The Florida Justice Reform Institute Opposes CS/SB 1734

2021 CS/SB 1734 proposes comprehensive consumer data privacy protections through the enactment of the Florida Privacy Protection Act (the "Act"). The Act would provide new obligations for covered businesses and a significant expansion of consumers' rights concerning businesses' use of their personal information, including a right to opt out of a business's data selling practices. While the bill is well-intentioned, the Florida Justice Reform Institute opposes the legislation as it would impose exceedingly burdensome and costly requirements on businesses with little benefit to consumers and create a broad private cause of action that will prove to be a boon for class action plaintiffs' lawyers.

The Compliance Requirements Are Onerous, Costly, and Needlessly Complex. The legislation's ostensible goal is to better protect consumers' personal information in the hands of businesses. CS/SB 1734 defines the term "personal information" to mean traditionally sensitive, personally identifying information like social security numbers and medical information—the types of information the disclosure of which risks identity theft. But the definition of "personal information" also encompasses relatively innocuous information, the disclosure of which is unlikely to lead to identify theft, such as "[i]nferences drawn from any [of the other types of personal information identified] which can create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes." Proposed § 501.174(18)(a)12., Fla. Stat. Thus, for example, the inference that a consumer likes true crime shows based on his or her Netflix preferences is protectable "personal information" within the meaning of the legislation.

Under CS/SB 1734, covered businesses would be required to meet several requirements in order to protect such personal information, including the requirement to implement reasonable security procedures and practices appropriate to the nature of the personal information to protect the information from unauthorized or illegal access, destruction, use, modification, or disclosure. Proposed § 501.1745(3), Fla. Stat. In addition to the right to opt out of a business's data selling practices, the proposed law would grant consumers the right to request access to, correction of, or the deletion of personal information. Proposed § 501.175(5)(f), (6), (8), (12), Fla. Stat. A covered business will be required to promptly respond to a consumer's request to access, correct, or delete within 30 days after the date the request is submitted, although that period may be extended by up to 30 days if the business determines, in good faith, an extension is necessary. Proposed § 501.175(12)(d).

These requirements are deceptively simple, but when applied to businesses' data management systems and practices, they are exceedingly complex and costly. Even for businesses with strong data management practices, the ability to identify and organize information, and make that information accessible and ready portable for consumers, would require a significant

investment in data management software and program capabilities that can easily run into the millions of dollars. Indeed, most covered businesses do not inventory personal information to be sortable or retrievable by individual such that the requirements of the legislation can be accomplished easily. Given the breadth of the bill's definition of "personal information," companies will be required to translate the categories of information encompassed within that definition into discrete data elements so that they can catalogue and make accessible such information, all at great cost to the organization. Even when the legwork of readying systems to respond to consumer requests is done, the reality is that it will be difficult for a covered business to respond to all such requests within even the extended 60-day timeframe.

The legislation contains detailed exemptions for certain types of information, including, e.g., "[p]ersonal information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act" ("GLBA"), a federal law that already requires financial institutions to explain information-sharing practices to their consumers and to safeguard sensitive personal data. Proposed § 501.176 (2)(f), Fla. Stat. Such exemptions create their own complexities, as to account for these exemptions, covered businesses will have to invest significant amounts of resources into data management software and solutions that would allow them to appropriately catalogue personal information that is subject to CS/SB 1734 and that which is not (but may be subject to other, different requirements such as GLBA).

The legislation's requirement that covered businesses delete personal information upon request also presents unique challenges. In some instances, data meeting the legislation's definition of "personal information" might serve as a "key" between upstream and downstream systems, such that the attempted deletion of that "key" information will have consequences for the systems' overall stability and require covered businesses to conduct extensive testing before any data can be deleted—all the while running on a difficult-to-meet 30-day or 60-day clock.

In short, the legislation would require covered businesses to invest significant time and resources in compliance with Byzantine data management requirements to protect information as simple as a consumer's Netflix preferences. And that compliance will come at a great cost. As just an example, under the California Consumer Privacy Act ("CCPA") on which CS/SB 1734 appears to be partially modeled, the total estimated cost of ***initial*** compliance by businesses with the act was ***approximately $55 billion***.[1] This is ***in addition*** to the significant costs businesses will face as the result of the expansive civil liability proposed under CS/SB 1734, discussed next.

CS/SB 1734's Private Cause of Action Will Create a Gold Rush for Class Action Plaintiffs' Attorneys. There is no statutory private cause of action as of yet in Florida for data breaches. Under proposed section 501.177, Florida Statutes, however, "[i]f any business violates ***any provision*** of this act, the consumer may initiate a civil action for any of the following," including "[r]ecovery of damages of at least $100 and not more than $750 per consumer per incident or actual damages, whichever is greater." Notably, the legislation does not contain an express causation requirement. Until now, the biggest obstacle plaintiffs faced in data breach litigation was proving actual harm—e.g., money losses. CS/SB 1734 removes that hurdle, and

[1] California Attorney General, *Standardized Regulatory Impact Assessment: California Consumer Privacy Act Regulations* at 11 (Aug. 2019), https://www.tellusventure.com/downloads/privacy/calif_doj_regulatory_impact_assessment_ccpa_14aug2019.pdf.

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with the broad liability created under the proposed legislation, Florida will be the site of a new gold rush for class action plaintiffs' attorneys looking for easy and lucrative cases.

If CS/SB 1734 is passed, Florida will be following in the footsteps of California, which in 2018 passed the CCPA. The CCPA grants a similar private cause of action to consumers for data privacy violations, although the cause of action is actually much narrower than that proposed by CS/SB 1734. Specifically, under the CCPA, consumers may bring a civil action if their "nonencrypted and nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information." Cal. Civ. Code § 1798.150(a)(1).

Although the CCPA's private cause of action is ostensibly narrow, civil litigants have already begun pushing the boundaries of this provision. Indeed, law firm Akin Gump reports that "of the 76 consumer class actions filed in 2020 that allege some violation of the CCPA, at least 44—***more than half of all cases***—do not specifically allege that the plaintiff's personal information was subject to unauthorized theft or disclosure resulting from a business's violation of its duty to implement and maintain reasonable security procedures and practices."[2] In other words, the plaintiffs in most CCPA actions do not allege that personal information was actually subject to any data breach. Rather, most of these cases illustrate that opportunistic plaintiffs are alleging technical violations of the CCPA to support causes of action outside the CCPA, such as violations of other consumer protection statutes like California's Unfair Competition Law. Here are just three examples of class actions in which plaintiffs have invoked the CCPA notwithstanding the fact that no personal information was subject to a data breach:

- *In re: Zoom Video Communications, Inc. Privacy Litigation*, Case No. 5:20-cv-2155-LHK (N.D. Cal. 2020). Fourteen class actions against Zoom were consolidated in the Northern District of California, including one class action led by a class representative from Florida. These plaintiffs generally alleged that Zoom had shared consumers' personal information with third parties without consent and failed to implement protocols to properly safeguard consumers' information, all in violation of the CCPA and other consumer protection laws. Each action alleged a matter in controversy exceeding $5 million. Plaintiffs did not, however, allege that any personal information was the subject of an unauthorized access and exfiltration, theft, or disclosure as a result of the business's failure to implement and maintain reasonable security measures—the trigger to state a private cause of action under the CCPA. Plaintiffs appear to have dropped their CCPA claims in a later consolidated amended complaint, however, likely due to their failure to state an actual CCPA claim and their failure to notify Zoom before bringing suit as required by the CCPA.

- *Hayden v. The Retail Equation, Inc.*, No. 8:20-cv-01203-DOC-DFM (C.D. Cal. 2020). In *Hayden*, plaintiffs seek to represent a class of consumers and complain that, without consumers' consent or knowledge, Sephora USA, Inc. ("Sephora") shared consumers' personal information with The Retail Equation, Inc., which in turn created consumer reports for Sephora. The complaint does not allege an express claim under the CCPA's

[2] Akin Gump, *2020 CCPA Litigation Report: Trends and Developments* at 7 (available by request via https://sites-akingump.vuturevx.com/16/3798/landing-pages/2020-ccpa-litigation-report--trends-and-developments.asp).

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private cause of action provision, nor could it, because the plaintiffs do not allege that any personal information was the subject of "an unauthorized access and exfiltration, theft, or disclosure as a result of the business's failure to implement and maintain reasonable security measures." Instead, plaintiffs attempt to state other causes of action—e.g., an unfair competition claim—based on violation of the CCPA's notice and disclosure provisions. Defendants have moved to dismiss on various grounds, including on the grounds that violation of the notice provisions of the CCPA does not give rise to a private cause of action and no personal information has been subject to a data breach. Defendants' motion to dismiss remains pending.

- *Conditi v. Instagram, LLC*, No. 3:20-cv-06534 (N.D. Cal. 2020). In this class action, plaintiffs allege that Instagram accesses consumers' smartphone cameras without consumers' consent. Plaintiffs allege that Instagram's conduct violates the CCPA because Instagram failed to disclose that it monitors users through their smartphone cameras "to collect personal information." Plaintiffs do not, however, state an actual cause of action under the CCPA, but simply argue that the CCPA violation of "monitoring" users amounts to, e.g., a claim under California's Unfair Competition Law. The case remains pending, and defendants have been given additional time to file a motion to dismiss.

These cases illustrate that, notwithstanding the express language of the CCPA, class action plaintiffs' attorneys can and will find ways to push the limits of any new private cause of action. Perhaps of greater concern here is the fact that CS/SB 1734 will likely prompt ***more*** litigation than the CCPA, for at least a few reasons:

- The private cause of action that would be authorized under CS/SB 1734 is ***broader*** than that in the CCPA. In addition to data breaches—i.e., where personal information is subject to "an unauthorized access and exfiltration, theft, or disclosure as a result of a business' violation of the duty to implement and maintain reasonable security procedures and practices"— CS/SB 1734 would grant a private cause of action for ***any*** violation of the Act, even if the violation is minor and technical. *Compare* Cal. Civ. Code § 1798.150(a)(1), *with* Proposed § 501.177(1), Fla. Stat.

- Under the CCPA, before bringing suit, a consumer must notify the business and identify the specific provisions of the CCPA that the business purportedly violated. Cal. Civ. Code § 1798.150(b). The business then has 30 days to cure the noticed violation, to the extent a cure is possible. *Id.* ("if within the 30 days the business actually cures the noticed violation and provides the consumer an express written statement that the violations have been cured and that no further violations shall occur, no action for individual statutory damages or class-wide statutory damages may be initiated against the business"). No such notice and opportunity to cure are afforded under the proposed Act.

- Another striking difference is that although the CCPA's definition of the term "personal information" is broad, a much narrower definition of that term applies to the private cause of action. *See* Cal. Civ. Code § 1798.150(a)(1); Cal. Civ. Code § 1798.81.5(d)(1)(A) (defining "personal information" for purposes of the private cause of action to mean more traditional personally identifying information, such as, e.g., a social security number, account number, driver's license number, and medical information). In contrast, CS/SB

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1734 incorporates its broad "personal information" definition—to include even internet browsing history and consumer preferences, data elements the disclosure of which pose virtually little risk of identity theft—into the private cause of action. Thus, a technical violation that might risk disclosure of only a consumer's preference for true crime shows would potentially trigger a private cause of action under CS/SB 1734 and the opportunity for at least statutory damages.

The Proposed Cause of Action Is Inconsistent with Florida's Data Breach Notification Law. Florida's data breach notification law requires businesses to implement reasonable data security measures and requires covered businesses experiencing a data breach within the meaning of the law to notify consumers and the Department of Legal Affairs. *See* § 501.171, Florida Statutes. Florida's breach notification law limits the definition of a breach to "unauthorized access of data in electronic form containing personal information." § 501.171(1)(a), Fla. Stat. Under CS/SB 1734, however, a business may face liability for even technical violations of the Act that do not result in data breaches.

The differences in these laws mean this: it is possible that under CS/SB 1734, a business might be sued for conduct for which it would not have been required to give notice under the data breach notification law. This may create a disincentive for businesses to notify the Department of Legal Affairs and consumers that a breach has occurred because bringing attention to the issue means the business would be risking expansive statutory liability under CS/SB 1734's private cause of action—and not just for the data breach itself. Such a disincentive would in turn only make it more difficult for consumers to learn about and resolve data breaches involving their personal information.

Vote No on CS/SB 1734. CS/SB 1734 would create a complex and flawed data privacy law with little if any tangible benefits for consumers. Only class action plaintiffs' attorneys stand to benefit, as the Act would present a lucrative opportunity to build class actions based on technical violations of the law, notwithstanding the fact that such violations did not lead to actual consumer harm. Florida already has sufficient laws to protect against data breaches, including the data breach notification law under which the Attorney General may seek up to $500,000 in civil penalties against businesses which violate the law. *See* § 501.171(9), Fla. Stat. For all these reasons, the Florida Justice Reform Institute urges that you vote no on CS/SB 1734.

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