

1 LITIGATION UPDATES 2021

Presented by:
Lorna Walker

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3 California Privacy Laws

- ▶ California's Consumer Privacy Act of 2018 ("CCPA")
 - ▶ Effective on January 1, 2020.
 - ▶ Requires businesses to notify consumers about what "personal information" they collect, where it was obtained, why it was obtained, what it is being used for, whether it is sold or disclosed to third parties, and to whom it is sold or disclosed.
- ▶ California Privacy Act of 2020 ("CPRA")
 - ▶ Effective January 2023.
 - ▶ Cal. Civ. Code §§ 1798.100 - 1798.199.

4 California's Consumer Privacy Act of 2018

- ▶ Applies to any for-profit business that:
 - ▶ Collects and controls California *consumers'* personal information;
 - ▶ Does business in the State of California; and,
 - ▶ Has annual gross revenue in excess of \$25 million;
 - ▶ Buys, receives or shares for commercial purposes, or sells, the personal information of 50,000 or more California residents, households, or devices; or,
 - ▶ Derives fifty percent or more of their annual revenues from selling California consumers' personal information.
- ▶ (*CCP* 1798.140(c)(1).)

5 California's Consumer Privacy Act of 2018

- ▶ "Personal information"
 - ▶ Broad Definition – "Information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." It includes information such as consumers' names, addresses, email addresses, online identifiers, internet protocol addresses, browsing history, and geolocation data. As long as such information can be linked back to the consumer, it is covered by the CCPA.
 - ▶ (*Id.*, at § 1798.140(o).)

6 California's Consumer Privacy Act of 2018

- ▶ Companies do not need to be based in California or have a physical presence in the state to be subject to the CCPA. Rather, since the CCPA applies to all California consumers, any company with an online presence that falls within the above parameters should comply with the law and implement a means to provide the required disclosures.

7 California Privacy Act of 2020

- ▶ Effective January 1, 2023
- ▶ Imposes new requirements to protect personal information

- ▶ Creates a privacy enforcement agency – the California Privacy Protection Agency
- ▶ Reduced the types of businesses affected to those who buy, sell, or share for business purposes the personal data of 100,000 or more consumers/households
- ▶ Expanded the coverage to joint ventures or partnerships, and each business that composes the joint venture or partnership

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8 **California Privacy Act of 2020**

- ▶ Businesses must “reasonably” minimize data collection, limit data retention, and protect data security.
- ▶ Companies must conduct privacy risk assessments and cybersecurity audits and regularly submit them to regulators.
- ▶ Clarifies that consumers have the right to opt out of both the sale and *sharing* of personal information.
- ▶ Businesses must track a new category of data titled “sensitive personal information” and allow consumers to restrict the use and disclosure of this information to perform only services that are “reasonably expected by an average consumer.”
 - Social security numbers, account log-ins, financial information, biometric data, health status, precise geolocation, contents of emails/texts, and race or ethnic origin.

9 **California Privacy Act of 2020**

- ▶ Businesses must inform consumers whether their personal information is sold or shared at or before the point of collection and requires any covered business to inform consumers how long it intends to retain the personal information.
- ▶ *Third parties, service providers, or contractors* who receive personal information from a covered business must also comply with the privacy protections provided under the CPRA.
- ▶ Consumers can request that businesses correct inaccurate personal information and expands the right of no retaliation following an opt-out to employees, independent contractors, and employment applicants.

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10 **California Collection Agency Registration**

- ▶ As of January 1, 2022, any *debt collector* collecting on a consumer debt must be licensed in California – (Cal. Financial Code Section 100000 *et. seq.*)
 - Amended the Rosenthal FDCPA to require disclosure of license number
 - “Consumer debt” or “consumer credit” means money, property, or their equivalent, due or owing, or alleged to be due or owing, from a natural person by reason of a consumer credit transaction. The term “consumer debt” includes a mortgage debt. The term “consumer debt” includes “charged-off consumer debt” as defined in Section 1788.50 of the Civil Code.

11 **California Collection Agency Registration**

- ▶ Applies to any person acting in California if the person is located in this state and is seeking to collect from a debtor that resides inside or outside the state, or is located outside of the state and is seeking to collect from a debtor that resides in this state.

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12 **California Collection Agency Registration**

- ▶ Includes attorneys
- ▶ Includes debt buyers
- ▶ Includes original creditors

- "Debt collector" means "any person who, in the ordinary course of business, regularly, on the person's own behalf or on behalf of others, engages in debt collection."
- "Debt collection" means any act or practice in connection with the collection of consumer debt."
- ▶ Does not apply to commercial debt

13 **Registration Information**

- ▶ California DFPI website:
 - <https://dfpi.ca.gov/debt-collectors-faq/>
- ▶ Application-Nationwide Licensing System (NMLS)
 - https://mortgage.nationwidelicencingsystem.org/slr/PublishedStateDocuments/CA-DFPI_Debt_Collection_License_Company_New_Application_Checklist.pdf
 - Must include a sample of the initial consumer debt validation letter required by 15 U.S.C. § 1692g that the licensee will use in correspondence with California consumers.
 - Must go through a criminal background and credit check.
- ▶ Surety Bond - minimum amount of \$25,000
 - Payable to the Commissioner of the California Department of Financial Protection and Innovation (CA-DFPI) and issued by an insurer authorized to do business in California.

14 **Fees**

- ▶ Initial Fees:
 - \$350.00 application fee
 - \$150.00 investigative fee
- ▶ Annual Fee:
 - Each licensee will be required to pay an annual fee, representing the debt collector's "pro rata share of all costs and expenses reasonably incurred in the administration of [the Act], as estimated by the commissioner, for the ensuing year and any deficit actually incurred or anticipated in the administration of [the Act] in the year in which the annual fee is levied."

15 **Annual Reports**

- ▶ Due on or before March 15
- ▶ Must disclose the following:
 - The total number of California debtor accounts purchased or collected on in the preceding year;
 - The total dollar amount of California debtor accounts purchased in the preceding year;
 - The face value dollar amount of California debtor accounts in the licensee's portfolio in the preceding year;
 - The total dollar amount of California debtor accounts collected in the preceding year, and the total dollar amount of outstanding debt that remains uncollected;
 - The total dollar amount of net proceeds generated by California debtor accounts in the preceding year;
 - Whether or not the licensee is acting as a debt collector, debt buyer, or both; and
 - The case number of any action in which the licensee was held liable by final judgment under the Rosenthal Act (Cal. Civ. Code §§ 1788 *et seq.*) or the California Fair Debt Buying Practices Act (Cal. Civ. Code §§ 1788.50 *et seq.*).
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16 **Recent Case Law**

- ▶ Bankruptcy
 - *Purdue Pharmacy*

- US Trustee challenged the constitutionality of Third Party Releases
- ▶ Rosenthal FDCPA
 - *Best v Ocwen Loan Servicing, LLC*, 2021 WL 2024716 (64 Cal.App.5th 568 (2021) *cert. for partial publication.*)
 - Rosenthal Act applies to non-judicial foreclosures
 - Relied on *Abduskey v McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019)
- 17 **Statute of Limitations**
 - ▶ No tolling for out of state debtors
 - (*Arrow Highway Steel, Inc. v. Dubin* (2020) 56 Cal. App. 5th 876, 880–8, *review denied* (Feb. 10, 2021).)
- 18 **Causes of Action**
 - ▶ A judgment creditor of a suspended corporation can sue that corporation’s debtors in a creditor’s suit
 - (*Wanke, Industrial, Comm’l, Residential, Inc. v. AV Builder Corp.* (2020) 45 Cal.App.5th 466, 477.)
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- 19 **Service of Process**
 - ▶ Parties may agree to waive formal service of process in favor of informal service of process so that Hague Convention’s requirements for service of process abroad do not apply
 - (*Rockefeller Tech. Investments (Asia) VII v. Changzhou SinoType Tech. Co.* (2020) 9 Cal. 5th 125, 144-45.)
- 20 **Demurrers**
 - ▶ Burden on Plaintiff to show complaint can be amended
 - Denial of leave to amend affirmed where plaintiff “proffered no *specific* amendments to the trial court”
 - Plaintiff must offer details on how amendment would cure defects
 - (*Reeder v. Specialized Loan Servicing LLC* (2020) 52 Cal.App.5th 795, 805.)
- 21 **Attorney Fees/Costs**
 - ▶ In uncontested default cases, a party is not entitled to additional costs and fees for post-judgment motions
 - Except where a default is vacated and a case is further litigated, attorney fees for that portion may be awarded even if default is later reinstated
 - (*Vincent v. Sonkey* (2020) 59 Cal.App.5th 160.)
 - ▶ Civil Code Section 1717
 - Applies to a post-judgment, independent action to deem an entity an alter-ego
 - (*MSY Trading Inc. v. Saleen Automotive, Inc.* (2020) 51 Cal.App.5th 395, 402-03.)
 - Does it apply to a post-judgment motion?
- 22 **Attorney Fees**
 - ▶ Fee Splitting
 - Written acknowledgement of a notice is not consent
 - ((*Reeve v. Meleyco* (2020) 46 Cal.App.5th 1092, 1098-99.)
 - ▶ Quantum Meruit
 - May be recoverable, but must be brought in two years
 - (*Id.*, 1101.)
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23 **Relief from Judgment**

- ▶ Motion to Vacate for Lack of Actual Notice
 - Motion under CCP 473.5 is timely if defendant only discovers default well after entry and where subsequent delay is result of “subterfuge” designed to mislead defendant as to which party was sued
 - (*Luxury Asset Lending, LLC v. Philadelphia Television Network, Inc.* (2020) 56 Cal.App.5th 894, 908-10.)
- ▶ Judgment versus Default
 - If motion is to vacate judgment only, court should vacate default also if moving papers are clear that the moving party seeks to have default set aside also
 - (*Id.*, at 909.)
 - CCP 473.5 provides:
 - “The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of:(i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.”

24 **Relief from Judgment**

- ▶ Diligence required
 - 9 month delay precludes relief
 - (*Kramer v. Traditional Escrow, Inc.* (2020) 56 Cal.App.5th 13, 37-38.)
- ▶ Grounds for relief
 - A party’s own negligence precludes relief
 - (*Id.*, at 29.)
 - Here, defendant refused to participate in suit or provide notice of new address resulting in their failure to receive complaint

25 **Discovery**

- ▶ Attorney work production doctrine may include identity of non-testifying expert
 - (*Curtis v. Sup.Ct. (California Employment Lawyers Ass’n)* (2021) 62 Cal.App.5th 453.)
- ▶ Electronically-stored information
 - Orders for production may be conditioned on payment of costs
 - (*Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal.App.5th 323, 338-39.)
- ▶ Depositions
 - Remote depositions permitted
 - (Cal. Civ. Proc. Code § 2025.310(a), (b).)

26 **Appeal**

- ▶ Time to file appeal is not extended by motion for reconsideration
 - (*Marshall v. Webster* (2020) 54 Cal.App.5th 275, 284.)

27 **Enforcement**

- ▶ Receiverships
 - Appointment of a receiver ordinarily may not be used to enforce a simple money judgment and is reserved for exceptional circumstances when the judgment debtor's conduct makes a receiver necessary.
 - (*Medipro Med. Staffing LLC v. Certified Nursing Registry, Inc.* (2021) 60 Cal.App.5th 622, 628-629.)
- ▶ Real Property Levy:

- Judgment debtor's principal place of residence is not subject to sale under an execution of judgment lien *based on consumer debt* unless the debt was secured by that residence when it was incurred
 - (CCP § 699.730.)

28 **Enforcement**

- ▶ Bank levies
 - Automatic exemption
 - Money in the judgment debtor's deposit account in an amount equal to or less than the minimum basic standard of adequate care *for a family of four* for Region 1, established by Section 11452 of the Welfare and Institutions Code and as annually adjusted by the State Department of Social Services pursuant to Section 11453 of the Welfare and Institutions Code, *is exempt without making a claim.*
 - Adjusted periodically
 - Currently \$1,788 *per debtor* (not account)
- ▶ Still allows an additional claim of exemption
 - *to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor*

29 **Notary**

- ▶ California allows electronic notarization, but not remote notarizations
- ▶ Some states now allow remote

30 **Questions?**

Lorna Walker
 Sweet & Walker, PC
 P.O. Box 27558
 San Francisco, CA 94127
 Telephone: (415) 334-1600
 Facsimile: (415) 334-0855
www.sweetwalker.com
mail@sweetwalker.com