



PRIVACY & SECURITY LAW



REPORT

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California's Song-Beverly Credit Card Act: The Past, Present, and Future



By JOHN W. MCGUINNESS

Introduction

A customer approaches the cash wrap at her favorite retailer, after selecting a new pair of shorts. When she gets there, the retailer employee requests the customer's name and telephone number, and enters the information into the cash register or point of sale termi-

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nal. The employee rings up the item, the customer hands the employee her credit card, then the transaction is completed. This is a situation that occurs countless times each day. However, in California, it may subject a retailer to a lawsuit under the California Song-Beverly Credit Card Act, California Civil Code section 1747.08 (the "Act" or "section 1747.08"). This statute, which provides for up to \$1,000 in civil penalties per violation, has been construed by California plaintiffs' attorneys to prohibit **any** request for personal identification information (for example, address, telephone number, e-mail address or even zip code) from customers paying by credit card in California. Suits have been brought against merchants ranging from large nationally-known retailers to Internet sellers of downloadable software, and targeted retailers face potentially significant damages.

The aim of this article is to provide those persons and businesses that regularly engage in credit card transactions in California, most notably retail merchants, with

a meaningful primer on some critical current and developing aspects of the Act. To that end, this article provides an overview of the Act's provisions, and discusses the important legal issues surrounding the Act, including several that California courts have resolved, several that are currently pending before those courts, and one that may be resolved in the near future.

Overview of the Act

Cal. Civ. Code section 1747.08(a) provides that no person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business may:

- (1) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information upon the credit card transaction form or otherwise.
- (2) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.
- (3) Utilize, in any credit card transaction, a credit card form which contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder.

Section 1747.08(c)(1)-(4) of the Act provides that the above prohibitions do not apply in the following circumstances:

- (1) If the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence.
- (2) In cash advance transactions.
- (3) If the party accepting the credit card is contractually obligated to provide personal identification information in order to complete the credit card transaction or is obligated by federal law or regulation to collect such information.
- (4) If personal identification information is required for a special purpose incidental but related to the individual credit card transaction, including, but not limited to, information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders.

"Personal identification information" is defined in section 1747.08(b) as "information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number."

Further, the Act does not prohibit requiring customers paying by credit card to provide reasonable forms of positive identification, such as a driver's license or California state identification card, provided that this information is not recorded (however, under Cal. Civ. Code section 1747.08(d), the identification card number may be recorded if the customer does not present the credit card at the time of purchase).

Section 1747.08(e) provides for up to \$250 in civil penalties for the first violation, and up to \$1,000 in civil penalties for each subsequent violation. In addition, under section 1747.08(f), the California Attorney General and California district and city attorneys are permitted to seek injunctive relief under the statute.

The Act was adopted in 1971. At that time, merchants conducted credit card transactions largely, if not exclusively, in paper; it was not until later in the decade that electronic authorizations for such transactions became prevalent.¹ In 1991—several years before commercial transactions via the Internet became commonplace—the California Legislature amended the predecessor to section 1747.08. Notably, the 1991 amendment added the word "request" at the front of sections (a)(1) and (a)(2).² The 1991 amendment addressed two privacy concerns: First, that with increased use of computer technology, very specific and personal information about a consumer's spending habits was being made available to anyone willing to pay for it; and, second, that acts of harassment and violence were being committed by store clerks who obtained customers' phone numbers and addresses.³

Key Decisions Under the Act

Plaintiffs' attorneys bringing section 1747.08 actions have advanced very broad interpretations of the Act that stretch the statute well beyond what was ever intended by the legislature. These interpretations have been challenged in several cases, resulting in the following favorable outcomes for defendant retailers:

Plaintiffs Are Not Entitled to a Jury Trial

In *Shabaz v. Polo Ralph Lauren Corporation*, 586 F. Supp. 2d 1205 (C.D. Cal. 2008), the U.S. District Court for the Central District of California held that plaintiffs are not entitled to a trial by jury because Section 1747.08 is equitable and not compensatory in nature. As a "pure legal penalty," it is designed only to discourage retailers from combining personal identification information with credit card data.⁴

The Applicable Statute of Limitations Is One Year, Not Three Years

In *TJX Companies, Inc. v. Superior Court*, 163 Cal. App. 4th 80 (2008), the California Court of Appeals held that the applicable statute of limitations is one year under Cal. Code Civ. Pro. section 340(a), which applies to actions "upon a statute for a penalty or forfeiture." The court rejected plaintiff's argument that the three-year limitations under Cal. Code Civ. Pro. section 338 applies instead, on the ground that, while the amount of penalty is within the court's discretion, a penalty **must** be im-

¹ See http://www.gotmerchant.com/history_of_credit_card_processing.php, last accessed July 19, 2010.

² See *Absher v. AutoZone Inc.*, 164 Cal. App. 4th 332, 342 (2008) (7 PVL 1092, 7/21/08). See also Enrolled Bill Report of the California Department of Consumer Affairs, "Assembly Bill No. 1477 (1991-1992 Reg. Sess.) (stating in pertinent part that "[t]his bill would prohibit requesting or requiring" personal information [;] 'since the card issuer already has that information, there is no need for the retailer to request it (some retailers request it for mailing list purposes.'").

³ See *Saulic v. Symantec*, 596 F. Supp. 2d 1323, 1334 (C.D. Cal. 2009) (8 PVL 302, 2/23/09) (quoting *Florez v. Linens 'N Things*, 108 Cal. App. 4th 447, 452 (2003) (2 PVL 473, 5/5/03), which, in turn, cites California Assembly Committee on Finance and Insurance, Background Information Request on Assembly Bill No. 2920. Stats. 1990, ch. 999, § 1 [A.B. No. 2920]).

⁴ See also *In re Payless Shoesource, Inc.*, No. 09 MD 2022, 2009 WL 3233820 (E.D. Cal. Sept. 11, 2009) (following *Shabaz*).

posed – though the court emphasized that the penalty could be as little as a “peppercorn.”⁵

Plaintiffs May Not Obtain Injunctive Relief

While the plain reading of subsections (e) and (f) of Section 1747.08 reveals that plaintiffs are not authorized to secure injunctive relief under the statute, many class actions filed under the statute have sought such relief. However, in *Korn v. Polo Ralph Lauren Corporation*, 644 F. Supp. 2d 1212 (E.D. Cal. 2008), the Eastern District of California struck plaintiff’s request for injunctive relief as a matter of law on the ground that the statute “unambiguously” provides that plaintiffs may only sue for civil penalties while the Attorney General or other government actor may sue for both civil penalties and injunctive relief. Accordingly, plaintiffs, as private citizens, are confined to the statutory remedy of civil penalties expressly provided in section 1747.08(e).

The Act Does Not Apply to Return Transactions

While on its face section 1747.08 encompasses only credit card purchases, many class actions filed under the Act have sought penalties for information collected in the context of credit card return transactions. These cases are generally brought under section 1747.08(a)(3), under the theory that the phrase “any credit card transaction” should be read broadly to include returns. Both federal and state courts in California have rejected that interpretation, holding that section 1747.08 is concerned exclusively with protecting consumers at the point of sale, and does not apply to returns.⁶

The Act Does Not Apply to Transactions Conducted Over the Internet

On its face, section 1747.08 would seem to apply both to transactions conducted remotely and brick and mortar transactions. The court in *Saulic v. Symantec*, 596 F. Supp. 2d 1323 (C.D. Cal. 2009) (8 PVL 302, 2/23/09), however, held that the Act does not cover online transactions. The court reasoned that “[w]hile the use of computer technology is mentioned [in the Act], the language does not suggest the Legislature considered online transactions or the perils of misappropriation of consumer credit information in an online environment where there is no ability to confirm the identity of the customer” and “[n]either the language of the Act nor its legislative history suggests the Act includes online transactions.”

Open Issues Surrounding the Act

Whether the Act Applies to Any Request

An open issue that remains is whether the Act would prohibit any request for personal identification information from customers paying by credit card, regardless of whether the request is made as a “condition to accepting the credit card as payment.”

On the one hand, plaintiffs’ attorneys in California have relied on *Florez v. Linens ‘N Things*, 108 Cal. App. 4th 447 (2003), for the argument that merchants who

accept credit cards for the transaction of business may neither “**request**” that the cardholder provide personal identification information in conjunction with the use of a credit card, nor may they “**require as a condition to accepting the credit card as payment in full or in part for goods or services**” that the cardholder provide personal identification information. On the other hand, California courts have also held that only “requests” made “as a condition to accepting the credit card as payment” fall within the scope of the Act.⁷

Whether a Zip Code Is ‘Personal Identification Information’

Arguably, another open issue that remains is whether a zip code constitutes “personal identification information” as that term is defined under the Act. In *Party City Corp. v. Superior Court*, 169 Cal. App. 4th 497 (2008) (8 PVL 13, 1/5/09), the California Court of Appeals considered the language of the Act and the legislative history and concluded, as a matter of law, that a zip code is not “personal identification information” within the meaning of section 1747.08, because a zip code is not facially individualized information. Last year, in *Pineda v. Williams-Sonoma Stores, Inc.*, 178 Cal. App. 4th 714 (2009) (8 PVL 1562, 11/2/09), the California Court of Appeal followed *Party City* and affirmed the decision that Williams-Sonoma did not violate the Act by requesting and recording the customer’s zip code for the purpose of using it and the customer’s name to obtain the customer’s address through the use of reverse data mining.

While the *Party City* and *Pineda* decisions provided some clarity for companies in California that collect customer zip codes and then reverse data mine, earlier this year the California Supreme Court in *Pineda* granted a petition to review the issue of whether a retailer violates the Act if, in connection with a credit card transaction, it records a customer’s zip code for the purpose of later using it and the customer’s name to obtain the customer’s address through a reverse search database.

Notably, in its brief, *Pineda* asks the Supreme Court to reverse *Party City* on the grounds that zip codes are expressly defined as “information **concerning the cardholder**, other than information set forth on the credit card, and including, **but not limited to**, the cardholder’s address and telephone number.” *Pineda* contends that the lower courts erred by inserting an additional criteria into the definition and requiring that the information be “unique” to the cardholder, rather than merely “concerning” the cardholder, as set forth in the statute. In addition, *Pineda* argues that Williams-Sonoma preys on its credit card customers who are accustomed to providing their zip codes for legitimate verification purposes at gas stations and mistakenly assume that Williams-Sonoma is requesting their zip codes to process their credit cards. Meanwhile, according to *Pineda*, their sole

⁵ See also *Shabaz*, 586 F. Supp. 2d at 1211 (following *TJX* and holding that “the one-year statute of limitations under Cal. Code Civ. P. § 340 applies, and allegations of conduct unlawful under § 1747.08 occurring outside . . . [that] statute of limitations should be stricken”).

⁶ See, e.g., *Romeo v. Home Depot USA, Inc.*, No. 06-CV-1505, 2007 WL 3047105, at *7 (S.D. Cal. Oct. 16, 2007); *Korn v. Polo Ralph Lauren Corp.*, 644 F. Supp. 2d 1212 (E.D. Cal. 2008); *TJX Cos., Inc. v. Super.Ct.*, 163 Cal. App. 4th 80 (2008).

⁷ See *Absher v. AutoZone, Inc.*, 164 Cal. App. 4th 332, 343-44 (2008) (7 PVL 1092, 7/21/08) (acknowledging that “the punctuation in subdivisions (a)(1) and (a)(2) [of Section 1747.08] is not punctilious,” the Second District squarely rejected the plaintiff’s broad interpretation, concluding that Section 1747.08 can only be violated if the request for information is “a condition precedent to accepting payment by credit card.”); *TJX*, 163 Cal. App. 4th at 88. But see *Shabaz*, 586 F. Supp. 2d at 1210 and *Korn*, 2008 WL 2225743, at *4 (following *Florez*).

intent is to use their customers' zip codes to "covertly" obtain their home addresses to build its customer database.

Williams-Sonoma, on the other hand, argues that the question of whether a zip code is "personal identification information" was not certified for review by the California Supreme Court, thus, the California Court of Appeals' decision in *Party City* stands. In addition, Williams-Sonoma argues that Section 1747.08 does not prohibit the *use* of information that is collected by a retailer at the point of sale. Instead, Section 1747.08 is silent as to any conduct other than the request and recording of "personal identification information" during a credit card transaction. Because a zip code has already been held to not fit within the definition of "personal identification information," the inquiry ends there—it cannot be transformed into "personal identification information" based on how the zip code is used.

How the California Supreme Court resolves the issue of whether a zip code constitutes "personal identification information" may have a substantial impact on retailers that collect this information. If, for example, the Supreme Court accepts Pineda's interpretation of Section 1747.08 that zip codes are "personal identification information," retailers could be left wondering what other conduct is prohibited, since neither "zip codes" nor "reverse data searches" are expressly mentioned in the statute. In addition, after having relied on *Party City* the last couple of years, retailers also may be left wondering whether they are now liable for this conduct under Section 1747.08 for up to \$1,000 per transaction.

Future Issue Under the Act: Whether an E-mail Address Is 'Personal Identification Information'

Several retailers have recently been hit with class action lawsuits alleging that requests for an e-mail ad-

dress from customers paying by credit card violate section 1747.08. To date, no California court has decided the issue. However, in late 2009, a California appeals court in *Powers v. Pottery Barn, Inc.*, 177 Cal. App. 4th 1039 (2009) (8 PVL 1384, 9/28/09), held that a class action lawsuit against Pottery Barn, Inc. alleging unauthorized collection of customer e-mail addresses could proceed to trial. While the court declined to find that e-mail addresses are "personal identification information" under section 1747.08—it was not necessary to decide the issue because the court found that the federal CAN-SPAM Act could not be interpreted to preempt the Act as Congress had expressly limited the preemption provision to only apply to state laws that specifically regulate electronic mail—retailers in California should be wary of requesting them before courts resolve the issue.

Why This Matters

While defendant retailers had been successful in narrowing the interpretation of section 1747.08 closer to that which was intended by the legislature, class actions under the Act have been—and continue to be—filed, with many retailers and merchants finding themselves faced with multiple, overlapping class actions against them. This is not surprising given the number of credit card transactions processed each day by retailers in California, the Act's \$1,000 per violation civil penalty, and the absence of any explicit cap on aggregate damages under the Act. The fact that such lawsuits continue to be filed against retailers that collect information on a purely voluntary basis, means that any retailer accepting credit cards in California and requesting information from customers paying by credit card—including address, telephone number, and potentially zip codes and e-mail addresses—remains at risk of a lawsuit.⁸

⁸ Kelley Drye attorney Joseph D. Wilson contributed to this article.