

GETTING READY FOR CPRA LITIGATION – WHAT YOU NEED TO KNOW AND LESSONS LEARNED FROM CCPA LITIGATION



Ian Ballon, JD, LLM, CIPP/US
Co-Chair, Global IP & Technology Practice Group
Greenberg Traurig LLP
(650) 289-7881 (310) 586-6575 (202) 331-3138
Ballon@GTLaw.com
www.IanBallon.net



E-Commerce & Internet Law

Ian C. Ballon

IAN C. BALLON

HOME

2022 UPDATES

ABOUT THE TREATISE

MORE...

E-Commerce & Internet Law: Treatise with Forms - 2d Edition



2022 UPDATES OUT SOON!

The revised and updated edition of this comprehensive work will provide you with a complete legal authority on e-commerce and Internet law, covering business-to-business and business-to-customer issues, regulatory issues, and emerging trends. It includes practice tips and forms and its unique organization facilitates finding quick answers to your questions. This valuable resource on Internet and e-commerce issues contains nearly 10,000 detailed footnotes, plus references to hundreds of unpublished court decisions, many of which are not available anywhere else.

BUY NOW

E-COMMERCE & INTERNET LAW: TREATISE WITH FORMS 2D - 2022

Download File



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

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

- 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 defendant was a *business*)
 - *In re Waste Management Data Breach Litig.*, 2022 WL 561734 (S.D.N.Y. Feb 24, 2022) (dismissing CCPA claim for failure to sufficiently allege breach due to failure to implement SP&P or failure to cure)

Other Claims Raised in Data Breach 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 Alphabet, Inc. Securities Litigation*, 1 F.4th 687 (9th Cir. 2021)
- *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)
 - 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)

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*, 521 F. Supp. 3d 1355 (J.P.M.D.L. 2021) (denying consolidation of CCPA and other data breach putative class action suits)
- Motions to Dismiss
 - Rule 12(b)(1) standing – circuit split - 6th, 7th, 9th, DC vs. 2d, 4th, 8th (3d); P may prefer state court?
 - Rule 12(b)(6) motion to dismiss for failure to state a claim
- Summary judgment
- Class Certification
- Work Product and other privileges
 - *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*, 13 F.4th 710 (9th Cir. 2021)
- Settlement
 - *Atkinson v. Minted, Inc.*, Case No.: 3:20-cv-03869-VC, 2021 WL 2411041 (N.D. Cal. May 14, 2021) (granting preliminary approval to a \$5 million settlement of California Consumer Privacy Act and other claims brought on behalf of a class of 4.1 million people); *see also Atkinson v. Minted, Inc.*, Case No.: 3:20-cv-03869-VC, 2021 WL 6028374 (N.D. Cal. Dec. 17, 2021) (granting final approval)

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

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 browserwrap 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; ways to make future modifications enforceable



SIGN IN SHIPPING & PAYMENT GIFT OPTIONS PLACE ORDER

Review your order

By placing your order, you agree to Amazon.com's privacy notice and conditions of use.

Shipping address [Change](#)
 [Redacted Address]

Payment method [Change](#)
 VISA [Redacted Card Number]
 Gift Card

Gift cards & promotional codes

Billing address [Change](#)
 Same as shipping address

Or try Amazon Locker
 20 locations near this address

Order Summary

Items:	[Redacted]
Shipping & handling:	[Redacted]
<hr/>	
Total before tax:	[Redacted]
Estimated tax to be collected:	[Redacted]
Total:	[Redacted]
Gift Card:	[Redacted]

Order total: [Redacted]

[How are shipping costs calculated?](#)

FREE Two-day shipping **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



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
- Two-Day Shipping --get it Wednesday, Sept. 24
- Standard Shipping --get it Sept 25 - 26
- FREE Shipping --get it Sept. 28 - Oct. 2

*Why has sales tax been applied? [See tax and seller information](#)

Do you need help? Explore our [Help pages](#) or [contact us](#)

For an item sold by Amazon.com: When you click the "Place your order" button, we'll send you an email message acknowledging receipt of your order. Your contract to purchase an item will not be complete until we send you an email notifying you that the item has been shipped.

Colorado, Oklahoma, South Dakota and Vermont Purchasers: [Important information regarding sales tax you may owe in your State](#)

Within 30 days of delivery, you may return new, unopened merchandise in its original condition. Exceptions and restrictions apply. See [Amazon.com's Returns Policy](#)

[Go to the Amazon.com homepage](#) without completing your order.

6:00

Register

GOOGLE+ **FACEBOOK**

OR

First Name _____ Last Name _____

name@example.com

(21) 555-5555

Password _____

NEXT

6:00

Payment

PROMO CODE

Credit Card Number

MM ____ YY ____ CVV ____

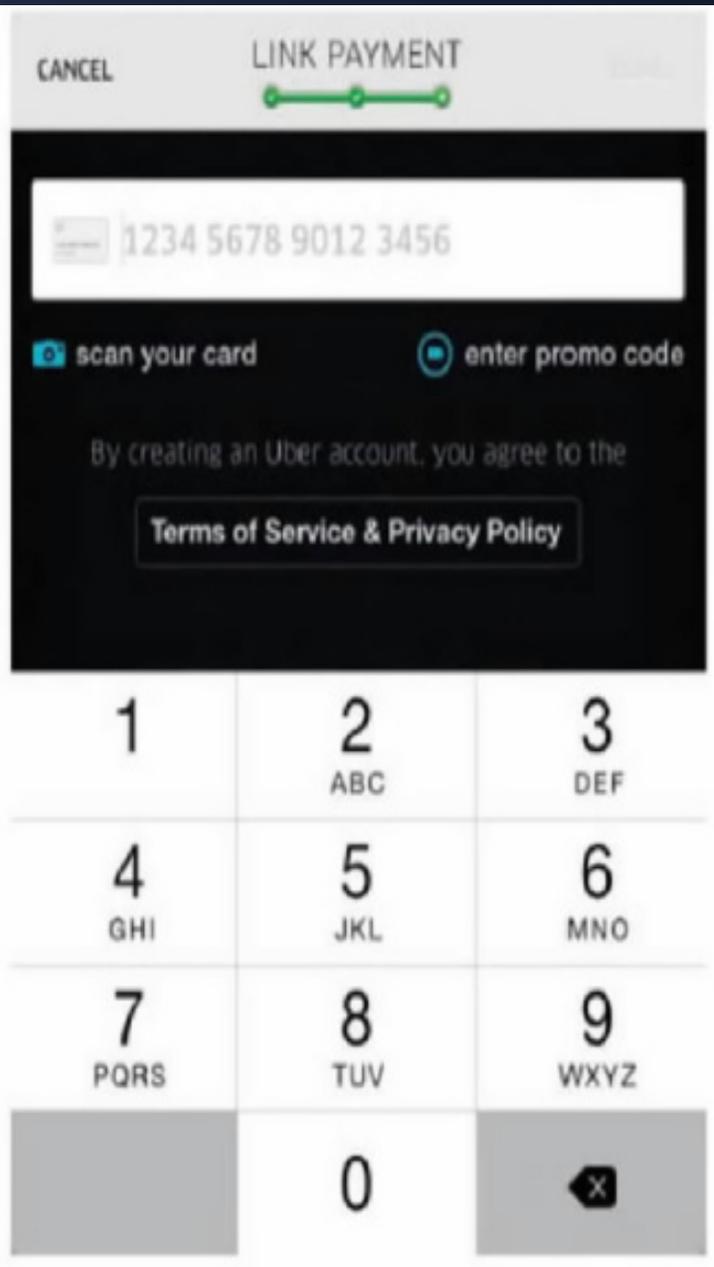
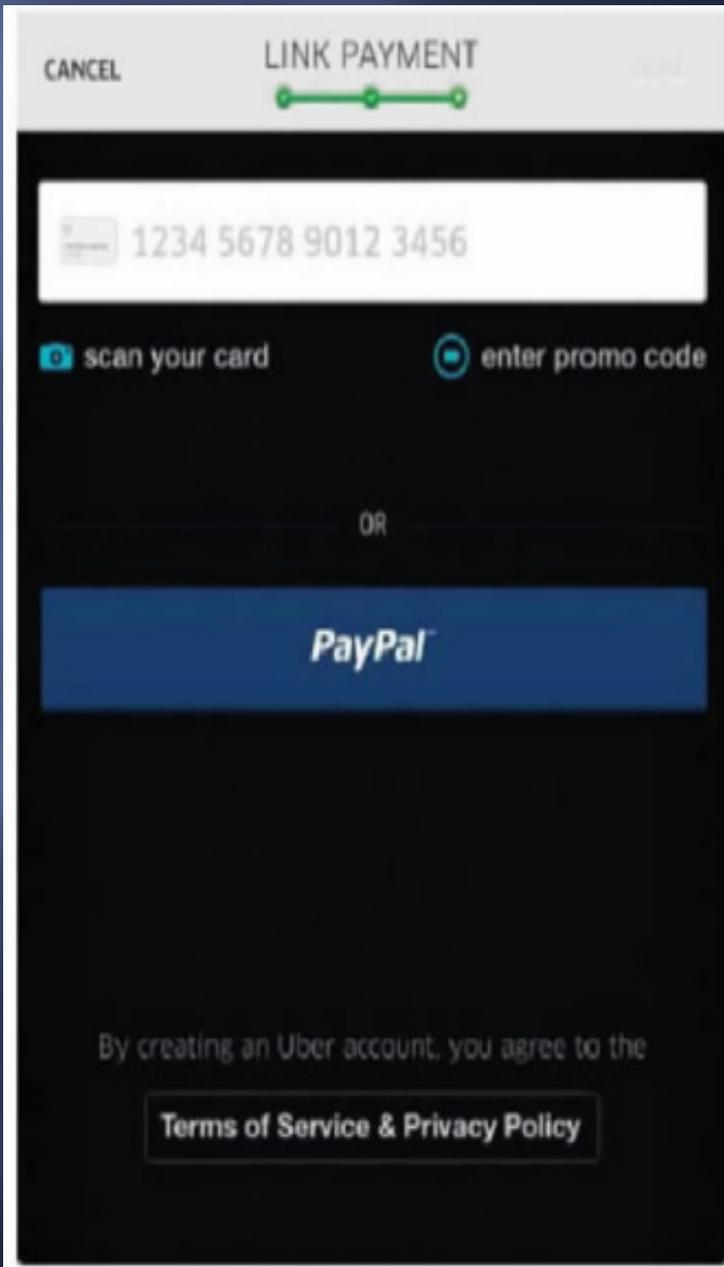
U.S. ____ ZIP ____

REGISTER

OR

PayPal **Google Wallet**

By creating an Uber account, you agree to the [TERMS OF SERVICE & PRIVACY POLICY](#)



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 browswrap 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; ways to make future modifications enforceable

Arbitration & Mass Arbitration of CCPA/CPRA Claims

- 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
- Mass Arbitration
 - *Adams v. Postmates, Inc.*, 823 F. App'x 535 (9th Cir. 2020) (affirming the district court's holding that the issue of whether mass arbitration claims violated the class action waiver provision of Postmates' arbitration agreement was an issue that had been delegated to the arbitrator);
 - *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)
- Public Injunctions (Include? Exclude? Delegation)
 - *Capriole v. Uber Technologies, Inc.*, 7 F.4th 854 (9th Cir. 2021) (holding that injunctive relief seeking reclassification of plaintiff Uber drivers' status from "independent contractors" to "employees" was not public injunctive relief)
 - *DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1152-58 (9th Cir. 2021)
 - *Ramirez v. Electronic Arts Inc.*, Case No. 20-cv-05672-BLF, 2021 WL 843184, at *4 (N.D. Cal. Mar. 5, 2021)
 - *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 216 Cal. Rptr. 3d 627, 393 P.3d 85 (2017)
 - CPRA amendment
- 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)
 - *Mondigo v. Epsom America, Inc.*, 2020 WL 8839981 (C.D. Cal. Oct. 13, 2020)
 - *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)
 - *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 vs. FedArb
 - Review and update frequently

GETTING READY FOR CPRA LITIGATION – WHAT YOU NEED TO KNOW AND LESSONS LEARNED FROM CCPA LITIGATION



Ian Ballon, JD, LLM, CIPP/US
Co-Chair, Global IP & Technology Practice Group
Greenberg Traurig LLP
(650) 289-7881 (310) 586-6575 (202) 331-3138
Ballon@GTLaw.com
www.IanBallon.net