class actions accusing client LinkedIn Corp. of using members' images in advertising campaigns without their authorization.

In the first suit, the firm won dismissal of all federal statutory claims, including alleged violations of the Wiretap Act, leading to a settlement that resolved remaining claims. In the second suit, plaintiffs voluntarily dismissed their case after the firm's motion to dismiss was fully briefed.

On the data security side of the practice, Munger Tolles won a jury verdict in favor of UCLA with a finding that the school's health system wasn't responsible for the unauthorized release of a woman's medical records by a romantic rival. The \$1.25 million suit was one of the first data disclosure cases to actually go to a jury trial, Munger Tolles' Jonathan Blavin said.

Blavin said a 2013 appellate victory won by Munger Tolles on behalf of the University of California's Board of Regents paved the path for the trial win, because the jury instructions were consistent with a ruling that plaintiffs must be able to prove their confidential information was improperly viewed.

"I think it will cause plaintiffs' lawyers to think carefully about their claims and whether they can ultimately prevail in front of a jury," Blavin said. "In a lot of these cases you have what's alleged to be a violation of the law. It's often a very technical violation and it's difficult to see how anyone was damaged at all by that violation."

Blavin said the UC case shows juries can see through what was alleged to be a technical violation of the law to find there was no underlying injury or harm to the plaintiff.

He and Ring worked together on the HTC, LinkedIn and ESPN and Disney cases. Their collaboration on those and many other cases is emblematic of the firm's culture of working together, Ring said. Clients get the benefit of all the practice group's best thinking, no matter who's assigned to the case, because of the frequent and often lengthy discussions the privacy lawyers have with each other about their cases and the issues they're facing, she said.

“We know the arguments that have been made, we know the areas that are still unclear and unsettled,” Ring said. “I think, based on our experience, we both have a feel for which arguments are really going to advance the ball. Big picture, what are the big, open issues in privacy law and is this the right case to push those issues or not? There’s a lot of collaboration in these cases.”

--Editing by Kelly Duncan.

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