

# Private Litigation Under the California Consumer Privacy Act

**CCPA REPORT UPDATE | FEBRUARY 2022**



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### ***Acknowledgements***

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# Private Litigation Under the California Consumer Privacy Act

**A REPORT BY**

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## INTRODUCTION & EXECUTIVE SUMMARY

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The California Consumer Privacy Act (CCPA) went into effect on January 1, 2020. Broadly, the CCPA is designed to protect consumers' privacy by making the collection and use of consumer data more transparent, and giving consumers the right to prevent companies from sharing their data with third parties. Although these core privacy provisions are enforced exclusively by the California Attorney General, the CCPA also provides a private right of action when a business's failure to implement "reasonable security practices and procedures" results in the theft of personal information.<sup>1</sup>

In 2021, the Program on Economics & Privacy issued its initial report, *Private Litigation Under the California Consumer Privacy Act*, which examined private CCPA cases filed from its effective date (January 2020) through the first quarter of 2021.<sup>2</sup> This new Report provides data on private actions filed under the CCPA from April 1, 2021 through December 31, 2021, and highlights developments in cases covered in the 2021 Report.

Among the key findings are:

- 55 new private actions were filed from April 1, 2021 to the end of 2021, bringing the total number of private CCPA actions filed since its inception to 138.
- The Southern District of California is the most popular venue for new cases, followed by the Western District of Washington, and the Northern District of California.
- Cases against five defendants surrounding the same alleged conduct account for a majority (32) of the new filings, including 15 cases filed against T-Mobile and 9 against Bank of America.
- All but one of the complaints examined contained allegations that the defendant violated the CCPA's provision requiring covered entities to take reasonable care to protect consumer data (Section 1798.150).
- Almost half (44%) of the new cases also allege the CCPA violation as a predicate violation for a California Unfair Competition Law (UCL) claim,<sup>3</sup> and 11% of cases alleged a CCPA violation as a predicate for a negligence claim. By contrast with the 2021 Report, none of the new cases involve allegations related to the CCPA's core privacy provisions, such as failure to provide notice or obtain consumer consent.
- Four of the cases reported in the 2021 Report have had CCPA claims dismissed, although some plaintiffs have filed amended complaints that contain revised CCPA claims. Our research indicates that 8 cases have settled since our 2021 Report.

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<sup>1</sup> CAL. CIV. CODE § 1798.150(A)(1).

<sup>2</sup> PROGRAM ON ECONOMICS & PRIVACY, PRIVATE LITIGATION UNDER THE CALIFORNIA CONSUMER PRIVACY ACT (May 2021), at <https://masonlec.org/wp-content/uploads/2021/05/Draft-April-2021-CCPA-Report.pdf>.

<sup>3</sup> CAL. BUS & PROF. CODE §§ 17200 et. seq.

## NUMBER OF CASES AND TYPES OF CLAIMS

A search of federal and state dockets from April 1, 2021-December 31, 2021 discovered 55 new cases filed that had causes of actions based on allegations that the defendant violated the CCPA. As shown in Figure 1, all but one of the new cases bases their CCPA claim on the data breach provision (Section 1798.150) – the only provision for which there is an explicit private right of action. Almost half (24) of the new cases also allege the CCPA violation as a predicate unlawful act for California’s Unfair Competition Law (UCL). Six new cases allege that the CCPA violation also constituted negligence.

FIGURE 1  
CCPA CLAIMS

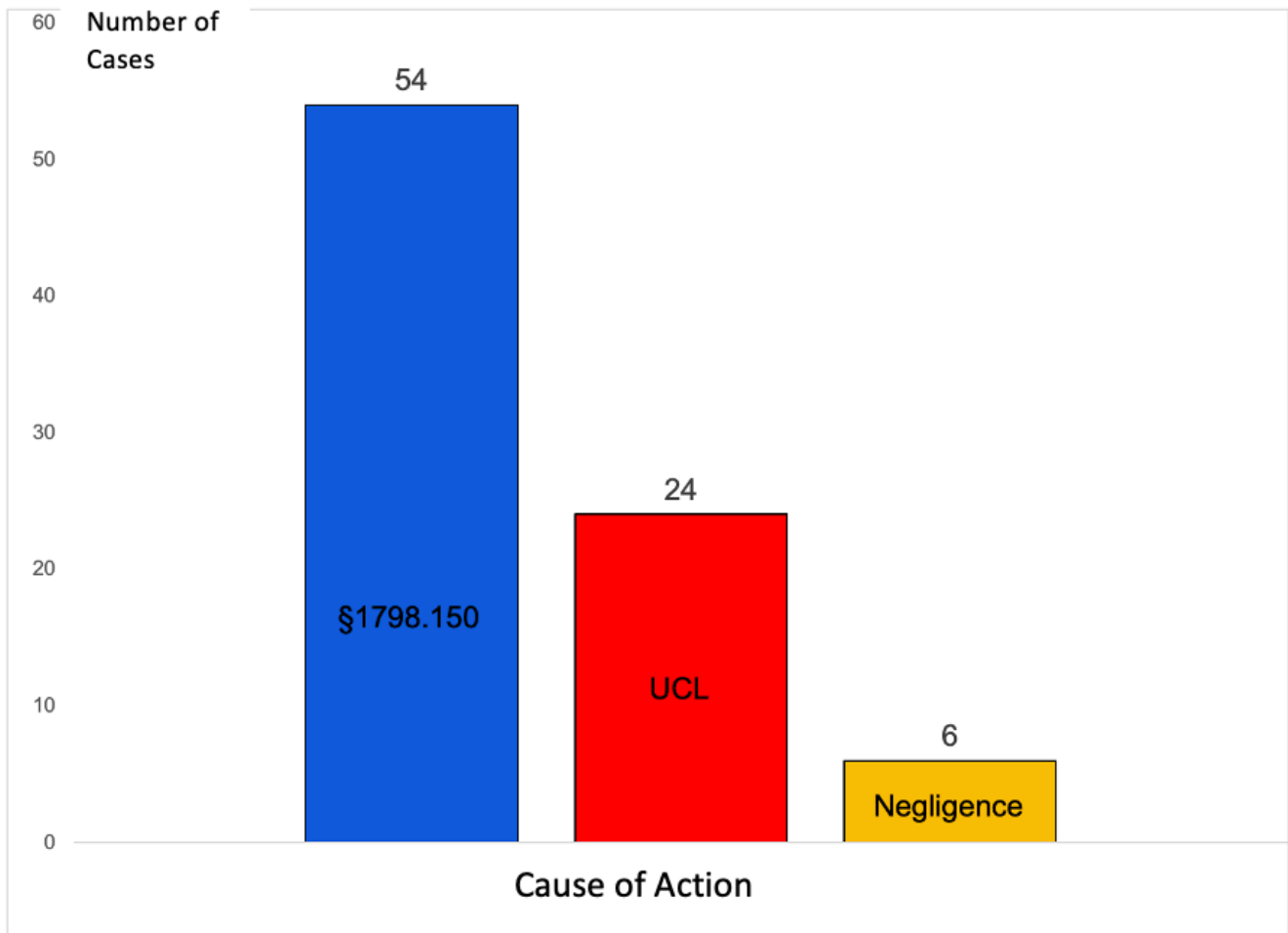


TABLE 1  
DEFENDANTS WITH MULTIPLE CCPA CASES

| Defendant                                   | Number of Cases with CCPA Allegations | Courts  |
|---|---------------------------------------|---|
| T-Mobile USA Inc.                           | 15                                    | C.D. Cal.<br>N.D. Cal.<br>W.D. Mo.*<br>W.D.N.Y.<br>W.D. Wash. |
| Bank of America, N.A.                       | 9                                     | S.D. Cal.*<br>D.S.C<br>Cal. Super. Ct.                        |
| Dickey's Barbecue Restaurants, Inc.         | 3                                     | N.D. Tex.   |
| USA Waste-Management Resources, LLC         | 3                                     | S.D.N.Y.  |
| The Regents of the University of California | 2                                     | S.D. Cal.   |

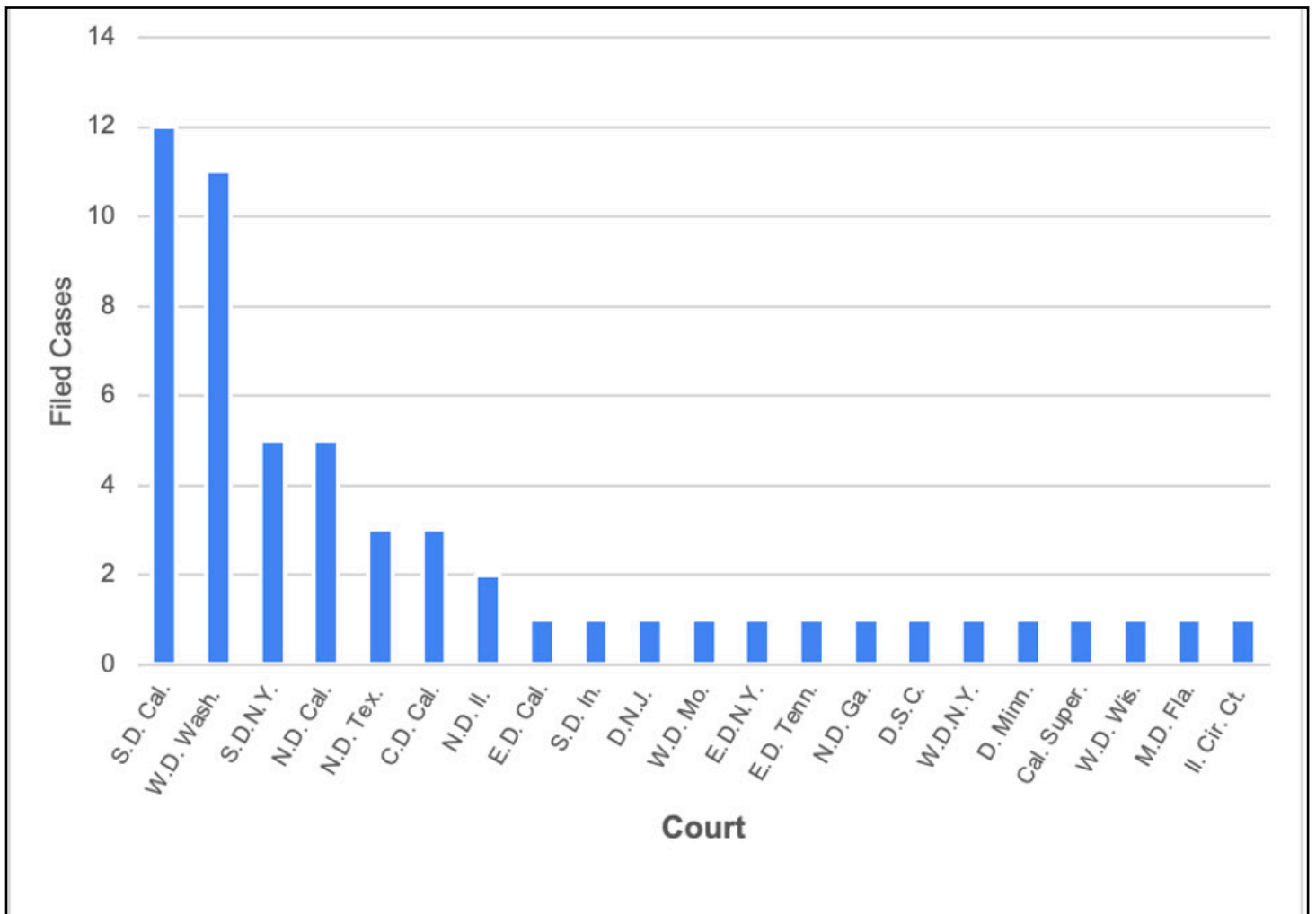
\*District where case is being consolidated.

Table 1 shows that many of these new cases are driven by a few separate fact patterns: five cases account for a majority (32) of the new filings. For example, plaintiffs filed 15 separate actions against T-Mobile and 9 against Bank of America for alleged data security deficiencies that led to data breaches. There are also multiple cases filed against Dickey's Barbecue, USA Waste-Management Resources, and the Regents of the University of California.

## VENUE

Figure 2 shows the distribution of venue for filed cases. Plaintiffs filed cases in 21 separate courts: 19 cases in federal district courts, and two cases in California and Illinois state courts. By a wide margin – and not surprisingly – plaintiffs filed more cases in California (22) than any other individual state. Nonetheless, plaintiffs filed a majority (60%) of new cases in non-California courts. Looking at specific courts, the number of new filings in the Southern District of California (12) and the Western District of Washington (11) were more than double those in the districts with the next largest number of new filings (Northern District of California and Southern District of New York). As seen in Table 1, the large volume of filings in these courts was driven primarily by the T-Mobile and Bank of America class actions.

FIGURE 2  
VENUE





## DISPOSITION

Of the active cases reported in the 2021 CCPA Report, four have had CCPA claims dismissed for various reasons.<sup>4</sup> In *Mullinix v. U.S. Fertility*, for example, the court held that because the defendant was a business associate of a HIPPA-covered entity, it was explicitly exempt from the CCPA.<sup>5</sup> The court in *Burns v. Mammoth Media* dismissed the plaintiff's complaint for failing to allege sufficient injury to satisfy Article III standing requirements.<sup>6</sup> Both *Griffey v. Magellan Health*<sup>7</sup> and *Maag v. U.S. Bank National Association*<sup>8</sup> involved insufficient allegations that the defendant failed to take adequate security precautions. Review of the dockets suggests that seven of the active cases from the 2021 Report have since settled.<sup>9</sup> In addition, one case filed since the 2021 Report has also settled.<sup>10</sup>

## CONCLUSION

CCPA filings continued apace, with 55 new cases in the last nine months of 2021. The use of additional UCL and negligence claims predicated on CCPA violations continues to be an important strategy for plaintiffs. One key difference between the newly reported cases and those from the 2021 Report, however, is that none of the CCPA claims involved alleged violations of the CCPA's core privacy provisions. Instead, all direct CCPA claims (and UCL and negligence claims predicated on CCPA violations) center on the data breach provision (Section 1798.150), which expressly provides a limited private right of action. As courts continue to decide dispositive motions involving CCPA claims, the character of harm covered by the CCPA and what the CCPA requires of businesses will come into sharper focus.

<sup>4</sup> *Mullinix v. US Fertility, LLC*, 8:21-cv-00409 (C.D. Cal.); *Griffey v. Magellan Health Inc.*, 2:20-cv-01282 (D. Ariz.); *Burns v. Mammoth Media, Inc.*, 2:20-cv-04855 (C.D. Cal.); *Maag v. U.S. Bank National Assoc.*, 3:21-cv-00031 (S.D. Cal.).

<sup>5</sup> *Mullinix v. US Fertility, LLC*, 2021 WL 4395975, at \*5 (C.D. Cal. Apr. 21, 2021). The CCPA specifically exempts a "business associated of a covered entity governed by the privacy, security, and data breach notification rules issued by the United States Department of Health and Human Services . . ." CAL. CIV. CODE §1798.146(a)(3).

<sup>6</sup> *Burns v. Mammoth Media, Inc.*, 2021 WL 3500964 (C.D. Cal. Aug. 6, 2021). Defendant introduced evidence that the data accessed during the breach was "essentially useless," which the plaintiff did not counter. Accordingly, the court held the data breach "could not possibly have caused the risk of identity theft, fraud, and attendant harms alleged." *Id.* at \*\*3-4. Plaintiff filed an amended complaint that did not include any CCPA allegations.

<sup>7</sup> *Griffey v. Magellan Health Inc.*, 2021 WL 4427065, at \*15 (D. Ariz. Sept. 27, 2021). The court characterized plaintiffs' allegations as conclusory because they essentially stated that "because there was a breach, Magellan's security was inadequate." *Id.* The court also held that Griffey failed sufficiently to allege harm. Plaintiff filed an amended complaint with CCPA allegations, and a motion to dismiss is currently pending.


<sup>8</sup> *Maag v. U.S. Bank, Nat'l Ass'n*, 2021 WL 5605278 (S.D. Cal. Apr. 8, 2021). The plaintiff in Maag filed an amended complaint with a CCPA claim, and both parties agreed to remand the case to California Superior Court.


<sup>9</sup> *In Re: Hanna Andersson and Salesforce.com Data Breach Litigation*, No. 3:20-cv-00812 (N.D. Cal. Feb 03, 2020); *Llamas v. Truefire, LLC*, No. 8:20-cv-00857 (M.D. Fla. Apr. 14, 2020); *Pfeiffer v. Radnet, Inc.*, No. 2:20-cv-09553 (C.D. Cal. Oct 19, 2020); *Poling v. Artech L.L.C.*, No. 3:20-cv-07630 (N.D. Cal. Oct 29, 2020), *Hashemi et al v. Bosley, Inc.*, No. 2:21-cv-00946 (C.D. Cal. Feb 01, 2021), *Cochran v. Accellion, Inc.*, No. 5:21-cv-01887 (N.D. Cal. Mar 17, 2021), *Beyer v. Flagstar Bancorp, Inc.*, No. 5:21-cv-02239 (N.D. Cal. Mar 30, 2021).

<sup>10</sup> *Powers v. Filters Fast LLC*, No. 3:20-cv-00982 (W.D. Wis. Oct 26, 2020).



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