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BART Derails App User's Data-Collection Class Action

By **Brandon Lowrey**

Law360, Los Angeles (December 15, 2017, 8:53 PM EST) -- A California federal magistrate judge has tossed a putative class action alleging the San Francisco Bay Area's public rail system secretly collected users' personal data with its BART Watch smartphone app, but said the claims could be salvaged in a more thorough complaint.

U.S. Magistrate Judge Jacqueline Scott Corley on Thursday dismissed plaintiff Pamela Moreno's privacy and consumer rights complaint against San Francisco Bay Area Rapid Transit District and app developer Elerts Corp., saying Moreno failed to connect some of the dots in her claims.

For example, Moreno's constitutional privacy claim failed because Moreno didn't plausibly show that the BART system used the collected data for any nefarious or objectionable purpose.

"Indeed, she does not allege that BART uses the data for any purpose, or even that BART was aware of the data collection," Judge Corley wrote. "In this age of mobile technology the court cannot conclude that a reasonable user would consider it highly offensive or egregious that a voluntarily downloaded mobile application which utilizes the user's cell phone identifier and location data when the app is in use, also 'periodically' accesses that anonymous data while the application is not in use."

Judge Corley, however, gave Moreno leave to amend her claims and try again.

Moreno sued BART and Elerts in May and later filed a first amended complaint alleging the transit agency and software developer committed intrusion and violated California's Cellular Communications Interception Act, the right to privacy under the state constitution and an anti-electronic tracking law.

Moreno accuses the San Francisco Bay Area Rapid Transit District of furtively collecting unique identifiers associated with consumers' cellphones and their physical locations through the BART Watch app, designed by Massachusetts-based Elerts, without users' permission or knowledge.

Since launching the BART Watch app in 2014, BART and Elerts have persuaded tens of thousands of Californians to download it on their smartphones via the Google Play and Apple App Store.

The app offers transit alerts, the option to call police at the touch of a button, and the ability to report incidents, anonymously or not, according to the complaint. The app has consistently been marketed as a "discreet" way to quickly alert security personnel about safety and security concerns, the suit says.

Moreno was among those who downloaded the app onto her Samsung Galaxy S7 in 2016. She used it regularly as part of her commute, according to her complaint.

However, she wasn't aware that the app actually secretly collects mobile device identification numbers, periodically monitors users' locations even when they aren't reporting incidents and tracks the identities of anonymous reporters, according to the complaint. The app's user agreement and privacy policy don't make clear the extent of the information being collected and don't properly get consent from users, the suits alleges.

Shortly after Moreno filed her complaint in May, BART spokeswoman Alicia Trost said in a statement

that the agency doesn't use the Elerts system for "any other purpose than responding to security and safety reports made by our riders."

In June and July, BART and Elerts, respectively, filed motions to dismiss the claims. They argued Moreno consented to the data collection when she downloaded the app and expressly granted it permission to collect her data. The defendants also said her electronic tracking claim failed because Moreno can't state a claim under that law, that the state's Cellular Communication Interception Act doesn't apply to them, and that Moreno failed to plead her constitutional and common law claims.

On Friday, Elerts attorney Esteban Morales Fabila of Mintz Levin Cohn Ferris Glovsky & Popeo PC told Law360 that the judge made the right decision. He said the case appears to him to be an attempt by the plaintiffs to "push the boundaries of existing law and make new law."

He added that the electronic tracking claim, in particular, fails because the underlying law was crafted to apply to tracking devices "attached to a vehicle or other movable thing" without the consent of the owner, and was not meant to apply to smartphones.

"What we're dealing with here is an app that's voluntarily downloaded," he said. "That's not what lawmakers had in mind when they were writing that law."

Representatives for the other parties did not immediately respond to requests for comment.

Moreno is represented by Rafey Sarkis Balabanian, Eve-Lynn Rapp, John Aaron Lawson, Todd M. Logan, and Nina Eisenberg of Edelson PC.

BART is represented by Gordon James Calhoun and Rene I. Gamboa of Lewis Brisbois Bisgaard & Smith LLP. Elerts is represented by Esteban Morales Fabila and Joshua Briones of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

The case is Pamela Moreno v. San Francisco Bay Area Rapid Transit District et al., case number 4:17-cv-02911, in the U.S. District Court for the Northern District of California.

--Additional reporting by Shayna Posses. Editing by Kelly Duncan.