



Ep. 46: 2020 CCPA Litigation Report – Analyzing the First Year of Litigation

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Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

The California Consumer Privacy Act, or CCPA, passed in June 2018, and it took effect on January 1, 2020. Since then, and, perhaps unsurprisingly, the CCPA has been referenced in numerous litigations, particularly class actions. Akin Gump lawyers researched this litigation. The results of which are compiled and presented in the firm's new *2020 CCPA Litigation Annual Report*.

Returning to the show today are the co-heads of Akin Gump's cybersecurity, privacy and data protection practice, Natasha Kohne and Michelle Reed, as well as counsel Molly Whitman. They'll be discussing the firm's CCPA report, some of its key findings and what the rest of 2021 looks like for business in and about California.

Welcome to the podcast.

Natasha, Michelle, Molly, welcome back to the show. The last time we sat down to talk about CCPA, the law was only a few months old. Now, more than a year later, let's dive back in and check the state of play.

To start and, to a certain extent, to recap, Natasha, could I ask you to briefly bring listeners up to speed on what and whom the California Consumer Privacy Act covers?

Natasha Kohne:

Yes, sure. The CCPA is truly a landmark statute. It passed almost three years ago, back in 2018, and went into effect of January 1 of last year, and it's our nation's first comprehensive data privacy statute that cuts across most industries doing business in California. Now, because doing business isn't defined in the statute, and because California is the fifth-largest economy in the world, most businesses in the U.S. are concerned about some aspect of the statute, as well as a number of our international clients.

This statute really woke up businesses in the United States. I cannot emphasize enough its significance. It's not just because all California residents have the right to know what

personal information has been collected about them or even the right to request that a business delete their data, but more because of the extensive operational, legal and technical work that businesses must undertake just to comply with the statute.

The statute is extensive, and I'll just mention three main points that I think are unique. You mentioned particularly the private right of action, which is the very reason that we're really talking today. The private right of action gives California residents an explicit right to sue businesses if their personal information is compromised in a data breach and to recover statutory damages in that case. This is what we're discussing in our groundbreaking first annual CCPA litigation report.

A second point is that there is this unique focus on the concept of selling personal information that even Europe's GDPR [*General Data Protection Regulation*] didn't really directly hone in on. Basically, if you're a business that discloses personal information to a third party for valuable consideration, a business might have to give a California resident a right to opt out of the disclosure. That's what we call a sale under the CCPA, and that has given a lot of businesses quite a bit of heartburn.

The third thing I'll mention just to get everyone up to speed, and perhaps it's the most important point for listeners is that, while businesses were frantically implementing and adjusting to these CCPA requirements, California's voters actually went to the polls last November, voted to make the CCPA even more onerous and comprehensive, and this is what we call the California Privacy Rights Act ballot initiative, or the CPRA.

The interesting thing about the CPRA is that it really brings California's privacy law more in line with the GDPR. It establishes our nation's first independent privacy agencies solely dedicated to enforcing a state privacy statute. These are all new developments, and California seems to be willing to be out in front and leading the experiment in data privacy, at least in the U.S.

Jose Garriga:

Thank you, Natasha. So, the new report is, it hits a lot of really interesting notes. Generally, it tracks CCPA-related litigation through 2020 from both the plaintiff and defendant perspectives. Michelle, could you speak, please, to what were your findings and were you surprised by any of the findings that emerged over 2020?

Michelle Reed:

So, there were some surprising findings that I think came out of this litigation report. The first is, most of the CCPA private causes of action that were brought in 2020 were not related to data breach. The reason why that's surprising is because, as the legislation is structured, data breach scenarios are the only ones in which the private cause of action should be brought. Finding that the plaintiffs were using the private cause of action to bring claims related more to the privacy requirements in general, I think was a surprising result in many ways.

The second thing that I was surprised about and that I think others also were surprised about was the fact that we didn't see any enforcement at all in 2020 coming out of the [*California*] attorney general. Certainly, this is an area where we would expect some activity, and, so far, we haven't seen any enforcement actions being brought. I think the next year's report, to preview, will probably be more exciting on that front, but, at this state, there wasn't any increased enforcement in that. Then perhaps the third thing that I think was really surprising was that the forum in which the plaintiffs engaged was actually federal court, as opposed to state court. Typically, plaintiffs very frequently will favor state court forums, and, here, we didn't see that. We saw that federal court has been the preferred forum for these punitive CCPA class actions.

Jose Garriga: Thank you, Michelle. Let's talk a little bit, I think listeners might be interested in, as Natasha said, it's a groundbreaking report. Molly, how did this report come to be? What was the impetus behind it?

Molly Whitman: Sure, I'd love to talk about that. First, it's good to think about what we were trying to accomplish with this report. Natasha, Michelle and I, we're all litigators, and one of our goals was, how are we going to advise our clients on how to best comply with the law and to run the traps that may be coming for them in litigation? There's no treatise or practice manual about the CCPA yet. We were really trying to create that, create a resource that we can use ourselves to advise our clients, and that's looking at the trends that are coming out.

Since the CCPA became effective on January 1st, 2020, we hit the ground running. We set up trackers to patch every piece of litigation that we could find that was mentioning the CCPA. We weeded out those cases that were false hits, false positives, maybe cases that just mentioned the CCPA for some reason, but didn't actually assert any sort of a call to action. We set up a huge team of contributors, many of whom are mentioned in the back of the report, and you can see their names and who all added effort to this.

We tracked cases; we followed them through their litigation process, looking at their docket, reading important pleadings. What we ended up with was a collection of cases that we were able to draw data from and really use analytics and tools that we have in-house at the firm to try to distill the information into the finished product that we see today. I think it can't be [over]stated that it was truly a Herculean effort from many people around the firm. In addition to those who actually contributed and wrote portions of the report, we also consulted with people across practice groups, for example, our policy and regulatory folks in D.C.

We also consulted with our data privacy experts in London, and as you'll see, there's a portion on the GDPR, and comparing the CCPA to the GDPR. So, we really tried to hit this from many angles to get the most comprehensive view of the CCPA that we possibly could.

Natasha Kohne: Yeah, and just to jump in a bit. I mean, Molly's totally right. One of the main purposes of the report is really to be able to advise our clients on the risk and the amount of work that goes into creating a report like this, reading through each complaint and really pulling out the important details is just extremely time consuming and challenging, and, so, I cannot thank enough our team and the tremendous effort that's been put into this report, and, ultimately, our clients will benefit as a result.

Jose Garriga: Thank you both. Following on a theme that I seem to run into whenever I'm talking to litigators working in California, and that's the plaintiff's bar. Has the law, the CCPA, has it become a panacea for the plaintiff's bar, and say, you're talking about people bringing private calls of action, where does that stand? What were some of the commonly employed litigation strategies on both sides? Molly, if I could ask you to take this one.

Molly Whitman: Jose, panacea, I wouldn't say. I'd say maybe more like an experimental cure. I think Natasha earlier called the CCPA an experiment itself. I think that plaintiffs are looking for new ways always, the plaintiff's bar is looking for ways to capitalize on the increased data security requirements that various statutes are implementing across the country. They're looking to find new ways to add pressure on defendants through bringing creative causes of action. In many of these cases, that's what we saw here. For

example, in over half of the cases that we tracked that did not actually relate to a data breach despite the pretty clear mandate in the statute that a data breach needs to be involved in order to invoke the private right of action.

It is attractive for the plaintiff's bar to add a shiny new CCPA violation to litigation that is somehow related to data security, including because the CCPA provides for statutory remedy, but whether that's going to play out for them or not remains to be seen. As we mentioned in the report, given that the statute has been effective for one year, many of these cases are still in the motion to dismiss pleading stage, especially because, as we all know, COVID drastically slowed down a lot of the courts' processes. We're not really going to see what happens with a lot of these cases until sometime in 2021 and beyond.

Jose Garriga:

Thank you. A reminder, listeners, we're here today with Akin Gump partners Natasha Kohne and Michelle Reed who serve as co-heads of the firm's cybersecurity, privacy and data protection practice, and with counsel Molly Whitman.

The last time we sat down to talk about the CCPA, we talked about its impact on other states' legislation and its impact on federal legislation. One year later, has California's law really moved the needle in other states—I saw, for example, recently, that Virginia Gov. Northam signed a Consumer Data Protection Act, which we might discuss—as well as in Congress, where, as I think last time, there was a discussion about the possibility of a national/federal data legislation? Natasha, could I ask you your thoughts on that?

Natasha Kohne:

Sure. Well, I mean, I think the needle continues to be moved, not just by the CCPA, but as I mentioned, the CPRA, and then you mentioned Virginia's CDPA, but I think it might be easier just to take a couple steps back and remember, after the CCPA initially passed, there was this avalanche of state privacy legislation being introduced across the nation, and well over 20 states introduced privacy legislation. We frankly expected to be inundated with new state privacy laws. Almost three years later, we're sitting here today, and this is before Virginia passed its privacy law, really, only Nevada managed to introduce a major privacy law, and that wasn't nearly as extensive as California's law.

Now, of course, we did experience a bit of a lull in state privacy legislative activity during COVID, but now we seem to be back in the swing of things, and Virginia's law that was just passed does put it second in the nation behind California in terms of real, comprehensive privacy legislation. One could say that Virginia is positioning itself as one of the models on which maybe the federal government can lean on, perhaps as an alternative to the CCPA.

If you look at the law itself, that makes sense, it doesn't have a private right of action, it uses more universally known data protection terminology from the GDPR like the concept of a controller or the processor. But does that mean that Virginia would be the leading model for the federal government? Not necessarily. I think, in order for a federal bill to pass, frankly, Californians have to feel like they're not losing some of the protections they currently have. With the Speaker of the House from California, the Vice President from California, with around 53 California House members, a majority of whom are Democrats, there's just a lot of power behind the state, and you really need broad California buy-in, or it will be extraordinarily difficult to get a federal deal done.

The last thing I'll say is, on the flip side, President Biden has gone on record to say that our country needs a privacy law, something like the EU's GDPR, and there is bipartisan support for a comprehensive privacy bill, but we have this slim majority in the Senate and the filibuster and basically another 10 votes, at least, from the Republicans, at a

minimum, will be needed to get a bill passed. These issues, especially the issue of preemption, as well as the role of FTC enforcement and the private right of action, just continue to be major sticking points, particularly along party lines.

Jose Garriga: Thank you, Natasha. Michelle, let me turn to you and picking up on a thread of something that's been mentioned now a couple of times, and that, is in fact, the COVID-19 pandemic. To what extent has the CCPA's impact been attenuated or maybe even in some ways amplified by the pandemic of last year?

Michelle Reed: It's actually both. In some ways, it's attenuated. We know that the COVID-19 pandemic ultimately closed many courts for a time. Then once they were reopened, certainly extended out many of the schedules. So, where many of these cases were filed in ... All of the cases were filed in 2020, and many of them were slowed down in terms of their motion to dismiss practice and generally their practice all around, which has resulted in a report that provides a lot about how the claims were filed and where they were filed and what was contained, but very little about what was ruled on, because very little has been ruled on in these cases.

To that extent, it has really extended out some certainty and understanding of how courts will interpret really key provisions, like whether a privacy class action is actually actionable under the private cause of action under CCPA where there's not a data breach, and other issues with respect to standing, arbitration and other considerations that are before the court. On the flip side, you definitely saw some enhancement of cases and acceleration of cases, particularly if you look at the Zoom class actions that were filed.

When you look at the Zoom class actions, now Zoom, very few people even heard of Zoom before the pandemic. The pandemic hit, and everybody knew about Zoom. They knew about Zoom so much that everyone was suing over Zoom. And, so, the CCPA class actions, which were pretty significant in number and volume, against Zoom were certainly precipitated by the pandemic. So, it's an interesting question that has answers on both sides of the spectrum, but I think, either way, we can say that the first year of enforcement was definitely impacted by our unusual circumstances.

Jose Garriga: Thank you, Michelle. Looking forward, and this is something that you all have touched on briefly, looking at the balance of 2021 and beyond, Molly, could I ask you to lead off on this? How do you see the CCPA changing how business does business through the balance of this year? Then Natasha mentioned the CPRA. Are businesses already looking over the horizon at 2023 when the California Privacy Rights Act will take effect?

Molly Whitman: Sure. In some ways, I would expect that the effectiveness of the CCPA hasn't necessarily changed how businesses do business through 2021, because the CCPA was passed in 2018. There was a significant ramp-up period during which businesses, not just in California, but any business that does business in California, which, of course, has a much broader reach, that ramp-up period gave those businesses the time to start getting prepared and change what they needed to change. However, in many ways, I think 2020, specifically the regulations that were released in August by the attorney general's office and have since been modified by the attorney general's office have given details and guidelines for businesses to make sure that they're in compliance.

There are things that are rapidly changing and that businesses will continue to change and refine to make their practices not only comply with the rules of the CCPA, but also make their business work the most efficiently and effectively that they can. Then, as you

mentioned, moving forward, we now have the CPRA. The CPRA was passed in November 2020, and it's going to take effect in 2023. So, between now and then, we've got businesses who are trying to comply with the state of the law as it exists today, but they also have to look ahead to the CPRA becoming effective January 1st, 2023 for most of its provisions, and make sure that they're not going to be caught flatfooted when that takes effect.

Natasha Kohne: I think Molly is spot on the CPRA and the Virginia law, both becoming operative in 2023, I think 2021 will continue to focus businesses on really getting their house in order and laying the foundations to, develop a robust privacy program, so, reviewing their retention programs, developing a vendor management program or running their data mapping exercises. There could be other state bills that pass and trickle in and actually go into effect in 2022. If that's the case, then businesses will have to quickly adjust to laws, to these new laws, prior to 2023. We did see this with Nevada where it went into effect in 2019 before the CCPA, but the Nevada law passed after the CCPA.

I also see businesses that previously wanted a quick fix or an off-the-shelf template for their privacy policies, paying more attention now to privacy, looking for holistic and hopefully thoughtful solutions. With the CPRA moving in line with the GDPR, and the Virginia laws taking on some of these GDPR principles, and when you look at the rest of the world like Brazil or Singapore, Japan, Canada, and all of these countries have amended their laws or introduced legislation to bring data protection more in line with GDPR principles, I think we're hopeful that, in a few years, businesses will be better able to harmonize their global privacy practices, or, at least, that's the goal.

Jose Garriga: Thank you, Natasha. Michelle, I'll give you the last word. Any thoughts to wrap this up?

Michelle Reed: Only thoughts I have are read the report. I think you're going to gain a lot of insight into where their risk points are and what the creative ways that plaintiffs are approaching things. When you see the creative ways that plaintiffs are approaching things, I think it can really guide your business and help you create a compliance program and systems that are going to avoid some of the litigation risks that you see with these creative plaintiffs.

Jose Garriga: Perfect. Thank you. Listeners, you've been listening to the co-heads of Akin Gump's cybersecurity, privacy and data protection practice, Natasha Kohne and Michelle Reed, and counsel Molly Whitman. Thank you all for making the time to come back to the show and bring listeners up to speed on the CCPA and all other alphabet soup-related topics.

And thank you, listeners, as always, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on among others, iTunes, YouTube and Spotify.

To learn more about the firm's work in, and thinking on, cybersecurity, privacy and data protection matters, search for "cybersecurity" on the Experience or the Insights & News sections on akingump.com; take a moment to read Natasha, Michelle and Molly's bios on the site; visit our AG Data Dive blog for insights and analysis on all matters related to cybersecurity and privacy, and, finally, as Michelle said, read the report. Visit our LinkedIn page or akingump.com to get your own copy of the [2020 CCPA Litigation Annual Report](#).

Until next time.

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