

# Calif. Businesses Avoid Privacy Class Action Explosion

By **Seamus Duffy, Natasha Kohne, Meredith Slawe and Michael Stortz** (May 21, 2019)

A California bill, S.B. 561, that would have added a sweeping and unrestricted private right of action for any violation of the California Consumer Privacy Act died in the appropriations committee of the California Senate on May 16, 2019. Businesses ramping up to comply with the CCPA breathed a collective sigh of relief.

The CCPA, which will become effective on Jan. 1, 2020, unless preempted by a federal solution, represents a revolution in data privacy rights for consumers in the United States. California Attorney General Xavier Becerra supports the radical shift in consumer data privacy rights embodied in the CCPA, but has insisted that his office is not equipped to fulfill the regulatory and enforcement responsibilities placed on the attorney general under the CCPA. His office authored and shepherded S.B. 561 as a means of co-opting the private class action bar as enforcement authorities for the CCPA.

## The CCPA — A Revolution in Data Privacy Rights

Even before the European Union's adoption of the General Data Protection Regulation in 2016, privacy experts were fond of likening U.S. data privacy law to the Wild West — contrasting it with the far more restrictive EU model. The CCPA brings the pendulum crashing, not swinging, back in the other direction.

Modeled on the core elements of the GDPR, the CCPA creates a new set of rights of disclosure, access, deletion and nondiscrimination for "consumers" — currently defined broadly — in California. These rights, if they survive the inevitable challenge in the courts, will disrupt fundamentally the ownership rights of businesses that lawfully acquire data from California consumers in the marketplace. With the CCPA, California will commandeer businesses' internet homepages with "Do Not Sell My Personal Information" buttons, effectively rewrite and dictate privacy policies for the entire U.S. digital economy, and institute an opt-out regime for the sale of consumers' data and an opt-in regime for the sale of minors' data.

The story of the CCPA's hurried enactment in the summer of 2018 is well-known. Over a weekend, as a deadline loomed to preempt a ballot initiative that would have been far worse for the data economy, privacy advocates and tech companies reached a compromise that resulted in the California Legislature passing the CCPA. The original CCPA was drafted, introduced and passed in a week.

In exchange for the new rights afforded consumers outlined above, the Legislature placed enforcement of this new statutory regime exclusively with the state AG. With the exception of data breach scenarios, the CCPA as enacted permits no private right of action, either on an individual or collective basis. Instead, the CCPA provides that only the AG may sue to recover civil



Seamus Duffy



Natasha Kohne



Meredith Slawe



Michael Stortz

penalties for any alleged violation, with the recovery of those penalties to be earmarked for a new consumer privacy fund designed to offset the AG's and courts' additional costs in enforcing the CCPA.

In addition, Section 1798.155 delegates to the AG very specific rulemaking authority, prohibits enforcement actions until six months after adoption of the regulations, and further requires the AG to provide compliance opinions to requesting businesses.

Similar to the "data protection authority" framework at the center of the GDPR enforcement regime, the CCPA establishes a deliberate and phased enforcement regime with a single government regulator at its center. The DPAs have led the enforcement effort under GDPR in the EU, and private litigation under the GDPR (which includes a private right of action) is far more limited than it would be under the U.S. class action framework.

The CCPA contemplates that much-needed clarity will be brought to the statute through a rulemaking process, followed by incremental enforcement activity that is complemented by authoritative opinions that provide uniform compliance guidance. This enforcement regime was a central component of the compromise under which the CCPA was passed in June 2018, and was revised further in the September amendments.

### **The Attorney General Reacts**

Attorney General Becerra quickly rejected the challenge posed for his office by the CCPA. After initially suggesting in an August 2018 letter to the California Legislature that the CCPA's civil enforcement provision was very possibly an unconstitutional subversion of Proposition 64 (the 2004 ballot initiative that restricted private enforcement of California's Unfair Competition Law), the AG earlier this year co-sponsored S.B. 561 to redo the enforcement regime under the CCPA.

S.B. 561 proposed to amend the statute to link this revolution in privacy rights with a broad and unrestricted private right of action. Under the proposed amendment, any consumer claiming a violation of the CCPA's provisions could claim the greater of statutory damages (ranging from \$100 to \$750 per violation) or actual damages, and could pursue the claim as a class action with no apparent cap on aggregate damages. In addition, S.B. 561 would have removed the 30-day right to cure, as well as the requirement that the AG provide opinions to requesting businesses regarding compliance.

S.B. 561 would have opened the floodgates to a wave of class action litigation under the CCPA, to be followed inevitably by inconsistent court rulings that would further compound the compliance challenges under the statute. These problems have been borne out when the private class action bar has been tasked with testing the parameters of other privacy-based laws in the courts, including the Telephone Consumer Protection Act, California's "Shine the Light" law and the California Invasion of Privacy Act.

### **The Private Class Action Enforcement Regime**

The private class action is a distinctly American form of enforcement regime, marked by a history of overreaching by private counsel chasing windfall fees, and California is unfortunately home to some of the best and the worst of this history. The same state that has given us high points like the Volkswagen clean diesel settlement has also given us low points like the case claiming that Cap'n Crunch's Crunchberries cereal doesn't contain actual fruit.[1]

Combining the CCPA, with all of its contradictions, inconsistencies and ambiguities, with the private class action regime would be, in a word, disastrous. It would be the polar opposite of the regime chosen by the original drafters, in which a single public authority guides businesses through a compliance transition period and chooses enforcement actions to address important enforcement priorities.

If S.B. 561 had passed, we would have seen a sweeping wave of class actions clog the California courts in January, claiming all manner of technical violations against businesses struggling to understand the law and operationalize compliance measures. Businesses would likely also have been subject to the problematic, real-world issue of presuit demand letters threatening class action litigation absent prompt settlement.

### **The CCPA and the Class Action Device — A Potently Awful Combination**

The CCPA is not a model of statutory drafting — and if S.B. 561 had passed that would have become evident quickly and plagued the courts.

Consider the nondiscrimination provisions, just as one example. Section 1798.125(a)(1) of the CCPA prohibits discrimination against consumers exercising rights under the statute, and does so in the strongest of terms. Section 1798.125(a)(2) then immediately reverses course and says consumers may indeed be treated differently if the differences are “reasonably related” to “the value provided to the consumer by the consumer’s data.” Section 1798.125(b)(1) then goes on to expressly permit “financial incentives” for the collection, sale or deletion of personal information and again authorizes price and quality differences, now only if “directly related” to the same quizzically described “value provided to the consumer by the consumer’s data.” Section 1798.125(b)(3) then expressly permits “financial incentive programs” with the consumer’s “prior opt-in consent,” which is mildly encouraging until one reads that the consent “may be revoked by the consumer at any time.”

This trip down the rabbit hole into Wonderland ends with an ominous warning in Section 1798.125(b)(4) that “[a] business shall not use financial incentive practices that are unjust, unreasonable, coercive or usurious in nature.”

These inconsistent statutory directives might reasonably be reconciled through a considered rulemaking process that yielded uniform and definitive regulations reasonably in advance of any enforcement activity.[2] What would not be helpful — and indeed is anathema to the design of the CCPA — is hundreds of class actions targeting businesses’ good faith efforts to make sense of this maze, and scores of likely inconsistent judicial decisions that exacerbate the statute’s ambiguities — all against the backdrop of crushing statutory damages and attendant risk of bankruptcy of good and otherwise compliance-minded companies.

There could be good cases to be sure — the kind of cases a thoughtful prosecutor would bring. But there would be far more Crunchberries cases. Where privacy rights are concerned, history teaches that an enforcement program with the private class action at its center is impossible to control and leads inevitably to abuse. The compliance challenge presented by the CCPA calls for the more thoughtful and deliberate approach to enforcement embodied in the statute as drafted. Our hope is that Attorney General Becerra will embrace this opportunity to guide California through this important transition.

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*Seamus Duffy, Natasha Kohne, Meredith Slawe and Michael Stortz are partners at Akin Gump Strauss Hauer & Field LLP.*

*Kathryn Deal, Hyongsoon Kim, Michael McTigue, Michelle Reed and Diana Schaffner also contributed to this article.*

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[1] *Sugawara v. Pepsico, Inc.*, No. 2:08-cv-01335, 2009 U.S. Dist. LEXIS 43127 (E.D. Cal. May 21, 2009) (England, J.).

[2] A number of other proposed amendments to the CCPA are pending that, if passed, could affect businesses' obligations under the CCPA. Proposed changes to the definition of PI and an expansion of the public records exception could help practical implementation, as could a proposed exclusion of employees from the definition of "consumer." Changes related to aggregate and deidentified information could also be significant.