

# STATE PRIVACY & SECURITY COALITION

July 6, 2021

Uniform Law Commission  
111 North Wabash Avenue  
Suite 1010  
Chicago, IL 60602

**Re: Private Right of Action in the UDPA**

Dear Commissioners,

We appreciate the extensive effort and thought that went into the UDPA draft. We write at this juncture to express serious concerns regarding the recent decision to include a private right of action (PRA) under State UDAP laws, keyed to a “knowing” violation standard in Section 16, and to explain why the letter last week from a very broad range of business groups on this point should be taken very seriously by the ULC.

It is important to understand that PRAs for alleged privacy violations involve highly asymmetrical eDiscovery costs because they give rise to costly and disruptive eDiscovery into business’s data operations. The cost to defend non-meritorious cases typically exceeds \$500,000 without the plaintiff bar law firm incurring material expense. This makes privacy class actions an inviting opportunity for nuisance litigants. For example, a plaintiff lawyer could easily allege a knowing violation of a complex privacy right with the bad faith purpose of extracting a settlement from a defendant forced to settle in order to avoid an expensive and disruptive eDiscovery.

Furthermore, while we appreciate attempting to limit this right by including the Section 16 scienter requirement, this provision would do almost nothing to prevent frivolous lawsuits. This is because the facts as alleged in the complaint are assumed true at the motion to dismiss phase, so plaintiffs’ lawyers could very easily draft their way around this standard to impose costly eDiscovery and extract nuisance settlements under State UDAP laws.

Moreover, while we share the Committee’s goal of protecting consumers, recent studies have proven that PRAs do little to compensate consumers for privacy intrusions, and that government enforcers, including State Attorneys General, are far better equipped both financially and in their understanding of privacy regulation to act in consumers’ best interest.<sup>1</sup> Instead, PRAs primarily benefit the plaintiffs’ bar, failing to meaningfully compensate consumers *even when a privacy violation has been shown*.

There is also nothing “uniform” about including this provision in the UDPA. To date, no state multi-rights privacy law has provided for privacy enforcement under the state UDAP statute. The only states to pass such a law, California, Virginia, Colorado and Nevada, all declined to head down this road, and the ULC proposal should not do so either. For these reasons, we

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<sup>1</sup> Mark Brennan et al., Ill-Suited: Private Rights of Action and Privacy Claims, U.S. Chamber Institute for Legal Reform (July 2019).

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respectfully request that the Commission follow the states that have passed multi-rights consumer privacy legislation by eliminating this provision in favor of enforcement by the State Attorney General.

We thank you for your consideration and would be happy to discuss this issue further with you, if helpful.

Sincerely,

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Associate

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