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Privacy Plaintiffs Uncover Way To Win Rare Class Cert.

By **Allison Grande**

Law360, New York (April 08, 2013, 10:43 PM ET) -- To score elusive certification of a privacy class action last week, a group of consumers alleging a data research company sold their information without permission capitalized on a boilerplate licensing agreement to help unify their claims and establish standing, potentially paving the way for other plaintiffs to overcome pleading-stage roadblocks, attorneys say.

In an April 2 ruling, Northern District of Illinois Judge James F. Holderman certified a class that could top one million people who have unwittingly downloaded comScore Inc.'s tracking software via one of its bundling partners within the past eight years.

Plaintiffs' attorney Jay Edelson of Edelson LLC said he believed this was the largest privacy case ever certified on an adversarial basis.

"The ComScore certification is significant if for no other reason than class certification is rare in cases arising from privacy violation allegations," Shook Hardy & Bacon LLP data security and privacy group co-chair Al Saikali told Law360 Monday.

The suit claims comScore violated the Stored Communications Act, the Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act by covertly installing software on users' computer that collects data about their activity and sends it to comScore's servers.

The company then sells the information to media giants such as The Wall Street Journal, The New York Times and Fox News for statistical use in their articles and as a gauge of consumer interest in products and services, according to the suit.

Typically, privacy plaintiffs mire down during the pleading stage, unable to prove that each proposed class member suffered the same type of harm, or that they suffered the type of quantifiable injury that entitles them to standing at all.

But by turning to an end-user license agreement each consumer saw before downloading comScore's tracking software, the plaintiffs in this case were able to establish a commonality others have struggled to achieve, according to attorneys.

"Judge Holderman rejected comScore's argument that the scope of consent for each class member would be based on their respective subjective understanding of the form contract," said Sedgwick LLP partner David Almeida. "If courts are going to continue to discount the subjective aspects of consent, expect to see many, many more of these 'scope of consent' privacy cases filed."

Edelson, the plaintiffs' attorney, agreed that the common representations in the license

agreement were key to certification, calling the matter “a simple case about the interpretation of a form contract.”

“In this context, the court's decision fits neatly into the legions of court decisions that explain that when the key issues surround the interpretation of a uniform contract, class certification is merited,” he said.

According to attorneys, the comScore plaintiffs were likely helped over the certification hurdle by their claims under the Electronic Communications Privacy Act and the Stored Communications Act, two federal privacy laws that carry statutory damages.

“Because the statutes themselves call for damages, there tends to be a stronger argument for damages at the pleading stage,” BakerHostetler partner Erica Gann Kitaev said. “I think we’ve seen an increasing trend toward statutory damages cases, and this case underscores that.”

But the plaintiffs' victory was a qualified one: The court declined to grant certification on a claim for common law unjust enrichment, saying the law varied too much from state to state for class treatment to fly. This wasn't much of a surprise, attorneys said.

“The comScore certification decision is very consistent with other cases establishing that plaintiffs will have a tough time certifying nationwide common law and state-specific statutes for [subjects like] consumer fraud due to complex choice of law problems,” Almeida said.

Although many attorneys said the ruling fell in line with developing case law on both the privacy and the class action fronts, some saw the comScore decision as an outlier. Because it was based on the terms of a standard-form contract, which might not exist in other consumer cases, they expressed doubt that others would follow suit.

“In general, the decision appears to be out of line with the trend these days requiring plaintiffs to demonstrate a workable theory of classwide proof on each element of their claims,” Ropes & Gray LLP partner Mark Szpak said.

Even Edelson cautioned that it would be “a mistake to simply lump all privacy cases together and treat them like they are some type of unique animal that courts need to deal with.”

The plaintiffs are represented by Jay Edelson, Rafey S. Balabanian, Ari J. Scharg, Chandler Givens and Benjamin S. Thomassen of Edelson LLC.

ComScore is represented by Andrew Schapiro, Stephen Swedlow and Robyn Bowland of Quinn Emanuel Urquhart & Sullivan LLP and by Paul F. Stack and Mark William Wallin of Stack & O'Connor Chartered.

The case is Mike Harris et al. v. comScore Inc., No. 1:11-cv-05807 in the U.S. District Court for the Northern District of Illinois.

--Editing by Kat Laskowski and Chris Yates.