

California credit card privacy litigation continues apace

California's Song Beverly Credit Card Act continues to be debated in court. Questions surround the prohibitions in the Act regarding the collection and recording of personal identification information as part of a credit transaction and appropriate exemptions. Keri E. Campbell, Alysa Z. Hutnik and Christopher M. Loeffler, of Kelley Drye & Warren LLP, discuss the Act, the decisions so far and the on-going dispute involving Apple as to whether the Act applies to online transactions.

Enacted in 1971, California's Song-Beverly Credit Card Act has received considerable attention since 2008. At its core, the Act is a consumer protection statute designed to provide state credit protections similar to the federal Truth in Lending Act. Yet, one portion of the Act, which prohibits entities from requesting and recording personal identification information (PII) from consumers as part of a credit transaction, has been the subject of considerable litigation. Song-Beverly litigation continues to help form the evolving US privacy framework.

The scope of Song-Beverly

Under Song-Beverly, an entity is restricted from activities related to the requesting and recording of PII from credit card customers. An entity shall not: 1. 'Request, or require as a condition to accepting the credit card as payment in full or in part for goods and services, the cardholder to write any [PII] 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 and services, the cardholder to provide [PII], which the [entity] accepting the

credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise. 3. Utilise, in any credit card transaction, a credit card form which contains preprinted spaces specifically designated for filling in any [PII] of the cardholder.'

Under the Act, 'PII' means '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.' The Act does not restrict asking customers paying by credit card from providing identification as long as the information is not recorded. If the customer pays by providing their credit card number (but not the card), the entity can request and record the driver's licence number or state ID card number.

What is covered

The Act identifies two types of PII that may not be recorded - address and telephone number. The legislature's use of non-exhaustive language 'including, but not limited to the cardholder's address and telephone number' has resulted in litigation. Disputes have largely grown out of retailers' practices of requesting information from consumers at the register. While a retailer's intended use of data may vary - marketing, analytics, fraud prevention - except for a few exemptions, the Act prohibits requesting or requiring that PII be recorded.

Express exemptions

The Act includes exemptions from the prohibited acts. Specifically, the prohibition does not apply: (1) to use of the credit card as a deposit; (2) to cash advance transactions; (3) when the retailer is contractually obligated to provide PII to complete the transaction; (4) in a sale transaction at a retail

motor fuel dispenser or payment island automated cashier and the retailer uses zip code information solely for the prevention of fraud, theft, or identify theft; (5) the retailer must collect and record the PII under applicable law; or (6) PII is required for a special purpose related to the transaction (e.g. shipping, delivery).

Zip codes

For a period, determination of whether a zip code constitutes PII was an issue. In 2008, a class action filed against retailer Party City alleged that Party City's practice of collecting zip code at the register violated Song-Beverly. On appeal, the California Court of Appeal held that zip code was not PII under Song-Beverly, as it was not facially individualised information.

Yet, in *Pineda v. Williams-Sonoma Stores, Inc.* the California Supreme Court held that zip code information is PII under Song-Beverly. In *Pineda*, the plaintiff was prompted by the cashier to provide her zip code during a transaction. Believing the zip code was necessary to the transaction, the plaintiff provided it. The plaintiff later alleged that the retailer used her zip code and name to conduct a reverse lookup of her address and add it to the marketing database. The California Supreme Court rejected the holding in *Party City*, which stated that zip code was not PII because it pertains to a group of individuals that live in a certain area, as opposed to an individual. The Court provided three statutory explanations for its holding: 1. A zip code is understood to be part of an address. The word 'address' should be construed as encompassing not only a complete address, but its components. 2. A complete address and telephone number can refer to more than one individual residing at the location. Merely because a zip code may

refer to more than one person does not make it dissimilar to an address or telephone number. 3. Address and telephone number are both unnecessary to the sales transaction. Zip code also falls into this category.

The Court in Pineda broadened the definition of PII and so opened the floodgates of litigation.

Fraud prevention

A putative class action alleged Song-Beverly violations for collection of zip code at the gas pump. The court held that such collection and recording of zip code information was not a violation and that the practice fell within the 'special purpose' exemption that allows incidental but related use. The court's reliance on the 'special purpose' exemption may signal that companies using kiosks or self-pay registers other than motor fuel retailers may be able to collect and record zip code for fraud prevention purposes.

Merchandise returns

The California Court of Appeal has held that collection of PII from a customer as part of a merchandise return does not violate the Act. In several decisions, the court stated that 'returns' are not 'purchases' and due to the opportunities for fraud related to merchandise returns, the retailer needs to be able to identify the merchandise.

Application of Pineda

In several decisions, California courts have held that its holding in Pineda - zip codes are PII under the Act - can be applied retrospectively. So, companies can be liable for violations of the Act consistent with the statute of limitations for an action, which is set at one year, even if such actions occurred prior to the Court's holding. This line of decisions had immediate implications for

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retailers. It remains to be seen whether a retroactive application could be applied in any subsequent determination of PII.

Injunctive relief

The language in the Act regarding remedies available to plaintiffs for violations related to the request and recording of PII limits private plaintiffs to bring actions for statutory civil penalties. Despite language indicating that injunctive relief is only available in public actions brought by the Attorney General, state district or city attorneys private class action plaintiffs have sought injunctive relief. The courts have rejected this claim to the remedies available for private plaintiffs.

Practices in dispute

Loyalty programs

In Gass v. Best Buy a putative class action alleged violations of Song-Beverly based on the collection of PII used to enrol customers into a loyalty program. The court evaluated the practices of Best Buy and identified two scenarios that do not violate Song-Beverly. First, the court held that there is no violation when a cashier asks if the customer is a member of the loyalty program and, if not, subsequently obtains the PII. Second, the court held that there is no violation when a salesperson on the floor of a retail store asks a customer if they would like to provide information to join the mailing list. Returning to Florez v. Linens 'N Things and Pineda the court focused on the reasonable expectations of the customer and whether such action was interpreted as a condition of the transaction. Additionally, the court found that enrolling in a loyalty program or requesting PII to look up a current member fell within the 'special purpose' exemption. In Rothman v. Gen. Nutrition

Corp. the court denied a putative class including customers that had voluntarily joined the defendant's loyalty program. Yet, in Yeoman v. IKEA USA West Inc., another federal court certified a class action that included members that provided their PII related to a loyalty program.

Online vs. brick and mortar

Determination as to whether Song-Beverly applies to online transactions is a key open issue. Numerous California courts have considered this issue and held that online transactions and self-service transactions conducted at a kiosk are excluded from the Act. In a class action suit brought against Apple Inc., this issue will be addressed by the California Supreme Court.

Apple has argued that the Act is not applicable to online retail transactions selling a downloadable service and is only applicable to brick and mortar stores. Apple alleges that online transactions were not contemplated and did not exist when Song-Beverly was enacted. Additionally, the Act contemplates having customers provide positive ID instead of PII at the time of the transaction - which is not an option for online retailers. Further, a retailer's concerns regarding fraud are more apparent in an online transaction, as the retailer does not have the opportunity to confirm the identity of the individual. Without the ability to collect certain PII for identity verification, there is a greater chance of fraud - which can harm the consumers that Song-Beverly was enacted to protect.

Keri E. Campbell Partner
Alysa Z. Hutnik Partner
Christopher M. Loeffler Associate
 Kelley Drye & Warren LLP
 kcampbell@kelleydrye.com
 ahutnik@kelleydrye.com
 cloeffler@kelleydrye.com