

# Class Actions Seek to Test the Limits of the CCPA's Private Right of Action

Companies doing business in California should expect to see these boundary-testing CCPA class actions continue until courts weigh in on this unsettled area of law.

By **Kate Spelman, Vivian Bickford and Effiong Dampha**

The California Consumer Privacy Act (CCPA) took effect Jan. 1. As has been well documented, the statute provides consumers with certain rights regarding their personal information, including the right to know whether businesses are collecting such information and how it is being used, the right to request deletion of such information, and the right to opt out of the sale of such information to third parties.

The CCPA also includes what was supposed to be a limited private right of action that permits consumers to recover up to \$750 in statutory damages per incident when certain types of personal information are exposed in connection with a data breach. Perhaps unsurprisingly, this private right of action has already spawned dozens of class actions in California state and federal courts. These suits shed light on the various ways plaintiffs are testing the boundaries of the CCPA and its private right of action. Several categories of boundary-testing CCPA lawsuits are discussed below.



(L to R) Jenner & Block's Kate T. Spelman, Vivian L. Bickford and Effiong K. Dampha.

## CCPA Lawsuits Premised on Violations of the Statutory Notice and Opt-Out Provisions

As mentioned above, the CCPA provides consumers with certain rights to know and control how their data is being collected and used. However, the CCPA's private right of action applies only to the "unauthorized access and exfiltration, theft, or disclosure" of personal information resulting from a business's failure to "implement and maintain reasonable security procedures and practices." Importantly, CCPA claims "based on violations of any other section of this title" are not permitted. Despite this express limitation, a number of plaintiffs have asserted CCPA claims based on alleged fail-

ures to comply with the CCPA's disclosure, deletion and opt-out requirements. While these alleged failures may constitute technical violations of the CCPA, under a plain reading of the statute, they do not give rise to a private right of action. Nonetheless, plaintiffs have not been deterred from bringing suit.

For example, in *L.P. v. Shutterfly*, which was filed in the Northern District of California on July 23, several minor plaintiffs and their legal guardians assert a CCPA claim based on Shutterfly's alleged collection and use of minors' personal biometric information without notice and an opportunity for deletion in violation of Section 1798.100(b) of the CCPA. The complaint also seeks to hold

Shutterfly liable for selling minors' personal biometric information without requiring opt-in or parental consent, and attempts to equate this conduct to "a data breach" under CCPA Section 1798.150. If adjudged viable, this claim would render meaningless the prohibition against CCPA claims based on violations of the disclosure and opt-out provisions of the statute. Shutterfly has not yet responded to the complaint.

Similarly, in *McCoy v. Alphabet*, which was filed in the Northern District of California on Aug. 5, the plaintiffs allege that Google violated Section 1798.100(b) of the CCPA by failing to disclose that it collects plaintiffs' "sensitive personal data from non-Google apps, including the duration of time spent on non-Google apps and the frequency that non-Google apps are opened." Google's pending motion to dismiss argues that the plaintiffs' CCPA claim should be dismissed because it is premised on statutory violations to which the private right of action does not apply.

#### **CCPA Lawsuits Seeking Recovery for Non-California Residents**

The CCPA applies only to "consumers" who are "California resident[s]." Yet, several pending CCPA class actions seek recovery for or on behalf of non-California residents. *Fuentes v. Sunshine Behavioral Health Group LLC*, filed in the Central District of California on March 10, is representative of these actions. There, a Pennsylvania resident filed a CCPA claim on behalf of a nationwide class of alleged victims of a California company's data breach. The defendant

filed a motion to compel arbitration or, in the alternative, to dismiss the complaint, in which it argued, among other things, that the CCPA claim must be dismissed because the non-resident plaintiff is not a "consumer" under the statute. The court has not yet ruled on the motion.

*McCoy* is also illustrative of this category of CCPA lawsuits. There, the lead plaintiff is a resident of New York, and Google therefore argued in its motion to dismiss that the plaintiff lacks statutory standing because he does not meet the definition of a "consumer" under the CCPA.

#### **CCPA Lawsuits Stretching the Definition of 'Personal Information'**

The CCPA contains a broad definition of "personal information" subject to its notice and opt-out requirements. The CCPA's private right of action, on the other hand, only covers data breaches involving the more narrow definition of "personal information" in California Civil Code § 1798.81.5(d)(1)(A). Under that statute, "personal information" must include a consumer's first name or first initial and last name "in combination with" unencrypted sensitive information such as the consumer's Social Security number, driver's license number, financial information, medical information, health insurance information, or unique biometric data. However, several CCPA class actions seek recovery for the allegedly unauthorized disclosure of information that does not appear to meet this statutory definition.

*Atkinson v. Minted*, filed in the Northern District of California on June 11, provides an example of one

such lawsuit. There, the plaintiffs filed a class action against the online marketplace Minted following notice of a data breach that allegedly resulted in the disclosure of consumer names, email addresses, passwords, and, where available, telephone numbers and addresses. There is no allegation, however, that the breach resulted in the exposure of consumers' names in conjunction with the type of sensitive information required by the relevant statutory provision on which the CCPA's private right of action relies. No substantive motions have been filed to date, though Minted has indicated that it intends to file a motion to compel arbitration.

Companies doing business in California should expect to see these boundary-testing CCPA class actions continue until courts weigh in on this unsettled area of law. Until then, and in any event, businesses should take steps to implement adequate security procedures, and ensure that they are providing consumers with all information and disclosures required under the CCPA. Moreover, businesses should be cognizant of the additional protocols they may be required to implement in the event the CCPA is replaced by the California Privacy Rights Act scheduled to appear on the November ballot.

*Kate Spelman* is a partner in Jenner & Block's Los Angeles office and co-chair of the firm's consumer law practice. *Vivian Bickford* and *Effiong Dampha* are Los Angeles-based associates in the firm's litigation department.