

Calif. Android Users Win Class Cert. In Google Data Use Row

By **Allison Grande**

Law360 (October 27, 2023, 2:01 PM EDT) -- A California state judge has agreed to certify a class of Android mobile device users who are accusing Google of illegally using their cellular data allowances to passively transfer information without their permission, finding that the proposed class members share "numerous" commonalities that make proceeding collectively the superior choice.

Just over a year after the Northern District of California tossed a separate suit alleging the same claims for conversion and quantum meruit against Google for its allegedly unlawful passive data transfer practices, Superior Court Judge Sunil R. Kulkarni on Thursday permitted the suit before him to move forward by granting the plaintiffs' motion to certify a statewide class of Android users who have purchased devices they use with monthly cellular data plans.

Judge Kulkarni found that the proposed class of California residents, which is estimated to have over 13 million members, easily met the numerosity requirement for certification, that class members could be identified through Google's own records and self-identification, and that "numerous common legal and factual issues" existed that predominated over individual issues.

"To start, the types of data transfers focused on by plaintiffs affect all or virtually all Android users because they are triggered by the same software present on all or virtually all Android devices," the judge ruled. "While there may be types of network transfers that affect different users differently, those are not the transfers at issue in this class certification motion."

Plaintiffs Attila Csupo, Andrew Burke and Kerry Hecht accuse Google of misappropriating their data allowances without their permission through "passive data transfers," which are transmissions that occur in the background and don't result from users' direct engagement with Google products.

These transfers — which the plaintiffs allege Google initiates to fuel its product development and targeted advertising practices — happen "in a variety of ways," including when mobile devices that are connected to cellular networks are completely "stationary, untouched and with all apps closed," according to the plaintiffs, who additionally assert that these transmissions are "significantly more frequent" on Android devices than during comparable use of an iPhone that doesn't come with Android or Google applications pre-installed.

In ruling on the plaintiffs' class certification motion, which came after the plaintiffs survived a bid by Google to dismiss the suit in August 2020, Judge Kulkarni found that Google's opposition focused mainly on the merits of the claims instead of the "key question" at the class certification stage of whether the

transfers are present for "a large proportion" of Android users.

"In fact, Google stipulated that 'all or nearly all' Android users experienced Clearcut and CheckIn transfers," the judge noted. "Thus, there is a 'centralized practice' that exhibits 'common behavior toward similarly situated plaintiffs.' Whether these transfers are truly 'passive' is a merits question, to the extent it is relevant."

Judge Kulkarni also found that, because the plaintiffs are relying solely on Google's misappropriation of cellular data to show harm, they don't have the issues with individualized inquiries that could have arisen if they had argued that class members experienced throttling or overage charges.

Additionally, Google fell short with its argument that consent is an individualized issue that dooms class certification, with the judge finding that express consent requires users to have agreed to the same terms or submenu and that whether class members had impliedly consented through other means like continuing to use the phone after learning about the practices in a newspaper article didn't present additional barriers to certification.

"Even assuming arguendo that some putative class members heard about the allegations, Google denied these allegations," Judge Kulkarni noted. "These putative class members could have believed Google and kept on using their devices because of Google's denials. The court does not construe such continued phone use as implied consent, as these putative class members didn't have all relevant, material facts in order to make an informed decision to consent."

The judge also rejected Google's contention that class certification should be denied because class members could have "wildly different" damages, finding that individualized issues regarding damage amounts do "not defeat a class action as long as there are common questions of liability amenable to class resolution" and that the plaintiffs' inability at this stage to establish how damages will be allocated "is not fatal to plaintiffs' class certification motion."

"Here, the court finds that 1 class action would be superior to 13 million (or even 13) individual lawsuits," Judge Kulkarni added. "If plaintiffs succeed on the merits of their claims, this class action will give individuals a chance for compensation for small harms — small enough that individual actions are unlikely. And if plaintiffs don't succeed, then Google will not need to face hundreds or thousands of follow-on suits (assuming the number of opt-outs is low.)"

In his ruling, Judge Kulkarni also separately denied attempts by both sides to exclude certain expert opinions.

The plaintiffs had pushed for the exclusion of Google expert Dr. Natalie Mizik, who provided opinions about the extent to which class members were generally aware that Android smartphones make these passive data transfers and how this knowledge would affect their decision of buy a new phone or data plan, while Google moved to exclude the plaintiffs' expert Dr. Jon Krosnick, who provided an expert report rebutting Mizik's survey-based opinions, and three other experts who provided opinions on issues such as passive data transfers and the fair market value of cellular data.

Judge Kulkarni determined that the plaintiffs had failed to show that Mizik's methodology of using a non-random online survey to collect consumers' views on passive data transfers "is so far out of the mainstream in her field that opinions flowing from the methodology should be excluded."

The judge similarly rejected Google's exclusion bid, finding that Krosnick wasn't late in filing his report since the court had allowed for such rebuttals to be submitted after the filing deadline and that all the experts were "qualified" to offer their opinions and their methodologies passed muster.

Representatives for the parties couldn't be reached for comment Friday.

Thursday's state court ruling comes on the heels of an October 2022 decision in which a Northern District of California judge tossed nearly identical claims over Google's alleged passive data transfers.

In that decision, U.S. District Judge Virginia K. DeMarchi granted Google's motion to dismiss the suit with prejudice, finding that the consumers had not shown that they have ownership of the cellular data at issue or that they had been harmed by the tech giant's alleged practice of illegally using Android users' cellular data to constantly transmit data back to Google.

In particular, Judge DeMarchi took issue with the consumers' attempt to show that Google has been "free-riding" off cellular data that they own. They had likened cellular data to the consumption of electricity or water, noting that electricity is considered property under California law.

"The [first amended complaint's] allegations, however, indicate that a user does not actually possess cellular data until the user sends or receives a transmission of information," Judge DeMarchi said. "Thus, as in the original complaint, the [first amended complaint] suggests that there is nothing that customers possess that is separate and apart from their use of a particular or unlimited quantum of access to the network, which is measured in these bytes of data — i.e., a right of access that is entirely defined by their respective contracts with their cellular carriers."

And ultimately, the benefits of contractual rights are not personal property capable of shouldering such a claim, the judge said.

Judge DeMarchi also found that, while the consumers had alleged that they had been harmed by Google's alleged passive data transfers by having their data throttled or having to pay an overage fee for using more data than they purchased, the plaintiffs had failed to allege in their complaint that anyone had "to pay more money for data or suffered a degradation in service."

That dispute — which unlike the state court suit sought to represent a nationwide class of all users, except for those in California, who have used Android mobile devices that access the internet through cellular data networks operated by mobile carriers — is currently on appeal to the Ninth Circuit.

The plaintiffs in the state court suit are represented by Glen Summers, Karma Giulianelli and Alison Wheeler of Bartlit Beck LLP, Mark Wallenstein, Michael E. Klenov, Carol O'Keefe, George A. Zelcs, Robert E. Litan and Ryan Z. Cortazar of Korein Tillery LLC and Ann Ravel of McManis Faulkner.

Google is represented by Whitty Somvichian and Max Bernstein of Cooley LLP.

The suit is Csupo et al. v. Google Inc., case number 19CV352557, in the Superior Court of California, County of Santa Clara.

--Additional reporting by Hailey Konnath. Editing by Patrick Reagan.

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