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Groups Ask DC Circ. To Weigh TSA Body Scanner Incidents

By Linda Chiem

Law360, New York (January 5, 2017, 7:50 PM EST) -- Consumer groups asked the D.C. Circuit on Thursday to consider two recent highly publicized passenger screening incidents at airports in Los Angeles and Detroit as it weighs a challenge to the Transportation Security Administration's final rule on airport body scanners, saying the technology is intrusive and hurting passengers.

Freedom to Travel USA, the National Association of Airline Passengers, Bill of Rights Defense Committee/Defending Dissent Foundation, and Consumer Watchdog filed a letter with the D.C. Circuit calling attention to a Dec. 4 incident at Los Angeles International Airport in which a breast cancer survivor was subject to an allegedly aggressive pat-down by TSA agents, and a Dec. 22 incident at Detroit Metropolitan Airport in which a CNN commentator was subject to a pat-down after a body scan raised a false alarm on her dress.

The consumer rights groups told the federal appeals court that any review of the TSA's March 3 final rule, titled "Passenger Screening Using Advanced Imaging Technology," should be informed by the actual realities of how the agency is implementing its passenger screening procedures, which have become increasingly invasive and are harming or humiliating consumers.

"These incidents lend fresh support to many of the TSA abuses identified in the amici's brief and the 'hard questions' they raise," the groups said in the letter. "The amici thus ask the court to consider these new incidents in deciding this case."

The groups in October filed a friend-of-the-court brief in a **consolidated lawsuit** launched by the Competitive Enterprise Institute and Electronic Privacy Information Center seeking to have the federal appeals court vacate the TSA's rule.

According to the consumer groups' letter on Thursday, both the Los Angeles and Detroit incidents were filmed on cellphone video.

In the first reported incident, breast cancer survivor Denise Albert told TSA agents at LAX in advance about a port in her chest for chemotherapy. Nevertheless, "TSA agents aggressively attempted to do a body cavity search [of Albert] in public." Albert corroborated this account with a cellphone video in which a TSA agent may be seen "grabbing [Albert's] left thigh and [running] her hands up to Albert's crotch," according to the letter.

In the second reported incident, CNN commentator Angela Rye said she was flagged for a pat-down after a body scan resulted in a false alarm on her dress. By Rye's account, the TSA agent went down her leg, up her dress, and the agent's hand "sideways hit [her] right in the crack of [her] labia," according to the group's letter.

The consumer and passenger groups have said that numerous Americans have reported being injured and humiliated by the TSA screening procedures. At the same time, TSA whistleblowers and federal investigations have revealed a striking pattern of neglect, misconduct and abuse in the TSA's administration of these procedures, they said in their Oct. 3 amici curiae brief.

The federal government has staunchly defended the final rule establishing the use of full-body scanners — also known as Whole Body Imaging or Advanced Imaging Technology — at U.S. airports to detect and thwart security threats, according to court records.

Officials told the D.C. Circuit in November that the TSA had **properly justified its rationale** for the rule and insisted that the agency weighed personal privacy concerns against overall public safety.

The officials insisted that the TSA's decision to allow Advanced Imaging Technology as a primary screening method at airports was well-reasoned and supported by substantial evidence proving that the scanners are the most effective technology currently available to detect both metallic and nonmetallic threat items, including explosives.

Ultimately, the Competitive Enterprise Institute's and Electronic Privacy Information Center's attempt to get the rule axed as arbitrary and capricious doesn't pass muster, the federal government said.

Meanwhile, the two **told the D.C. Circuit** in September that the rule on airport body scanners downplays the technology's intrusiveness and has actually heightened travel risks by inducing people to drive instead of fly.

They also claimed the agency failed to properly consider less invasive alternatives, despite overwhelming public opposition to the use of the scanners.

The challenged rule was finalized March 3 after several years in the making following a previous court battle. EPIC had launched a 2010 lawsuit claiming the TSA unilaterally deployed the body scanners in 2009 as a primary tool for screening airport passengers without any opportunity for public comment. The group claimed that use of the scanners is effectively a "digital strip search," in violation of the Fourth Amendment and various laws.

The D.C. Circuit sided with EPIC in 2011, finding the TSA was required to solicit public comment, and ordered it to "promptly" conduct a proper rulemaking process for implementing the scanners.

A proposed rule was issued in 2013, but the TSA **dragged its feet** on coming up with a final rule, prompting the Competitive Enterprise Institute, Rutherford Institute and National Center for Transgender Equality to file suit in 2015, seeking to prod the agency into action, with the court **ruling in the groups' favor** in October 2015. The TSA committed to publishing the final rule by March 3, 2016.

EPIC is represented by in-house counsel Marc Rotenberg, Alan Butler and Jeramie Scott.

The petitioners in the CEI-led case are represented by Sam Kazman and Hans Bader of the Competitive Enterprise Institute.

The amici curiae are represented by Mahesha P. Subbaraman of Subbaraman PLLC.

The U.S. Department of Homeland Security and TSA are represented by Sharon Swingle and Mark B. Stern of the U.S. Department of Justice.

The cases are Competitive Enterprise Institute et al. v. U.S. Department of Homeland Security et al., case number 16-1135, and Electronic Privacy Information Center v. Transportation Security Administration et al., case number 16-1139, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Daniel Wilson. Editing by Catherine Sum.