

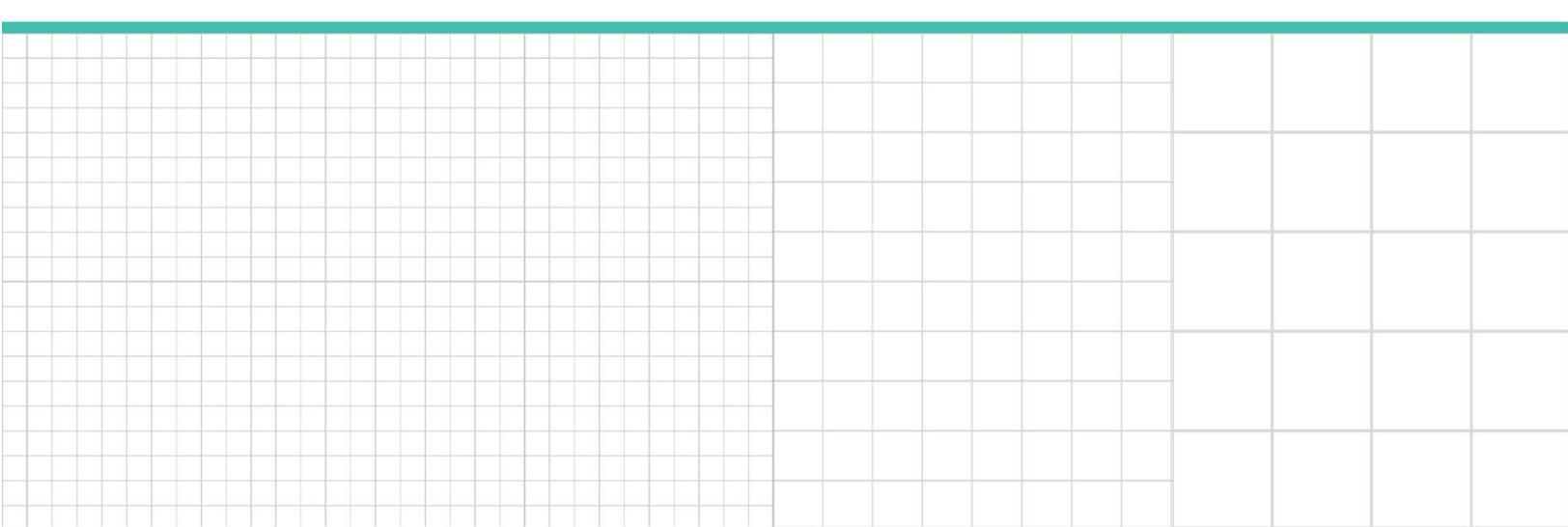


Professional Perspective

Song-Beverly Credit Card Act: Litigation Developments and Guidance for Retailers Collecting Customer Information

*John W. McGuinness and Allison C. Nelson
Manatt, Phelps & Phillips, LLP*

Reproduced with permission. Published March 2019. Copyright © 2019 The Bureau of National Affairs, Inc. 800.372.1033. For further use, please visit: <http://bna.com/copyright-permission-request/>



Song-Beverly Credit Card Act: Litigation Developments and Guidance for Retailers Collecting Customer Information

By [John W. McGuinness](#) and [Allison C. Nelson](#), of [Manatt, Phelps & Phillips, LLP](#)

A customer walks into a store and starts browsing through racks of clothing. A salesperson with a tablet or mobile phone approaches the customer and asks her for her name and address, which the customer gives. The salesperson then enters that information on the mobile device. The customer continues to shop, selects her item, proceeds to the cash register, pays with a credit card, and completes the transaction. Is this an unlawful collection of a consumer's personally identifiable information ("PII") under California's Song-Beverly Credit Card Act (the "Act")?

Alternatively, a customer approaches the point of sale, pays with a credit card, the receipt and merchandise are handed to the customer, and then the retail associate asks the customer for her telephone number and enters this information into the point of sale terminal. Does this subject the retailer to a lawsuit under California law?

Retailers who regularly engage in credit card transactions in California should be aware of collection practices that may increase the risk of litigation under the Song-Beverly Credit Card Act. Recent caselaw provides valuable guidance for retailers seeking to collect customer PII while minimizing the risk of litigation.

The Song-Beverly Credit Card Act

Retailers in California are likely already well aware of the Song-Beverly Credit Card Act, codified as [Cal. Civ. Code §1747.08](#), which generally prohibits businesses from requesting or requiring a cardholder to provide PII at the time of the transaction as a condition to accepting the credit card as payment in full or in part for goods or services, and then recording that information.

More than a decade ago, retailers experienced a wave of litigation brought by plaintiffs' attorneys construing the Act to prohibit any request for PII (including, address, telephone number and e-mail address) at the point of sale from customers paying by credit card in California. Plaintiffs' attorneys' positions were bolstered in 2011, when the California Supreme Court held that ZIP codes constitute PII, which resulted in a further round of lawsuits involving retailer requests for customers' ZIP codes at the point of sale before purchases were consummated. See *Pineda v. Williams-Sonoma Stores, Inc.*, [51 Cal. 4th 524](#), 530 (2011). While plaintiffs' lawyers have focused less on these sorts of cases in recent years, litigation risk remains, subjecting retailers to up to \$1,000 in civil penalties per violation of the Act.

In the following scenarios, we address various potential ways for retailers to collect PII from credit card paying customers, highlight where courts have weighed in on whether these practices violate the Act, and the likely degree of litigation risk associated with these practices.

Collecting PII After a Credit Card Transaction Has Been Completed

Because the Act was designed to promote consumer protection, a retailer's request for PII must be viewed from the customer's standpoint; the retailer's unannounced subjective intent is irrelevant. *Florez v. Linens 'N Things, Inc.*, [108 Cal. App. 4th 447](#), 451 (2003). Accordingly, what matters is "whether a consumer would **perceive** the store's 'request' for information as a 'condition' of the use of a credit card." *Id.* (emphasis in original). Therefore, one of the questions posed to California courts in recent years has been: could a consumer reasonably perceive a retailer's request for PII after a credit card transaction has **already been completed** as a condition of the use of the credit card?

In *Pineda*, the California Supreme Court held that the Act "prohibits businesses from requesting that cardholders provide 'personal identification information' **during** credit card transactions, and then recording that information." *Pineda*, 51 Cal. 4th at 527 (emphasis added). However, in a later case, the plaintiff argued that "[a] violation of section 1747.08 occurs [any time] a retailer requests and records [PII] from a customer who pays by credit card." *Harrold v. Levi Strauss & Co.*, [236 Cal. App. 4th 1259](#), 1264 (2015). While the *Harrold* court agreed with the plaintiff that "the prohibition applies at all times during and prior to the completion of a credit card transaction," it held that "there is no support for [plaintiff's] contention

that the prohibition continues beyond that point.” *Id.* at 1265. The court characterized the point at which a credit card transaction has concluded as “when the customer receives a receipt for the purchase, following acceptance of the credit card, and the merchandise has been delivered to the customer.” *Id.* The court held that at this point, when the transaction has been concluded, a request for PII “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.” *Id.*

Whether the transaction could be considered concluded at a point earlier than the customer receiving a receipt for the purchase following acceptance of the credit card is not as clear. In a recent unpublished case, the court considered this question where customers were asked if they would like to offer their ZIP code **after** swiping their credit or debit cards, signing on the card terminal, and pressing “done,” but **before** receiving their receipt. *Dremak v. Urban Outfitters, Inc.*, No. D071308, [2018 BL 100334](#), at *2 (Cal. Ct. App. 2018). The Court of Appeal upheld the trial court's finding that “the plaintiffs failed to meet their burden of proof to establish that the defendants violated the [Act],” where the trial court had held that “**no consumer could reasonably perceive** that a request for a ZIP code that was made after the card had already been accepted was a condition for acceptance of the card.” *Id.* at *7 (emphasis in original).

However, in another unreported case, a federal court came to the opposite conclusion. That case involved basically the same facts—the request occurred after the plaintiff indicated that he would be paying with a credit card, handed his card to the sales associate, obtained approval from the credit card processor, and signed for the purchase, but before his receipt was printed and the purchased merchandise was handed to him by the sales associate. *Juhline v. Ben Bridge Jeweler, Inc.*, No. 11CV2906-WQH-NLS, [2012 BL 235884](#), at *6 (S.D. Cal., Sept. 11, 2012). The court held that the defendant failed to show that, viewed from the customer's standpoint, “no reasonable customer could perceive the request for [personal identification information] as a condition for the credit card transaction,” and ultimately that the request for PII was not “in conjunction with the use of a credit card.” *Id.* at *6 (quoting *Florez*, 108 Cal. App. 4th at 451 and *Gass*, 279 F.R.D. at 572). Accordingly, the court denied the defendant's motion for summary judgment. *Id.*

While *Dremak* and *Juhline* are both unreported cases, they indicate an uncertainty regarding whether a transaction is considered concluded prior to the customer receiving a receipt and the merchandise, following the acceptance of the credit card. The Ninth Circuit requested that the California Supreme Court clarify the issue of whether the Act prohibits a retailer from requesting a customer's PII at the point of sale, after the customer has paid with a credit card and the cashier has returned the credit card to the customer, if it would not be objectively reasonable for the customer to interpret the request to mean that providing such information is a condition to payment by credit card. See *Davis v. Devanlay Retail Grp., Inc.*, [785 F.3d 359](#), 360 (9th Cir. 2015). Unfortunately, the California Supreme Court declined this request. *George v. Guitar Ctr., Inc.*, No. B275956, [2018 BL 517](#), at *9, n.9 (Cal. Ct. App. 2018) (summarizing the request by the Ninth Circuit in *Davis* and noting the denial by the California Supreme Court to answer the question).

Under the current case law, a retailer's collection of PII from customers at the point of sale, but after the transaction has been completed (*i.e.*, after the receipt and merchandise have been delivered to the customer, following the acceptance of the credit card), in accordance with clear written company procedure, exposes a retailer to minimal litigation risk under the Act. Litigation risk increases, however, where a retailer opts to collect PII prior to providing the customer with the credit card receipt and merchandise.

Collecting PII Before a Credit Card Transaction Has Been Completed

Whether a retailer may request and then record PII from customers **before** a credit card transaction has been completed depends on whether it is clear to the customer that offering this information is **voluntary** and **not** a condition to their use of credit card as payment for their purchase.

In *Florez*, the plaintiff claimed she brought items to the cashier for purchase, the cashier asked the plaintiff for her telephone number and the plaintiff offered it, and the cashier then typed the number into the register before the plaintiff produced her credit card and paid for her purchases. *Florez*, [108 Cal. App. 4th 447](#), at 449. The court held that the plaintiff's allegations were sufficient to state a cause of action for violation of the Act because the customer explicitly alleged she believed that offering her PII was a condition of completing the transaction. *Id.* at 449, 453. However, the court also noted “that nothing prevents a retailer from soliciting a consumer's address and telephone number for a store's mailing list, if that information is provided voluntarily.” *Id.* at 451. See also *Gass v. Best Buy Co., Inc.*, [279 F.R.D. 561](#) (C.D. Cal. 2012). In *Gass*, the cashier first asked the customer if he wanted to enroll in a rewards program, the

customer responded in the affirmative, and only then did the cashier request PII from the customer. *Id.* at 570. The court held that in that situation “no reasonable customer could perceive this request for PII as a condition for completing the credit card transaction” because “[a] reasonable consumer would understand that a request for PII made in this manner is not a condition for the credit card transaction, but rather is a condition for joining the [rewards program].” *Id.* at 570-71. See also *id.* at 572 (“It cannot be the case that even where a cashier falls over himself to inform the customer that his provision of PII is optional and not required to complete the credit card transaction, that a request for PII still violates the Act.”).

However, in another case involving a retailer's request for PII in relation to its rewards program, the court denied the defendant's motion to dismiss the Act claim as the plaintiff alleged the cashier made no reference whatsoever to the retailer's rewards program when requesting PII. *Schwartz v. Destination Maternity Corp.*, No. CV141477GHKFFMX, [2014 BL 515545](#), at *3 (C.D. Cal., Aug. 5, 2014). The court reasoned that “[a]bsent any such reference, a customer who had previously signed up for a mailing list would not necessarily suspect that the request for her [PII] had anything to do with the mailing list,” but rather was a necessary step in completing the credit card transaction. *Id.*

Florez, *Gass*, and *Schwartz* seem to support a request for PII from customers during a credit card transaction, but only if the retailers' associates are **very clear** about it being voluntary and **not** a condition of payment with their credit card (for instance, the request was made for purposes of enrollment or to look up membership in a rewards program). It should be noted that requesting a customer's PII for the incidental purpose of enrolling a customer in a rewards program might also be an exception to liability under the Act and, therefore, not a violation. In any event, there is degree of risk associated with this practice that warrants extreme caution.

Collecting PII from Customers at a Location Separate from the Point of Sale

This scenario contemplates the collection of PII by retailers from customers at a location on the sales floor and away from the point of sale, likely using a mobile device such as a tablet or mobile phone. While there is scant case law addressing this specific scenario, it appears reasonable to conclude that such a practice would not violate the Act.

As noted above, case law makes clear that the Act only applies to the collection of PII **during** a credit card transaction, and the test for whether there is a violation is whether a consumer would perceive the retailer's request as a condition for the use of a credit card for payment. Accordingly, it seems reasonable to conclude that a court would be unlikely to find that a retailer violated the Act where its associates request customer PII away from the point of sale and such a request has no connection to a purchase transaction.

Although no court has directly addressed this particular issue, a federal court did discuss in *dicta* a similar, hypothetical use case with approval. See *Gass*, 279 F.R.D. at 570-71. Specifically, the court considered a situation in which a salesperson on the floor of a retail store circulates among customers and asks them if they wish to provide their street address to join the store's mailing list. *Id.* at 571. The court characterized this situation as conduct that does **not** violate the Act, noting “[t]he *Florez* court specifically held that this is not a violation, and that businesses are permitted to request PII for the purpose of maintaining a mailing list. *Id.* (citing *Florez*, 108 Cal. App. 4th at 451).

Why this Matters

The number of lawsuits under the Act has narrowed in the years since the height of litigation a decade ago, mostly because defendant retailers successfully narrowed the interpretation of the Act closer to that which was intended by the legislature, and retailers prudently modified their PII collection practices at the point of sale. However, class actions under the Act have been—and continue to be—filed against retailers. This should not come as a surprise given the number of credit card transactions processed each day by retailers in California, the Act's \$1,000 per violation civil penalty, the absence of any explicit cap on aggregate damages, and retailers' continued desire to collect customer data. Retailers in California that accept credit cards and collect PII from customers should seek to minimize litigation risk under the Act by

collecting PII from customers at the point of sale, but only after the receipt and merchandise have been delivered to the customer, following the acceptance of the credit card, and this practice should be outlined clearly in a written company policy. Retailers could also consider collecting PII from customers away from the point of sale, where a compelling argument could be made under current law that the collection of customer information is wholly unrelated to a credit card transaction. Lastly, retailers should continue to exercise caution when requesting PII before a credit card transaction has been completed, and be *very clear* about it being voluntary and *not* a condition of payment with their credit card.

Author Information:

[John W. McGuinness](#) is a partner with Manatt, Phelps & Phillips, LLP in the firm's litigation, financial services, and class action defense groups. Working out of both Los Angeles and Washington, DC, he regularly represents clients in consumer class and individual actions (including consumer protection, mortgage/financial services and data security/privacy), and has deep experience at all stages of complex commercial disputes, including arbitrations, mediations, court and jury trials. For clients in the mortgage, financial services, banking, technology and retail industries, John handles litigations, regulatory proceedings and examinations related to both state and federal consumer protection statutes. These statutes include the Song-Beverly Credit Card Act, Telephone Consumer Protection Act of 1991 (TCPA), Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA) and Truth in Lending Act.

[Allison Nelson](#) is a litigation associate with Manatt, Phelps & Phillips, LLP in the firm's Los Angeles office.