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Plaintiffs Attys Will Find Way Around Driver's License Ruling

By Allison Grande

Law360, New York (June 17, 2013, 9:39 PM ET) -- Even though the U.S. Supreme Court ruled Monday that plaintiffs attorneys cannot use driver's license records to find potential clients for class actions, they will still be able to build classes through plenty of other popular avenues, such as Facebook postings and television ads, experts say.

In a 5-4 decision reversing the Fourth Circuit, the high court held that soliciting legal clients is not a valid purpose for obtaining names, Social Security numbers and other personal information from state motor vehicle departments. The court rejected the argument that the practice was permitted under an exception to the federal Driver's Privacy Protection Act that allows the disclosure of this data "for use in connection with ... an investigation in anticipation of litigation."

"If [the exception] were to permit disclosure of personal information whenever any connection between the protected information and a potential legal dispute could be shown, it would undermine in a substantial way the DPPA's purpose of protecting an individual's right to privacy in his or her motor vehicle records," the majority ruling said.

But attorneys from both the plaintiffs and defense bars predicted that lawyers will sidestep the ruling by turning to the plethora of other ways still available for soliciting clients.

"I don't think this limits or puts a big roadblock in the way of class action plaintiffs' attorneys because there are lots of other ways to troll for plaintiffs, including advertising on TV, using their websites or Facebook pages, or through the class notification process," BakerHostetler partner Craig Hoffman said.

For instance, plaintiffs attorneys can obtain court orders that require defendants to turn over information about potential class members — a viable, and sometimes even preferable, alternative to scooping up piles of sensitive driver's license data, according to plaintiffs attorney Brian Kabateck, a founding partner of Kabateck Brown Kellner LLP and president of the Consumer Attorneys of California.

"There's not any shortage of ways that smart, ethical class action lawyers can find class representatives," he said.

And the ruling doesn't prohibit attorneys from invoking the disputed exception once litigation is under way, for the more limited purposes of tracking down witnesses or finding out information about a litigant's driving record.

Justice Anthony Kennedy pointed to these potential workarounds in his majority opinion. Attorneys remain free to solicit plaintiffs through "traditional and permitted advertising without obtaining personal information from a state DMV," and to use the information for "proper investigatory purposes" such as discerning the extent of alleged misconduct, he wrote.

They can also comply with the statute by limiting their notices to individuals who have “expressly consented” to receiving marketing materials, a tactic that is permissible under another exception to the DPPA, according to the opinion.

“In light of these and other alternatives, attorneys are not without the necessary means to aggregate a class of plaintiffs,” the opinion said. “What they may not do, however, is to acquire highly restricted personal information from state DMV records to send bulk solicitations without express consent from the targeted recipients.”

Despite the majority's firm stance on the “for use in connection with litigation” exception, the ruling also leaves several questions for the Fourth Circuit to address on remand: Was soliciting clients the main purpose of the communications at issue in the suit? Was the attorneys' conduct permissible under another exception to the DPPA that allows attorneys to collect information if they are acting as private attorneys general?

Attorneys could use these unanswered questions to get around the majority's opinion, according to Akin Gump Strauss Hauer & Feld LLP appellate practice co-head Rex Heinke.

“There's likely to be future litigation at least over how to determine what a predominant purpose for sending a notice is,” he said.

Some attorneys say DMV databases are of limited use to plaintiffs attorneys, anyway, since the scope of their data is narrow.

“I'm not aware of DMV records being a critical source of information for plaintiffs class action attorneys,” Hoffman said. “The use in this case made sense because attorneys were looking for people who bought cars from different dealerships and were able to find over 30,000 car purchasers. But if you're looking for someone impacted by a credit card data breach or an online privacy issue, then the DMV database won't be very useful.”

Kabateck says he has never contemplated using driver's records to find class action representatives, since California has a strict "pro-privacy" interpretation of the DPPA and he believes accessing the records is too invasive.

“The Supreme Court's decision is completely consistent with stance of most class action lawyers, who advocate all the time to support reasonable privacy restrictions on private records like driver's license data,” he said. “To advocate for privacy and then go out and use records like that to find out about potential class members doesn't seem to make much sense.”

Fellow plaintiffs attorney Jay Edelson of Edelson LLC agrees that the decision strikes an appropriate balance between the lawyer's ability to access data and the consumer's right to privacy.

“Even as a plaintiffs attorney, I agree with the court's decision,” he said. “Congress has gone to great lengths to protect the private information of Americans. We're glad that the Supreme Court similarly recognizes the importance of privacy rights, especially given current events."

The petitioners are represented by Joseph R. Guerra of Sidley Austin LLP and Philip N. Elbert of Neal & Harwell PLC.

The respondents are represented by Paul D. Clement of Bancroft PLLC and M. Dawes Cooke Jr. of Barnwell Whaley Patterson & Helms LLC.

The case is Edward F. Maracich et al. v. Michael Eugene Spears et al., case number 12-25, in the U.S. Supreme Court.

--Editing by Kat Laskowski and Melissa Tinklepaugh.
