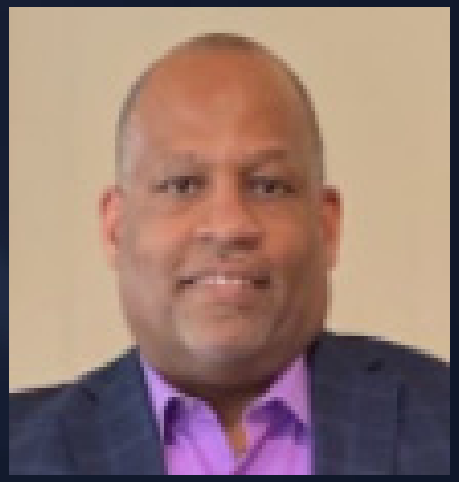
ADVANCED STATE PRIVACY AND SECURITY BREACH CLASS ACTION LITIGATION STRATEGIES – AND LESSONS FOR COMPLIANCE LAWYERS



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
Threads, Facebook, LinkedIn, X (Twitter), BlueSky: Ian Ballon
www.IanBallon.net

Doug Smith
Executive Director,
Cybersecurity & Privacy Legal
Morgan Stanley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CPRA/Security Breach Class Action Litigation: How to Mitigate the Risks and Win or Favorably Settle Claims

- Claims
  - Anatomy of a CPRA claim and how defendants can use the elements to their advantage
  - Other claims typically joined with CPRA claims
  - Trends: kitchen sink complaints vs narrow claims for negligence and unfair competition
- Defense strategies
  - Who are the plaintiffs and their lawyers?
  - What motions to bring – and when to bring them?
  - When to fight and when to settle
- Privilege and confidentiality issues
  - Problems that arise when nonlitigators respond to security incidents
- Class certification issues and the problem of mass arbitration
- A deep dive on settlement strategies, structures and terms
  - Common mistakes, including panicking at the prospect of $750 class claims
  - Individual vs action class settlements
- Ways to mitigate risk
  - The importance of considering litigation in a company's compliance program
  - Online and mobile contract formation
  - Arbitration clauses – enforceability and how to deal with mass arbitration
- The next frontier
  - CPPA litigation under *other* provisions of the CPRA
  - Washington state's My Health My Data Act (signed into law 4/27/23), which includes a private right of action

CPRA AND RELATED DATA PRIVACY, CYBERSECURITY BREACH & ADTECH PUTATIVE CLASS ACTION LITIGATION

Cybersecurity/Data Privacy 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
    - *Tamraz v. Bakotic Pathology Associates, LLC,* 2022 WL 16985001 (S.D. Cal. Nov. 16, 2022) (datasecurity not part of bargained for exchange
  - State cybersecurity statutes (especially those that provide for statutory damages and attorneys' fees)
  - California (and potentially Oregon) IoT Law, CPRA
- 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)
    - Michigan's Preservation of Personal Privacy Act
    - California laws including the California Privacy Rights Act (CPRA)
      - Other claims are preempted by the CPRA *only* if based on a violation of the CPRA
  - 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 the California Privacy Protection Agency (CPPA)
    - Coordinate litigation and regulatory enforcement (usually confidential)

Defense Strategies for Data Privacy & 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)
- 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 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

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**

Illinois Biometric Information Privacy Act

- 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 Litigation*, No. 21-15553, 2022 WL 822923 (9th Cir. Mar. 17, 2022) (affirming a $650 Million settlement, approved after the district court had earlier rejected a $550 Million settlement, over objections to the $97.5 Million attorneys fee award)
- *Johnson v. Mitek Systems, Inc.*, 55 F.4th 1122 (7th Cir. 2022) (declining to compel arbitration where HyreCar, an intermediary between people who own vehicles and other people who would like to drive for services such as Uber and GrubHub, provided personal information to Mitek for background verification where plaintiff's contract with HyreCar required arbitration "with a long list of entities" including "all authorized or unauthorized users or beneficiaries of services or goods provided under the Agreement.")
- Standing arguments
- 2022: 90 opinions referencing BIPA. Approved class settlements ranged from $250,000 to $100 Million (*Rivera v. Google*). First jury trial resulted in a $228 Million verdict (*Rogers v. BNSF Ry. Co.*).

AdTech Cases Involving Replay Software and Chat

- California law
  - *Massie v. General Motors LLC*, Civil Action No. 21-787-RGA2022 WL 534468 (D. Del. Feb. 17, 2022) (dismissing plaintiffs' Wiretap Act and CIPA claims, arising out of GM's use of Decibel's Session Replay software on GM's websites, for lack of Article III standing)
    - *Massie v. General Motors LLC*, 2021 WL 2142728 (E.D. Cal. May 26, 2021) (dismissing and transferring the case to the District of Delaware)
  - *Saleh v. Nike, Inc.*, _ F. Supp. 3d _, 2021 WL 4437734, at *12-14 (C.D. Cal. Sept. 27, 2021) (dismissing plaintiff's CIPA section 635 claim, alleging use of FullStory session replay software, because "[c]ontrary to Plaintiff's argument, § 635 does not prohibit the 'implementation' or 'use' of a wiretapping device; instead, it prohibits the manufacture, assembly, sale, offer for sale, advertisement for sale, possession, transport, import, or furnishment of such device" and ruling, by analogy to ECPA, that a private cause of action may not be premised on mere possession and therefore plaintiff lacked Article III standing)
  - *Graham v. Noom, Inc.*, No. 3:20-cv-6903, 2021 WL 1312765, at *7-8 (N.D. Cal. Apr. 8, 2021) (dismissing plaintiffs' 635(a) CIPA claim because plaintiffs could not allege eavesdropping where FullStory merely provided a cloud-based software tool and acted as "an extension of Noom[,]" and thus there could be no section 635 violation and plaintiffs lacked Article III standing)
  - *Yale v. Clicktale, Inc.*, No. 3:20-cv-7575, 2021 WL 1428400, at *3 (N.D. Cal. Apr. 15, 2021) (applying *Noom* to reach the same result); Johnson v. Blue Nile, Inc., No. 3:20-cv-8183, 2021 WL 1312771, at *3 (N.D. Cal. Apr. 8, 2021) (applying *Noom* to reach the same result)
- Florida law
  - *Jacome v. Spirit Airlines Inc.*, No. 2021-000947-CA-01, 2021 WL 3087860, at *2 (Fla. Cir. June 11, 2021) (holding that sections 934.03(1)(a) and 934.03(1)(d) of the Florida Security of Communications Act's purpose was "to address eavesdropping and illegal recordings regarding the substance of communications or personal and business records . . . and not to address the use by a website operator of analytics software to monitor visitors' interactions with that website operator's own website. . . . [T]he FSCA does not cover Plaintiff's claims seeking to penalize Spirit's use of session replay software on its Website.")

LITIGATION UNDER THE CALIFORNIA PRIVACY RIGHTS AND ENFORCEMENT ACT OF 2020 (CPRA)

CPRA Putative Class Action Litigation

- The private right of action narrowly applies only to security breaches and the failure to implement reasonable measures, not other CPRA provisions
  - Regulatory enforcement of the rest of the Act is by the California Privacy Protection Agency (CPPA).
  - *Sephora* (August 2022) ($1.2 M penalty, 2 years of compliance monitoring)
- But plaintiffs may recover statutory damages of between $100 and $750
- The CPRA 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)
  - Notice and an opportunity to cure only applies for private litigation, not regulatory enforcement by the California Privacy Protection Agency (CPPA)
- 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"
- CPRA claims typically are joined with other cybersecurity breach or data privacy claims in civil litigation

Defense Strategies for CPRA & Other Cybersecurity litigation

- Many "CPRA claims" aren't actually actionable under the CPRA
- The CPRA 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 CPRA 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*)
  - *Atkinson v. Minted, Inc.*, 2021 WL 6028374 (N.D. Cal. Dec. 17, 2021)
  - *Kostka v. Dickey's Barbecue Restaurants, Inc.*, 2022 WL 16821685 (N.D. Tex. Oct. 14, 2022)

Defense Strategies for CPRA & Other Cybersecurity litigation

- The CPRA creates a private right of action for
  - [1] consumers
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  - [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 . . . ."
- Court opinions
  - *Wynne v. Audi of America*, Case No. 21-cv-08518-DMR, 2022 WL 2916341 (N.D. Cal. July 25, 2023) (denying motion to remand, finding Article III standing; "To the extent that Shift Digital contends that an alleged violation of the CCPA alone is sufficient to confer standing, *TransUnion* expressly rejected such an argument, holding that "[u]nder Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court." . . . However, the injury that gives rise to the alleged violation of the CCPA—that is, the "invasion of [Wynne's] privacy interests" that occurred as a result of the theft of her PII, is a concrete injury that establishes Article III standing.")
  - *Florence v. Order Express, Inc.*, _ F. Supp. 3d. , 2023 WL 3602248 (N.D. Ill. May 23, 2023) (denying defendant's motion to dismiss plaintiff's CPRA claim based on the notice and cure provision where plaintiff alleged it sent a notice and defendant's response advising that it had enhanced its security was insufficient to defeat a claim because "[t]he implementation and maintenance of reasonable security procedures and practices ... following a breach does not constitute a cure with respect to that breach." Cal. Civ. Code § 1798.150(b))

How has litigation changed under the CPRA?

- CPRA litigation commenced 1/1/23; regulatory enforcement begins 7/1/23
- 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"

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
  - *Roley v. Google LLC*, 40 F.4th 903 (9th Cir. 2022) (ad that contributing to Google Maps could "unlock cool benefits like . . . 1TB of Google Drive storage" not a contract offer)
  - *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849 (9th Cir. 2022)
    - *Sifuentes v. Dropbox, Inc.*, 2021 WL 2673080 (N.D. Cal. June 29, 2022)
  - *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 arbitration clause in mobile ToS)
  - *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
  - *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
    - Ways to make future amendments enforceable

Samples & Savings

Welcome back, stephanie!

Confirm your ZIP Code Below:

93930

I understand and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy

I AGREE to receive daily emails from SamplesandSavings and SweepstakesAlerts

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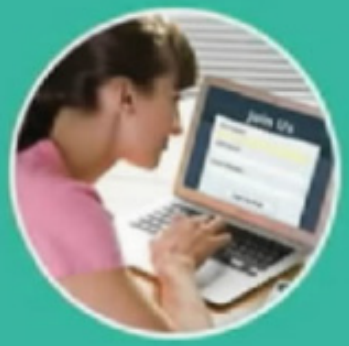

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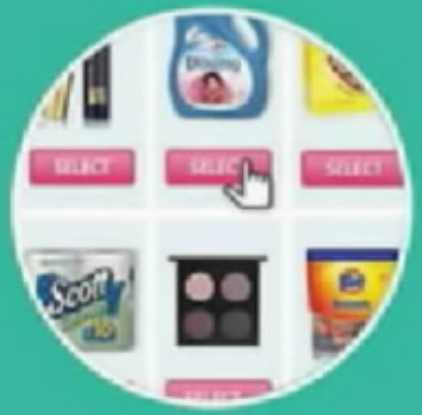

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Includes Express Shipping

NATIONAL CONSUMER CENTER

Program Requirements – Updated March 31, 2017. To earn an incentive, you must: 1) be a U.S. resident 18 years or older; 2) provide accurate and complete registration information; 3) complete the survey questions; 4) view optional offers; and 5) complete the required number of Silver, Gold and Platinum offers which are split into two tiers based on the incentive's value. For Tier 1 incentives with a value of $100 or less, complete 1 Silver, 1 Gold and 2 Platinum offer. For Tier 2 incentives with a value of more than $100, complete 1 Silver, 1 Gold, and 6 Platinum offers. You must complete all offers within 20 days from when you complete your first offer. Completion of offers usually requires a purchase or entering into a paid subscription program for goods or services. Members are limited to one incentive of any kind per household (persons living at the same address) within any twelve-calendar month period provided you must wait 24 calendar months after you claim a Tier 2 incentive before you can claim another Tier 2 incentive. The Representative Offer Chart describes the terms of several offers, including a description of the offer, the initial commitment, ongoing obligations and how to cancel. We reserve the right to substitute a gift card of greater or equivalent value for any incentive. Failure to submit accurate registration information, complete the survey questions or comply with claim verification process will result in disqualification. SOLVING A PUZZLE, ANSWERING YOUR REGISTRATION INFORMATION, COMPLETING THE SURVEY OR VIEWING OPTIONAL OFFERS WITHOUT COMPLETING THE NUMBER OF REQUIRED OFFERS DESCRIBED ABOVE DOES NOT QUALIFY YOU FOR AN INCENTIVE. We verify your response information and if it's inaccurate, the pages with the Gold, Silver and Platinum offers may not be displayed. If that happens, you won't be eligible to earn an incentive.

By participating, you agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy which includes your consent to our sharing your personally identifiable information with our Marketing Partners for which we may be compensated.

RewardZone USA administers this website and does not claim to represent or own any of the trademarks, tradenames or rights associated with the displayed brands or any of the incentives which are the property of their respective owners who do not own, endorse, or promote RewardZone or this promotion.

Member Support - Prize Status - Privacy Policy - Terms & Conditions - FAQ

Online and Mobile Contract Formation

- Trend: Continued hostility to implied contracts
  - *Roley v. Google LLC*, 40 F.4th 903 (9th Cir. 2022) (ad that contributing to Google Maps could "unlock cool benefits like . . . 1TB of Google Drive storage" not a contract offer)
  - *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849 (9th Cir. 2022)
    - *Sifuentes v. Dropbox, Inc.*, 2021 WL 2673080 (N.D. Cal. June 29, 2022)
  - *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 arbitration clause in mobile ToS)
  - *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
  - *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
    - Ways to make future amendments enforceable

amazon.com

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]

Or try Amazon Locker
20 locations near this address

Payment method Change

VISA [redacted]
Gift Card

Billing address Change
Same as shipping address

Gift cards & promotional codes

Enter Code Apply

Place your order

Order Summary

Items:	[redacted]
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?

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

[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
- Two-Day Shipping --get it Wednesday, Sept. 24
- Standard Shipping --get it Sept. 25 - 26
- FREE Shipping --get it Sept. 29 - Oct. 2

*Why has sales tax been applied? See tax and seller information

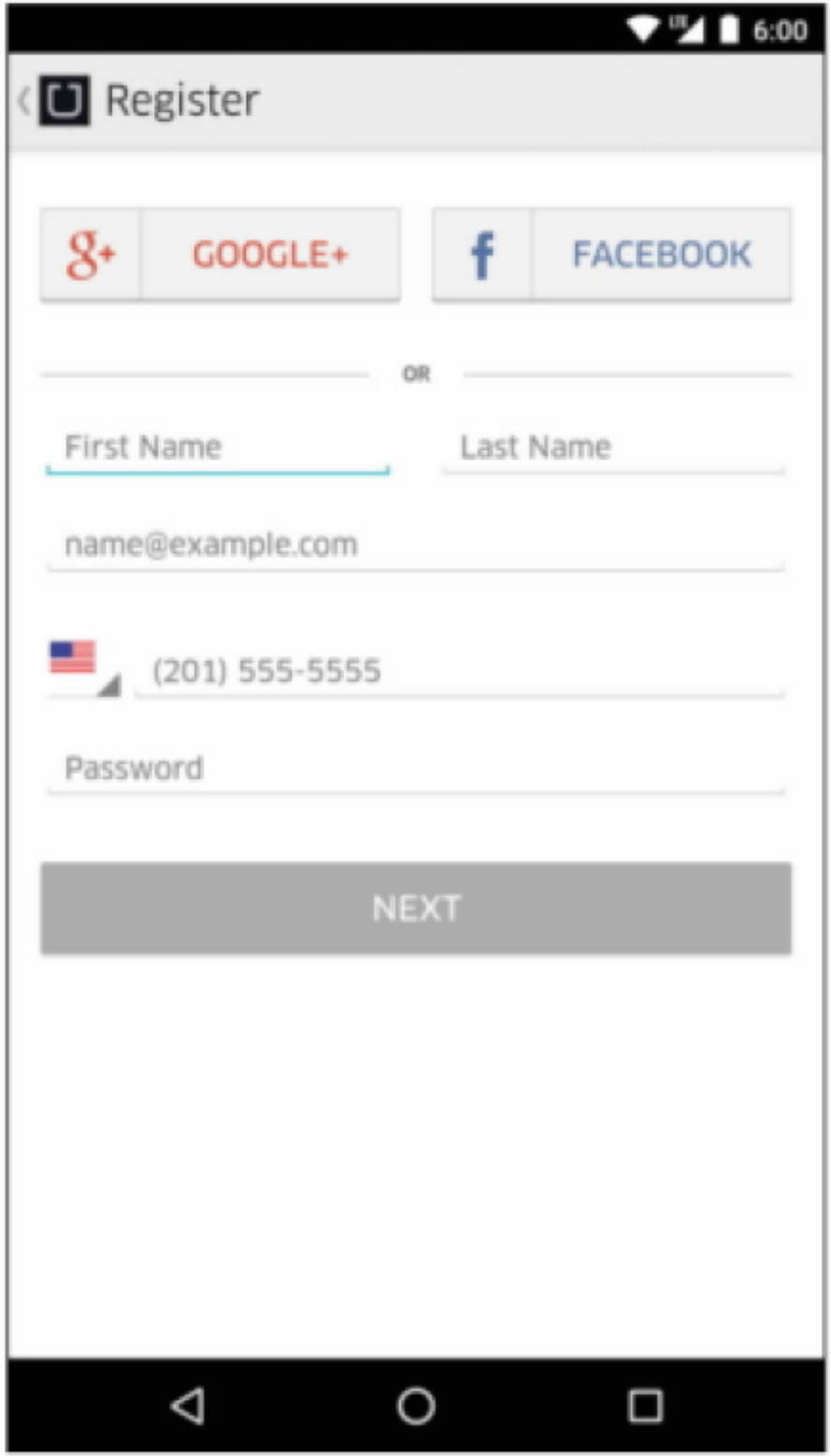
Do you need help? Explore our Help pages or contact us

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.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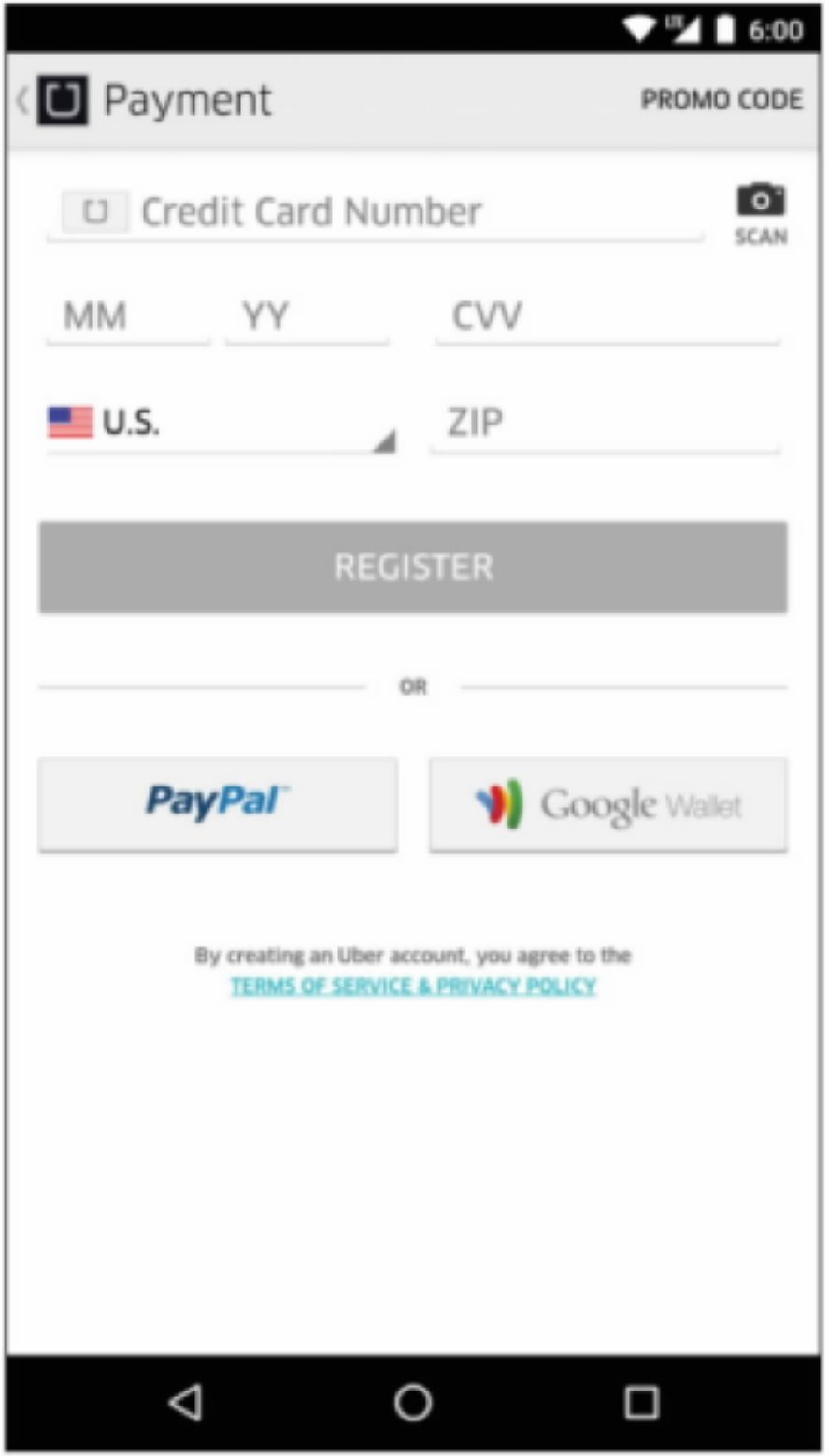
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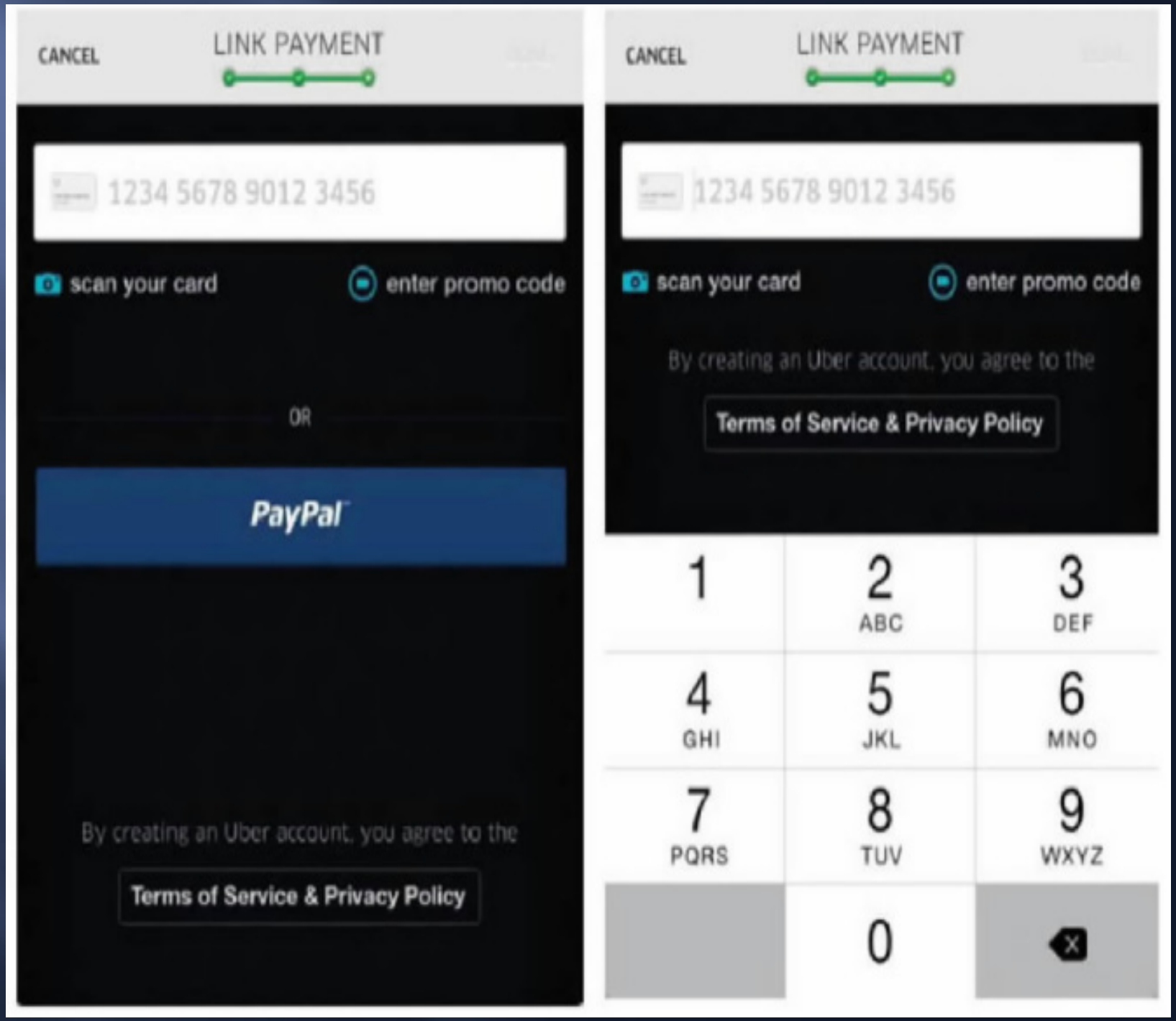
OR
PayPal
Google Wallet
By creating an Uber account, you agree to the
TERMS OF SERVICE & PRIVACY POLICY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OR
PayPal
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy
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enter promo code
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy
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2 ABC
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4 GHI
5 JKL
6 MNO
7 PQRS
8 TUV
9 WXYZ
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Arbitration & 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

- 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)
  - *MacClelland v. Cellco Partnership*, _ F. Supp. 3d _, 2022 WL 2390997 (N.D. Cal. July 1, 2022) (holding unconscionable a mass arbitration clause that provided that if 25 or more customers initiated dispute notices raising similar claims or brought by the same or coordinated counsel the claims would be arbitrated in tranches of 5 bellwether cases at a time, which the court concluded could take 156 years to resolve all claims at issue given the average time of 7 months to resolution of AAA claims)

- 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)
  - *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. Epson 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

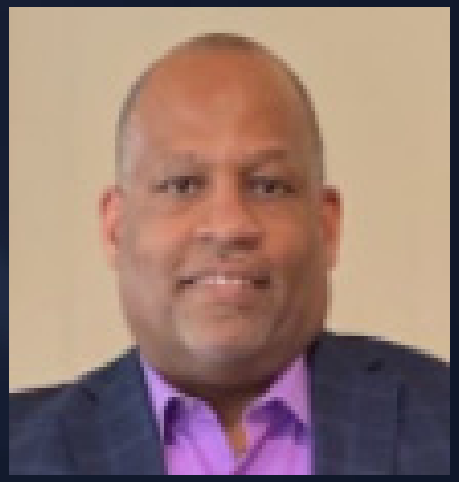
CPRA/Security Breach Class Action Litigation: How to Mitigate the Risks and Win or Favorably Settle Claims

- Regulatory enforcement and litigation brought by the CPPA

CPRA/Security Breach Class Action Litigation: How to Mitigate the Risks and Win or Favorably Settle Claims

- Class certification issues
- Settlement – individual vs. class (and dollars and sense)
- Trial
- Hypotheticals for discussion
  - Plaintiff sues your company for negligence and after the fact sends a CPRA demand letter. Should you respond? Why or why not?
  - Plaintiff's counsel sends you a letter saying he represents 119 claimants who plan to initiate AAA arbitration under the CPRA next week. How do you respond and why? What if plaintiff's counsel only has one claimant?
  - Plaintiff's counsel sues your company (an Ohio company with its PPB in Ohio) in the Northern District of Ohio seeking nation-wide certification of a CPRA class. What is your strategy? What if the plaintiff sues in California?
  - You just learned that your consumer company had a security breach potentially requiring notice under California's security breach notification law – should you hire a forensics firm?
    - Same hypothetical but notice is *not* required under California law
    - Should you give notice even if it is not required?
  - What things can you do to minimize the risk of certification of a CPRA class action suit?

ADVANCED STATE PRIVACY AND SECURITY BREACH CLASS ACTION LITIGATION STRATEGIES – AND LESSONS FOR COMPLIANCE LAWYERS



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
Threads, Facebook, LinkedIn, X (Twitter), BlueSky: Ian Ballon
www.IanBallon.net

Doug Smith
Executive Director,
Cybersecurity & Privacy Legal
Morgan Stanley