PLANNING FOR – AND AVOIDING – CCPA LITIGATION

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What is CCPA litigation?

- CCPA class action litigation over cybersecurity breaches brought in state court in California and federal court potentially anywhere but most likely in California
- Class action litigation over those provisions of the CCPA not actionable under California law, under the laws of other states (for companies that implement the CCPA nationally)
  - A violation of law may be an unfair trade practice under Massachusetts law and in some other jurisdictions
  - Failure to implement CCPA procedures nation-wide could be characterized as negligent – falling below perceived practices
  - Failing to comply with CCPA obligations incorporated by reference in a privacy statement could support a breach of contract claim
- Suits between or among businesses, service providers, and/or third parties for breach of contract and indemnification (including claims arising out of AG enforcement actions)
- Suits against insurers over coverage issues for litigation and AG enforcement actions

THE CALIFORNIA CONSUMER PRIVACY ACT

California Consumer Privacy Act

- California Consumer Privacy Act (effective Jan. 1, 2020)
  - preempted in the future by federal legislation??
- Draft AG Regulations issued 10/2019, 2/10/2020 and 3/10/2020; final regulations (not yet released) will be enforced by the AG as of July 1, 2020
- Private cause of action – good news/ bad news
- Applies to California residents, not just *consumers*
- Applies to *businesses* with (1) annual gross revenue > $25 M; (2) that buy, sell or receive for commercial purposes personal information of 50,000 or more consumers, households or devices, and (3) businesses that derive 50% or more of their annual revenue from selling consumers' personal information (excludes entities subject to federal regulation)
- Regulates *businesses, third parties* and *service providers*
- Consumer rights to
  - Notice of the personal information collected and the purpose of collection at or before collection
  - Request disclosure up to 2x every 12 months (generally free of charge, generally 45 days)
  - Opt out of collection (for minors 16 years and under, opt-in consent is required)
  - Deletion of personal information
- *Personal information* is very broadly defined.
  - Inferences drawn about a consumer (ie, likes to dive) are *personal information*
- Broad: Rather than regulating the use, collection and dissemination of information obtained *by companies from consumers*, as past consumer laws did, the CCPA focuses on information *about* state residents
- Nondiscrimination/ financial incentives
- Required Privacy Policy disclosures – but a Privacy Policy alone is not enough

CCPA Putative Class Action Litigation

- The private right of action narrowly applies only to security breaches and the failure to implement reasonable measures, not other aspects of the statute
- However, plaintiffs may recover statutory damages of between $100 and $750
- The CCPA creates a private right of action for consumers "whose nonencrypted or nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices . . . ."
- What is *reasonable* will be defined by case law and potentially guidance from the California Attorney General
  - Final regulations to be issued, with regulatory enforcement commencing July 1, 2020
- $100 - $750 "per consumer per incident or actual damages, whichever is greater, injunctive or declaratory relief, and any other relief that a court deems proper."
- In assessing the amount of statutory damages, the court shall consider "any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth"
- 30 day notice and right to cure as a precondition to seeking statutory damages
  - Modeled on the Consumer Legal Remedies Act
  - Can one "cure" a breach?
  - If cured, a business must provide "an express written statement" (which could later be actionable)

How CCPA litigation will play out

- CCPA class action litigation over cybersecurity breaches –
- Three relevant touchstones:
  - California CLRA litigation (30 day notice & cure provision)
  - Cybersecurity class action litigation over the past decade
  - TCPA class action litigation (class action suits where plaintiffs can recover statutory damages regardless of injury or damage)
    - 3,803 new suits filed in 2018
    - 2,300 in 2019 through August 30 (webrecon.com)
- Class action litigation over those provisions of the CCPA not actionable under California law, under the laws of other states (for those companies that are rolling out the CCPA nationally)
- How to avoid class action litigation?
  - Encrypt your data and comply with the CCPA (or make sure to avoid its application)….
  - Craft a binding and enforceable arbitration provision and include it in every contract with consumers under the FAA (not state law), avoiding or complying with AAA requirements
  - Make sure your online and mobile consumer contract formation process conforms to the law in the worst jurisdictions (currently the First and Ninth Circuits)
  - Where you don't have privity of contract, make sure you are an intended beneficiary of an arbitration clause in a contract with a business partner who does have privity (because you will be sued!)
  - Explore insurance coverage
- Suits between or among businesses, service providers, and/or third parties for breach of contract and indemnification (including claims arising out of AG enforcement actions)
  - Pay close attention to indemnification provisions, encryption obligations, notice obligations and intended beneficiary clauses where there is no privity of contract with consumers
- Suits against insurers over coverage issues for litigation and AG enforcement actions
  - Check your insurance coverage NOW
  - Make sure you can hire counsel of your choosing

CCPA Putative Class Action Litigation

- $100-$750 "per consumer per incident or actual damages, whichever is greater
- Suits will be brought as putative class action suits
  - 100,000 consumers → up to $75,000,000
  - 1,000,000 state residents → up to $750,000,000 and *at least* $100,000,000
- 30 day advance notice and the right to cure
- Compare to Cal. Civil Code § 1798.84(b)
- Standing
  - *In re Zappos.com, Inc.*, 888 F.3d 1020, 1023-30 (9th Cir. 2018) (holding that plaintiffs, whose information had been stolen by a hacker but who had not been victims of identity theft or financial fraud, nevertheless had Article III standing to maintain suit in federal court)
  - *Cahen v. Toyota Motor Corp.*, 717 F. App'x 720 (9th Cir. 2017) (affirming the lower court's ruling finding no standing to assert claims that car manufacturers equipped their vehicles with software that was susceptible to being hacked by third parties)
  - *Antman v. Uber Technologies, Inc.*, Case No. 3:15-cv-01175-LB, 2018 WL 2151231 (N.D. Cal. May 10, 2018) (dismissing, with prejudice, plaintiff's claims, arising out of a security breach, for allegedly (1) failing to implement and maintain reasonable security procedures to protect Uber drivers' personal information and promptly notify affected drivers, in violation of Cal. Civ. Code §§ 1798.81, 1798.81.5, and 1798.82; (2) unfair, fraudulent, and unlawful business practices, in violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; (3) negligence; and (4) breach of implied contract, for lack of Article III standing, where plaintiff could not allege injury sufficient to establish Article III standing); *see generally infra* § 27.07 (analyzing claims raised in security breach litigation).

WHAT CAN WE LEARN FROM CLRA, TCPA AND SECURITY BREACH PUTATIVE CLASS ACTION LITIGATION TO DATE?

Anticipating CCPA Class Action Litigation

- CLRA
  - You will have 30 days to plan to be sued if a plaintiff wants to recover damages
  - Some may sue you anyway claiming notice would be futile and the lawsuit constitutes notice, so plan ahead and retain counsel now
- TCPA
  - There will be an avalanche of lawsuits – likely multiple suits for every cybersecurity breach, as class action lawyers jostle for lead position
  - Some companies will overpay to settle these cases (pushed by insurers or out of concern for potentially large damage awards), fueling even more litigation
  - Relief eventually may come from Congress, but not before one or more companies are hit with punitive awards
    - Golan v. FreeEats.com, Inc., 930 F.3d 950, 962-63 (8th Cir. 2019) (statutory min. damages $1.6 Billion)
- Cybersecurity class action suits
  - The life cycle of a case – and how to win!
  - Standing (caveat – for CCPA cases you may end up in California state court)/ MTD/ SJ/ Class certification/ Settlement/ No trials
  - Settlement values – and how to value your case and your exposure
  - Statutory damages under the CCPA will skew settlement numbers nationally
- Standing: To establish injury in fact, a plaintiff must have suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"
  - Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (remanding a 9th Circuit order to address "whether any named plaintiff" had alleged injuries "sufficiently concrete and particularized to support standing" under *Spokeo*)
  - Clapper v. Amnesty International USA, 568 U.S. 398 (2013) (5-4)
  - Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (Alito) (compromise 6-2)
- **Circuit split on the risk of future harm under *Clapper***

Security Breach Litigation

- Circuit split – Low threshold: 6th, 7th, 9th, DC vs. high threshold: 2d, 4th, 8th (3d)
- **Remijas v. Neiman Marcus Group, 794 F.3d 688 (7th Cir. 2015)**
- **Lewert v. P.F. Chang's China Bistro Inc., 819 F.3d 963 (7th Cir. 2016)**
- **Dieffenback v. Barnes & Noble, Inc., 827 F.3d 826 (7th Cir. 2018)**
- **Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384 (6th Cir. 2016) (2-1)**
- Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011), *cert. denied,* 566 U.S. 989 (2012)
- **Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017)**
  - Allegation that data breaches created an enhanced risk of future identity theft was too speculative to constitute an injury-in-fact
    - Rejected evidence that 33% of health related data breaches result in identity theft
    - Rejected the argument that offering credit monitoring services evidenced a substantial risk of harm (rejecting *Remijas*)
  - Mitigation costs in response to a speculative harm do not qualify as injury in fact
- **Whalen v. Michael's Stores, Inc., 689 F. App'x. 89** (2d Cir. 2017)
  - The theft of plaintiff's financial information was not sufficiently concrete or particularized to satisfy *Spokeo*
  - breach of implied contract, N.Y. Gen. Bus. L. § 349
  - Plaintiff made purchases via a credit card at a Michaels store on December 31, 2013
  - Michaels experienced a breach involving credit card numbers but no other information such as a person's name, address or PIN
  - plaintiff alleged that her credit card was presented for unauthorized charges in Ecuador on January 14 and 15, 2014, but she did not allege that any fraudulent charges were actually incurred by her prior to the time she canceled her card on January 15
- **Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 981** (2018)
  - following *Remijas v. Neiman Marcus Group, LLC* in holding that plaintiffs, whose information had been exposed but who were not victims of identity theft, had plausibly alleged a heightened risk of future injury to establish standing because it was plausible to infer that a party accessing plaintiffs' personal information did so with "both the intent and ability to use the data for ill."
- **In re U.S. Office of Personnel Management Data Security Breach Litig.**, 928 F.3d 42 (D.C. Cir. 2019) (21mil records)
- **In re SuperValu, Inc., Customer Data Security Breach Litig., 870 F.3d 763 (8th Cir. 2017)**
  - affirming dismissal for lack of standing of the claims of 15 of the 16 plaintiffs but holding that the one plaintiff who alleged he suffered a fraudulent charge on his credit card had standing to sue for negligence, breach of implied contract, state consumer protection and security breach notification laws and unjust enrichment
  - defendants experienced two separate security breaches, which they announced in press releases may have resulted in the theft of credit card information, including their customers' names, credit or debit card account numbers, expiration dates, card verification value (CVV) codes, and personal identification numbers (PINs). Plaintiffs alleged that hackers gained access to defendants' network because defendants failed to take adequate measures to protect customers' credit card information
  - **Rejected cost of mitigation (*Clapper*) (*Cf. P.F. Chang's*)**
- **In re Zappos.com, Inc.,** 888 F.3d 1020 (9th Cir. 2018), cert. denied, 139 S. Ct. 1373 (2019)
  - merely having personal information exposed in a security breach constitutes sufficient harm to justify Article III standing in federal court, regardless of whether the information in fact is used for identity theft or other improper purposes
  - **Bootstrapping -** Because other plaintiffs alleged that their accounts or identities had been commandeered by hackers, the court concluded that the appellants in *Zappos* – who did not allege any such harm – could be subject to fraud or identity theft
- **Causation/ damages – a major issue in most cases**
- **Settlement value**

RELATED CYBERSECURITY AND DATA PRIVACY CLAIMS THAT COULD BE JOINED IN A CCPA SUIT

CCPA Class Action Litigation – Related Claims

- Related cybersecurity claims

(not preempted by the CCPA if not based on a violation of the CCPA)

  - Breach of contract (if there is a contract)
  - Breach of the covenant of good faith and fair dealing (if the contract claim isn't on point)
  - Breach of implied contract (if there is no express contract)
  - Breach of fiduciary duty
  - Negligence
  - Fraud
  - State cybersecurity statutes (especially those that provide for statutory damages and attorneys' fees)

- Related data privacy claims
  - Electronic Communications Privacy Act
    - Wiretap Act
    - Stored Communications Act
  - Computer Fraud and Abuse Act
    - $5,000 minimum injury
  - Video Privacy Protection Act
  - State laws
    - Illinois Biometric Information Privacy Act (recently adopted in other states)
    - Michigan's Preservation of Personal Privacy Act
    - California laws including the California Consumer Privacy Act (CCPA) which takes effect Jan 1, 2020
  - Breach of contract/ privacy policies
- Regulatory enforcement – important to coordinate litigation strategy with California AG (and potentially FTC) enforcement actions
  - Experience from other cases

CCPA Class Action Litigation – Related Claims

- California's Internet of Things (IoT) Law (effective Jan. 1, 2020)
  - Cal. Civil Code §§ 1798.91.04 to 1798.91.06
  - Requires a manufacturer of a connected device to equip the device with a reasonable security feature or features that are appropriate to the nature and function of the device, appropriate to the information it may collect, contain, or transmit, and designed to protect the device, and any information it contains, from unauthorized access, destruction, use, modification, or disclosure
  - Who is responsible? Privity of contract?
    - In re Vizio
- Michigan's Preservation of Personal Privacy Act
- Illinois Biometric Information Privacy Act (BIPA)
  - A private cause of action for "any person aggrieved by a violation" of BIPA
    - Rosenbach v. Six Flags Entertainment Corp., 129 N.E.3d 1197 (Ill. 2019) (holding that a person need not have sustained actual damage beyond violation of his or her rights under the statute to be *aggrieved* by a violation)
  - A plaintiff may recover the greater of (1) actual damages or (2) $1,000 in liquidated damages for negligent violations or $5,000 if intentional or reckless
  - The statute also authorizes recovery of attorneys' fees
    - Patel v. Facebook, 932 F.3d 1264 (9th Cir. 2019) (affirming certification of a class of Illinois users of Facebook's website for whom the website created and stored a face template during the relevant time period) (petition for cert. filed Dec. 4, 2019)
    - In re Facebook Biometric Information Privacy Litig., Case No. 3:15-cv-0373-JD, 2018 WL 2197546 (N.D. Cal. May 14, 2018) (denying cross motions for summary judgment)
    - Santana v. Take-Two Interactive Software, Inc., 717 F. App'x 12 (2d Cir. 2017) (affirming the lower court's finding of no standing in a BIPA case based on mere procedural violations)

ONLINE AND MOBILE CONTRACT FORMATION – YOUR BEST DEFENSE AGAINST THE CCPA

Online and Mobile Contract Formation

- Continued hostility to implied contracts
  - Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175-79 (9th Cir. 2014)
    - declining to enforce an arbitration clause where the website provided terms of use via a link accessible on every page of the website but provided no notice to users or prompts to demonstrate express assent to those terms; "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice"
  - Wilson v. Huuuge, Inc., 944 F.3d 1212 (9th Cir. 2019) (declining to enforce arbitration in a mobile Terms of Service agreement)
- What is reasonable notice
  - Nicosia v. Amazon.com, Inc., 834 F.3d 220 (2d Cir. 2016)
    - reversing the lower court's order dismissing plaintiff's complaint, holding that whether the plaintiff was on inquiry notice of contract terms, including an arbitration clause, presented a question of fact where the user was not required to specifically manifest assent to the additional terms by clicking "I agree" and where the hyperlink to contract terms was not "conspicuous in light of the whole webpage."
  - Meyer v. Uber Technologies, Inc., 868 F.3d 66 (2d Cir. 2017)
    - (1) Uber's presentation of its Terms of Service provided reasonably conspicuous notice as a matter of California law and (2) consumers' manifestation of assent was unambiguous
    - "when considering the perspective of a reasonable smartphone user, we need not presume that the user has never before encountered an app or entered into a contract using a smartphone. Moreover, a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found."
    - "[T]here are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories."
  - Cullinane v. Uber Technologies, Inc., 893 F.3d 53 (1st Cir. 2018)
    - Displaying a notice of deemed acquiescence and a link to the terms is insufficient to provide reasonable notice to consumers

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Place your order

Order Summary

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Shipping & handling:	[redacted]
Total before tax:	[redacted]
Estimated tax to be collected:	[redacted]
Total:	[redacted]
Gift Card:	[redacted]
Order total:	[redacted]

How are shipping costs calculated?

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FREE Two-Day Shipping on this Order: [redacted], you can save $5.48 on this order by selecting "FREE Two-Day Shipping with a free trial of Amazon Prime" below.
» Sign up for a free trial

Estimated delivery: Sept. 25, 2014 - Sept. 26, 2014

[redacted]

Choose a delivery option:

- FREE Two-Day Shipping with a free trial of [redacted] --get it Wednesday, Sept. 24
- One-Day Shipping --get it tomorrow, Sept. 23
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*Why has sales tax been applied? See tax and seller information

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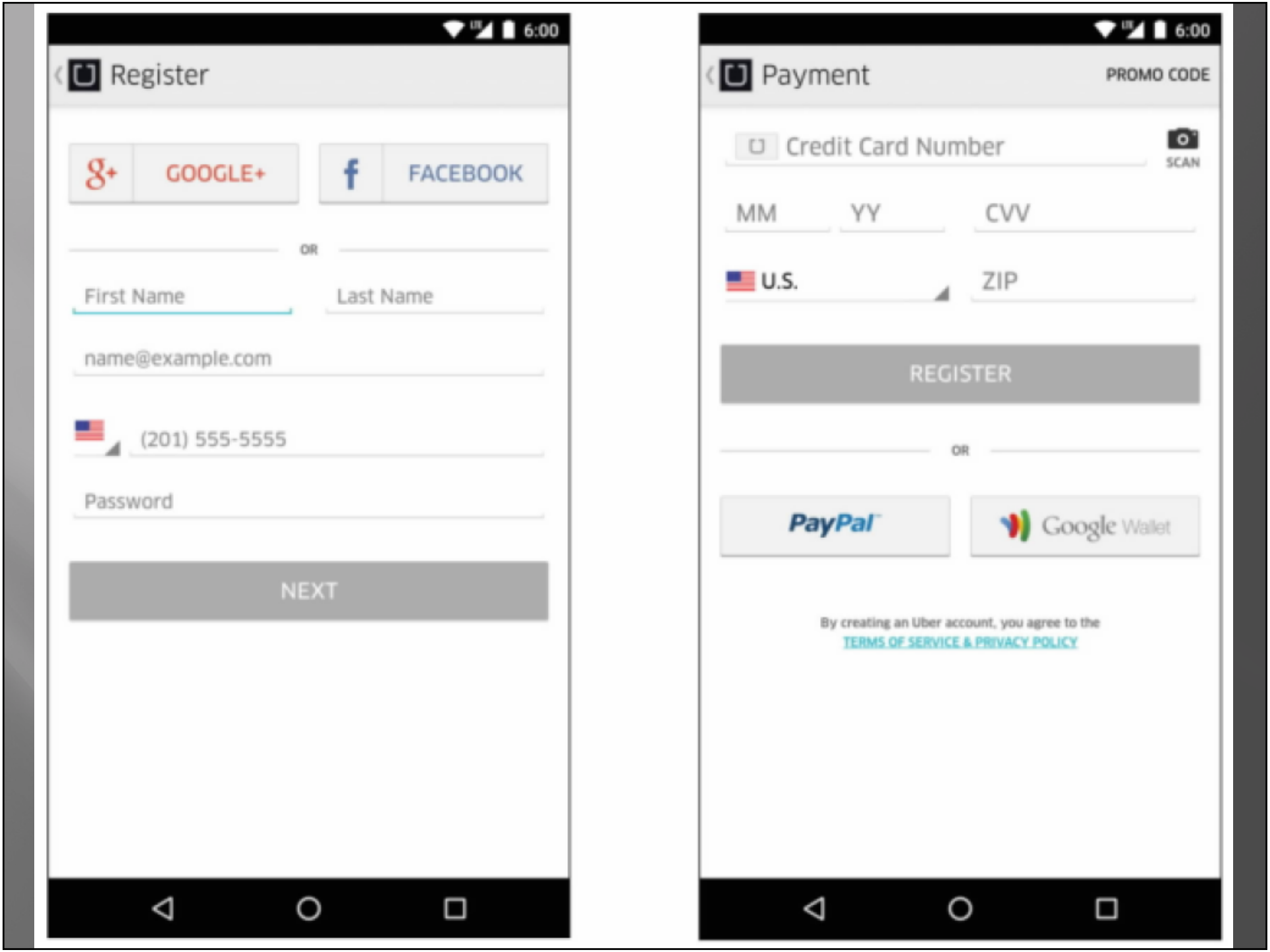
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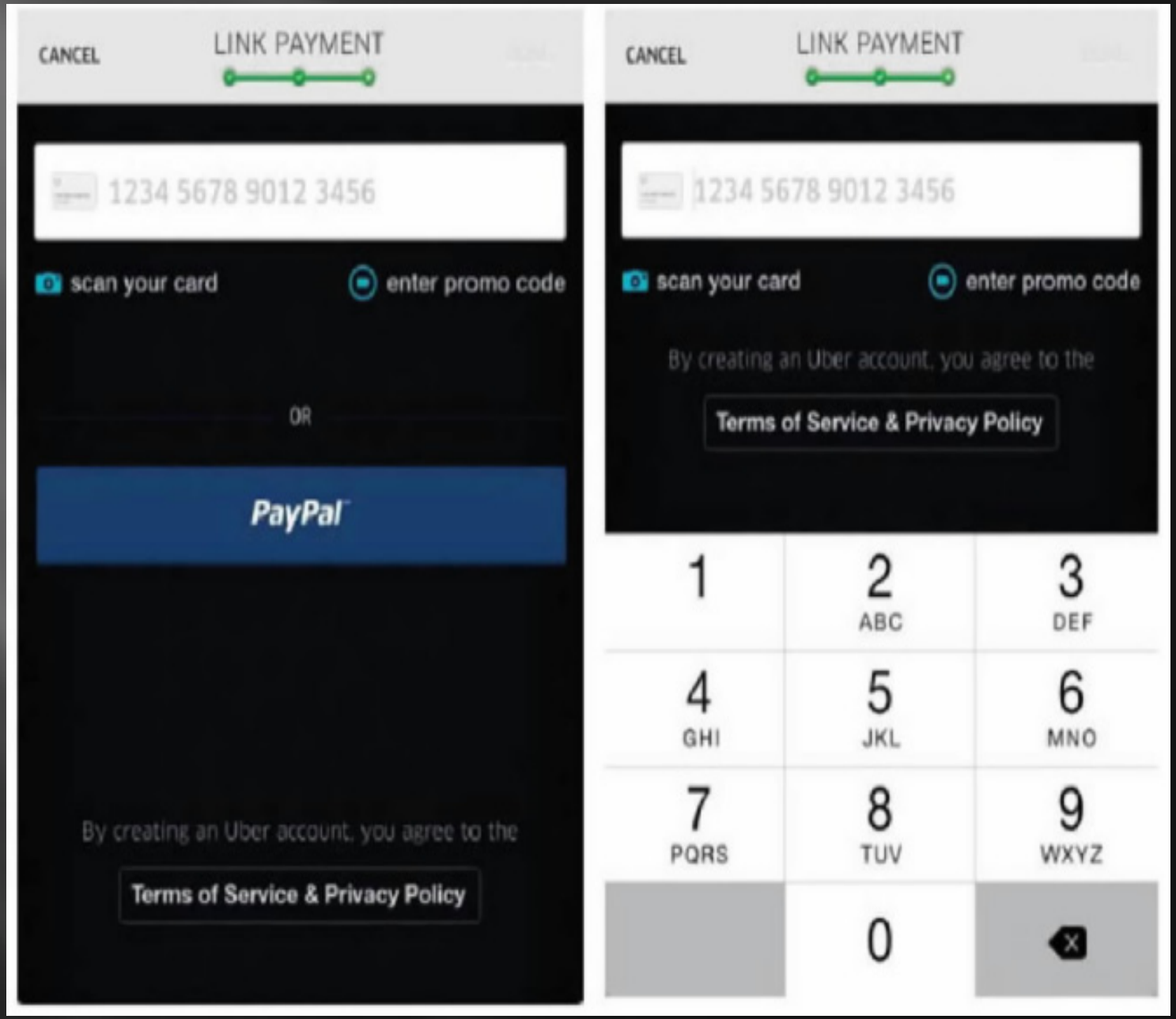
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4 GHI
5 JKL
6 MNO
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  - Cullinane v. Uber Technologies, Inc., 893 F.3d 53 (1st Cir. 2018)
    - Displaying a notice of deemed acquiescence and a link to the terms is insufficient to provide reasonable notice to consumers
  - Starke v. Squaretrade, Inc., 913 F.3d 279 (2d Cir. 2019)
    - Denying motion to compel arbitration where the consumer did not have reasonable notice because the post-sale T&C were not provided in a clear and conspicuous way. An Amazon purchase page said plaintiff would receive a "service contract" by email. Plaintiff then received an email advising he would receive a "service agreement." He then received an email saying his "contract" was enclosed, but it came in the form of a link and none of the communications put him on notice that his "service contract" would come via a link.
    - (1) no notice it would be a link; (2) the link was buried in an email that primarily comprised a chart (3) more similar to *Nicosia* than *Meyer*

Online and Mobile Contract Formation

- Arbitration and Class Action Waivers
  - AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)
  - Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019)
  - American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)
  - Tompkins v. 23andMe.com. Inc., 840 F.3d 1016 (9th Cir. 2016)
    - Abrogating or limiting earlier Ninth Circuit cases that applied pre-*Concepcion* California unconscionability case law, which had treated arbitration clauses differently from other contracts
    - Venue selection, bilateral attorneys' fee and IP carve out provisions not unconscionable
    - Enfording delegation clause
  - Baltazar v. Forever 21, Inc., 62 Cal. 4th 1237, 200 Cal. Rptr. 3d 7 (2016) (abrogating earlier precedent that held certain provisions to be unconscionable when included in arbitration agreements)
  - Larsen v. Citibank FSB, 871 F.3d 1295 (11th Cir. 2017) (compelling arbitration; unilateral amendment provision modified by the duty of good faith and fair dealing under either Ohio or Washington law)
  - National Federation of the Blind v. Container Store, 904 F.3d 70 (1st Cir. 2018)
    - Holding T&Cs illusory under TX law, and declining to enforce the included arbitration clause
    - Rejecting the argument that a unilateral amendment clause was not illusory because modified by the duty of good faith and fair dealing or based on the severability clause
- Drafting tips
  - Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010)
    - Challenge to the enforceability of an agreement (arbitrable) vs. challenge to the agreement to arbitrate
    - Clause: arbitrator, not a court, must resolve disputes over interpretation, applicability, enforceability or formation, including any claim that the agreement or any part of it is void or voidable
  - Rahimi v. Nintendo of America, Inc., 936 F. Supp. 2d 1141 (N.D. Cal. 2013)
  - Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019)
  - Tompkins v. 23andMe.com. Inc., 840 F.3d 1016 (9th Cir. 2016)
  - Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230 (11th Cir. 2018)
    - Disagreeing with four other circuits, holding that incorporation by reference of AAA rules delegates the issue of whether arbitration may proceed on a class-wide basis to the arbitrator, not the court, if the contract is otherwise silent about whether it provides for individual or class arbitration
    - But **see** **Stolt-Nielsen** S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)
    - But see Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019) (holding that ambiguity in an arbitration agreement does not provide sufficient grounds for compelling classwide arbitration)
  - AAA – registration requirement
  - Review and update frequently

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