Podcast Transcript

California's New Privacy Enforcement "Sweep"

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Kattman: On January 26, the Office of California Attorney General sent a wave of investigative letters to businesses who provide their customers with streaming services and devices. The letters alleged the recipients of these letters have violated the California Consumer Privacy Act, or CCPA, by failing to provide consumers with required opt out of sales of personal information. I'm Amy Kattman, and you're listening to BakerHosts.

On today's episode, we discuss the new investigative sweep announced by the California Attorney General relating to alleged privacy violations by streaming services and devices. Today's discussion is led by Justin Yedor and Jen Mitchell. Justin and Jen are both partners in the Digital Assets and Data Management Group at BakerHostetler and specialize in privacy governance and technology

transactions. They're both located in Los Angeles where Jen serves as the office's group leader. Welcome to the show, Jen and Justin.

Mitchell: Thanks for having us.

Yedor: Thanks, Amy. Glad to be back.

Kattman: Justin, could you give us a brief overview of the California Consumer Privacy Act and how the California Attorney General is enforcing it, based on his office's recent announcement?

Yedor: Sure. Glad to, and I'll keep this really high level because the CCPA is so complicated. The CCPA is our comprehensive consumer privacy law here in California, and among its many, many rights including access, deletion, correction, and so forth, it includes the right for California residents to opt out of certain data practices, what the CCPA calls sales and sharing of personal information for cross-context behavioral advertising. Sales and sharing opt outs have been a central focus point for the AG's investigations and enforcement of CCPA since the beginning, and this has not slowed down. The AG, in particular, has been really active in enforcing the CCPA since it took effect. And in each enforcement that has taken place they always like to raise this question about sale and sharing opt outs, as well as just purely in their investigative sweeps that they've done this has been a really common focus. And I think we're continuing to see that it continues to be a centerpiece of both the law itself as well as the enforcement of the law.

Kattman: Thanks, Justin. Jen, could you talk about why businesses in this particular industry are being targeted?

Mitchell: Yes, Amy. Well, we can't say for sure, but I agree with Justin's comment and observation that the California AG has been very focused on sales and sharing activity, and businesses' compliance with the opt-out requirements for sales and sharing. And we know that this is true via websites, but we also know that this enforcement activity and this messaging expanded to mobile apps. We saw a similar sweep relating to mobile apps this time last year, in 2023, and we've also seen the emphasis on enforcing opt-out requirements in enforcement activity. I also think it is interesting that the focus is on smart TVs and streaming applications because of the AG's focus on protecting children's data rights, and in fact the press release makes reference to families increasingly using streaming platforms for entertainment and ensuring that families' personal information is protected. So, I think that may be another reason why we're seeing this particular industry be targeted.

Yedor: I agree with that point, Jen. And I think, as well, it raises some really interesting questions in terms of the definitions of sales and sharing. And I'll be watching very closely to see what comes out of this investigative sweep to see if there is some clarity around how the AG is thinking those definitions apply in the streaming space, because there are so many types of advertising that take place

on a streaming service that may or may not actually be sales or sharing for behavioral advertising.

Kattman: Jen, why do you think this investigative sweep is occurring now?

Mitchell: Well, I think it is pretty clear that the investigative sweep in January happened around Data Privacy Day, which is January 28, and the Attorney General has told us before that they intend to use Data Privacy Day as the day to announce not only sweeps but potential enforcement activity and create awareness around enforcement with the CCPA, just like we saw in years past. So, this latest enforcement sweep was also announced after a series of meetings by the California Privacy Protection Agency, the CPPA, and enforcement has been emphasized in all of those meetings. During those meetings, the CPPA agreed that successful enforcement is one of their top priorities over the next three years, and we also know that the CPPA has increased their team within the enforcement division. So, for all of those reasons, we shouldn't be surprised that the sweep was announced, and that the sweep was announced around January 28.

Kattman: Justin, what immediate advice would you provide a business that just received one of these investigative letters?

Yedor: I think, number one, take it very seriously. While this is an investigative sweep, and if you are one of these businesses, you can also know you're not the only target that received a letter. It is nonetheless a really significant matter, and you need to prepare your best response. That is likely going to be a collaborative process involving outside counsel or in-house counsel certainly to craft the response. But beyond that, the questions that the AG is asking in this sweep really hit on deep questions about marketing compliance, advertising, and things that are going to require the input of many teams throughout the business. So, the response is always collaborative when we're dealing with responding to these kinds of investigations, and it is important to get all the right players in the room as soon as possible to make sure that you're putting your best foot forward and figuring out how you're going to respond back to the AG.

Mitchell: I agree with all of that, Justin. I think in some cases it can be really useful to coordinate and reach out to outside counsel who has experience in defending and working with the California AG's office on privacy matters as well as the CPPA, because outside counsel has those insights as to how prior investigations and prior sweeps were handled. And also, completely agree with you that also importantly starting that fact-finding discovery process to understand what may have been wrong, what may need to be corrected, or in other cases, what the company has already done to comply with this law.

Yedor: Yeah, absolutely. And if I can add one other point. Amy, you didn't directly ask this, but I would say as well, every time we see a new wave of investigations from the AG, it does sort of tell us something about their motivations and the types of things they're interested in. And so, one other piece of advice I would have is, even if you are a business that does not have a streaming service or

device, part of the takeaway here, I think, is that the AG is emphasizing the point that privacy doesn't end at your website. And so, there may be other ways that you collect personal information. It could be as simple as in-person in a bricks-and-mortar store. It could be through a mobile app. We've seen enforcement around mobile apps as well in the past. But I would take this as an opportunity to think even broader than just streaming and say, okay, well, what are the ways that we collect and process personal information beyond our website? And how do we best position ourselves for compliance and hopefully avoiding getting one of these letters if and when the AG ever turns to other types of interactions between businesses and consumers that may not be streaming?

Kattman: This is very helpful. Thank you. Jen, how can businesses with these services take proactive steps to ensure their compliance to CCPA?

Mitchell: Yes. So, I think this is a great opportunity as Justin was just describing for companies to take proactive steps to understand their compliance and any compliance gaps that they may have with the CCPA, generally, and in particular with opt-out requirements, because as we've been discussing, that does appear to be the focus. But really, it is a good chance for companies to ensure that they don't have any significant gaps, and take steps to remedy those gaps. But very specifically, the AG's press release enumerated three steps that companies in this industry should be taking currently.

Number one, exercising the right to opt out should be easy and involve minimal steps. So, for example, consumers that are using smart TVs should be able to navigate to the settings menu in the streaming services mobile app and also enable the service's "Do Not Sell My Personal Information" setting through that mechanism. That was number one.

Number two, consumers should also have the ability to have this choice, their choice to opt out of sales on or across different devices, if they're logged on to their account when they send their opt-out request.

And, number three, consumers should be able to easily find a streaming service's privacy policy that discusses their CCPA rights. So, their CCPA privacy policy should be easy to find and to navigate and to review, because those rights to have data practices disclosed is also one of the key pillars of CCPA compliance.

Kattman: Thanks so much for joining us today, Jen and Justin.

Mitchell: Thanks, Amy. Thanks for having us.

Yedor: Thanks, Amy. It is always great chatting with you.

Kattman: If you have any questions for Jen or Justin, their contact information is in the show notes. As always, thanks for listening to BakerHosts.

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