SURPRISING TRENDS AND IMPORTANT LESSONS FROM RECENT DEVELOPMENTS IN CYBERSECURITY BREACH AND CCPA LITIGATION

FALL ACADEMY – PRIVACY + SECURITY FORUM

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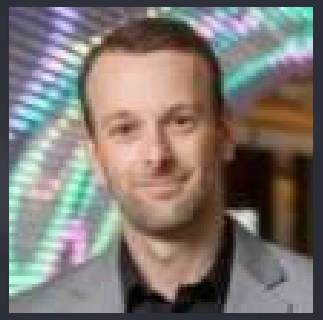

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CCPA/CPRA SECURITY BREACH PUTATIVE CLASS ACTION LITIGATION

Surprising Trends and Important Lessons

- Widely reported trend: hundreds of CCPA lawsuits
  - Surprising trend: how cases are playing out in court and resolving
  - Not all CCPA cases are litigated in California
- Widely reported trend: more cybersecurity litigation overall
  - Surprising trend: Fewer MDLs and fewer multi-suit cases: why?
  - Much of the case law comes from on district and even a few judges
- Widely reported trend: privilege is harder to preserve in security breach cases
  - Ways to protect privilege
- Widely reported trend: arbitration
  - Surprising trend: mass arbitration, including of CCPA claims
    - What companies are likely targets?
  - How should companies respond
- AGENDA
  - Hour One – Law and Trends
    - CCPA litigation
    - What will change under the CPRA
    - How to defend these cases
    - Contract formation and arbitration
  - Hour Two – In-house Panel
    - What compliance issues flow from CCPA litigation?
    - How can you plan for CCPA/CPRA litigation?
    - Insurance issues
    - Tabletops for litigation
    - AG Enforcement and coordination with CCPA/CPRA litigation
    - Litigation playbook
    - Litigation agenda

THE CALIFORNIA CONSUMER PRIVACY ACT (CCPA) & CALIFORNIA PRIVACY RIGHTS AND ENFORCEMENT ACT OF 2020 (CPRA)

CCPA Putative Class Action Litigation

- The CCPA applies to businesses (1) with 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, or (3) that derive 50% or more of their annual revenue from selling consumers' personal information (excludes entities subject to federal regulation)
- The private right of action narrowly applies only to security breaches and the failure to implement reasonable measures, not other CCPA provisions
- But plaintiffs may recover statutory damages of between $100 and $750
- The CCPA creates a private right of action for [1] consumers [2] "whose nonencrypted or nonredacted [3] personal information [within the meaning of Cal. Civ. Code §§ 1798.150(a)(1) and 1798.81.5] . . . [4] is subject to an unauthorized access and exfiltration, theft, or disclosure [5] as a result of the business's [6] violation of the duty to implement and maintain reasonable security procedures and practices . . . ."
- What is *reasonable* will be defined by case law
- $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."
- 30 day notice and right to cure as a precondition to seeking statutory damages (modeled on the Consumer Legal Remedies Act)
  - If cured, a business must provide "an express written statement" (which could later be actionable)
- 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"
- CCPA claims typically are joined with other cybersecurity breach or data privacy claims

Defense Strategies for CCPA & Other Cybersecurity litigation

- Many "CCPA claims" aren't actually actionable under the CCPA
- The CCPA creates a private right of action for
  - [1] consumers
  - [2] "whose nonencrypted or nonredacted
  - [3] personal information [within the meaning of Cal. Civ. Code §§ 1798.150(a)(1) and 1798.81.5] . . .
  - [4] is subject to an unauthorized access and exfiltration, theft, or disclosure
  - [5] as a result of the business's
  - [6] violation of the duty to implement and maintain reasonable security procedures and practices . . . ."
- Cal. Civ. Code § 1798.150(c) ("Nothing in this title shall be interpreted to serve as the basis for a private right of action under any other law.")
- Should you respond to a CCPA 30 day cure notice and if so how?
- Court opinions
  - Rahman v. Marriott International, Inc., Case No. SA CV 20-00654-DOC-KES, 2021 WL 346421 (C.D. Cal. Jan. 12, 2021) (dismissing CCPA, breach of contract, breach of implied contract, unjust enrichment and unfair competition claims, for lack of Article III standing, in a suit arising out of Russian employees accessing putative class members' names, addresses, and other publicly available information, because the sensitivity of personal information, combined with its theft, are prerequisites to finding that a plaintiff adequately alleged injury in fact)
  - Gardiner v. Walmart Inc., Case No. 20-cv-04618-JSW, 2021 WL 2520103, at *2-3 (N.D. Cal. Mar. 5, 2021) (dismissing plaintiff's CCPA claim for failing to allege that the breach occurred after January 1, 2020, when the CCPA took effect, and failing to adequately allege the disclosure of personal information as defined by the statute)
  - Gershfeld v. Teamviewer US, Inc., 2021 WL 3046775 (C.D. Cal. June 24, 2021) (dismissing claim)
  - Silver v. Stripe Inc., 2021 WL 3191752 (N.D. Cal. July 28, 2021) (no UCL claim based on CCPA)
  - In re Blackbaud, Inc., Customer Data Breach Litig., 2021 WL 3568394, at *4-6 (D.S.C. Aug. 12, 2021) (denying motion to dismiss where plaintiff adequately alleged d a *business*)

How will litigation change under the CPRA?

- The CPRA was adopted as a ballot initiative in November 2020 and will amend the CCPA litigation section effective January 1, 2023
- The litigation remedies are largely the same except:
  - New thresholds for CPRA applicability for a business (and covers sharing)
  - Expanded to cover anyone whose email address in combination with a password or security question and answer that would permit access to the account was subject to an unauthorized access and exfiltration, theft, or disclosure
  - The CPRA will apply to businesses engaged in consumer credit collection and reporting
  - New caveat on what constitutes a cure
  - Online contract formation
  - Representative action nonwaiver
- New threshold: The CPRA applies to businesses with (1) annual gross revenue > $25 M; (2) that buy, sell or receive for commercial purposes personal information of (50,000) 100,00 or more consumers, households or devices, and (3) businesses that derive 50% or more of their annual revenue from selling (buying or sharing) consumers' personal information (excludes entities subject to federal regulation)
- New Civil Code § 1798.150 - implementation and maintenance of reasonable security procedures and practices does not amount to a cure (in response to a 30 day letter)
- New Civil Code § 1798.140(h) - Consent does not include "acceptance of a general or broad terms of use" that describes "personal information processing along with other, unrelated information . . . ."
- New Civil Code § 1798.192 – prohibits and renders void "a representative action waiver"

Defense Strategies for CCPA/CPRA & Cybersecurity litigation

- Can you compel arbitration?
- If there are multiple suits – is MDL consolidation possible or desirable?
  - Security breach cases are often consolidated in the district where the defendant is located
  - In re Dickey's Barbecue Restaurants, Inc., Customer Data Security Breach Litigation, _ F. Supp. 3d _, 2021 WL 405657 (J.P.M.D.L. 2021) (denying consolidation)
- Motions to Dismiss
  - Rule 12(b)(1) standing – circuit split - 6th, 7th, 9th, DC vs. high threshold: 2d, 4th, 8th (3d)
  - Rule 12(b)(6) motion to dismiss for failure to state a claim
- Summary judgment
- Class Certification
- Work Product Privilege
  - In re: Capital One Consumer Data Security Breach Litig., MDL No. 1:19md2915, 2020 WL 3470261 (E.D. Va. June 25, 2020) (Ordering production of the Mandiant Report)
    - Applied the 4th Circuit's "driving force" test – (1) was the report prepared when the litigation was a real likelihood (yes); (2) would it have been created anyway in the absence of litigation (yes)
    - Capital One had a preexisting contractual relationship with Mandiant for similar reports and could not show that, absent the breach, the report would have been any different in addressing business critical issues (and the report was widely distributed to 50 employees, 4 different regulators and an accountant)
    - Footnote 8: use different vendors, scopes of work and/or different investigation teams
  - In re: Capital One Consumer Data Security Breach Litig., MDL No. 1:19md2915, 2020 WL 5016930 (E.D. Va. Aug. 21, 2020) (Price Waterhouse – not produced)
  - The Ninth Circuit does not weigh motivations where documents may be used both for business purposes and litigation: In re Grand Jury Subpoena, 357 F.3d 900, 908 (9th Cir. 2004)
    - Cf. In re Grand Jury Subpoena, _ F.4th _, 2021 WL 4143102 (9th Cir. Sept. 13, 2021)
- Settlement

Cybersecurity Class Action Litigation

- Cybersecurity claims
  - 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, unfair competition
  - State cybersecurity statutes (especially those that provide for statutory damages and attorneys' fees)
  - California (and potentially Oregon) IoT Law, CCPA
- Securities fraud
  - In re Facebook, Inc. Securities Litigation, 477 F. Supp. 3d 980 (N.D. Cal. 2020) (dismissing plaintiffs' amended complaint for lack of causation and reliance)
- Data privacy claims
  - Electronic Communications Privacy Act
    - Wiretap Act
    - Stored Communications Act
  - Computer Fraud and Abuse Act
    - $5,000 minimum injury
    - Van Buren v. United States, 141 S. Ct. 1648 (2021)
  - 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)
      - Other claims are preempted by the CCPA *only* if based on a violation of the CCPA
  - Breach of contract/ privacy policies
    - Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1037-38 (N.D. Cal. 2019) (dismissing claims for breach of contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, quasi contract, and breach of confidence in a putative data security breach class action suit, where Facebook's Terms of Service included a limitation-of-liability clause)
  - Regulatory enforcement – the FTC and potentially state Attorneys General, including in California (under the CCPA)
    - Coordinate litigation and regulatory enforcement (usually confidential)

Cybersecurity Breach Class Action Litigation - Standing

- Circuit split on Article III standing: Low threshold: 6th, 7th, 9th, DC vs. higher: 2d, 4th, 8th, 11th (3d)
- **TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)**
- **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)**
- **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
    - 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 credit card numbers was not sufficiently concrete or particularized to satisfy *Spokeo* (name, address, PIN not exposed)
  - credit card was presented for unauthorized charges in Ecuador, but no allegation that fraudulent charges actually were incurred
- **McMorris v. Carlos Lopez & Associates, LLC, 995 F.3d 295 (2d Cir. 2020)**
  - **Plaintiffs may establish Article III standing based on an increased risk of identity theft or fraud following the unauthorized disclosure of their data, but employee was not at substantial risk of future identity theft**
- **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 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) (21M 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
  - **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
- **Tsao v. Captiva MVP Restaurant Partners, LLC, 986 F.3d 1332 (11th Cir. 2021)**
  - **No Article III standing for mitigation injuries (lost time, lost reward points, lost access to accounts) or potential future injury, where plaintiff's credit card was exposed when a restaurant's point of sale system was breached**

MITIGATING RISK

Litigation - Risk Mitigation

- Businesses that seek to limit their liability to consumers may be able to do so to the extent an end user must sign on to a website or access an App to operate a device, at which point the user may be required to assent to Terms of Use, including potentially a binding arbitration agreement
- Where there is no privity of contract, a business cannot directly limit its potential exposure to consumers, but it may --
  - seek indemnification from others
  - contractually require that a business partner make it an intended beneficiary of an end user agreement (including an arbitration agreement), or
  - obtain insurance coverage
- If there is no enforceable contract, a business may be unable to avoid class action litigation in the event of a security breach, system failure, or alleged privacy violation, through binding arbitration, except in narrow circumstances where equitable estoppel may apply
- The best way to mitigate the risk of class action litigation is to have an enforceable arbitration agreement (or be an intended beneficiary of a party that does) --
  - You must have an enforceable online or mobile contract (or be an intended beneficiary of one)
  - You must have an enforceable arbitration provision (or be an intended beneficiary of one)
  - You should review your contract formation and arbitration provisions (or those of your business partners) every 6-12 months

ONLINE AND MOBILE CONTRACT FORMATION

Online and Mobile Contract Formation

- Trend: Continued hostility to implied contracts
  - Emmanuel v. Handy Technologies, Inc., 992 F.3d 1 (1st Cir. 2021) (enforcing ToS and arbitration provision under Mass law where plaintiff selected "Accept" in a mobile app)
  - Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175-79 (9th Cir. 2014)
    - declining to enforce an arbitration clause
    - "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 an arbitration clause in a mobile Terms of Service agreement
    - Benson v. Double Down Interactive, LLC, 798 F. App'x 117 (9th Cir. 2020) (no constructive notice)
  - Dohrmann v. Intuit, Inc., 823 F. App'x 482 (9th Cir. 2020)
    - Reversing the denial of a motion to compel arbitration
    - Holding the arbitration provision in Intuit's Terms of Use enforceable where a user, to access a TurboTax account, was required, after entering a user ID and password, to click a "Sign In" button, directly above the following language: "By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement," where each of those documents was highlighted in blue hyperlinks which, if clicked, directed the user to a new webpage containing the agreement
  - Lee v. Ticketmaster L.L.C., 817 F. App'x 393 (9th Cir. 2020)
  - 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
  - Stover v. Experian Holdings, Inc., 978 F.3d 1082 (9th Cir. 2020)
    - Visiting a website four years after agreeing to Terms of Use that permitted changes did not bind the plaintiff to the terms in effect on later visit

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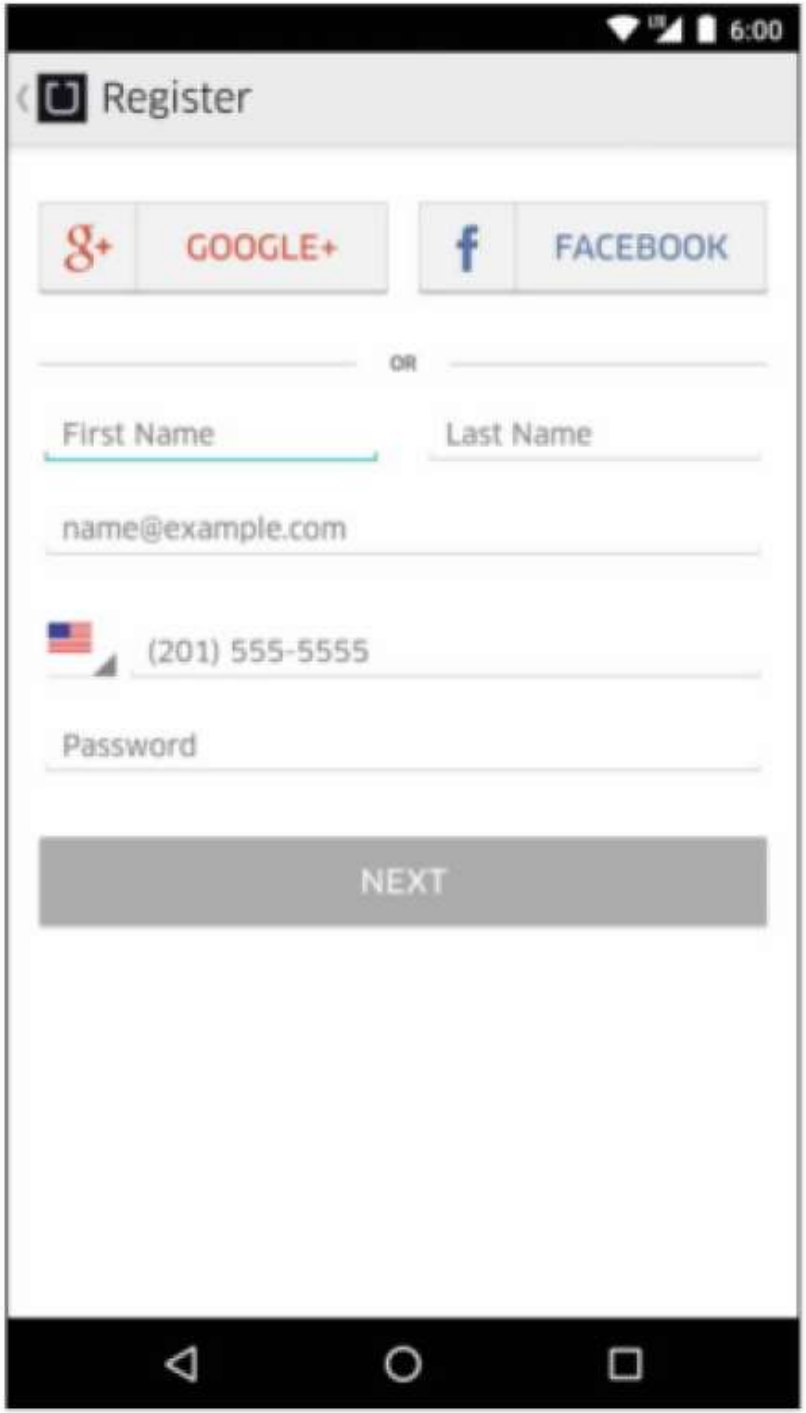
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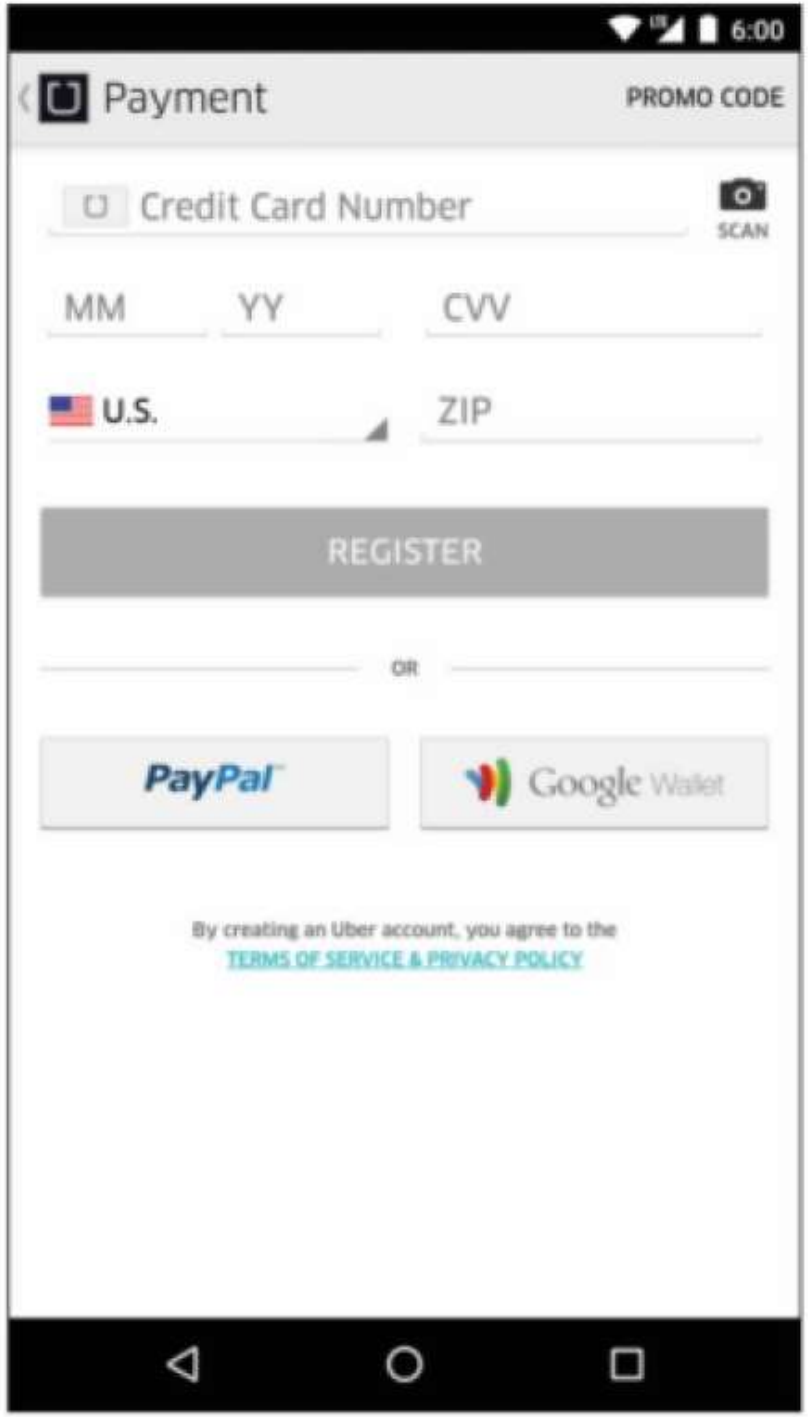
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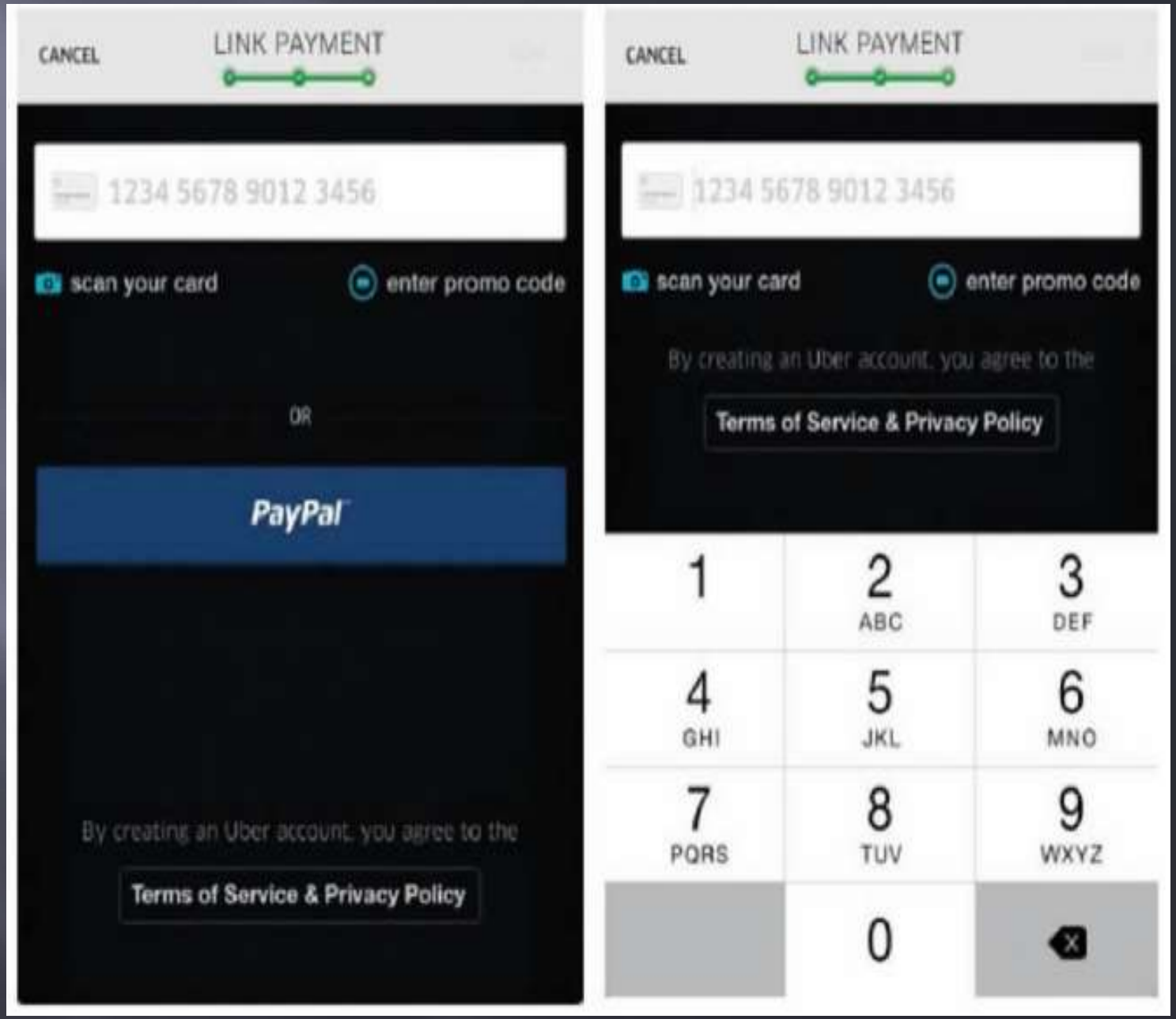
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4 GHI
5 JKL
6 MNO
7 PQRS
8 TUV
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    - Visiting a website four years after agreeing to Terms of Use that permitted changes did not bind the plaintiff to the terms in effect on later visit

Arbitration, Contract Formation & Mass Arbitration

- 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
    - Enforcing delegation clause
  - 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
- Mass Arbitration
  - Postmates Inc. v. 10,356 Individuals, CV 20-2783 PSG, 2020 WL 1908302 (C.D. Cal. 2020) (denying injunctive relief)
- Minors
  - R.A. by and through Altes v. Epic Games, Inc., No. 5:19-cv-325-BO, 2020 WL 865420 (E.D.N.C. Feb. 20, 2020)
- 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)
  - Revitch v. DIRECTV, LLC, 977 F.3d 713 (9th Cir. 2020) ("affiliates" didn't extend to later affiliates; declining to enforce an arbitration agreement in a TCPA case)
  - 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
  - Address "mass arbitration" – JAMS vs AAA
  - Review and update frequently

PANEL DISCUSSION

SURPRISING TRENDS AND IMPORTANT LESSONS FROM RECENT DEVELOPMENTS IN CYBERSECURITY BREACH AND CCPA LITIGATION

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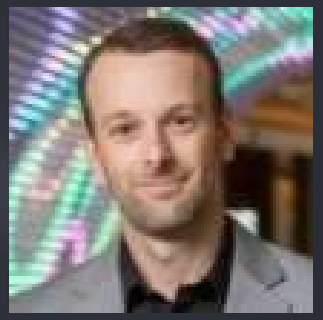

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