

IN PRACTICE



Keep up with Song-Beverly compliance when collecting customer data

California courts are rapidly reinterpreting the credit card act, including its application to online transactions.



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Privacy

California courts continue to refine the reach and scope of the Song-Beverly Credit Card Act of 1971, Cal. Civil Code § 1747.08, in the context of an increasingly online marketplace. Several recent decisions provide guidance for practitioners counseling retailers on both online and point-of-sale data collection practices.

Following the California Supreme Court's decision in *Apple v. Superior Court* (Krescent), 56 Cal. 4th 128 (2013), the courts continue to address whether Song-Beverly applies to online transactions. In *Apple*, the court held that the statute does not apply to online transactions regarding downloadable products, but left open the question whether it applies to other online credit card transactions.

On May 4, 2015, an intermediate appellate court in California held that Song-Beverly does not apply to online transactions involving the sale of merchandise that the buyer chooses to pick up at a retail store. In *Michael Ambers v. Beverages & More, Inc.*, 236 Cal. App. 4th 508 (2015), plaintiff alleged that he was required to provide person-

ally identifying information in the course of an online purchase of alcohol, in violation of Song-Beverly. Song-Beverly prohibits a retailer from requiring the purchaser to provide personally identifiable information, such as address and telephone number, as a condition of a credit card sale if the information is not necessary to complete the sale. Plaintiff later picked up his purchase at a BevMo retail store, where he was required to show identification and the credit card used to make the online purchase.

Citing *Apple*, the appellate court noted that Song-Beverly predated, and thus does not refer to, online credit card transactions. The appellate court found that both the reasoning and the analysis in *Apple* applies "with equal force" to online credit card transactions where the merchandise is picked up in the retail store. Noting that title to the merchandise passed to plaintiff upon completion of the online transaction, the appellate court held that BevMo was entitled to require personal identifying information at the time of the transaction to verify that plaintiff was the authorized user of the credit card entered to pay for it. Although plaintiff argued that showing identification and the credit card at time of pickup was sufficient anti-fraud protection, the appellate court disagreed, because BevMo no longer held title to the goods at that point and would have no recourse had the transaction then proven to be fraudulent.

Another area of dispute is whether the timing of the merchant's request for personally identifiable information is relevant. The day after the BevMo opinion was filed, the Ninth Circuit certified a question to the California Supreme Court regarding interpretation of Song-

Beverly. In *Davis v. Devanlay Retail Group*, No. 13-15063 (May 5, 2015), the Ninth Circuit asked for clarification about whether the Act prohibits a retailer from requesting personally identifiable information if it is not objectively reasonable for the customer to interpret the request as a condition precedent to using the credit card (e.g., requesting the information after completion of the transaction). This question suggests that the issue may turn on customer perception.

Two weeks after the Ninth Circuit certified that question, the First District Court of Appeal weighed in on the issue of timing, holding that a retail store's practice of requesting a customer's email address after the credit card transaction was completed did not fall within the scope of Song-Beverly. In *Harrold v. Levi Strauss & Co.*, No. A142747 (1st Appellate District, Division Three, May 19, 2015), plaintiff asserted that she had been asked for her email address while her credit card transaction at a Levi Strauss store was being processed. In opposition to plaintiff's motion for class certification, Levi's presented evidence of its written policies that established that store cashiers were trained to wait until after both the merchandise and receipt are handed to the customer before inviting the customer to join the email marketing program. The appellate court disagreed with the plaintiff that the retailer was prohibited from asking for her email address once the credit card transaction is completed, as such a request "cannot reasonably be considered—by the customer or by anyone else—as a condition of acceptance of the credit card as a form of payment."

The appellate court further pointed out that nothing in Song-Beverly prohibits a merchant from obtaining personally identifiable information voluntarily provided by a customer who understands that providing it is not required to complete a credit card transaction. In affirming the denial of plaintiff's class certification motion, the appellate court noted that plaintiff failed to establish numerosity, the existence of an ascertainable class, or that her claim is typical, given that she identified no customer other than herself from whom email addresses were requested in nonconformity with company policy.

Courts have also clarified the scope of the statutory exemptions in the statute. In a pair of cases decided within eight weeks, two Courts of Appeal used the same reasoning to hold that a merchant's collection of a customer's birth date during the credit purchase of alcoholic beverages fell squarely within statutory exemptions. In both cases, the same plaintiff purchased an alcoholic

beverage using a credit card, and both merchants requested proof of plaintiff's birth date as a condition of sale and then entered it into the computerized cash register. Plaintiff alleged violation of Song-Beverly in separate complaints and both merchants demurred on the ground that recording purchaser birth dates falls within an exception to Song-Beverly.

Both Courts of Appeal agreed with the merchants, but cited different statutory exceptions. In *Lewis v. Jinon Corporation*, 232 Cal. App. 4th 1369 (2015), the Second Appellate District held that recording the customer's birth date, in part as a defense to a criminal or licensing action alleging sale to a minor, fell within the exemption in section 1747.08(c)(4) because it is a "special purpose incidental but related to the individual credit card transaction." In contrast, in *Lewis v. Safeway, Inc.*, 235 Cal. App. 4th 385 (2015), the First Appellate District cited the exception in section 1747.08(c)(3)(C) which exempts conduct otherwise prohibited when the retailer "is obligated to collect and record the personal identification information by federal or state law or regulation." The appellate court reasoned that because a business licensed to sell alcoholic beverages is statutorily obligated to both verify the purchaser's legal age and keep its records available for inspection by the Department of Alcoholic Beverage Control, the purchaser's birth date is a "fundamental component" of those records and thus the merchant was obligated under law to collect it.

The law regarding interpretation of Song-Beverly continues to evolve. For example, until the California Supreme Court responds in *Devanlay*, it is not clear whether the consumer perception test (as suggested by the Ninth Circuit's certified question) or the objective test set forth in Harrold will prevail with respect to timing of the request for personal identification information. Moreover, given the increasingly online marketplace, expect to see more decisions in the future—and possibly legislation—regarding the scope and applicability of Song-Beverly to online transactions.

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