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9th Circ. Judge Open To Reviving Facebook Housing Bias Suit

By **Dorothy Atkins**

Law360 (July 28, 2022, 5:33 PM EDT) -- A Ninth Circuit judge appeared open on Thursday to reviving a proposed discrimination class action alleging Facebook allows advertisers to illegally exclude certain users from seeing housing ads, telling Facebook's counsel the allegations are "very descriptive" and "not conclusory," and doubting whether there could be an innocent explanation.

During a hearing in San Francisco, Facebook's counsel, Theodore J. Boutrous Jr. of Gibson Dunn & Crutcher LLP, argued that the trial judge was right to dismiss the lawsuit filed by Rosemarie Vargas and others against the social media giant because Vargas and her co-plaintiffs didn't identify which ads they had been prevented from seeing.

However, U.S. Circuit Court Judge Susan P. Graber appeared skeptical and noted that Vargas, who is a Hispanic, disabled woman with children, claimed Facebook's advertising tools allow advertisers to discriminate against and exclude her and others from seeing certain housing ads.

"If she didn't see them, how would she know?" the judge asked.

Judge Graber also noted that Vargas said her white friend saw more housing ads when they both used the same search terms and were in the same location.

"What's the innocent explanation for two people sitting side by side at the same time using identical criteria [and seeing different housing ads]?" Judge Graber asked. "Is there an innocent explanation for that?"

Boutrous replied that there are "all sorts of explanations" about why different paid, and unpaid ads might appear for different Facebook users, and those explanations are not based on race but are based, in part, on Facebook users' interests.

The exchange came during a hearing before a three-judge panel on Vargas' appeal of U.S. District Judge William H. Orrick's **August 2021 order dismissing** the proposed class action **filed in 2019**. Judge Orrick found Vargas failed to demonstrate how Facebook's targeting advertising tools illegally excluded her and others from seeing more desirable housing options, and that Section 230 of the Communications Decency Act ultimately bars the lawsuit.

But Vargas and her co-plaintiffs appealed with her attorney, Gerard Mantese of Mantese Honigman PC, arguing before the panel on Thursday that Judge Orrick used too stringent of a pleading standard, and the allegations that Facebook excluded ads using the company's discriminatory "sophisticated ad delivery systems" should be given the benefit of the doubt under the Fair Housing Act at the pleading stage.

"[Facebook] was the excluder," Mantese said. "It barred the doors to the protected classes."

Mantese also argued that Judge Orrick erred in denying his client jurisdictional discovery into Facebook's advertising practices and created an "impossible standard" to overcome by requiring his client to produce the specific ads the plaintiffs didn't see, but also denying their request for discovery to review paid ads that were excluded from their views.

Mantese added that Facebook isn't shielded from liability under Section 230 because Facebook

created the tools advertisers use to exclude certain demographics from seeing housing ads, including a purported "toggle" tool that allows advertisers to create geographical boundaries around certain ads, "giving a new meaning to red lining."

"[Facebook] in effect said, 'If you want to discriminate, click here,'" Mantese argued.

But Boutrous fired back, arguing that Vargas was searching for a $1,700 three-bedroom apartment in Lower Manhattan, which is a "highly unlikely piece of real estate to exist." He also argued that there is a "whole universe of places to look for housing" online, including Zillow and Apartments.com, so she and her co-plaintiffs could have identified housing ads that they allegedly didn't see on Facebook if they existed, but they didn't.

However, Judge Graber told Facebook's counsel that the discrimination allegations in the complaint appear to be "basically on all fours with respect to standing" as described in a Second Circuit's 1991 decision in Ragin v. New York Times Co .

Judge Graber acknowledged that neither party cited the Ragin case in their briefs, and she said the appellate panel may request additional briefing on it from both sides. But she explained that the Ragin case suggests that a plaintiff doesn't need to identify the specific discriminatory housing advertisements at issue to establish standing to sue and proceed past a motion to dismiss.

"It seems to me you're asking us to create a circuit split," Judge Graber told Boutrous.

The judge added that Vargas' allegations appear to be more detailed and stronger than the Ragin plaintiffs' allegations with respect to standing because the Ragin plaintiffs weren't looking to move while the instant suit alleges Vargas was "ready, willing and able" to move into a new home.

Still, Boutrous argued that the lawsuit's allegations are conclusory and entirely speculative, but the judge appeared to disagree.

"But they're not conclusory. This is a person who says 'Hi, I'm looking for housing,'" and yet she claims she couldn't find housing due to alleged discriminatory conduct, Judge Graber said.

"It's not speculative," the judge said. "It's very descriptive of a person's situation."

Judge Graber also appeared open to granting the plaintiffs' request for jurisdictional discovery.

"For the purpose of our analysis, we have to take all allegations as true. ... I'm still puzzled by why discovery might not uncover the things that you assert are missing," Judge Graber said.

All three judges on the panel also asked the parties if they would be open to mediation. Mantese said he and his clients are always open to mediation although he added that he doesn't know if it would be "fruitful," but Facebook's counsel suggested Facebook would be unwilling to negotiate in this instance.

"I don't think so," Boutrous replied.

At the end of the hearing, the judges took the arguments under submission.

The case is **one of many suits** over Facebook's housing advertising offerings, and it follows other claims **lobbed against Facebook in recent years** by the U.S. Department of Housing and Urban Development and users who claim the company allowed advertisers to keep people from seeing housing ads, as well as job and credit-related posts.

Ninth Circuit Judges Susan P. Graber and John B. Owens, and Tenth Circuit Judge Michael R. Murphy, sitting by designation, sat on the panel.

Vargas and the other appellants are represented by Gerard Mantese of Mantese Honigman PC.

Facebook is represented by Theodore J. Boutrous Jr. of Gibson Dunn & Crutcher LLP.

The case is Rosemarie Vargas et al. v. Facebook Inc., case number 21-16499, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Kristen Becker.

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