

How Calif. Privacy Act Could Prompt Private Plaintiff Suits

By **Joshua Jessen** (January 11, 2019, 2:23 PM EST)

Since its passage in June 2018, the California Consumer Privacy Act[1] has been the subject of considerable discussion and debate regarding whether it strikes an appropriate balance between consumers' privacy interests and the burdens placed on businesses covered by the act. Its rushed passage — the result of a compromise that removed a similar privacy initiative from appearing on the November 2018 ballot — virtually ensured that the law would be amended before it goes into effect in January 2020.

And indeed, the CCPA has already been amended once (in September 2018). Further amendments are expected this year, and the California attorney general is also slated to weigh in with regulations to further the statute's purposes, as well as to solicit "broad public participation" before the law goes into effect.[2]

The CCPA aims to give California consumers increased transparency into and control over how companies use and share their personal information, and it applies (subject to certain thresholds and with certain exceptions) to for-profit businesses that collect "personal information" (a term that is very broadly defined) about California consumers. As currently enacted, the law would require those businesses to:

1. Disclose what personal information is collected about a consumer and the purposes for which that personal information is used;
2. Delete a consumer's personal information if requested to do so, unless it is necessary for the business to maintain that information for certain purposes;
3. Disclose what personal information is sold or shared for a business purpose, and to whom;
4. Stop selling a consumer's information if requested to do so, unless the consumer is under 16 years of age, in which case the business is required to obtain affirmative authorization to sell the consumer's data; and
5. Not discriminate against a consumer for exercising any of the aforementioned rights, including by denying goods or services, charging different prices, or providing a different level or quality of goods or services, subject to certain exceptions.



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While there are many ambiguities in the CCPA, one of the notable aspects of the law from the standpoint of covered businesses is that, while the statute may be enforced by the attorney general, it does not create a private right of action (outside of certain kinds of data breaches involving the personal information of California consumers).[3] In fact, apart from the data breach private-right-of-action provision, the CCPA states that “[n]othing in this title shall be interpreted to serve as the basis for a private right of action *under any other law*,”[4] meaning that other alleged violations of the CCPA will not be able to be challenged by private plaintiffs under other statutes, including California’s expansive Unfair Competition Law.

That may change in 2019. California Attorney General Xavier Becerra, has stated to the Legislature that “the CCPA does not include a private right of action that would allow consumers to seek legal remedies for themselves to protect their privacy,” and he has “urg[ed] [the Legislature] to provide consumers with a private right of action under the CCPA.”[5] Some consumer and privacy advocacy groups also have encouraged the Legislature to adopt a private right of action.[6] But there is a significant and obvious downside to adding a private right of action to the statute: It could flood already overburdened California courts with scores of lawsuits of dubious merit (e.g., lawsuits based on minor violations of the law and unaccompanied by any actual harm to consumers).

Even absent a change to the statute, however, businesses subject to the CCPA should still be concerned about the possibility of private lawsuits — including class actions — arising from the CCPA. The reason is simple: While the CCPA does not create a private right of action, it does create a mechanism that enables private plaintiffs to request and obtain information from businesses that could be used as evidence in a lawsuit asserting non-CCPA claims.

Specifically, part of the CCPA provides that “[a] consumer shall have the right to request that a business that collects a consumer’s personal information disclose to that consumer the categories and *specific pieces of personal information* the business has collected.”[7] “A business that receives a verifiable consumer request from a consumer to access personal information shall promptly take steps to disclose and deliver, free of charge to the consumer, the personal information required by this section.”[8] In other words, if a consumer makes an appropriate request of a business covered by the CCPA to turn over a copy of the categories and specific pieces of personal information the business has collected regarding that consumer, the business is required to provide the consumer with the information.

The CCPA also provides that “[a] business that collects a consumer’s personal information shall, *at or before the point of collection*, inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used. A business shall not collect additional categories of personal information or use personal information collected for additional purposes without providing the consumer with notice consistent with this section.”[9] Additionally, the CCPA requires that businesses disclose in their online privacy policies and in any California-specific description of a consumer’s rights a list of the categories of personal information they have collected about consumers in the preceding 12 months.[10]

These provisions create the potential for private plaintiffs to file non-CCPA lawsuits based on the information they request and obtain through the mechanisms provided by the CCPA. That is (to take one example), to the extent there is any daylight between a business’ representations about the categories of personal information it collects from California consumers (and how it uses such information) and the specific information provided to an individual consumer in response to a verifiable consumer request, a private plaintiff might attempt to file suit against the business under California’s Unfair Competition Law

(for alleged “unfair” or “fraudulent” conduct), False Advertising Law, Consumers Legal Remedies Act, or a similar statute.

The likely basis for the claim would be that the business made misrepresentations in its privacy policy (or elsewhere) that the plaintiff relied on in deciding to do business with the company. The claim would not be brought under the CCPA (and thus, the plaintiff's counsel would argue, would not run afoul of the prohibition on private suits); rather, the claim would be brought under one of these other statutes but rely upon evidence gathered through the mechanisms/rights established by the CCPA. Absent an amendment to the CCPA prohibiting such suits, this might allow private plaintiffs to effectively do an end run around of the statute’s prohibition on CCPA suits brought under “any other law.”[11]

Such lawsuits would face many hurdles. For example, most private plaintiffs likely would struggle to prove they suffered the type of economic harm required by these other laws. Still, the potential for such private suits underscores the importance for covered businesses of taking the necessary steps to ensure compliance with the CCPA. In particular, companies covered by the law should ensure that the representations they make in their privacy policies (and elsewhere) about the personal information they collect and how they use such information are up to date and accurate.

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[1] The law will be enacted as several new sections of the California Civil Code (Sections 1798.100 to 1798.198).

[2] Cal. Civ. Code § 1798.185.

[3] Cal. Civ. Code § 1798.150(a)-(c).

[4] Cal. Civ. Code § 1798.150(c) (emphasis added).

[5] Aug. 22, 2018 Letter from Attorney General Becerra to Calif. Assemblymember Ed Chau and Sen. Robert Hertzberg, D-Calif., available at <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2801&context=historical>.

[6] Dec. 3, 2018 Letter from several consumer and privacy groups to Members of the state Legislature, available at https://www.eff.org/files/2018/12/04/12.3.18_ccpa_coalition_letter.pdf.

[7] Cal. Civ. Code §1798.100(a) (emphasis added).

[8] Cal. Civ. Code § 1798.100(d).

[9] Cal. Civ. Code § 1798.100(b) (emphasis added).

[10] Cal. Civ. Code §§ 1798.110(c); 1798.130(a)(5)(B).

[11] Cal. Civ. Code § 1798.150(c).