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Privacy and Cybersecurity Case Law and Strategic Trends – Year in Review

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The California Consumer Privacy Act

California Consumer Privacy Act

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

CCPA Putative Class Action Litigation

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

How CCPA litigation will play out

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

CCPA Putative Class Action Litigation

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

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

Anticipating CCPA Class Action Litigation

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

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CYBERSECURITY CLASS ACTION LITIGATION

Security Breach Litigation

- Circuit split – Low threshold: 6th, 7th, 9th, DC vs. high threshold: 2d, 4th, 8th (3d)
- **Remijas v. Neiman Marcus Group, 794 F.3d 688 (7th Cir. 2015)**
- **Lewert v. P.F. Chang's China Bistro Inc., 819 F.3d 963 (7th Cir. 2016)**
- **Dieffenback v. Barnes & Noble, Inc., 827 F.3d 826 (7th Cir. 2018)**
- **Galaria v. Nationwide Mut. Ins. Co., 663 F. App'x 384 (6th Cir. 2016) (2-1)**
- Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011), *cert. denied,* 566 U.S. 989 (2012)
- **Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017)**
  - Allegation that data breaches created an enhanced risk of future identity theft was too speculative to constitute an injury-in-fact
    - Rejected evidence that 33% of health related data breaches result in identity theft
    - Rejected the argument that offering credit monitoring services evidenced a substantial risk of harm (rejecting *Remijas*)
  - Mitigation costs in response to a speculative harm do not qualify as injury in fact
- **Whalen v. Michael's Stores, Inc., 689 F. App'x. 89** (2d Cir. 2017)
  - The theft of plaintiff's financial information was not sufficiently concrete or particularized to satisfy *Spokeo*
  - breach of implied contract, N.Y. Gen. Bus. L. § 349
  - Plaintiff made purchases via a credit card at a Michaels store on December 31, 2013
  - Michaels experienced a breach involving credit card numbers but no other information such as a person's name, address or PIN
  - plaintiff alleged that her credit card was presented for unauthorized charges in Ecuador on January 14 and 15, 2014, but she did not allege that any fraudulent charges were actually incurred by her prior to the time she canceled her card on January 15
- **Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 981** (2018)
  - following *Remijas v. Neiman Marcus Group, LLC* in holding that plaintiffs, whose information had been exposed but who were not victims of identity theft, had plausibly alleged a heightened risk of future injury to establish standing because it was plausible to infer that a party accessing plaintiffs' personal information did so with "both the intent and ability to use the data for ill."
- **In re U.S. Office of Personnel Management Data Security Breach Litig.**, 928 F.3d 42 (D.C. Cir. 2019) (21mil records)
- **In re SuperValu, Inc., Customer Data Security Breach Litig., 870 F.3d 763 (8th Cir. 2017)**
  - affirming dismissal for lack of standing of the claims of 15 of the 16 plaintiffs but holding that the one plaintiff who alleged he suffered a fraudulent charge on his credit card had standing to sue for negligence, breach of implied contract, state consumer protection and security breach notification laws and unjust enrichment
  - defendants experienced two separate security breaches, which they announced in press releases may have resulted in the theft of credit card information, including their customers' names, credit or debit card account numbers, expiration dates, card verification value (CVV) codes, and personal identification numbers (PINs). Plaintiffs alleged that hackers gained access to defendants' network because defendants failed to take adequate measures to protect customers' credit card information
  - **Rejected cost of mitigation (*Clapper*) (*Cf. P.F. Chang's*)**
  - **In re SuperValu, Inc., Customer Data Security Breach Litig., 925 F.3d 955 (8th Cir. 2019) (affirming dismissal of all claims following remand)**
- **In re Zappos.com, Inc.,** 888 F.3d 1020 (9th Cir. 2018), cert. denied, 139 S. Ct. 1373 (2019)
  - merely having personal information exposed in a security breach constitutes sufficient harm to justify Article III standing in federal court, regardless of whether the information in fact is used for identity theft or other improper purposes
  - **Bootstrapping -** Because other plaintiffs alleged that their accounts or identities had been commandeered by hackers, the court concluded that the appellants in *Zappos* – who did not allege any such harm – could be subject to fraud or identity theft
- **Causation/ damages – a major issue in most cases**
- **Settlement value**

Cybersecurity Class Action Claims

- 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
  - State cybersecurity statutes (especially those that provide for statutory damages and attorneys' fees)
- Securities fraud
  - In re Facebook, Inc. Securities Litigation, 405 F. Supp. 3d 809 (N.D. Cal. 2019) (dismissing plaintiffs' putative class action suit alleging that defendants made materially false and misleading statements and omissions concerning its privacy and data protection practices in violation of federal securities laws)
- Related data privacy claims
  - Electronic Communications Privacy Act
    - Wiretap Act
    - Stored Communications Act
  - Computer Fraud and Abuse Act
    - $5,000 minimum injury
  - Video Privacy Protection Act
  - State laws
    - Illinois Biometric Information Privacy Act (recently adopted in other states)
    - Michigan's Preservation of Personal Privacy Act
    - California laws including the California Consumer Privacy Act (CCPA)
      - Other claims are preempted by the CCPA *only* if based on a violation of the CCPA
  - Breach of contract/ privacy policies
    - In re Equifax, Inc., Customer Data Security Breach Litigation, 362 F. Supp. 3d 1295, 1331-32 (N.D. Ga. 2019) (granting defendant's motion to dismiss breach of contract claims premised on Equifax's Privacy Policy)
    - 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)

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DATA PRIVACY LITIGATION

Data Privacy Class Action Litigation

- California's Internet of Things (IoT) Law (effective Jan. 1, 2020)
  - Cal. Civil Code §§ 1798.91.04 to 1798.91.06
  - Requires a manufacturer of a connected device to equip the device with a reasonable security feature or features that are appropriate to the nature and function of the device, appropriate to the information it may collect, contain, or transmit, and designed to protect the device, and any information it contains, from unauthorized access, destruction, use, modification, or disclosure
  - Who is responsible?
    - In re Vizio
    - How does a company establish privity of contract to reduce exposure and obtain assent to an arbitration agreement?
- Michigan's Preservation of Personal Privacy Act
- Illinois Biometric Information Privacy Act (BIPA)
  - A private cause of action for "any person aggrieved by a violation" of BIPA
    - Rosenbach v. Six Flags Entertainment Corp., 129 N.E.3d 1197 (Ill. 2019) (holding that a person need not have sustained actual damage beyond violation of his or her rights under the statute to be *aggrieved* by a violation)
  - A plaintiff may recover the greater of (1) actual damages or (2) $1,000 in liquidated damages for negligent violations or $5,000 if intentional or reckless
  - The statute also authorizes recovery of attorneys' fees
    - Patel v. Facebook, 932 F.3d 1264 (9th Cir. 2019) (affirming certification of a class of Illinois users of Facebook's website for whom the website created and stored a face template during the relevant time period) (petition for cert. filed Dec. 4, 2019)
    - Miller v. Southwest Airlines Co., 926 F.3d 898, 902-03 (7th Cir. 2019) (holding that plaintiffs had Article III standing to sue under the Illinois BIPA)
    - Santana v. Take-Two Interactive Software, Inc., 717 F. App'x 12 (2d Cir. 2017) (affirming the lower court's finding of no standing in a BIPA case based on mere procedural violations)

Privacy Class Action Litigation

- Video Privacy Protection Act – 18 U.S.C. § 2710
  - **No private cause of action for retaining personal information beyond the time period set by section 2710(e)**
    - Daniel v. Cantrell, 375 F.3d 377, 384-85 (6th Cir. 2004)
    - Sterk v. Redbox Automated Retail, LLC, 672 F.3d 535, 538-39 (7th Cir. 2012)
  - **Only a *video tape service provider* may be held liable under the Act:**
    - Rodriguez v. Sony Computer Entertainment America, LLC, 801 F.3d 1045 (9th Cir. 2015)
  - **Violations must be *knowing*:** Mollett v. Netflix, Inc., 795 F.3d 1062 (9th Cir. 2015) (holding that Netflix did not *knowingly* disclose PII by displaying lists of videos recently viewed or queued for future viewing even though plaintiffs had alleged that Netflix knew that some of its subscribers accessed their devices in the presence of other people; the disclosure was lawfully made to the customer, who then voluntarily shared that information with third parties)
  - Circuit splits: Subscriber (11th vs. 1st Circuits); PII: (1st vs. 3d and 9th Circuits)
  - Ellis v. Cartoon Network, Inc., 803 F.3d 1251 (11th Cir. 2015)
    - a user who downloads a free app is not a *subscriber* under the VPPA
  - Yershov v. Gannett Satellite Information Network, Inc., 820 F.3d 482 (1st Cir. 2016)
    - GPS coordinates were PII: "PII is not limited to information that explicitly names a person" – it encompasses information *reasonably and foreseeably likely* to reveal which videos a person obtained
    - Declining to follow *Ellis* in holding that downloading the *USA Today* app made the plaintiff a *subscriber* (Souter)
  - In re Nickelodeon Consumer Privacy Litigation, 827 F.3d 262 (3d Cir. 2016)
    - VPPA permits plaintiffs to sue only a person who *discloses* information covered by the Act, not a person who *receives* such information (Google not liable for receiving viewing data)
    - The Act's prohibition on the disclosure of personally identifiable information applies only to the kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior (IP address, browser fingerprints, cookie identifiers and unique device ID numbers– not PII)
  - Perry v. CNN, 854 F.3d 1336 (11th Cir. 2017) (holding that the plaintiff had Article III standing but affirming dismissal because a user of an app is not a subscriber)
  - Eichenberger v. ESPN, Inc., 876 F.3d 979 (9th Cir. 2017)
    - Alleged statutory violation was sufficient to establish Article III standing
    - Agrees with other circuits that PII includes information that *can be used* to identify an individual
    - Follows 3d Circuit, not 1st Circuit on what is PII: PII includes information that readily permits an ordinary person to identify a particular individual as having watched certain videos (the 3d circuit *ordinary person* test, rather than the 1st Circuit's focus on information "reasonably and foreseeably likely to reveal" which videos a person has obtained)
    - The statute views disclosure from the perspective of the disclosing party and therefore *personally identifiable information* must have the same meaning without regard to its recipient's capabilities
    - A Roku device serial number and names of videos watched was not PII because it cannot identify an individual unless it was combined with other data
  - In In re Facebook, Inc., Consumer Privacy User Profile Litigation, 402 F. Supp. 3d 767 (N.D. Cal. 2019) (denying motion to dismiss)

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TELEPHONE CONSUMER PROTECTION ACT CLASS ACTION LITIGATION

TCPA Suits

- Up to $500 “per violation” – trebled where the defendant violated the statute “willfully or knowingly”
  - Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 661-63 (4th Cir. 2019) (affirming the district court judge’s decision to award treble damages following a jury verdict based on both: (1) agency liability; and (2) “demonstrated indifference to ongoing violations and a conscious disregard for compliance with the law.”)
- Potential defenses:
  - Consent
  - Arbitration
  - No grounds for class certification
  - No use of an ATDS
- ATDS: equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.
  - ACA Int'l v. F.C.C., 885 F.3d 687 (D.C. Cir. 2018)
    - Invalidates 2003, 2008 and 2015 regulations to the extent they expand the definition of an ATDS
    - Invalidates the one call safe harbor for reassigned numbers
    - Upheld revocation procedures in 2015 Order
  - Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018) (statute requires number generation; *present* capacity)
    - Dominguez v. Yahoo, Inc., 629 F. App’x. 369, 373 & nn.1, 2 (3d Cir. 2015) (number generation required)
  - King v. Time Warner Cable Inc., 894 F.3d 473 (2d Cir. 2018) (present capacity)
  - Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1289 (2019)
    - Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019) (applying *Marks*) (petition for cert. filed)
  - Glasser v. Hilton Grand Vanacations Co., 948 F.3d 1301 (11th Cir. 2020) (number generation)
  - Gadelhak v. AT&T Services, Inc., 950 F.3d 458 (7th Cir. 2020) (number generation)
  - Duran v. La Boom Disco, Inc., 955 F.3d 279 (2d Cir. 2020) (dialing from a list)
- Human intervention test
  - Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018)
  - Duran v. La Boom Disco, Inc., 955 F.3d 279 (2d Cir. 2020)
  - Glasser v. Hilton Grand Vanacations Co., 948 F.3d 1301 (11th Cir. 2020)
  - Ramos v. Hopele, 334 F. Supp. 3d 1262 (S.D. Fla. 2018)
- FCC Requests for Comments – May and October 2018
- Reassigned/ recycled numbers – one call safe harbor regulation invalidated

Marks v. Crunch San Diego, 904 F.3d 1041 (9th Cir. 2018)), *cert. dismissed,* 139 S. Ct. 1289 (2019)
Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019) (applying *Marks*)

- *ACA* is binding and that the D.C. Circuit vacated the FCC's entire interpretation of ATDS, leaving only the 1991 statutory definition of ATDS to apply
- But the *Marks* court concluded that the statutory definition of ATDS is "ambiguous" (abrogating *Satterfield*)
- Rewrote the statute without regard to its grammatical structure by broadly ruling that it should be "read" as

  equipment which has the capacity—
  (1) to store numbers to be called or
  (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers

  Compare to the Statutory language:

  Equipment which has the capacity
  (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
  (B) to dial such numbers.
  - Cf. Pinkus v. Sirius XM Radio, Inc., 319 F. Supp. 3d 927, 937-39 (N.D. Ill. 2018) (analyzing the grammatical structure of the statute and construing ATDS as requiring number generation, consistent with *ACA*)
  - The statutory term refers to the manner in which phone numbers are *generated*, not the order in which they are called. *See, e.g.*, *ACA*, 885 F.3d at 702; *Dominguez*, 629 F. App'x at 372
  - The phrase "using a random or sequential number generator" cannot reasonably be read to only modify "produce" but not "store" in the preceding clause of the statutory definition
- Creates a circuit split with Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018) by reading the phrase "using a random or sequential number generator" as optional versus a statutory requirement. The Third Circuit has construed *ATDS* as requiring number generation (An ATDS has the capacity to store or produce numbers to be called that have been randomly or sequentially generated).
- Conflicts with ACA Int'l v. F.C.C., 885 F.3d 687 (D.C. Cir. 2018) by interpreting the statute so that any "device that stores telephone numbers to be called" is an ATDS, regardless of its ability to generate numbers randomly or sequentially, which would include all 300 million + smartphones in use today in the United States (because all smart phones have the capacity to dial from a list of stored numbers)
- Conflicts with legislative history, which the panel acknowledges confirms that Congress intended to "regulat[e] the use of equipment that dialed blocks of sequential or randomly generated numbers . . . "
  - Panel opinion instead relied on Congress's failure to amend the ATDS definition which it misconstrued as Congress's "tacit approval" of the former FCC rulings that were being challenged on appeal at that time
- Criticized and not followed by, among others:
  - Snow v. General Electric Co., No. 5:18-CV-511-FL, 2019 WL 2500407, at *5-7 (E.D.N.C. June 14, 2019) (dismissing plaintiff's TCPA claim with prejudice where plaintiff could not allege use of an ATDS; "Although the Fourth Circuit and courts within this circuit have not addressed the split between these courts and Marks, the court finds the Dominguez approach better comports with the plain language of the statue. The statute unambiguously incorporates a 'random or sequential number generator' into the definition of an ATDS. 47 U.S.C. § 227(a)(1).")
  - Thompson-Harbach v. USAA Federal Savings Bank, 359 F. Supp. 3d 606, 626 (N.D. Iowa 2019) ("[T]his Court finds the Marks court's decision erroneous as a matter of statutory construction . . . .")
  - Johnson v. Yahoo!, Inc., 346 F. Supp. 3d 1159, 1162 (N.D. Ill. 2018) (granting reconsideration, rejecting Marks's reading of the statute and holding that the statute is "not ambiguous," and granting summary judgment for the defendant; "The phrase 'using a random or sequential number generator' applies to the numbers to be called and an ATDS must either store or produce those numbers (and then dial them). Curated lists developed without random or sequential number generation capacity fall outside the statute's scope.")
  - Roark v. Credit One Bank, N.A., No. CV 16-173 (PAM/ECW), 2018 WL 5921652, at *3 (D. Minn. Nov. 13, 2018) (rejecting Marks, finding "the decisions of the D.C., Second, and Third Circuits more persuasive[,]" and granting summary judgment for Credit One because its system did "not have the present capability to generate random or sequential numbers to dial . . ." and therefore did not constitute an ATDS)

TCPA-Additional Case Law

- PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019) (remanding to determine, without addressing, whether district courts are bound by the Hobbs Act to defer to FCC determinations in construing the TCPA)
- Vicarious liability
  - Thomas v. Taco Bell Corp., 582 F. App'x 678 (9th Cir. 2014)
  - Kristensen v. Credit Payment Services, Inc., 879 F.3d 1010 (9th Cir. 2018) (ratification requires actual or apparent agency)
  - Hodgin v. UTC Fire & Security Americas Corp., 885 F.3d 243 (4th Cir. 2018) (no ratification where no benefit and no knowledge of illegal calls)
- Class certification
  - FCC regulation: Consent and revocation by any reasonable means (affirmed by *ACC*)
    - *ACC*: Applies only to unilateral revocation; parties may be able to set binding revocation rules through a mutual agreement
    - Reyes v. Lincoln Automotive Financial Services, 861 F.3d 51, 56-59 (2d Cir. 2017) (applying common law principles in holding that the plaintiff could not unilaterally withdraw the consent to receive calls he had previously given by an express provision in a contract to lease an automobile from Lincoln)
  - Sherman v. Yahoo!, Inc., No. 13cv0041–GPC–WVG, 2015 WL 5604400 (S.D. Cal. Sept. 23, 2015)
- Fast track rules (S.D. Fla.)
- Truth in Caller ID Act, TRACE Act
- Standing
  - Salcedo v. Hanna, 936 F.3d 1162, 1166-73 (11th Cir. 2019) (holding that a law firm client did not establish a concrete injury in fact from receiving single unsolicited text message and, therefore, did not have Article III standing to sue in federal court)
  - Cordoba v. DirecTV, LLC, 942 F.3d 1259 (11th Cir. 2019) (holding that plaintiffs, whose phone numbers were not on the National Do Not Call Registry and who never asked Telcel not to call them again, lacked Article III standing for unwanted calls received from Telcel, under the TCPA, because the receipt of a call was not traceable to Telcel's alleged failure to comply with regulations requiring it to maintain an internal do-not-call list)
  - Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1305-06 (11th Cir. 2020) (holding that plaintiffs had standing under *Cordoba* where the defendant allegedly made dozens of calls to their cell phones without their consent) (call vs. text)
- Golan v. FreeEats.com, Inc., 930 F.3d 950, 962-63 (8th Cir. 2019) (holding that $500 minimum statutory damages totaling $1.6 Billion (based on 3.2 million phone calls allegedly placed in the course of one week) violated Due Process)
- The 4th and 9th Circuits have ruled that the 2015 debt collection provision violates the First Amendment but is severable from the rest of the statute:
  - Duguid v. Facebook, Inc., 926 F.3d 1146, 1153-57 (9th Cir. 2019)
  - American Association of Political Consultants, Inc. v. Federal Communications Commission, 923 F.3d 159 (4th Cir. 2019), cert. granted sub. nom Barr v. Political Consultants, 140 S. Ct. 812 (U.S. 2020)
- Direct-to-voicemail message, or direct drop voicemail, constitutes a call within the meaning of section 227(b)(1)(A): Saunders v. Dyck O'Neal, Inc., 319 F. Supp. 3d 907, 911 (W.D. Mich. 2018)
- A hybrid telecommunications service with both cellular and VoIP components constituted a "cellular telephone service" within the meaning of the TCPA: Breda v. Cellco Partnership, 934 F.3d 1, 10-13 (1st Cir. 2019)

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ARBITRATION & ONLINE AND MOBILE CONTRACT FORMATION – YOUR BEST DEFENSE AGAINST CLASS ACTION EXPOSURE

Online and Mobile Contract Formation

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

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

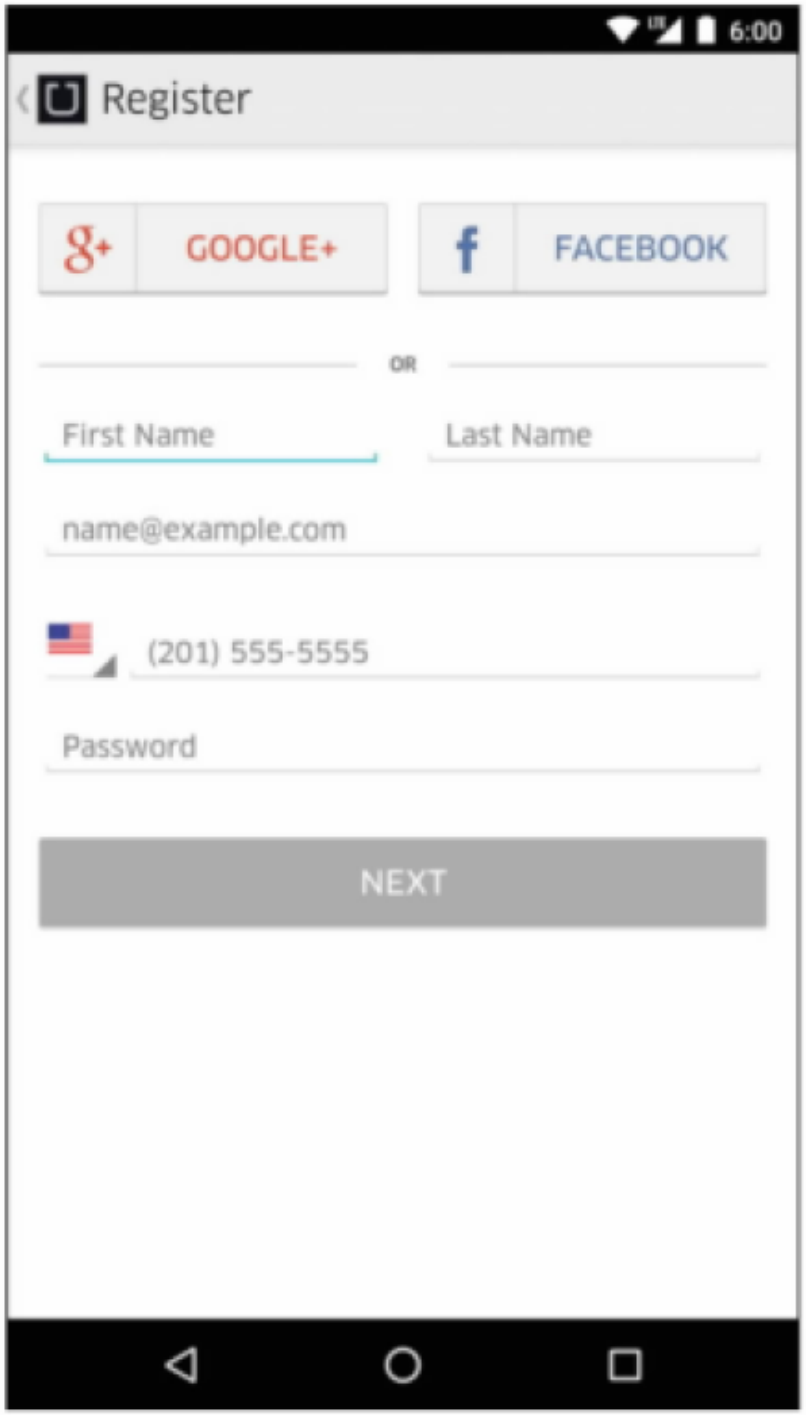
Do you need help? Explore our Help pages or contact us

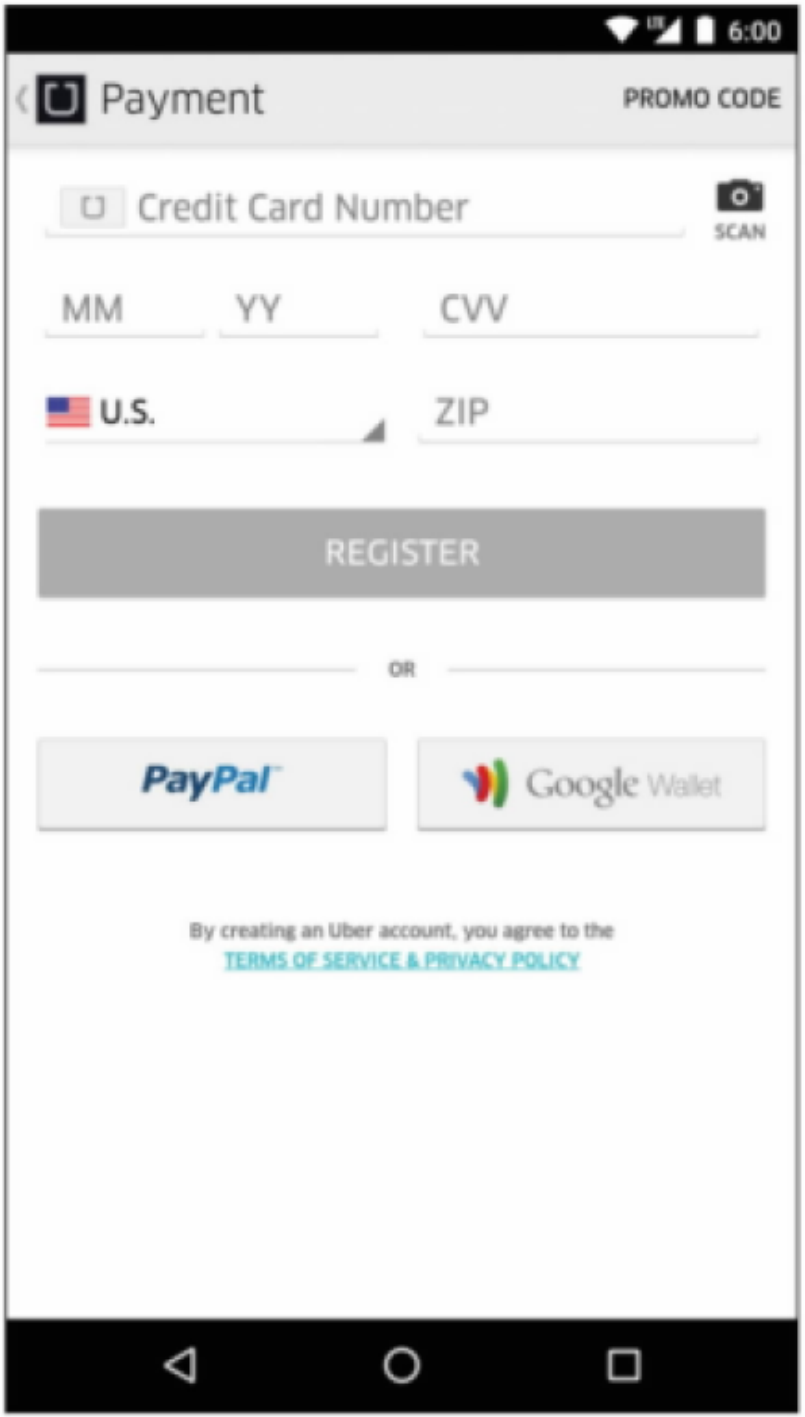
For an item sold by Amazon.com: When you click the "Place your order" button, we'll send you an email message acknowledging receipt of your order. Your contract to purchase an item will not be complete until we send you an email notifying you that the item has been shipped.

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.


6:00
Register
GOOGLE+
FACEBOOK
OR
First Name
Last Name
name@example.com
(201) 555-5555
Password
NEXT


6:00
Payment
PROMO CODE
Credit Card Number
SCAN
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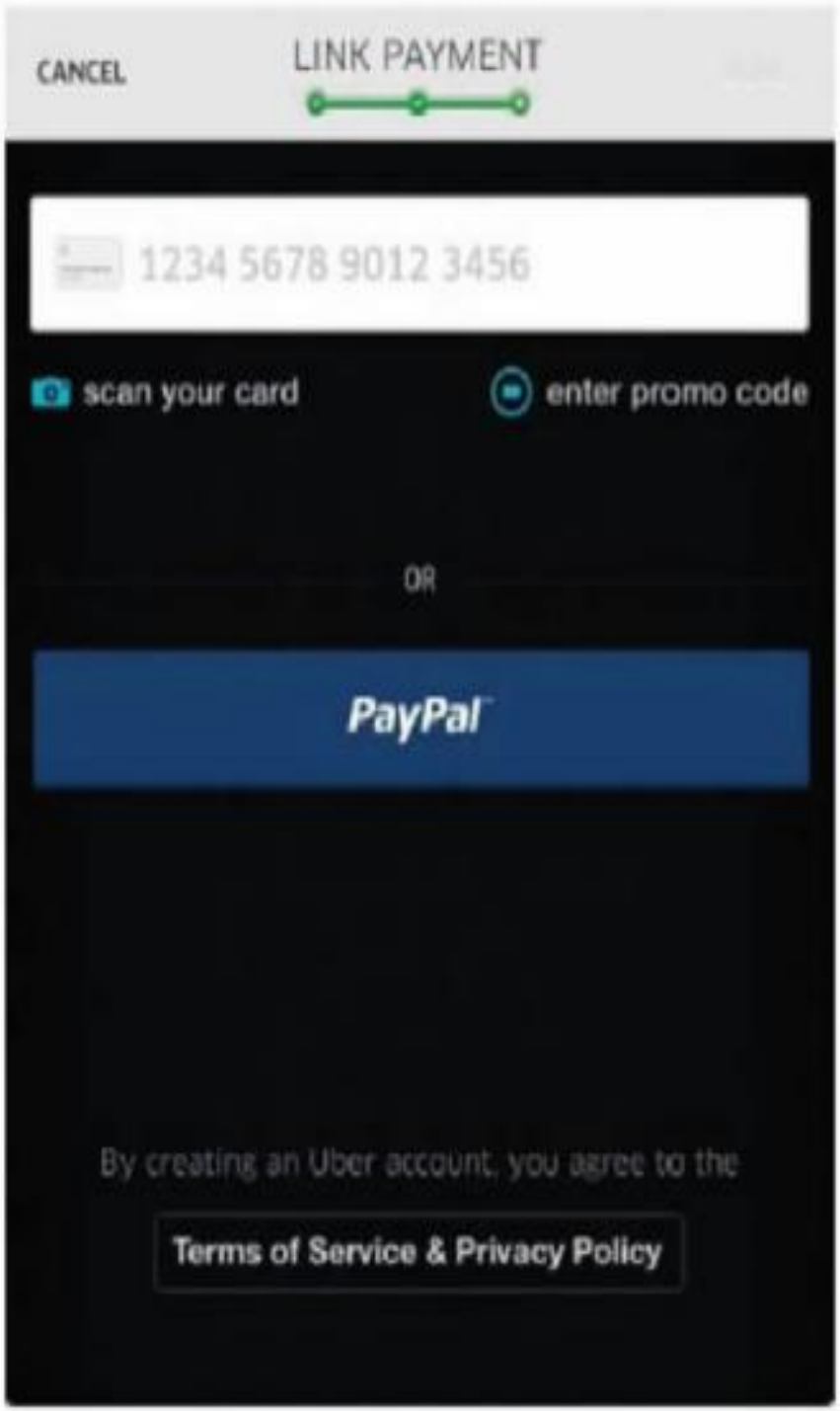
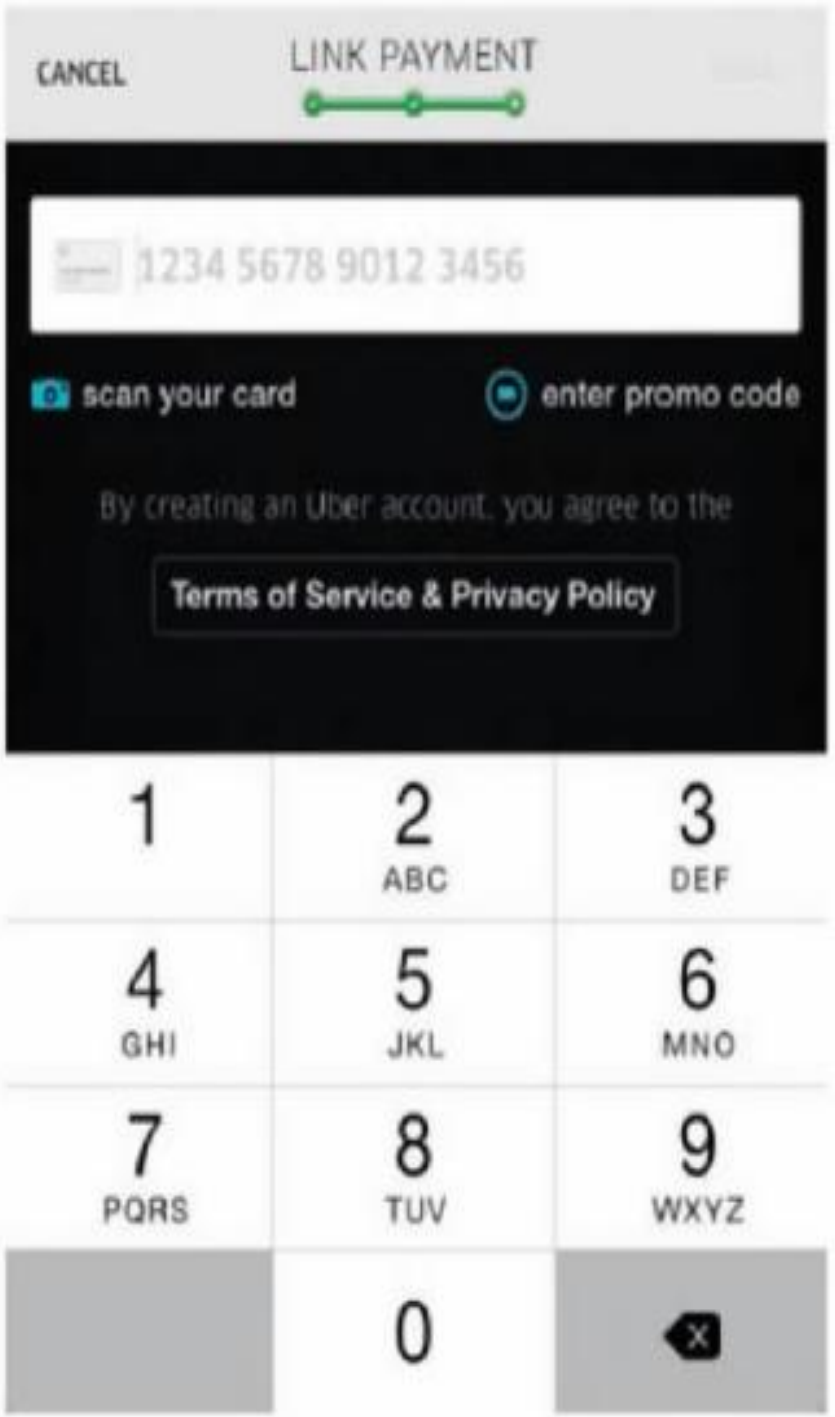
ZIP
REGISTER
OR
PayPal
Google Wallet
By creating an Uber account, you agree to the
TERMS OF SERVICE & PRIVACY POLICY


CANCEL
LINK PAYMENT
1234 5678 9012 3456
scan your card
enter promo code
OR
PayPal
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy


CANCEL
LINK PAYMENT
1234 5678 9012 3456
scan your card
enter promo code
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy
1
2 ABC
3 DEF
4 GHI
5 JKL
6 MNO
7 PQRS
8 TUV
9 WXYZ
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  - Starke v. Squaretrade, Inc., 913 F.3d 279 (2d Cir. 2019)
    - Denying motion to compel arbitration where the consumer did not have reasonable notice because the post-sale T&C were not provided in a clear and conspicuous way. An Amazon purchase page said plaintiff would receive a "service contract" by email. Plaintiff then received an email advising he would receive a "service agreement." He then received an email saying his "contract" was enclosed, but it came in the form of a link and none of the communications put him on notice that his "service contract" would come via a link.
    - (1) no notice it would be a link; (2) the link was buried in an email that primarily comprised a chart (3) more similar to *Nicosia* than *Meyer*

Online and Mobile Contract Formation

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

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Privacy and Cybersecurity Case Law and Strategic Trends – Year in Review

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