

Consumer Litigation Under the CCPA: A Year in Review

Private consumer litigation in 2020 was significantly impacted by the [California Consumer Privacy Act \(CCPA\)](#) which took effect on January 1, 2020. Whether asserted as a standalone CCPA violation claim or as a predicate act for other causes of action, including under California's Unfair Competition Law ("UCL"), the volume of CCPA litigation has not abated. While some claims have already been resolved (by motion or agreement), others are just hitting their litigious stride and with a full year of experience, certain trends have started to develop.

Over the course of the year, we have reported and summarized filed cases in our CCPA Round-Ups ([Q1](#), [Q2](#), [Q3/4](#)). Now, with the first year of CCPA litigation behind us, this post (1) highlights emerging trends across the docket of cases; and (2) introduces Kelley Drye's new [CCPA Litigation Tracker](#), which is designed to provide an ongoing reference guide for updates on key cases involving consumers asserting CCPA-related claims.

CCPA Litigation Trends

At least three dozen consumer actions filed in 2020 asserted CCPA violations either as direct CCPA claims, but also as a predicate for separate causes of action, for example, as a violation of California's Unfair Competition Law (UCL). We have seen that direct CCPA claims are more common, with 21 of the 39 complaints alleging direct CCPA causes of action, while 11 allege a CCPA violation as a predicate to support other causes of action. The remaining 7 consumer complaints referenced the CCPA without actually relying on it, either directly or as a predicate, in a specific cause of action.

While some CCPA cases are just getting started and others are seemingly headed for long, drawn-out disputes, several cases have either terminated or are temporarily stalled. As discussed in further detail below, 13 cases have been subject to a motion to dismiss, 5 have been subject to a motion to compel arbitration, and 2 class actions are currently pending settlement approval. In particular, we discuss several cases previously summarized in our 2020 CCPA Round-Ups that have been preliminarily resolved, stayed pending arbitration, or are subject to dispositive motions:

1. Motions to Dismiss

Several defendants have responded to CCPA-related consumer complaints with motions to dismiss, arguing that the plaintiffs fail to state a valid claim. While motions to dismiss have been filed in at least 13 cases, all but 4 are still pending. However, in the 4 motions to dismiss that have been decided, the court did not engage in any substantive CCPA-related analysis and they offer little guidance going forward:

- In *Rahman v. Marriott International*, the defendant argued that the plaintiff failed to allege the breach of any categories of information that are actionable under the CCPA and that the plaintiff failed to provide the required notice and opportunity to cure. The court did not address these arguments, relying instead on Article III standing to dismiss the complaint because the allegedly compromised information, "names, addresses, phone numbers, email addresses, genders, birth dates, and

loyalty account numbers,” were not sufficiently sensitive to result in an injury in fact.¹

- In *Karter v. Epiq Systems*, the defendant moved to dismiss, asserting that the plaintiff lacked standing and failed to state a claim because he sued the wrong party in that the named defendant never maintained the plaintiff’s personal information.² The court denied the motion without prejudice but permitted the parties to engage in jurisdictional discovery on the issue of the proper defendant.
- In *Top Agent Network, Inc. v. National Association of Realtors*, the court orally granted the motion to dismiss without prejudice. The motion did not make substantive CCPA-related arguments. Plaintiff subsequently filed an amended complaint alleging a violation of the UCL, using the alleged CCPA violation as a predicate.³
- In *Shay v. Apple Inc*, the plaintiff agreed to dismiss the CCPA claim in its opposition to the motion to dismiss, mooted that portion of the motion.⁴

There are at least 9 other CCPA-related cases with motions to dismiss still currently pending.⁵ We have outlined below some of the common arguments raised by the defendants in these motions:

(a) The defendant is not the type of business that is subject to the CCPA. The CCPA applies only to a “business” that operates in California, collects personal information, and determines the purpose or means of processing that data. Defendants have relied on this definition to argue that they are not “businesses” under the CCPA, but only “service providers” that process the data on behalf of businesses.⁶

(b) CCPA violations cannot serve as a predicate for a UCL violation. The UCL acts as a borrowing statute by prohibiting “unlawful, unfair, or fraudulent” business practices and making violations of other laws actionable under the UCL. However, the CCPA explicitly provides that “nothing in this act shall be interpreted to serve as the basis for a private right of action under any other law.”⁷ Typically, courts do not permit plaintiffs to use statutes as predicate violations for a UCL claim if the statute expressly precludes it. As

¹ *Rahman v. Marriott International, Inc.*, No. 8:20-cv-00654 (C.D. Cal.).

² *See Karter v. Epiq Systems, Inc.*, No. 8:20-cv-01385 (C.D. Cal.).

³ *Top Agent Network, Inc. v. National Association of Realtors et al.*, No. 3:20-cv-03198 (N.D. Cal.).

⁴ *Shay v. Apple Inc*, 3:20-cv-01629 (S.D. Cal.).

⁵ In addition to those discussed herein, the following cases also have motions to dismiss pending: *Wesch v. Yodlee, Inc.*, 3:20-cv-05991 (N.D. Cal.), *Bakhtiar v. FCA US LLC*, 2:20-cv-06522 (C.D. Cal.).

⁶ *See e.g., Hayden v. The Retail Equation, Inc.*, No. 8:20-cv-01203 (C.D. Cal.); *Gupta v. Aeries Software, Inc.*, No. 8:20-cv-00995 (C.D. Cal.).

⁷ Cal. Civ. Code § 1798.150(c).

such, defendants facing allegations that CCPA violations provide a basis for a UCL cause of action have moved to dismiss on these grounds.⁸

(c) Non-California residents cannot sue under the CCPA. The CCPA applies to the personal information of a “consumer,” which is defined by the statute as “a natural person who is a California resident.” This narrow definition of a consumer has led defendants to argue that individual plaintiffs and/or overbroad proposed class definitions that include non-California residents are not protected by the CCPA and are improper.⁹

(d) The personal information compromised does not give rise to a private right of action under the CCPA. While the CCPA includes its own definition of “personal information,” it also borrows the California Consumer Records Act’s (“CCRA”) narrower definition of “personal information” for its provision creating the private right of action for data breaches. Plaintiffs have asserted claims based on breaches where the breached data may satisfy the CCPA’s broad definition of personal information, but may not fall under the narrower definition contained in the CCRA. In response, defendants argue that plaintiffs’ causes of action are limited to personal information as defined by the CCRA.¹⁰

(e) The plaintiff(s) did not provide adequate notice and opportunity to cure prior to filing suit. Before a consumer is authorized to bring a lawsuit following a covered business’ data breach, he or she must provide the covered business 30 days’ written notice identifying the specific provisions of the CCPA that were violated and an opportunity to cure. If the business cures and provides an express written statement that the violation has been cured and that no further violations will occur, the consumer is prohibited from seeking statutory damages. Defendants have moved to dismiss on the basis that plaintiffs have either not provided notice at all, or filed suit within the 30 days without giving defendants the opportunity to cure.¹¹

As Courts begin to rule on these motions, they will provide helpful precedents for understanding the limits and pleading requirements to CCPA litigation claims.

⁸ See e.g., *Mccoy v. Alphabet, Inc.*, No. 5:20-cv-05427 (N.D. Cal.); *Gardiner v. Walmart Inc. et al*, No. 4:20-cv-04618 (N.D. Cal.); *Pygin v. Bombas, Llc*, No. 4:20-cv-04412 (N.D. Cal.); *Burns v. Mammoth Media, Inc.*, No. 2:20-cv-04855 (C.D. Cal.); *Galvez v. Draper James, LLC*, No. 2:20-cv-04976 (C.D. Cal.).

⁹ See e.g., *Mccoy v. Alphabet, Inc.*, No. 5:20-cv-05427 (N.D. Cal.); *Burns v. Mammoth Media, Inc.*, No. 2:20-cv-04855 (C.D. Cal.); *Hayden v. The Retail Equation, Inc.*, No. 8:20-cv-01203(C.D. Cal.); *Fuentes v. Sunshine Behavioral Health Group LLC*, 8:20-cv-00487 (C.D. Cal.).

¹⁰ The parties in *Flores-Mendez v. Zoosk, Inc.*, 3:20-cv-04929 (N.D. Cal.), *Shay v. Apple Inc.*, 3:20-cv-01629 (S.D. Cal.) and *Gupta v. Aeries Software, Inc.*, No. 8:20-cv-00995 (C.D. Cal.) are each currently briefing this issue before the Court.

¹¹ See e.g., *Hayden v. The Retail Equation, Inc.*, No. 8:20-cv-01203(C.D. Cal.); *Fuentes v. Sunshine Behavioral Health Group LLC*, No. 8:20-cv-00487 (C.D. Cal.).

2. Arbitration Continues to Be An Early Threshold

Arbitration of CCPA claims has proven to be a viable alternative where the record undisputedly supports it. Defendants have sought to compel arbitration in at least 5 CCPA-related suits. So far, 3 of those 5 motions have been decided. While all 3 granted the motions to compel arbitration, the motions were unopposed.¹² In those cases, each plaintiff filed a Statement of Non-Opposition conceding that the record before the court mandated arbitration. For example, in *Sweeney v. Life on Air, Inc. & Epic Games, Inc.*, plaintiff cited the “detailed declaration outlining the steps Plaintiff would have taken in accepting the terms and conditions prior to using Defendants’ platform and the arbitration provision contained therein” as plaintiff’s basis for not opposing arbitration. In the remaining 2 cases, the plaintiffs voluntarily dismissed the actions without filing any opposition to the motions.¹³

Based on these cases, motions to compel arbitration appear to be a potential exit ramp to litigating CCPA claims.

3. Class Settlements

Class settlements have been preliminarily approved in 2 cases: (1) *Llamas v. Truefire, LLC*, Case No. 8:20-cv-00857 (M.D. Fla.) and (2) *In Re: Hanna Andersson and Salesforce.com Data Breach Litigation*, Case No. 3:20-cv-00812 (N.D. Cal.). Both cases proceeded to settlement discussions before any responsive pleadings or dispositive motions were filed.

In *Llamas*, the named plaintiff alleged that the names, addresses, payment card numbers, security codes and expiration dates of the defendant’s customers were disclosed in a credit card scraping attack. The preliminary settlement releases all claims against Truefire related to the alleged breach in exchange for: (1) nine months of free access to Truefire for all 4,911 class members; (2) up to sixty dollars in payment to any class member who was required to remediate fraudulent charges on his credit card as a result of the breach, subject to proof; (3) a direct payment of fifty dollars to any California sub-class member; and (4) the implementation of enumerated data security practices by Truefire. In addition, Truefire agreed to pay class counsel’s fees and expenses, up to \$156,500.

In *In Re: Hanna Andersson and Salesforce.com Data Breach Litigation*, No. 3:20-cv-00812 (N.D. Cal.), the three named plaintiffs alleged that in 2019, hackers purportedly “scraped” the names, addresses, payment card numbers, security codes and expiration dates of defendant Hanna Andersson’s customers by compromising defendant Salesforce.com’s ecommerce platform. The preliminary settlement releases all claims against Hanna Andersson and Salesforce related to the alleged breach in exchange for: (1) a \$400,000 settlement fund and (2) injunctive relief. Approximately 200,273 class members are entitled to request either a basic award of up to

¹² See *Sweeney v. Life on Air, Inc. & Epic Games, Inc.*, Case No. 3:20-cv-00742 (S.D. Cal.); *Ornelas v. Central Valley Meat Co., Inc.*, No. 1:20-cv-01017 (E.D. Cal.); *Gitner v. U.S. Bank National Association*, 20-cv-02101 (D. Minn.).

¹³ *Calixte et al v. Dave, Inc.*, 2:20-cv-07704 (C.D. Cal.); *Fuentes v. Sunshine Behavioral Health Group LLC*, 8:20-cv-00487.

\$500 or a reimbursement award of up to \$5,000, subject to proof. All awards will be reduced pro rata if the total claims submitted exceed \$400,000. Hanna Andersson also agreed to implement certain security measures.

Kelly Drye's CCPA Litigation Tracker

We will continue to report on relevant developments in CCPA consumer litigation, and also provide updates in our new [CCPA Litigation Tracker](#). The Tracker includes key facts about each case – case caption, jurisdiction, summary of claims asserted, and current status – to help provide a quick point of reference to track developments in CCPA-related litigation.

If you have any questions about defending and/or preparing for a potential privacy consumer class action, please reach out to our [team](#).