

SELLERS BEWARE: Another Flurry of Class Actions Being Filed Against Retailers Accepting Credit Cards in California

INTRODUCTION

If you accept credit card payments in California, whether in person, over the Internet, or by phone, you may be at risk of joining dozens of retailers who have recently been hit with class action lawsuits under the California Song-Beverly Credit Card Act, California Civil Code §1747.08 (the “Act” or “Section 1747.08”). This statute, which provides for up to \$1,000 in civil penalties per violation, is being construed by California plaintiffs’ attorneys to broadly 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, such as Best Buy, Gucci, Coach, Barnes & Noble and Linens ‘N Things, to Internet sellers of downloadable software, such as Symantec Corporation. Targeted retailers face potentially significant damages (*i.e.*, \$1,000 per request). This advisory provides an overview of the Act’s provisions, the important legal issues surrounding the Act, including several issues that recently have been resolved by California courts, as well as guidance for mitigating your company’s risks.

OVERVIEW OF THE ACT

Section 1747.08 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.

CAL. CIV. CODE §1747.08(a).

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.

See CAL. CIV. CODE §1747.08(c)(1)-(4). “Personal identification information” is 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.” *Id.* at §1747.08(b).

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, the identification card number may be recorded if the customer does not present the credit card at the time of purchase). *See id.* at §1747.08(d).

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

LEGAL ISSUES SURROUNDING 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 recent cases, including cases detailed by this advisory, resulting in very favorable outcomes for defendant retailers.

Plaintiffs are Not Entitled to a Jury Trial

In August, the Central District of California in *Shabaz v. Polo Ralph Lauren Corporation* became the first court in California to address the issue of whether plaintiffs in Section 1747.08 actions are entitled to a trial by jury. *See* No. SACV 07-1349 AG (ANx), at *8 (C.D. Cal. Aug. 25, 2008). There, plaintiff primarily argued that the Seventh Amendment of the United States Constitution protects a party’s right to trial by jury. *See id.*, at *8-9. The court rejected this argument, holding that Section 1747.08 is equitable and not compensatory in nature. As “a pure civil penalty,” it is designed only to discour-

age retailers from combining personal identification information with credit card data. *See id.* Accordingly, plaintiffs asserting Section 1747.08 claims are not entitled to a trial by jury.

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

Another recently resolved issue with significant implications is the statute of limitations applicable to Section 1747.08 actions. In *TJX Companies, Inc. v. Superior Court*, the California Court of Appeals held that the applicable statute of limitations is one year under Cal. Code. Civ. Pro. § 340(a), which applies to actions “upon a statute for a penalty or forfeiture.” 163 Cal. App. 4th 80, 86-87 (2008). The court rejected plaintiff’s argument that the three-year limitation under Cal. Code Civ. Pro. § 338 applies instead, on the ground that, while the amount of penalty is within the court’s discretion, a penalty *must* be imposed – though the court emphasized that the penalty could be as little as a “peppercorn.” *See id.* at 85-87. In August, the Central District of California agreed with and followed TJX. *See Shabaz*, No. SACV 07-1349 AG (ANx), at *8.

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 Corp.*, 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. *See* No. CIV. S-07-02745 (FCD) (JFM), 2008 WL 2225743, at *7 (E.D. Cal. May 28, 2008). Accordingly, plaintiffs, as private citizens, are confined to the statutory remedy of civil penalties expressly provided in Section 1747.08(e). *See id.*; *see also Shabaz*, No. SACV 07-1349, at *6 (citing *Korn* and dismissing the claim for injunctive relief).

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 recently 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. See *Korn*, 2008 WL 2225743, at *3; *Romeo v. Home Depot USA, Inc.*, No. 06-CV-1505, 2007 WL 3047105, at *7 (S.D. Cal. Oct. 16, 2007); *TJX*, 163 Cal. App. 4th at 88-89.

Whether the Act Applies to Any Request

One 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* 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. See 108 Cal.App. 4th 447, 450 (Cal.App. 2003) (emphasis added). On the other hand, two recent decisions by the California Courts of Appeal (Second and Fourth Districts) have held that only “requests” made “as a condition to accepting the credit card as payment” fall within the scope of the Act. See *Absher v. AutoZone, Inc.*, 164 Cal. App. 4th 332, 343-44 (2008) (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*, No. SACV 07-1349, at *5 and *Korn*, 2008 WL 2225743, at *4 (following *Florez*).

Whether a Zip Code is “Personal Identification Information”

Another open issue that remains is whether a zip code constitutes “personal identification information” as that term is defined under the Act. In October, a California Superior Court held for the first time that a zip code is not “personal identification information,” on the grounds that (1) a zip code is not unique to the cardholder or his household, (2) the plaintiff failed to set forth any facts to show that a zip code falls under the definition of “personal identification information” or to show that acts of harassment and violence have occurred in that case, and (3) an “absurd result” would be reached if zip codes applied to the Act because it would broaden the statute to include information that is not specific to an individual, like an area code, city, or state. See *Pineda v. Williams-Sonoma Stores, Inc.*, No. 37-2008-00086061-CU-TB-CTL, at *2 (Oct. 3, 2008). The court also acknowledged retailers’ common practice of requesting zip codes “to protect consumers against the unauthorized and fraudulent use of credit cards.” *Id.* This issue is currently pending in the Fourth District of the California Court of Appeal in *Party City Corporation v. Superior Court of San Diego County*, No. D053539.

WHY THIS MATTERS

While recently defendant retailers have 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 at an increasingly rapid and alarming rate, with many retailers and merchants finding themselves faced with multiple overlapping Section 1747.08 class actions across California. This is no surprise considering the huge volume of credit card transactions processed each day by retailers in California, the Act’s \$1,000 per violation civil penalties, and the absence of any explicit

cap on aggregate damages under the Act. The fact that such lawsuits are being filed against retailers that collect information on a purely voluntary basis or in an effort to prevent return fraud, means that any retailer accepting credit cards in California and requests information from customers paying by credit card – regardless of the circumstances – is at risk of a lawsuit.

HOW TO PROTECT YOUR COMPANY

As an increasing number of states venture into the privacy and data security arena, the traps for the unwary will inevitably increase, with statutes such as Section 1747.08 as just one example. To mitigate compliance risk, companies, with the help of experienced outside counsel, should routinely audit their practices with respect to the collection, maintenance, and use of customer data, to ensure compliance with company policies, all current federal and state laws and regulations, as well as with credit card association rules.

In addition, retailers need to monitor federal and state legislation to ensure that they do not inadvertently become subject to laws that, however well-intentioned, only serve to line the pockets of plaintiffs' attorneys without providing any real privacy protections. In addition, consult your Chamber of Commerce or trade association to ensure that your interests are being watched by government relations professionals experienced in consumer financial services issues. They can be your first line of defense in protecting your business interests. Engaging your own legislative counsel brings even greater certainty that your particular concerns are addressed as legislators at the federal and state levels enact new laws.

KELLEY DRYE'S CONSUMER FINANCIAL SERVICES PRACTICE GROUP

Kelley Drye's Consumer Financial Services Group regularly defends and counsels clients with respect to consumer financial services issues, including privacy, data security, fair credit, and debt collection, and is currently defending clients in several putative class actions alleging violations of the Song-Beverly Credit Card Act and other privacy-related claims. Members of the group also represent clients before the United States Congress, federal agencies, and state legislatures advocating their interests on consumer financial services legislation and regulatory matters. We also develop and manage coalitions to shape legislation, and build alliances with business trade associations, financial services trade groups, and consumer advocacy organizations to advance our clients' interests.

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