

Privacy MVP: Covington & Burling's Eric Bosset

By **Allison Grande**

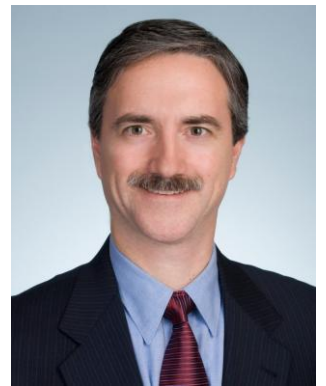
Law360, New York (December 09, 2011, 6:44 PM ET) -- Mounting an aggressive defense to behavioral advertising and online tracking claims, Eric Bosset of Covington & Burling LLP has helped Cable One Inc., Microsoft Corp., AOL Inc. and other major corporations quickly escape potentially costly litigation, earning him a place among Law360's Privacy MVPs.

Bosset, a partner in the firm's Washington office, has become adept at striking down privacy claims in their infancy, using his grasp of relevant statutes and case law in this rapidly evolving area to quickly exploit deficiencies in these cases.

"A pleading is an allegation, it's not an establishment of truth," Bosset said. "Our view at Covington and my view personally is that these claims should be defended against vigorously because you don't know if there's anything behind these allegations until you investigate these claims, and there may be a point along the way that a company can succeed in getting them dismissed."

Bosset has recently implemented this strategy to obtain several significant victories, including the August dismissal of his clients Microsoft, CBS Corp., McDonald's Corp. and Mazda Motor of America Inc. from a putative class action accusing them of conspiring with online advertising network Interclick Inc. to track consumers' Web usage. Interclick provided counsel of record, and Covington was retained as separate counsel.

The suit, filed in New York federal court, alleged that the defendants interfered with users' computers by implanting "flash" browser cookies that could track Web usage even when users cleared their browser history, and that they misappropriated the personal information gained through these intrusions for monetary gain.



Eric Bosset

But in dismissing the four advertiser defendants from the suit with prejudice, the court agreed with their contention that plaintiff Sonal Bose could not maintain her claim under the Computer Fraud and Abuse Act, which has a \$5,000 minimum damages threshold, because she had failed to allege that the advertisers had any specific interaction with her or that they had any knowledge of or active participation in Interclick's alleged unauthorized access.

"The advertising defendants were just using the Internet to place their advertisements, and they simply hadn't done anything that could remotely be viewed as wrongful," Bosset said.

The success came six months after Bosset secured a similar victory at the dismissal stage for his client Cable One in a putative class action in Alabama.

In that case, Samuel Green claimed that the Arizona-based cable and Internet service provider violated the Electronic Communications Privacy Act, the CFAA and state law by allowing NebuAd to test a system using "deep packet inspection" to anonymously profile subscribers' online activity for the purpose of serving targeted ads.

But during the deposition and discovery stage, Bosset and his team discovered that the plaintiff had not used the Cable One Internet service during the period in which the NebuAd test had allegedly occurred, a revelation that led to a quick dismissal of the claims against his client in February.

"The Cable One case is a good example of one of the things that attracted me to litigation: that when you really bore into the facts, you can discover an issue that can blow a case wide open and enable your client to prevail earlier than you might have anticipated," Bosset said.

His argument presented in a motion to dismiss also recently led to the voluntary dismissal of a putative class action in Massachusetts federal court accusing his client AOL and two video technology companies of using flash cookies to tailor ads to subscribers based on their Web-browsing interests.

In the September motion, AOL argued that its user agreement bound subscribers to file any action against the Internet service provider in Virginia, meaning that the suit — which subscriber Sandra Person Burns filed in Massachusetts, where defendants Brightcove Inc. and ScanScout Inc. are headquartered and where AOL maintains an office — could not legally proceed.

But before the court could rule on the request, the plaintiff voluntarily dismissed her claims against AOL and Brightcove without prejudice in a Nov. 23 notice.

In all of his matters, Bosset and the Covington team leverage a deep understanding of relevant statutes in order to advance strong and persuasive defenses, a skill Bosset used to his advantage in the trio of favorable outcomes during the past year.

"If you have a good sense of the various exceptions and allowances under the statutes and are persistent, it's easier to show that the claims don't have merit," Bosset said.

Bosset has handled class action litigation since joining Covington following his graduation from Yale Law School in 1987, but began working extensively on privacy matters in recent years as these issues have become more prevalent.

“Privacy is a very interesting subject matter because technological developments are changing in very unpredictable ways that companies themselves might not even fully foresee,” Bosset said.

And the ever-changing nature of developments in this area makes it vital that companies don't cave too quickly to these novel allegations, a strategy that has served Bosset's clients well in recent months.

“It can be a tactical and strategic error for companies to settle quickly to get these kinds of cases behind them,” Bosset said. “A settlement stokes plaintiffs' lawyers and makes companies an easy target the next time new technology or any upgrade is introduced. But if you litigate a case that ought to be litigated because it has no merit, you're much less likely to be a target in the future.”

--Editing by Andrew Park.

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