



In recent months, a wave of lawsuits has swept across the nation, targeting websites for allegedly violating state wiretapping laws through their use of tracking software.

Despite none of these statutes explicitly addressing the use of this ubiquitous technology—technology that offers significant benefits to consumers—these claims continue to be filed. The courts have been processing how to interpret wiretapping laws in the age of modern internet technologies. However, a recent case before the Massachusetts Supreme Judicial Court sheds new light on this issue, offering insights and potential precedents. In *Vita v. New England Baptist Hospital*, the plaintiff, Kathleen Vita, claimed that two separate hospitals violated Massachusetts' Wiretap Act by using analytics software to collect and share information regarding her activity on their websites without her consent. In a 5-1 ruling, the Massachusetts Supreme Judicial Court found

that the Wiretap Act does not cover the website tracking technology challenged in Ms. Vita's complaint and reversed the lower court's denial of the defendants' motion to dismiss.

## **The Challenged Technology**

Ms. Vita alleged the hospitals collected and transmitted information about her sessions on the non-"logged in" portions of the website. This information allegedly included:

- How she interacted with the webpages.
- Which of the hospitals' webpages she visited.
- Whether she submitted a form requesting an appointment.
- The hospital department pages viewed and search terms she used on the website.
- The filtering criteria she used on the "Find a Doctor" webpage, including specialty, location, gender, and language.
- Whether she navigated to the hospitals' patient portals or billing pages.

Ms. Vita did not allege that the websites intercepted or transmitted any private medical records or communications she had with any individual.

## **Key Points of the Decision**

**Ambiguity of the term "communication."** The court found that the Wiretap Act term "communication" was ambiguous when applied to the alleged interceptions of website activities. The act was enacted in 1968 and prohibits the interception of the "contents" of "wire or oral communication[s]." While the statute defined both wire and oral communication, neither definition made clear whether the tracking of website interactions (technology created after the passage of the law) constituted an interception of "communications."

**Legislative intent and history.** The court examined the legislative history and intent behind the Wiretap Act but found it unhelpful in resolving the ambiguity regarding online activities. The court found that legislature's intent was to protect against the interception of person-to-person conversations or messaging using surveillance devices, which the court noted was different from the interactions the plaintiff alleged between herself and the hospitals' websites, where no person was on the other end of the interactions.

**Rule of lenity.** The court applied the rule of lenity to resolve the ambiguity in favor of the defendant. The rule of lenity is a canon of interpretation that dictates that when a statute with criminal penalties is ambiguous or the court is unable to ascertain the intent to the legislature, "the defendant is entitled to the benefit of rational doubt."

**Alternative legal remedies.** The court highlighted that other statutory and common-law causes of action are available to address issues related to the misuse of private medical information and deceptive practices on the internet, but it held that the Wiretap Act does not apply to such conduct as alleged.

**Dissent.** In a 46-page dissent, Associate Justice Dalila Arguez Wendlandt argued that the legislature intended the Wiretap Act to cover modern electronic surveillance, including tracking tools on websites, and further claimed that the hospitals lied by not "candidly disclosing" their data collection and sharing. The dissent emphasized that the Wiretap Act's protections should extend to online exchanges of information and claimed that the majority's decision undermines the privacy protections envisioned by the legislature.

## **Looking Forward**

The *Vita* ruling interprets Massachusetts state law but may serve as a beacon for other courts wrestling with similar issues of statutory interpretation under similar state and federal wiretapping laws. Courts in other jurisdictions will need to assess the language of applicable wiretap statutes, similar to this court's analysis in *Vita* regarding the definition of "communication" in the Massachusetts statute. Given similarities, courts may look to *Vita* as providing favorable persuasive authority to those facing lawsuits on similar grounds in other states.

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