

## Calif. AG's Delta Privacy Suit Puts Other Cos. On Notice

By **Allison Grande**

*Law360, New York (December 07, 2012, 9:32 PM ET)* -- By suing Delta Air Lines Inc. on Thursday in the first test of a strict California privacy law, the state's attorney general sent companies scrambling to re-examine their data use disclosures in mobile apps in hopes of dodging similar actions by state and federal regulators who are increasingly focused on how the budding industry deals with personal information, attorneys said.

California Attorney General Kamala D. Harris alleged in state court that Delta's failure to post a privacy policy in its "Fly Delta" app violated the state's Online Privacy Protection Act, which requires commercial operators of websites and online services to "conspicuously" post a privacy policy that informs users of what personally identifiable information about them is being collected and what will be done with it.

The action followed up on warning letters that Harris sent to Delta, OpenTable Inc., United Continental Holdings Inc. and dozens of other mobile application developers and companies on Oct. 30 that gave them 30 days to bring their disclosures into compliance, or else face legal action under the act, which carries fines of up to \$2,500 for each download of a noncompliant app.

"This suit shows that the California attorney general's office is putting its money where its mouth is," Tyler Newby, an attorney in the San Francisco office of Fenwick & West LLP, told Law360 on Friday. "It's not sending these notices and forgetting about them; it's ready to take enforcement action and flex its regulatory muscle."

By taking the aggressive step of filing a suit under the statute — which was enacted in 2004 but has yet to be used in a legal action brought by the state — Harris has made it clear that companies that collect information from California residents online can no longer afford to ignore their privacy obligations, according to attorneys.

"We've certainly seen companies responding to these actions already by double-checking and making sure that their privacy policies are appropriate," Morgan Lewis & Bockius LLP partner Reece Hirsch said. "Regardless of the outcome of the case, all companies that practice in this space would be well-served to re-examine their privacy policies."

While the action against Delta specifically focuses on privacy policies found in mobile apps, Dorsey & Whitney LLP partner Melissa Krasnow noted that, given the language of OPPA, companies that operate websites should also use this action as catalyst for a review of their own privacy policies.

“Most people will probably focus on how the law applies to mobile apps, since that's the subject of this enforcement action. But if anything, the statute clearly covers websites and not just mobile apps, so these companies should also make sure that the privacy policies they are implementing are consistent with the law,” she said.

The companies should also be prepared to make changes to their policies beyond the concerns raised in the regulator's complaint, which focuses on Delta's lack of a privacy policy within its app, based on other suits that Harris may file against the other companies that received warning letters, Newby noted.

“What may be the more interesting issue in time is if the attorney general starts to take the position that the way in which the privacy policy is presented in the app, both in its substance and in the manner in which it is displayed, is not compliant with the law,” he said.

Thursday's suit marks the latest step in an effort by Harris to crack down on unlawful online data collection practices, according to attorneys.

“This administration wants to be a leader in this area on the enforcement side, and we've seen that through its actions during the past year,” Newby said.

Harris first signaled her particular interest in the technology in February, when she announced an agreement with six major app platform operators including Apple Inc., Google Inc. and Microsoft Corp. that effectively established a nationwide, legally enforceable standard for mobile app privacy policies. Facebook Inc. also signed onto the agreement in June.

In July, Harris announced the creation of a new Privacy Enforcement and Protection Unit, which is charged with enforcing OPPA as well as other federal and state privacy laws regulating the collection, retention, disclosure and destruction of private or sensitive information by individuals, organizations and the government.

“Through the creation of this unit, the state has a team of knowledgeable prosecutors who are going to focus on really being proactive and taking on certain issues like mobile app privacy policies, as opposed to being more reactive and just picking up privacy issues as they come to their attention,” Hirsch noted.

While California has been one of the most aggressive enforcers of privacy laws over the past decade, attorneys noted that other federal and state regulators have also ramped up their scrutiny of the online and mobile space during the past year.

“The new focus on mobile really results from the fact that consumers are using these devices more and the inherent ability of this technology to gather a significant amount of information that you might not be able to get on a desktop, such as location and photos,” said Foley & Lardner LLP's privacy, security and information management practice chair Andy Serwin. “While California is certainly going to try to lead the way, you'll see a variety of other states as well as the Federal Trade Commission follow on because inherently there will be a lot of privacy issues [stemming from the use of this technology].”

The FTC — which can use its authority under Section 5 of the FTC Act to regulate privacy policies and practices that it considers to be unfair or deceptive — has recently increased its attention to this space, both through its consideration of mobile devices in its efforts to update 12-year-old guidance on how to craft effective disclosures online and through the issuance of guidance in September focused on how mobile app developers can comply with basic privacy principles.

A trio of Canadian privacy commissioners in October also released their own joint guidance on good privacy practices for developing mobile apps, which cited several U.S. sources in its appendix, Krasnow noted.

“This shows that the regulation of mobile apps is not just a state issue; it's a national and global one as well,” she said.

State attorneys general outside of California also pose a risk to companies, especially considering the pledge by Maryland Attorney General Douglas F. Gansler in June to make protecting online privacy the focus of his one-year term as president of the National Association of Attorneys General. But attorneys noted Friday that these regulators may have difficulty bringing actions similar to the Delta suit because they don't have a statute like OPPA, and would have to use their states' less-precise unfair trade practices laws.

However, attorneys didn't rule out the possibility that some states might follow California's lead and enact more targeted privacy laws to address these data use disclosures, especially considering that California has traditionally been the first to enact several ground-breaking privacy laws, including a breach notification law in 2003 that has prompted nearly every other state to pass similar legislation.

But until another state or federal regulator takes significant action in this space, all eyes will continue to be focused on California, according to attorneys.

“By bringing these actions, Harris is giving new life to some of these existing laws that haven't gotten much attention,” Krasnow noted. “She clearly wants legal compliance to catch up with emerging technology, and she's changing companies' behaviors. It will be interesting to see where she will go after this.”

Counsel information for Delta, which declined to comment on the suit Friday, was not immediately available.

The case is *The People of the State of California v. Delta Air Lines Inc.*, case number 12-526741, in the Superior Court for the State of California, City and County of San Francisco.

--Additional reporting by Maria Chutchian and Erin Coe. Editing by John Quinn.