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Litigators of the Week: Google Hit With a $425.7 Million Verdict in Landmark Data Privacy Class Action Trial

By Ross Todd

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Our Litigators of the Week are **David Boies** of **Boies Schiller Flexner**, **Bill Carmody** of **Susman Godfrey** and **John Yanchunis** of **Morgan & Morgan**, who represented two classes totalling roughly 98 million Google users. Plaintiffs claimed Google collected data from third-party apps without their consent despite affirmative steps users took to opt out of the company's data collection.

Last week, after almost three weeks of trial and 10 hours of deliberations, federal jurors found for the plaintiffs on their claims of invasion of privacy and intrusion upon seclusion awarding a total of $425.7 million—$247.2 million to Android phone users and $178.5 million to non-Android-phone users. Although staggering, that number was well short of the more than $30 billion in compensatory, nominal, unjust enrichment and punitive damages sought, and jurors did not side with plaintiffs on their claim under the California Computer Data Access and Fraud Act.

How would you describe what was at stake here? Exactly what data was Google collecting and why was it a problem?

David Boies: Google was collecting data concerning people's use of the third-party apps that everyone today has on their phones even when users had said

Courtesy photos

(l-r) David Boies of Boies Schiller Flexner, Bill Carmody of Susman Godfrey, and John Yanchunis of Morgan & Morgan.

"no". The two most important questions at stake were related: Is it possible to protect people's privacy in today's world, and is it possible to successfully try complicated cases against large tech companies before juries?

How did this matter come to you and your firms?

Boies: The fact that Google was still collecting users' data even when users told Google not to was initially unraveled by **Mark Mao** at Boies Schiller working with **James Lee** and **Beko Reblitz-Richardson**. The

three firms decided to pursue the case together because of the special expertise and experience each brought to the effort.

Bill Carmody: Mark Mao and James Lee at BSF figured out the truth—that even when the Web & App Activity button was off, Google still collected users' activity data on non-Google apps. But Google is a formidable opponent and it takes a strong team to take them on. This group of three firms seemed like a natural fit—John Yanchunis's privacy litigation experience and Susman Godfrey's experience litigating complex class actions in this district rounded out the team.

John Yanchunis: Google's data and collection practices have been scrutinized and publicly reported on. Concerned consumers contacted Boies Schiller Flexner to learn more about the potential issues with these data collection practices and agreed to pursue claims against Google.

Who was involved and what was the division of labor, both in the run-up to trial and at the trial itself?

Boies: We formed a virtual law firm consisting of Boies Schiller, Susman Godfrey and Morgan & Morgan. The Boies Schiller participants included **Alison Anderson**, **Alex Boies**, James Lee, Mark Mao, Beko Reblitz-Richardson, **Samantha Parrish**, **Logan Wright**, **Victoria Scordato** and **Julia Bront**. Both during the pretrial phase and during the trial, lawyers from all three firms worked together seamlessly. At trial, James Lee put on our plaintiffs, **Amanda Bonn** at Susman and Mark Mao handled our expert witnesses, Bill Carmody examined the two Google witnesses that we called adversely in our case and I opened, closed and cross-examined the witnesses that Google brought in its case. Alison Anderson, **Ryan McGee** at Morgan & Morgan and Beko Reblitz-Richardson argued several key motions.

Carmody: There was also an incredible team of other partners, associates and staff from all three firms supporting the effort from behind the scenes.

Yanchunis: Each firm contributed to the prosecution of this case in a collaborative and collegial manner throughout the litigation. As the case came closer to trial, the three firms divided up witnesses (both for the case in chief and also for Google's anticipated lay and expert witnesses). Each firm contributed to the development of themes and strategy to be deployed at trial.

What were the key challenges in presenting this case to a jury?

Yanchunis: Privacy remains an abstract concept. Fortunately, juries (and courts) are turning the tide and understanding that just because a harm isn't physical (like a broken bone or money lost), consumers are still harmed by companies invading their privacy and taking their valuable, personal and sensitive data for profit.

You began your presentation of the evidence by putting Google witnesses on the stand. Why did you go that route?

Yanchunis: Google's own employees (product managers and engineers) were expressing concerns about the Web & App Activity privacy control years before this litigation was launched. They said that the WAA button was broken and the disclosures were intentionally vague. We thought it would resonate with the jury to hear from one of Google's own employees who was on many of those emails with other whistleblowers. And based on the jury's decision on liability, that strategy worked.

You had to show that Google's actions were "highly offensive" to prove your invasion of privacy and intrusion upon seclusion claims, where the jurors sided with you. But there was no such requirement for your California Comprehensive Computer Data Access and Fraud Act claim, where the jury sided with Google. What happened there?

Boies: The jury clearly found that Google's misleading of users to gain access to their personal data, and then using that data to profit from it, was highly offensive. We can't know why the jury did not find CDAFA liability. The jury's question requesting clarification as to the meaning of the "loss

or damage" requirement of CDAFA could suggest that they thought that that required them to find that plaintiffs suffered a monetary out-of-pocket loss. One of the jurors afterward suggested that some of them focused on the fact that plaintiffs had the burden of proving lack of permission under CDAFA, but Google had the burden of proving consent for its invasion of privacy. Google also argued that somehow plaintiffs did not own their data, which it argued was a requirement under CDAFA.

Your ultimate ask during closing arguments was for $31 billion. Even though the jury returned a verdict of $425.7 million, that was less than the value your expert put on a month's worth of data in a nearly 60-month class period. What do you make of where the jury came out?

Boies: The jury awarded more than 80% of what our expert calculated the value of the data taken to be. The jury reduced the amount because it found that, for a period of time, Apple users were less affected because of changes Apple had made to protect their privacy. The $31 billion was intended to demonstrate how conservative our expert's calculation was.

What are you asking for in terms of injunctive relief? Do you have any indication of when Judge Seeborg might rule on that and the parties' post-trial motions?

Yanchunis: We briefed our requested injunctive relief at class certification, which would potentially include remediations to the data Google collected, changes to Google's collection practices, as well as more explicit, robust disclosures informing consumers about what data is collected and what Google does with that data. This would be overseen by an independent third party to ensure compliance and reporting. We are working with Google on a jointly-proposed schedule that we intend to submit to the court soon.

Yours is at least the second high-stakes privacy class action to make it to trial in the San Francisco federal courthouse in as many months. With what's at stake in these cases, do you think we'll see more of them actually being tried in the near term?

Boies: I think this case demonstrates that it is possible to hold big tech companies accountable for their actions and to protect the privacy of people who care about their privacy. I think that you will see more of these cases for a period of time. I hope and believe that as time goes on and more of these cases are successful, as I believe they will be, I think that large tech companies will modify their practices both to better protect people's privacy and to better inform their users of how they collect and use people's data so that their users can make informed decisions.

What will you remember most about this matter?

Boies: What we were able to accomplish towards protecting people's privacy and giving consumers a meaningful choice concerning what of their data is collected and how it is used, and the way the entire team from three high-ego firms worked together selflessly to make it happen.

Carmody: The case truly is a David v. Goliath story in more ways than one. It shows that when truth is on your side, it's possible to take on a literal Goliath in its own backyard. But it helps when David Boies is your champion.

Yanchunis: The true camaraderie amongst our firms working these past five years to achieve this historic result—particularly in the months leading up to trial. With different litigation styles and levels of experience, our firms quickly coalesced to tackle the myriad, unpredictable challenges that are presented at trial. We are grateful for all of the lawyers, staff and witnesses who devoted countless hours and immense effort to bringing this case through trial to verdict.