

Online Shopping Gateways and Their Potential Litigation Loophole

Adava Jefferson

In my last couple of blogs, I wrote about America's lack of cybersecurity regulations and open banking, along with the implications on personal data. These are important conversations to have because it means staying informed on what kind of personal data is being collected and what the personal data is being used for. We have all heard of personal data leaks, and people having their credit cards maxed, and nobody wants to have that experience personally. While there are cybersecurity regulations protecting personal data collected by businesses, like the Gramm-Leach Bliley Act,¹ this is still a newer area in which the law must catch up. The advancement of technology is so quick that it will probably take years to answer all the big questions, but, for now, I will be following the process of protecting consumer data one case or regulation at a time.

In more recent news, it seems there is another topic to consider in the conversation about personal data on the internet. The 9th Circuit took on the question of where online payment platforms may have litigation brought against them.² Online payment platforms, like Shopify, act as payment gateways which help ease the process of an online purchase. In a transaction, payment platforms collect, transfer, and authorize customer information "in real-time" to the seller's bank.³ The transaction is then processed at the seller's bank.⁴ This process may occur through a redirect, which is a process that takes you to another payment page to complete the transaction.⁵ While online payment platforms provide a much easier payment process, they also come with a few potential security flaws. One security flaw is the vulnerability of data breaches.⁶ While payment gateways are confidential, data, such as card information, stays on the server where it remains at risk.⁷ Another serious risk is malware, which reads passwords and infiltrates user accounts.⁸ This malware can then send transactions, which simply appear authentic, through secured payment gateways.⁹ Although nobody wants their personal data stolen and used for nefarious purposes, we need to be prepared for any potential remedies we may have available in a worst case scenario. One of those remedies is the American legal system, but the next question addresses where you can bring suit and receive justice.

Normally, if an online retailer delivers physical products within a certain jurisdiction, the business can be sued in that state, but the implementation of payment platforms like Shopify has changed the rules. The 9th Circuit addressed this new complication in its recent decision of *Briskin v. Shopify, Inc.* Because the plaintiff, Briskin, could not show Shopify expressly aimed

¹ Garry Kranz, *Gramm-Leach-Bliley (GLBA)*, TECHTARGET, <https://www.techtarget.com/searchcio/definition/Gramm-Leach-Bliley-Act> (last updated June 2021).

² Alison Frankel, *Shopify, online payment platforms get free pass on jurisdiction from appeals court*, REUTERS (Nov. 30, 2023, 4:44 PM), <https://www.reuters.com/legal/transactional/column-shopify-online-payment-platforms-get-free-pass-jurisdiction-appeals-court-2023-11-30/>.

³ *Finding the Best Payment Gateway for Your Business*, BIGCOMMERCE, <https://www.bigcommerce.com/articles/ecommerce/payment-gateways/> (last visited Dec. 10, 2023).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

its conduct at California, under *Calder v. Jones*, the 9th Circuit ruled the state of California had no jurisdiction.¹⁰ This then moved the case to the 9th Circuit to decide. The focus of the court was not the delivery of physical products by the seller, but instead, the online services of Shopify, which are provided nationwide.¹¹ If Shopify were to deliberately aim its services at the state of California, the state would then have the jurisdiction needed to hear and decide the case. Briskin's lead appellate counsel attempted to compare this case to the recent decision in *Herbal Brands*, where physical products were involved.¹² This comparison highlighted the targeting of customers in California, including more than 80,000 merchants who signed up for Shopify.¹³ This was important because signing up for Shopify meant collecting data from people living in California and using Shopify through those merchants.

The 9th Circuit declined this argument because the case at hand was about the internet, which is different from using the delivery of physical products to establish jurisdiction. The 9th Circuit compared Briskin's case to 3 other cases: *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, *Will Co. v. Lee*, and *AMA Multimedia, LLC v. Wanat*.¹⁴ These three cases involved online websites, but only one plaintiff was able to show the website in question specifically targeted California and its market.¹⁵ As a result of this decision, there is now concern about where litigation may be brought against online payment platforms like Shopify. Briskin argued this decision would allow Shopify and other online platforms to avoid lawsuits in nearly all the states where they conduct business.¹⁶ The court responded to this argument by explaining how litigation may still be brought against these businesses in the jurisdictions where they are based or incorporated.¹⁷ This is because "our law has long recognized that as a matter of due process, web-based platforms cannot be subject to specific jurisdiction in any forum which they are accessible."¹⁸

This decision from the 9th Circuit is a concerning yet understandable one. It is important to provide access to the legal system to people from all socioeconomic groups. Imagine not being able to sue in your home state when your credit card information is stolen then used, and you can no longer afford a vacation you have been planning. This is why I believe it would have been nice for the 9th Circuit to require businesses like Shopify to participate in litigation in any jurisdiction they do business. While everyday people may not have the resources to travel for litigation, businesses can send attorneys and employees. On the other hand, the internet has given people the opportunity to use online payment methods, receive products to their homes, and access information they would otherwise have to leave their home to access. This is a major benefit for those who do not have access to resources, like a car, needed to do simple things, like go to the store or a public library. It would be wrong to punish online platforms like Shopify for providing ease of access to those who need it. By allowing litigation in any jurisdiction

¹⁰ Alison Frankel, *Shopify, online payment platforms get free pass on jurisdiction from appeals court*, REUTERS (Nov. 30, 2023, 4:44 PM), <https://www.reuters.com/legal/transactional/column-shopify-online-payment-platforms-get-free-pass-jurisdiction-appeals-court-2023-11-30/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

businesses decide to provide services to, it could require an overexertion of resources, or a lack of services to those who need it. This decision is not completely taking away the ability to bring litigation against online payment platforms who have done wrong, but it is instead limiting where that litigation may be brought. The bottom line is businesses like Shopify provide a service which promotes accessibility for purchasing products and services people need. While this service may come with its faults, it is important to note the justice system is still accessible, just not in every jurisdiction where you may have access to these platforms.