

ADVANCED DATA PRIVACY, CYBERSECURITY BREACH AND AI CLASS ACTION LITIGATION DEFENSE STRATEGIES AND COMPLIANCE LESSONS



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E-Commerce & Internet Law

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Developments over the Past Year and what to expect for 2024....

- ▣ The CPRA and other privacy, Adtech and security breach class action litigation and mass arbitration - trends, court opinions, litigation strategy and compliance lessons
- ▣ CPRA litigation – Lessons learned and how to win or settle these cases
- ▣ Data breach standing circuit splits, case law and settlement trends
- ▣ Federal and state privacy case law, litigation, and trends
- ▣ Ill. Biometric Information Privacy Act and related state laws
- ▣ Wire tap troll claims, mass arbitration and what your TOS, ToU or EULAs should provide for in 2024
- ▣ Online and mobile contract formation, the challenges of amending Terms of Use and the enforceability of mass arbitration clauses
- ▣ Trends – children (COPPA preemption inapplicable to those 13 and over), health data, the increasing significance of state law claims and the interplay between class action litigation and mass arbitration
- ▣ State privacy laws: CA, CO, CT, Del (1/1/25), Fla (7/1/24), Ind (1/1/26), Iowa, Montana (10/1/24), NH (1/1/25), NJ (1/9/25), Ore (7/1/24), Tenn (7/1/25), Tex (7/1/24), Utah, VA
 - Only California has a private cause of action
 - State laws impact what is reasonable and best practices
- ▣ Artificial Intelligence
 - using content and data sets to train algorithms for ML/AI/Generative AI
 - Your own content or data
 - Content or data freely available for use
 - Content or data licensed for training
 - Third party content or data that may be accessible but not freely available
 - Third party data may be incomplete (due to privacy opt-out laws)
 - Privacy laws, including state laws governing automated decision making (and opt out, access and notice rights)
 - Ethical Issues
 - Using AI in your legal practice
 - *Mata v. Avianca, Inc.*, _ F. Supp. 3d _, 2023 WL 4114965 (S.D.N.Y. 2023)

**DATA PRIVACY,
CYBERSECURITY
BREACH & ADTECH
PUTATIVE CLASS
ACTION LITIGATION**

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 and other state laws
 - Washington state's My Health My Data Act (signed into law 4/27/23), which includes a private right of action

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
 - *In re Marriott International, Inc.*, 78 F.4th 677 (4th Cir. 2023) (vacating class certification order over class action waiver for failure to consider a choice of law and venue class prior to 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*, 594 U.S. 413 (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*, 583 U.S. 1115 (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 separate claim accrues under the Act each time a private entity scans or transmits an individual's biometric identifier or information in violation of the Act. *Cothron v. White Castle Systems, Inc.*, 216 N.E.3d 918 (Ill. 2023); *Cothron v. White Castle Systems, Inc.*, 79 F.4th 894 (7th Cir. 2023)
 - 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.*)
- *New trend*: Suits under the Illinois Genetic Information Privacy Act (suits against employers over disclosure of family medical history).
 - *Bridges v. Blackstone, Inc.*, 66 F.4th 687 (7th Cir. 2023)

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.")

AdTech Cases Involving Ad pixels and forms

- Expansive definition of *interception* under Pennsylvania law
 - *Popa v. Harriet Carter Gifts, Inc.*, 52 F.4th 121 (3d Cir. 2022)
 - Holding that under Pennsylvania law, as predicted by the 3d Circuit, there was no direct-party exception to liability under the Wiretapping and Electronic Surveillance Control Act (WESCA), 18 Pa. Cons. Stat. Ann. § 5702, meaning anyone could “intercept” communications, including people who acquired a text message or chat sent directly to them because the Pennsylvania legislature had a prototype for a direct-party exception in the Federal Wiretap Act, 18 U.S.C.A. § 2511(2)(d), but it codified only a law-enforcement exception, in effect limiting any direct-party exception to that context.
 - *But see, e.g., Pena v. Gamestop, Inc.*, _ F. Supp. 3d _, 2-23 WL 3170047 (C.D. Cal. 2023) (CIPA)
- No retroactive consent
 - *Javier v. Assurance IQ, LLC*, No. 21-16351, 2022 WL 1744107 (9th Cir. 2022)
 - Interpreting CIPA section 631(a) to require the prior consent of all parties to a communication. “Here, Javier has sufficiently alleged that he did not provide express prior consent to ActiveProspect’s wiretapping of his communications with Assurance. According to the complaint, neither Assurance nor ActiveProspect asked for Javier’s consent prior to his filling out the insurance questionnaire online, even though ActiveProspect was recording Javier’s information as he was providing it. Javier has therefore alleged sufficient facts to plausibly state a claim that, under Section 631(a), his communications with Assurance were recorded by ActiveProspect without his valid express prior consent.”
- Pen register claims
 - *Greenley v. Kochava, Inc.*, _ F. Supp. 3d _, 2023 WL 4833466 (S.D. Cal. 2023)
 - Kochava, a data broker alleged to have provided a software developer kit (SDK) to app developers that “surreptitiously intercept[ed] location data” from app users to sell to clients in “customized data feeds” to “assist in advertising and analyzing foot traffic at stores or other locations.”
 - The court denied Kochava’s MTD claims for invasion of privacy under the California Constitution, California Computer Data Access and Fraud Act (CDAFA), Cal. Penal Code § 502(c) (no consent), California Invasion of Privacy Act (CIPA), Cal. Penal Code § 638.51 (which prohibits installation of a pen register without first obtaining a court order), and CIPA section 631 (wiretapping) (holding that location data constitutes the contents of communications)
 - A *pen register* is defined as “a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but not the contents of a communication.” Id. § 638.50(b). For purposes of stating a claim, the court held that a private company’s surreptitiously embedded software installed in a telephone may constitute a pen register.
 - The court dismissed eavesdropping (CIPA 632), UCL and unjust enrichment claims
- Strategies for troll suits
 - Settle vs. fight
 - Confidential claim vs. arbitration claim vs. state suits vs. federal suit
- Mitigation – pop up (just in time) disclosures

**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
 - [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”**
- ▣ Class certification
- ▣ Settlement
- ▣ Trial
- ▣ More 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))

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

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



ONLINE AND MOBILE CONTRACT FORMATION

Online and Mobile Contract Formation

▫ Trend: Continued hostility to implied contracts

- *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023) (reversing order denying MTC arbitration because under the totality of the circumstances Klarna's checkout widget provided reasonably conspicuous notice of contractual terms, including arbitration)
- *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023) (affirming MTC arbitration because California law does not require that corporate parties to a contract use their full legal names & Live Nation's ToS included repeated references to its common trade names such that a reasonable user could have identified Ticketmaster's full legal name)
- *Jackson v. Amazon.com, Inc.*, 65 F.4th 1093 (9th Cir. 2023) (denying MTC arbitration per an amended TOS where notice allegedly was provided by an email to drivers not produced in the litigation)
- *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)
- *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 browwrap 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

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By placing your order, you agree to Amazon.com's [privacy notice](#) and [conditions of use](#).

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 ██████████
 ██████████
 ██████████



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20 locations near this address

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VISA ██████████
Gift Card

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Same as shipping address

Gift cards & promotional codes

Order Summary

Items: ██████████
 Shipping & handling: ██████████
 Total before tax: ██████████
 Estimated tax to be collected: ██████████
 Total: ██████████
 Gift Card: ██████████

Order total: ██████████

[How are shipping costs calculated?](#)

FREE two-day shipping


FREE Two-Day Shipping on this Order: ██████████ 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  —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](#)

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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](#)


CANCEL

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LINK



 1234 5678 9012 3456

 scan your card

enter promo code

OR

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CANCEL

LINK PAYMENT

LINK



 1234 5678 9012 3456

 scan your card

enter promo code

By creating an Uber account, you agree to the

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1

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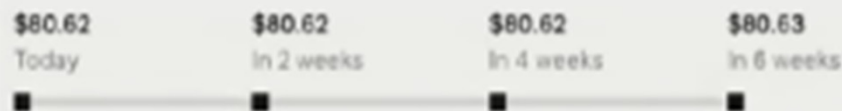
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- CREDIT CARD
- PAYPAL
- POWERUP REWARDS CREDIT CARD

BUY NOW PAY LATER

- QUADPAY
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Selecting this option will open a Klarna modal to complete your order. Please note, there will be no order review page.

Pay with **Klarna.**



Nintendo Switch with Gray Joy-Con

Platform: Nintendo Switch
Edition: Gray (V2)
Condition: New
Product Replacement Plan:
No replacement plan
In Stock

Price	\$299.99
Quantity	1
Total	\$299.99

Shipping Method

Standard (Allow 2 business days for processing. Delivers 4-7 business days once shipped.)

~~\$4.99~~ \$0.00

Add your card details



John Doe

john.doe@klarna.com



Card Number



MM/YY



CVC



Continue



Review your plan



John Doe
john.doe@klarna.com



Payment plan 4 payments of \$79.75


Due today \$79.75

Total cost \$500

 **Visa** 1111 Change

I agree to the [payment terms](#).

Confirm and continue

 United States ▾



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By clicking "Sign in" I approve [Klarna's User Terms](#) and confirm that I have read [Klarna's Privacy Notice](#). Links in the app are sponsored.

Welcome back, stephanie!



Confirm your ZIP Code Below:

93930

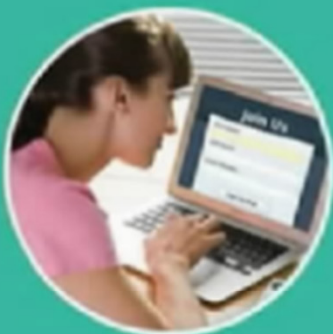
I understand and agree to the [Terms & Conditions](#) which includes mandatory arbitration and [Privacy Policy](#)

I AGREE

To receive daily emails from Samples&Savings and SweepstakesAlerts

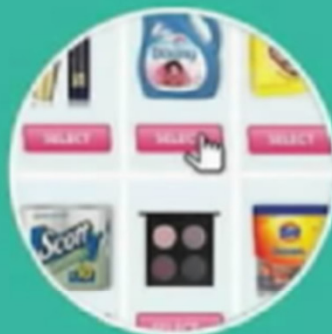
This is correct, Continue! >>

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There is no purchase necessary to access our list of links for samples but you do need to provide personal information, respond to survey questions and agree to be contacted by our marketing partners to qualify for a sample collection. By visiting the website and participating, you agree to the Terms & Conditions, which includes mandatory arbitration, and our Privacy Policy under which you allow us to share your personal information with our marketing partners who may also contact you via email, or if you separately consent, by telephone or text message. Message and Data rates may apply. Reply "STOP" to cancel. For customer service, reply "HELP". Sign up to receive deals via text from Samples and Savings. You may request up to a maximum of 10 offers on selected days of the week, with no more than 4 text messages in one day. We may be compensated for connecting our marketing partners with consumers who may be interested in their products or services. We may substitute other products.

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White Plains, NY 10601

Shipping Information Required



Item #5160300095421



Complete your shipping information
to continue towards your reward

First Name _____

Last Name _____

Street Address _____

ZIP Code _____

Telephone _____

Date of Birth:

MM - DD - 1923 -

Select Gender:

Male Female

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NATIONAL CONSUMER CENTER

Program Requirements - Updated March 22, 2017. To see 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 requisite number of Share, Cash and Platinum offers which are split into two tiers based on the incentive value. For Tier 1 incentives with a value of \$100 or less, complete 1 Share, 1 Cash and 2 Platinum offers. For Tier 2 incentives with a value of more than \$100, complete 1 Share, 1 Cash and 3 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 ordering into a paid subscription program for goods or services. Incentives are limited to one incentive of any kind per household (persons living at the same address) within any given 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 [Terms & Conditions](#) (T&Cs) describe the terms of selected offers, including a description of the offer, the initial commitment, ongoing obligations and how to cancel. You reserve the right to withdraw a gift card or monetary 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, IDENTIFYING YOUR REGISTRATION INFORMATION, COMPLETING THE SURVEY OR VIEWING OPTIONAL OFFERS WITHOUT COMPLETING THE NUMBER OF REQUIRED OFFERS SPECIFIED ABOVE DOES NOT QUALIFY YOU FOR AN INCENTIVE. We verify your registration information and if it is incorrect, the prizes with the Cash, Share and Platinum offers may not be awarded. If that happens, you won't be eligible to win an incentive.

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Online and Mobile Contract Formation

▫ Trend: Continued hostility to implied contracts

- *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023) (reversing order denying MTC arbitration because under the totality of the circumstances Klarna's checkout widget provided reasonably conspicuous notice of contractual terms, including arbitration)
- *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023) (affirming MTC arbitration because California law does not require that corporate parties to a contract use their full legal names & Live Nation's ToS included repeated references to its common trade names such that a reasonable user could have identified Ticketmaster's full legal name)
- *Jackson v. Amazon.com, Inc.*, 65 F.4th 1093 (9th Cir. 2023) (denying MTC arbitration per an amended TOS where notice allegedly was provided by an email to drivers not produced in the litigation)
- *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)
- *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 browwrap 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

Arbitration & Mass Arbitration

- ▣ Arbitration and Class Action Waivers
 - *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)
 - *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019)
 - *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (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*, 609 F. Supp. 3d 1024 (N.D. Cal. 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)
 - *Heckman v. Live Nation Entertainment, Inc.*, ___ F. Supp. 3d ___, 2023 WL 5505999 (C.D. Cal. 2023) (holding an amended arbitration provision changing the rules for mass arbitration to be procedurally and substantively unconscionable)
- ▣ 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
- ▣ Strategies – mass vs. individual arbitration
- ▣ Drafting Tips
 - *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (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 vs. Others
 - Review and update frequently

ADVANCED DATA PRIVACY, CYBERSECURITY BREACH AND AI CLASS ACTION LITIGATION DEFENSE STRATEGIES AND COMPLIANCE LESSONS



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