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# Meet the Labaton Duo That Hit Meta With a Calif. Wiretapping Verdict in Fertility App Case

By Ross Todd

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In the abstract, it sounds daunting. **Labaton Keller Sucharow** partners **Michael Canty** and **Carol Villegas** led a trial team charged with proving that Meta Platforms Inc. violated the California Invasion of Privacy Act, the state's wiretap law, by collecting reproductive and sexual health data from Flo Health, a popular period-tracking and fertility app, without the consent of users.

In reality, it proved doable.

After a two-week trial in San Francisco federal court, jurors found earlier this month that Meta violated CIPA, which carries potential statutory damages of \$5,000 per violation. If the verdict stands up in the face of post-trial motions from Meta's lawyers at **Latham & Watkins**, damages could be staggering. If one million class members come forward in California—a number that Canty called “conservative” when we spoke last week—the number could reach \$5 billion.

“It's a claims-made process, but the numbers, based on what we believe the class size to be, are going to be enormous,” he said.

Litigation Daily caught up with Canty and Villegas to discuss how they developed their trial chops and how they approached presenting the



Photos: Ryland West/ALM

**Labaton Keller Sucharow partners Michael Canty, left, and Carol Villegas, right.**

Flo Health case to a jury. Although the claims they were trying were novel, the approach they described was straightforward and traditional.

“In Carol's opening, she laid out clearly what we needed to prove, how we were going to prove it, and the evidence that we were going to use and present at the trial to prove it,” Canty said. “It just comes back to that basic concept: Present to the jury the evidence that you have that makes out the elements of the claim. No more. No less. And I think we did that.”

Both Villegas and Canty cut their teeth as trial lawyers as prosecutors in New York—Villegas in the district attorney's office in Staten Island and

Canty in the D.A.'s office in Nassau County, then as a federal prosecutor in the Eastern District of New York.

Villegas said she benefited from the experience of being in court every day as a prosecutor, calling it a "baptism by fire" and "probably the best way to learn how to do a trial."

"You are talking to victims every single day, cops every single day," she said. "You're going down the stairs and the bureau chief is handing you a file that you've never seen before, telling you you have a trial that afternoon."

"You don't have the resources that you do in the private sector, so you have to learn how to do everything. You are the secretary, the paralegal," she said. "I think that gave me a tremendous amount of training, being in front of many different kinds of judges, being up against many different kinds of defense counsel and representing all kinds of victims."

She said she's missed trying cases since her move to the private sector, where only about 1% of civil cases make it to trial. "It's been a minute since I've been on trial, but I have to tell you, it comes back really quick."

Canty prosecuted arson and homicide cases in Nassau County before moving to the Brooklyn U.S. attorney's office. He said that people often assume he picked up his trial skills as a federal prosecutor.

"I certainly honed a lot of skills there. But nothing trains you for being a trial lawyer like working in a district attorney's office, where you have 200 cases," he said.

The Flo Health case is not the firm's first foray into consumer protection and data privacy. Canty was among the lead counsel in the \$650 million class-action settlement Facebook reached to settle claims its facial recognition technology—the "Tag Suggestions" feature—violated the

Illinois Biometric Information Privacy Act. He has also served as co-lead counsel in a class action bringing wire-tapping claims against Amazon based on allegations Alexa-enabled devices surreptitiously record customers without their consent. Villegas, meanwhile, was recently appointed lead counsel for teachers' unions bringing claims against educational technology company PowerSchool related to a data breach last year that exposed the personal information of millions of teachers across the United States and Canada, as well as an estimated 62 million students.

Villegas said that the firm doesn't tend to handle "run-of-the-mill" data breach cases where credit card numbers are stolen. "We look for something that has a plus factor ... something special," she said. Canty added: "We look for opportunities where we see real egregious behavior, and we look to kind of deploy the resources that we have at Labaton to see if we can effect some change."

In the PowerSchool case, for instance, Villegas said children's data is at issue. The Flo Health case, she pointed out, involves reproductive health information. "So, it wasn't just like, 'Here's my information. I want to buy a shirt from Banana Republic,'" she said. "There needs to be a heightened standard for health information. Those are the types of cases we look for."

### **With Complex Technology, Analogies Aren't the Only Answer**

The technology at issue in the Flo Health case was a software development kit, or SDK. Villegas described the SDK at issue as code Meta provides to app developers for free that helps track certain metrics, such as how many people stop answering onboarding questions. It's the sort of information that can help developers make a more useful app. "Software development

kits aren't bad things. They're actually very useful to app developers," she said. But she added Meta provided its SDK to developers for free in exchange for the right to record information that users put into the app. "And unfortunately ... people aren't told that this is happening," she said.

Villegas described how one of the plaintiffs' experts went through the Flo Health app screen-by-screen, showing what code gets sent to Meta at each step. "I think the jury was able to get a real behind-the-scenes view of how this technology works," she said.

### **A Clear Narrative and an Appeal to Common Sense**

Meta's lawyers contended at trial that Meta had not asked for user information from Flo Health and couldn't read the information it received. But Canty said the plaintiffs' team was able to present evidence that the first thing Meta did with the information once it was in hand was try to connect it with a known Facebook user—something he said the company was able to do 34 million times. "You don't do that unless you want the data," he said.

"When you're using it, you're benefiting from it, but you turn around and say, 'Well, we really didn't want it' ... That doesn't make sense," Canty said.

"One argument we made was that the best tool you have in the jury is your common sense."

Villegas said that for her and Canty, the case was centered on Meta not informing people about what was really happening with their information. She said that she thought it was "really compelling" on that front for the jury to

hear directly from the plaintiffs—women at different stages in their lives, from a young teenage girl to a woman in menopause, with some seeking to get pregnant and others seeking to avoid pregnancy.

"Could you imagine getting in front of a room of 100 people and talking about your period with strangers?" Villegas said. "This is what these women did in order to be able to convey to the jury how their privacy was violated. I have such a tremendous amount of respect for them."

Canty pointed in particular to plaintiff Autumn Meigs, a recent college graduate who was a teenager when the case was filed. "It takes some bravery to stand up there in federal district court, take an oath and testify as to what you were doing on an app when you were 15 years old in front of jurors, in front of a judge, in front of a courtroom full of people," Canty said. "It takes a special person to step up and do that."

Villegas said that the whole team was stoic as the verdict was being read. But, she said, that changed when the group stepped outside the courtroom. "I was crying. The clients were all crying. The lawyers were all crying," she said. "It was pretty emotional. It was an incredible moment."

A Meta spokesperson, in an emailed statement to my colleague Kat Black, said that the company "vigorously disagree[d] with this outcome" and would explore all legal options.

"The plaintiffs' claims against Meta are simply false," the spokesperson said. "User privacy is important to Meta, which is why we do not want health or other sensitive information and why our terms prohibit developers from sending any."