CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

December 13, 2019

Via U.S. Mail and Electronic Mail

Alastair Mactaggart
c/o James C. Harrison
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1901 Harrison Street, Suite 1550
Oakland, CA 94612

Re: *The California Privacy Rights Act of 2020* [version 11-13-19]

Dear Mr. Mactaggart:

The Civil Justice Association of California ("CJAC") appreciates your collaboration with a broad swath of the business and technology communities and others to polish your sponsored statutory initiative on consumer privacy – the California Privacy Rights Act of 2020 ("CPRA"). The most recent version of this measure you filed with the Attorney General on November 13 improves on previous ones, showing that when those affected by proposed laws work together to make them clearer and more workable, the end product is better for all. Despite the progress made through these conferrals, however, CJAC still has concerns about the CPRA that we convey here for your consideration.

By way of background, CJAC represents a broad and diverse array of businesses and professional associations. A trusted source of expertise in legal reform and advocacy, we confront legislation, laws, and regulations that create unfair burdens on California businesses, employees, and communities. Toward this end, CJAC provides research and guidance on policy issues that impact civil liability issues, including ballot initiatives, to achieve our goals.

The first initiative we sponsored was Proposition 51, The Fair Responsibility Act of 1986.[1] Eighteen years later, CJAC sponsored Proposition 64, enacting limitations on the enforcement of Unfair Business Competition Laws to reduce "shakedown" lawsuits by requiring those who sue businesses on behalf of the public for conduct that is unlawful, unfair or based on false advertising to show that they suffered "actual injury" themselves. From their inception, both initiatives have undergone frequent judicial clarification about their scope and application. In the aftermath of Proposition 51, the Legislature enacted the Willie L. Brown Jr.-Bill Lockyer Civil Liability Reform Act of 1987, which made changes

[1] This Act buttoned-up the "deep pocket" rule of joint and several liability so defendants responsible for only a minimal share of the plaintiff's injuries would no longer have to pay all of the plaintiff's damages, but for non-economic losses only the percentage for which a defendant is found responsible for the plaintiff's injury.

to punitive damages, product liability, and medical malpractice benefitting defendants while raising the amount of recoverable contingency fees for attorneys in medical malpractice lawsuits.

Our experience with these initiatives and other liability laws understandably draws our attention to the private right of action provision in the CPRA. This provision illustrates our concerns about the timing and overlapping of the initiative with similar recently enacted laws we believe warrant clarification. Together they underscore why the CPRA should be deferred.

1. It Is Too Soon to Enact an Initiative that Replicates the California Consumer Privacy Act of 2020; a Reasonable Passage of Time is Necessary to Experience How that Act Is Working Before it is Enshrined by Initiative.

"Slow down, you move too fast." (Simon & Garfunkel). *The 59th Street Bridge Song* ("Feelin' Groovy")

The private right of action provision reads substantially the same (with the exception of one sentence we address later) as the legislative provision it supplants. That legislative provision, Civil Code § 1798.150, takes effect on January 1, 2020. The analogous provision to it in the initiative would become law on November 3, 2020, just nine months later, though its effective date is postponed to 2023.

We recognize your filing of a previous proposed initiative on consumer privacy in 2018 played a significant role in enactment of the California Consumer Privacy Act (CCPA), and that is why you understandably withdrew that initiative after the CCPA became law. Indeed, the CCPA largely mirrors your 2018 proposed initiative.[2] The CPRA, however, follows too closely on the heels of the CCPA. While an initiative measure may spur subsequent legislative enactments consistent with its general purpose, as happened with Proposition 51's stimulus for the Brown-Lockyer Civil Liability Reform Act, we know of no instance where a major legislative reform prodded by a threatened initiative was immediately followed by another initiative that cements it essentially "as is." Without knowing how and whether this private right of action provision and other sections will further or impair its intended purpose, the CPRA effectively locks those affected by it into perpetual judicial wrangling over its scope and application or another costly ballot measure to fix whatever may turn out to be amiss.

By "locks-in" we refer to the restrictive language in section 25 of the CPRA specifying that any legislative amendments to it "must be consistent with and further the purpose and intent of this Act." That stated "purpose and intent" is to achieve two goals that while sometimes complementary are also sometimes conflicting: "The law should be amended, if necessary, to improve its operation, *provided that the amendments do not compromise or weaken consumer privacy, while giving attention to the impact on business and innovation*." (Emphasis added.) The CPRA recognizes that these two goals – "[c]onsumer

[2] "Except for a much more limited private right of action and a key whistleblower provision included in the original initiative, [the CCPA] preserves the core rights enshrined by the initiative's drafters and adds a fourth key right: the right to have a business delete a consumer's personal information, with some exceptions." Pardau, *The California Consumer Privacy Act: Towards a European-style Privacy Regime in the United States* (2018) 23 *J. TECH. L. & POL'Y* 68, 91-92.

privacy and the development of beneficial new products and services" – may conflict when it admits that "they are *not necessarily* incompatible . . .", implying that they may sometimes be irreconcilable. (Section 3(c); emphasis added.)

This CPRA language governing legislative amendment is an obstacle to achieving same. There is no good reason to enshrine the specific private right of action language of the CCPA, or for that matter, other sections of it, into the CPRA so soon, while there are sound reasons to wait and see how this provision plays out in practice. It may be that the private right of action under the CCPA will prove more problematic than propitious, suggesting legislative surgery to repair or sever the section; but it will take more than nine months to make that determination. If your initiative passes in 2020, Californians will be locked into it before sufficient time has lapsed to see if it works as intended.

Concern that the private right of action provision could end up killing the goose of internet technology that lays the golden egg of cyber commerce is highlighted by experience with an analogous private right of action – the Private Attorney General Act (PAGA) of 2004. PAGA confers upon employees an ability to obtain statutory damages against employers for certain Labor Code violations comparable to the statutory damages allowable under the CCPA and the CPRA. The stated reason for creating PAGA's private right of action was the same as that given in support of it in the CCPA: the Attorney General does not have adequate resources to protect the law's intended beneficiaries – employees in PAGA and consumers here – from violations of their respective rights by employers or businesses.

However, the growth of private PAGA litigation has bolstered the coffers of the State sufficiently to enable the Attorney General to now take care of the law's intended beneficiaries without reliance on continued help from private contingency fee counsel.[3] The latest figures show a dramatic spurt in the State's receipt of PAGA settlements, jumping "from $13.5 million in . . . 2015-16 . . . to $34.07 million in . . . 2018-19. . .." (Atkins, "California's *Kilby* Ruling Sparks Big-Ticket PAGA Seating Deals," *LAW 360*, October 31, 2019.)

Most recently, and illustrative of how PAGA's private right of action often works in practice, a Santa Clara Court class action against Safeway for failing to provide seats to its more than 30,000 store cashiers settled for $12 million. Out of that total amount employees got $2 million, or a mere $66.66 each, while the handful of PAGA plaintiff attorneys got $4.2 million and the California Labor and Workforce Development Agency $5.6 million.[4] This prompted one PAGA attorney to suggest an amendment to its private

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[3] Between 2005 and 2013, PAGA claims increased more than 400%, from 759 cases to 3,137. Ottens, *Nuisance Cases Ramp Up Before High Court Weighs In*, *LOS ANGELES BUSINESS JOURNAL*, Nov. 10, 2014. A more recent report claims "statistics show an average of 5,900 PAGA filings in California per year, with the state collecting an average of $5.7 million in penalties per year." (https://www.bakersfield.com/kern-business -journal/paga-everything-you-wanted-to-know-but-were-afraid-to/article_ad0fb144-1cf6-5cd7-b3e6-a1cb66dc9608.html).

[4] PAGA allows private plaintiffs to dispense with a class action for certain claims against employers and bring a "representative" action for which the State gets 75% of the award and the plaintiffs get the remaining 25%.

right of action: "The amount of penalties and attorneys' fees awarded, if any, must bear an appropriate relationship to the harm . . . caused by the practices at issue."

But that amendment will never occur through the legislature. PAGA has been law long enough that its private right of action enables prevailing plaintiff attorneys to make political contributions and fund lobbying efforts to prevent its amendment. "One need only read the daily newspapers to see how much easier it is to stall legislation than to enact it, how much simpler to expand what exists than to contract it." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc*. (1998) 17 Cal.4th 553, 598 (Brown, J., dissenting opn.).[5]

Incorporating the CCPA's private right of action into the CPRA, then, saddles Californians with language unlikely to be changed despite evidence from its operation that amendment may well be advisable. Accordingly, we believe the better, more sensible approach is to wait and see how the CCPA's private right of action pans out before cementing language in the CPRA that can only, as a practical matter, be amended by future initiative.

There are other foreseeable problems posed by the CPRA's private right of action provision and its intersection with the CCPA's similar provision, as well as with other sections of both laws. The CCPA specifies, for instance, that recoverable "statutory damages" – *i.e*., those "not less than one hundred dollars ($100) and not greater than seven hundred and fifty ($750) per consumer per incident" – may only be sought if a consumer first gives the defendant 30 days written notice of the violations and an opportunity to "cure" them. "Cure" is not defined in the CCPA provision, but in the CPRA a sentence has been added to this section stating that the "implementation and maintenance of reasonable security procedures and practices . . . following a breach does not constitute a cure with respect to that breach." Does omission of this sentence in the CCPA mean that the "implementation and maintenance of reasonable security procedures and practices" by a business within the 30-day notice period does count as a "cure"? How does one harmonize the differences in wording about a "cure" of these two comparable provisions? Does the CCPA language apply until the CPRA is approved by voters in 2020, or until it "takes effect" in 2023? Moreover, while we know only what a "cure" is not from the CPRA, we don't know what really counts as a "cure" under it or the CCPA. These uncertainties should be clarified before the CPRA is put before voters.

Another issue is how the private right of action in the CPRA will work in conjunction with the "administrative fine of not more than two thousand five hundred dollars ($2,500) for each violation, or seven thousand five hundred dollars ($7,500) for each intentional violation or violations involving the personal information of consumers . . . under 16 years of age . . . in an administrative enforcement action brought by the California Privacy Protection Agency." (Section 17 of the CPRA.) Does this mean a business can be sued concurrently by a consumer and the Agency for violating the rights

[5] Justice Brown's observation was about the state's Unfair Competition Law ("UCL") which, though it does not contain a provision for attorney fees like PAGA, is often paired with another statute that permits prevailing plaintiffs to recover court-ordered attorney fees in public interest cases. (Code of Civil Proc. § 1021.5.) That attorney fee provision is directly available to successful plaintiffs for breach of data privacy claims under the CCPA or those claims can be "bootstrapped" to the "unlawful" prong of the UCL for equitable enforcement.

to privacy for a person under 16 years of age? May the Agency, authorized with "full administrative power . . . to implement and enforce" the Act (Section 24), settle a dispute with a defendant and foreclose other actions brought against that defendant by private parties for the same violations? Whatever the answer, private and public enforcement actions may interfere or conflict with each other.[6]

Private enforcement litigation often engenders an overemphasis on coercion and deterrence at the expense of negotiation and cooperation, regardless of the wishes of the government enforcement agency. A related problem is that private suits may impede government efforts to persuade industries to regulate themselves, since industry-generated guidelines may subsequently become the basis for private enforcement suits. If businesses fear that cooperating with state regulators to develop standards of conduct will lead to greater exposure to liability in private lawsuits, they may be more reluctance to engage in such cooperative efforts, which in turn would substantially raise the costs to regulators of developing appropriate regulatory standards.

Moreover, private enforcement suits entail social costs that are not internalized by private plaintiffs. Private plaintiffs are sometimes insensitive to the litigation costs of their suits (including the drain on judicial resources), especially if they are able to recover attorney fees. (See, e.g., Code of Civil Proc. § 1021.5.)

2. The tiered phasing in over three years for different sections of the CPRA, together with the requirement that the Attorney General promulgate regulations to enforce it, engenders confusion worse confounded for businesses trying to comply with the law.

"Good and bad, I define these terms/Quite clear, no doubt somehow/Ah, but I was so much older then/I'm younger than that now." (Bob Dylan). *My Back Pages*

The CPRA contains 30 separate sections, not counting section 31 that specifies the effective date each previous section takes effect. Six enumerated sections become operative upon passage of the CPRA, which would be November 3, 2020. The remainder, with the exception of "the right of access," applies retroactively to personal information collected by a business on or after January 1, 2022, even though these sections do not themselves become operative until January 1, 2023. In the meantime, the CCPA, which takes effect on January 1, 2020, shall remain in "full force and effect . . . until the same provisions of [the CPRA] become operative and enforceable."

All sections of the CPRA are, as is the CCPA, subject to the adoption of regulations by the Attorney General on or before July 1, 2020. The Attorney General has just solicited and received "broad public participation" on proposed regulations governing the CCPA. Should the CPRA become law, new regulations responsive to changes made by previous regulations to the CCPA will be required. Compounding this, "beginning July 1, 2021 . . ." the new politically appointed Privacy Agency under the CPRA takes over responsibility for promulgating and adopting regulations for its implementation. This

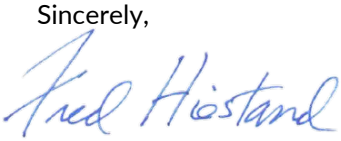
[6] As two knowledgeable commentators put it, private enforcement actions interfere with an agency's ability "to negotiate with regulated firms and other affected interests in order to establish a workable and consistent regulatory system." (Stewart & Sunstein, *Public Programs and Private Rights* (1982) 95 *HARV. L. REV.* 1193, 1292-93.)

phased-in process for statutory and regulatory sections places unreasonable and confusing burdens upon businesses seeking to understand and comply with a variety of complex legal requirements.

The practical effect of the CPRA and the new regulations that hopefully put clarifying meat on its bones all but assures uncertainty through continuous changes as to its scope and effect. Consumers and businesses subject to the CCPA, the CPRA and their accompanying regulations cannot be sensibly guided as to what the law permits and prohibits by this three-year staggered, herky-jerky process the CPRA imposes.

California needs a breather from this dictated turmoil over privacy, a reasonable opportunity to make the CCPA work and discover what changes to it may be warranted before subjecting people to a regulatory straitjacket from which the only way out is another costly initiative. Please give us all that chance by deferring any proposed privacy initiative to a later date.

Sincerely,



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