SUTHERLAND

LEGAL ALERT

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"Privacy Driven": Supreme Court Limits Use of Driver Data for Client Solicitation by Attorneys

Does the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725, allow lawyers to mine databases maintained by state departments of motor vehicles (DMVs) for the purpose of gathering plaintiffs for an emerging lawsuit? Is an otherwise-prohibited act of solicitation allowed where such a solicitation may facilitate the development of a class action? No, according to the U.S. Supreme Court in *Maracich v. Spears* (No. 12-25, argued Jan. 9, 2013). A 5-4 majority of the Court yesterday held that attorneys may not use Act-protected information for the primary purpose of client solicitation, even when such solicitation is meant to locate additional plaintiffs for a class action. Click here for the opinion.

The Court's ruling resolved a conflict in the circuits over the interpretation of several enumerated exceptions to the Act's general prohibition against disclosing driver data gathered by state DMVs. The first of those exceptions is the "litigation exception," which allows personal information to be disseminated if it is to be used "in connection with any" court proceedings, including the service of process, investigation in anticipation of litigation, and the execution of enforcement of judgments and orders. 18 U.S.C. § 2721(b)(4) (also known as the "(b)(4) exception"). The Act contains a separate "solicitation" exception, which allows a state DMV to disclose personal information for purposes of surveys, marketing or solicitation, but only if the department has implemented procedures allowing individuals an opportunity to prohibit such disclosures. 18 U.S.C. § 2721(b)(12) (also known as the "(b)(12) exception").

Petitioners, a group of consumers, sued various trial lawyers claiming that they violated the Act when they gathered and later used the personal information of 34,000 individuals without their consent. Respondent lawyers used the consumers' personal data, which had been obtained through a series of state Freedom of Information Act (FOIA) requests to the South Carolina DMV, to generate mass mailings seeking additional plaintiffs for a recently filed putative class action against various car dealers.

Respondents moved to dismiss the putative class action, arguing that their use of the consumers' data was "in connection with" litigation and was part of an "investigation in anticipation of litigation." The District Court agreed, holding that the lawyers' conduct was both protected by the litigation exception and the governmental-function exception.[1] On appeal, the U.S. Court of Appeals for the Fourth Circuit ruled that the lawyers' use of the data was permitted under the litigation exception, without addressing whether other exceptions covered the respondents' activities.[2]

In a majority opinion authored by Justice Anthony Kennedy, the Court reversed both lower courts and held that the solicitation of prospective clients is neither a use "in connection with" litigation nor an

[1] Respondents had also argued that they were authorized under South Carolina law to act as private attorneys general on behalf of the state, and thus their activities were protected by the Act's governmental exception (also known as the "(b)(1) exception," codified at 18 U.S.C. § 2721(b)(1)).
[2] The Fourth Circuit's ruling stood seemingly contrary to Third and Eleventh Circuit precedent stating that disclosures pursuant to the "litigation exception" must involve information that is relevant or likely to lead to discovery of evidence or witnesses.

"investigation in anticipation of litigation" under the Act's "litigation exception." Because the statute generally protects highly sensitive information, the Court reasoned, all of its exceptions should be read narrowly. Under such a reading, the reference in subsection b(4) to an "investigation in anticipation" extends only to activities to decide whether a potential claim has sufficient merit to warrant a lawsuit, or to locate witnesses, but not activities designed to sign up clients for a case. In the Court's view, though "the (b)(4) exception allows this sensitive information to be used for investigation in anticipation of litigation, there is no indication Congress wanted to provide attorneys with a special concession to obtain medical information and Social Security numbers for the purpose of soliciting new business." (Slip op. at 15) Reading subsection (b)(4) to permit disclosure of personal information when there is any connection between protected information and a potential legal dispute, the Court reasoned, would substantially undermine the Act's purpose of protecting a right to privacy in motor vehicle records. The Court's opinion does not seem to implicate the use of DMV data by expert witnesses in advance of litigation.

In determining whether obtaining, using or disclosing personal information constitutes a prohibited solicitation under the Act's terms, "the proper inquiry is whether the defendant had the predominant purpose to solicit." (Slip op. at 22) Such a purpose, the Court explained, may be inferred from either the communication itself or from associated conduct. Where solicitation is the predominant purpose, the "litigation exception" does not entitle attorneys to Act-protected information even when the solicitation seeks to locate additional plaintiffs for a class action. In so concluding, the Court stressed the availability of other alternatives (such as traditional or otherwise-permitted advertising), as well as counsel's ability to obtain Act-protected information for a proper investigative use. Further, "the attorneys could also have complied with (b)(12) and limited their solicitation to those individuals who had expressly consented, or respondents could have requested consent through the Act's waiver procedure." (Slip op. at 24)

The Court was careful to note that it was only judging the respondents' conduct in terms of the "litigation exception" – the basis for the Fourth Circuit's ruling. The Court also raised, but did not address, the issue of whether statutory damages under the Act for respondents' potential violations based on a class of more than 30,000 individuals would comport with "principles of due process and other doctrines that protect against excessive awards."[3] (Slip op. at 26)

Justice Ruth Bader Ginsburg's dissent dismissed the majority's interpretation of the Act as an unwarranted "sojourn away from [the exception's] text in search of a limiting principle." (Ginsburg, J., dissenting, slip op. at 10) The dissent would have instead permitted the use of DMV information under the "litigation exception," because the mailings at issue both "advance[d] the representative character of the suit during a critical time in the [] litigation" by "gather[ing] information about the fees charged by the [putative defendant car] dealers" and by identifying additional plaintiffs. (Ginsburg, J., dissenting, slip op. at 5-6)

The Fourth Circuit had ruled that the respondents' mass mailings, though they were solicitations, were protected by the "litigation exception" because they were "inextricably intertwined" with permissible litigation purposes. Yet under the proper standard, the mailings at issue would not be permitted by that exception if solicitation was the "predominant purpose." Thus, the Court remanded the case for the lower courts to objectively decide whether the "predominant purpose" behind the mass mailings was for client

[3] The Court's discussion on this topic may be cited in future controversies over possible due process limits on class certification of statutory damage claims. *See Bateman v. American-Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010).

solicitation (and thus illegal) or for some other permissible litigation-related purposes (in which case they would be permitted under the exception).

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