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Preparing For Private Right Of Action Under Calif. Privacy Law

By **Amanda Lawrence and Michael Rome** (April 1, 2020)

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The California Consumer Privacy Act went into effect at the beginning of this year, and while the California attorney general will not begin enforcing it until July, the private right of action that the CCPA created is available to consumers now.

The CCPA expressly provides for a private right of action for consumers whose nonencrypted or nonredacted personal information:

is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices.[1]

Consumers suing under this provision may recover the greater of actual or statutory damages, injunctive or declaratory relief, or any other relief the court deems proper.[2] This is the only express private right of action under the CCPA.

Since the California Legislature passed the CCPA in June of 2018, industry advocates repeatedly have fended off efforts to expand the private right of action. Yet there remain several open questions about the scope of that private right of action that ultimately will be decided by the courts. This article addresses three questions of particular importance for companies assessing their litigation risk:

1. Will courts recognize a general private right of action to enforce violations of the CCPA outside of the data breach context?

2. Can potential plaintiffs use violations of the CCPA as predicate unlawful acts to support claims under California's Unfair Competition Law?

3. Will courts permit plaintiffs to file lawsuits over data breaches that occurred prior to the CCPA's effective date?

1. Will Courts Recognize a General Private Right of Action to Enforce Violations of the CCPA Outside of the Data Breach Context?

As noted above, the CCPA provides consumers with an express private right of action for unauthorized access and disclosure of their data. A separate question is whether consumers can file lawsuits to enforce violations of other CCPA provisions, outside of the data breach context.

Under California law, "whether a statute gives rise to a private right of action is a question of legislative intent."[3] The presence or absence of such legislative intent "is revealed through the language of the statute and its legislative history."[4] In recent years, California courts have presumed that a statute does not provide for a private right of action unless the statutory text or legislative history affirmatively indicates an intent to provide one.[5]

The CCPA is silent with respect to civil enforcement of violations of the CCPA other than the

unauthorized access provision. However, several aspects of the statute support the argument that there is no broad private right of action to enforce the statute.

First, the statute itself contains evidence of legislative intent against such a private right of action, as it provides that "the cause of action established by this section shall apply only to violations as defined in subdivision (a) and shall not be based on violations of any other section of this title" and that "nothing in this title shall be interpreted to serve as the basis for a private right of action under any other law."[6]

Second, the fact that the CCPA provides a private right of action for one provision, but no others, suggests it is the only private right of action.[7] Third, the CCPA makes clear that the attorney general has enforcement power over all provisions,[8] including the unauthorized access provision, further evidencing that the Legislature could have — but did not — provide broad enforcement authority to consumers.

The legislative history also supports this reading. Several legislative reports express or reflect an understanding that the private right of action is limited to the data breach context, and that enforcement is otherwise left to the attorney general.[9] Moreover, efforts to amend the CCPA to add a general private right of action to enforce violations of any aspect of the law were defeated, evidencing a legislative intent against a general private right of action.[10]

While these points strongly militate against a private right of action, plaintiffs may try to argue for an implied right of action based on other language within the CCPA. For example, plaintiffs may point to the fact that the law instructs courts that the CCPA "shall be liberally construed to effectuate its purposes" as evidence that a court should construe silence in favor of allowing consumers to seek a remedy for CCPA violations.[11]

Companies subject to the CCPA may face these types of arguments unless the California Legislature amends the statute, but the history of the California Legislature's considering and rejecting a broader private right of action substantially weakens them, to the extent they ever had any strength at all.

2. Can plaintiffs use violations of the CCPA as predicate unlawful acts to support claims under California's Unfair Competition Law?

California law provides class action lawyers with a powerful weapon: the Unfair Competition Law, which prohibits "unlawful, unfair, or fraudulent" business practices. The law's scope is broad, and its coverage "is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law."

By prohibiting any unlawful business practice, the UCL acts as a borrowing statute. It borrows violations of other laws and makes them independently actionable under the UCL.[12] Thus, even if there is no private right of action (outside of data breaches) under California Civil Code Section 1798.150(a), plaintiffs may still attempt to sue for violations of the CCPA under the UCL.

A number of arguments exist as to why such claims should be prohibited. Of note, the CCPA provides that "nothing in this act shall be interpreted to serve as the basis for a private right of action under any other law."[13] The UCL is one such law. Thus, there is a straightforward textual argument that the CCPA prohibits UCL claims.

The California Senate Judiciary Committee agreed, stating in a report that:

it appears that this provision would eliminate the ability of consumers to bring claims for violations of the Act under statutes such as the Unfair Competition Law, Business and Professions Code Section 17200 et seq.[14]

Plaintiffs may argue to the contrary, as California courts have held in connection with different laws that the mere absence of a private right of action does not automatically preclude UCL claims.

In Chabner v. United of Omaha Life Insurance Co., for example, the U.S. Court of Appeals for the Ninth Circuit explained:

It does not matter whether the underlying statute also provides for a private cause of action; section 17200 can form the basis for a private cause of action even if the predicate statute does not.[15]

Rather:

a UCL cause of action will not lie to enforce a violation of a particular statute only if the Legislature affirmatively intended to preclude such indirect enforcement. It is not enough that the Legislature in drafting the predicate statute simply failed to "provide for the action."[16]

Further, even if they are unable to bring a claim for violation of the "unlawful" prong of the UCL, Plaintiffs might try to sue under the "unfair" prong of the UCL, which allows parties to sue over business practices that offend public policy or are substantially injurious to consumers.[17]

While UCL cases can be hard to dismiss, defendants will have strong evidence to support the argument that the Legislature intended to preclude a private right of action.

First, as noted above, the Legislature clearly stated in the statute that "nothing in this act shall be interpreted to serve as the basis for a private right of action under any other law."

Second, the fact that the Legislature considered and rejected an amendment to the CCPA that would have provided a private right of action to enforce all violations of the law is further evidence that it did not intend to provide for one in the first place.

Plaintiffs appear ready to test the viability of using the UCL to enforce the CCPA right away. In February, less than two months after the enactment of the CCPA, Clearview AI Inc. was sued in a putative class action alleging that the company violated the CCPA's personal information collection provisions.[18]

Notably, the complaint does not allege a claim under the CCPA's private right of action provision. Rather, it alleges that the violation of the CCPA's requirements regarding the collection of personal information is both an unlawful and unfair business practice in violation of the UCL. This theory squarely puts before a court the question of whether a party can use the UCL to bring a private lawsuit to enforce a violation of the UCL.

Until or unless courts shut the door on backdoor attempts to use civil litigation to enforce the CCPA, this is a risk companies will have to account for. However, it is important to note that even if courts permit UCL claims to enforce violations of the CCPA, damages will likely be limited. Unlike the CCPA, there are no statutory damages for violations of the UCL. Rather, remedies are ordinarily limited to injunctive relief and restitution.

3. Will courts permit plaintiffs to file lawsuits over data breaches that occurred prior to the CCPA's effective date?

The CCPA went into effect on Jan. 1. Since that time, at least one plaintiff has filed a lawsuit over a data breach under the CCPA's private right of action based on a breach that actually occurred before the law went into effect.

California, like most jurisdictions, applies a presumption against retroactive application of statutes. As one California appellate court put it in Rosasco v. Commission on Judicial Performance:

The general rule, both in California and in the United States, is that absent some clear indication to the contrary, any change in the law is presumed to have prospective application only.[19]

It that appears plaintiffs are trying to get around this presumption not by pointing to a legislative intention of retroactivity, but instead by focusing on the delay between the time of the original breach and the subsequent disclosure of stolen data.

A recent complaint that has been in the news provides an illustrative example. On March 9, Bernadette Barnes filed an amended complaint against Hanna Andersson LLC and Salesforce.com Inc. based on a data breach that occurred between September and November.[20] The amended complaint alleges a claim under the CCPA's private right of action.

While the plaintiff acknowledges in the amended complaint that the breach occurred before the CCPA's effective date, she brings the claim nonetheless on the grounds that the hackers who obtained unauthorized access in the first place disclosed it to third parties after Jan. 1.[21]

We do not believe this effort to extend the reach of the CCPA's private right of action will be successful. As discussed above, the CCPA's private right of action is potentially triggered where personal information:

is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices.[22]

For data breaches that occurred before Jan. 1, a plaintiff cannot prove an unauthorized access to personal information — a necessary element of any claim under the CCPA's private right of action — that occurred while the statute was in effect.

For the reasons set forth above, we believe it is unlikely courts will permit this effort to apply the CCPA retroactively, but this will be an open question until the courts ultimately weigh in.

Conclusion

The rushed drafting of the CCPA resulted in a number of potential questions regarding the private right of action. In the absence of further amendments clarifying these issues, it appears that California courts will have the final say on the existence, nature and extent of the private right of action under the CCPA.

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[1] Cal Civ. Code § 1798.150(a)(1).

[2] Id. § 1798.150(a)(1)(A)-(C).

[3] County of San Diego v. State of California, 164 Cal. App. 4th 580, 609 (2008).

[4] Lu v. Hawaiian Gardens Casino, Inc., 50 Cal. 4th 592, 596 (2010).

[5] See, e.g., Farmers Ins. Exch. v. Super. Ct., 137 Cal. App. 4th 842, 850 (2006) ("A statute creates a private right of action only if the statutory language or legislative history affirmatively indicates such an intent").

[6] Cal Civ. Code § 1798.150(c).

[7] See Bloom v. Martin, 865 F. Supp. 1377, 1384 (N.D. Cal. 1994) (finding that "[t]he inclusion of remedies in certain RESPA provisions and their omission in others is strong evidence that Congress did not intend" to create a private right of action to enforce provisions without express remedies); Gullatt v. Aurora Loan Servs., LLC, No. 1:10-cv-01109-AWI-SKO, 2010 U.S. Dist. LEXIS 110440, at *14-15 (E.D. Cal. Oct. 18, 2010) (finding that "the existence of an express private right of action" under one section of TARP "implies that Congress intended not to provide a private right of action under" a different section of TARP "which does not expressly provide a private right of action.").

[8] Cal. Civ. Code § 1798.155(a).

[9] See, e.g., Informational Hearing Report, 2 ("This bill provides a modified, private right of action for data breaches and allows for enforcement by the Attorney General for other violations.").

[10] Proposed Expansion of CCPA's Private Right of Action Defeated in State Senate, The National Law Review (May 24, 2019), https://www.natlawreview.com/article/proposed-expansion-ccpa-s-private-right-action-defeated-state-senate (last visited March 9, 2020).

[11] Cal. Civ. Code § 1798.194.

[12] Id.; Gafcon, Inc. v. Ponsor & Assocs., 98 Cal. App. 4th 1388, 1425 n. 15 (4th Dist. 2002) ("Virtually any law can serve as the predicate for a Business and Professions Code section 17200 action; it may be. . . civil or criminal, federal, state or municipal, statutory, regulatory, or court-made.").

[13] Cal. Civ. Code § 1798.150(c).

[14] Senate Judiciary Committee Report, AB-375, 2017-2018 Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180A

B375 (follow "06/25/18- Senate Judiciary" hyperlink).

[15] Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).

[16] Zhang v. Super. Court, 57 Cal. 4th 364, 388 (2013) (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 182-83 (1999)).

[17] Doe One v. CVS Pharmacy, Inc., No. 18-cv01031-EMC, 2018 WL 6574191, at *12-13 (N.D. Cal. Dec. 12, 2018) (acknowledging that the law regarding the standard for "unfair" prong claims remains unsettled and describing two tests courts apply).

[18] Burke et al. v. Clearview AI, Inc. et al., Case No. 20CV0370 BAS MSB, Class Action Complaint, ECF No. 1 (Feb. 27, 2020).

[19] Rosasco v. Comm'n on Judicial Performance, 82 Cal. App. 4th 315, 320 (2000)

[20] Barnes v. Hannah Anderson, LLC et al., Case No. 3:20-cv-00812-LB, First Amended Complaint, ECF No. 30 (March 9, 2020).

[21] Ibid at ¶ 103.

[22] Cal Civ. Code § 1798.150(a)(1).