

Date of Hearing: May 2, 2011

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Mike Eng, Chair

AB 1219 (Perea) – As Amended: April 25, 2011

SUBJECT: Credit cards: personal information.

SUMMARY: Provides clarification for those instances when an entity that accepts credit cards may not request certain types of personal information to complete the transaction. Specifically, this bill:

- 1) Specifies that if a cardholder physically presents a credit card to an employee, authorized agent, or representative of a person, firm, partnership, association, or corporation as payment, and the card functions properly, then the entity accepting the card may not request, nor record certain types of personal information from the consumer.

EXISTING LAW

- 1) Provides that under the Song-Beverly Credit Card Act of 1971 (Credit Card Act) (Civil Code Section 1747 *et seq*), no person, firm, partnership, association or corporation that accepts credit cards shall do any of the following:
 - a) Require, or request, as condition of accepting the credit card, the cardholder to write any personal identification information upon the credit card transaction form or other document. [Section 1747.08a(1)]
 - b) Require, or request, as a condition of accepting the credit card, the cardholder to provide personal identification information which the entity accepting the card would then write or record upon the credit transaction form or otherwise. [Section 1747.08a(2)]
 - c) Utilize in any credit card transaction, a credit card form that contains preprinted spaces for personal identification information of the cardholder. [Section 1747.08a(3)]
- 2) Specifies that the prohibitions in a, b and c do not apply under the following circumstances:
 - a) If the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence. [Section 1747.08(1)]
 - b) Cash advance transactions. [Section 1747.08(2)]
 - c) If the entity requesting the information is contractually obligated to provide the personal information in order to complete the transaction, or is obligated to collect and record the personal identification information by federal law or regulation. [Section 1747.08(3)]
 - d) 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. [Section 1747.08(4)]

- 3) Clarifies that the prohibitions on collecting personal identification information relating to the credit card transaction does not prohibit a requirement that the cardholder provide reasonable forms of positive identification, including a driver's license or California State identification card, or another form of identification. [Section 1747.08(4)d]
- 4) Specifies that if the cardholder pays for the transaction with a credit card number and does not make the credit card available upon request to verify the number, the cardholder's driver's license number or identification card number may be recorded on the credit card transaction form. [1747.08(4)d].
- 5) Defines "personal identification information" (PII) 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. [Section 1747.08(3)b]

FISCAL EFFECT: None

COMMENTS:

The need for this bill arises from the *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524 (Cal. 2011) case in which the California Supreme Court ruled that a consumer's ZIP code is personal identification information under the Credit Card Act, and as such, falls under the restricted uses contained within the statute. Prior to addressing how this bill would address this issue, it is important to provide background on the case.

Pineda v. Williams-Sonoma Stores

The plaintiff sued retailer Williams-Sonoma Stores, Inc., claiming that the retailer violated the Credit Card Act during a transaction in which a cashier at the retailer asked the plaintiff for her ZIP code. The plaintiff complied with the request, believing that her ZIP code was necessary for completing the transaction. Subsequently, the defendant used computer software to conduct reverse searches and cross checks against databases that contain millions of names, email address, telephone numbers, and street addresses. Using the software, the defendant was able to match the name and ZIP code of the plaintiff to match with her address which was then retained in the defendant's own database used for marketing purpose. Additionally, such information was also sold by the defendant to other businesses. The plaintiff filed a class action alleging that the retailer had violated the Credit Card Act.

The trial court and Court of Appeal agreed with the defendant that ZIP code does not constitute "personal identification information." The California Supreme Court agreed to take up the issue. The court concluded that under the Credit Card Act, "personal identification information" does include ZIP. The court concluded that because "address" is a sum of its parts (name, street, city, ZIP) in that ZIP "is readily understood to be part of an address; when one addresses a letter to another person, a ZIP code is always included. The question then is whether the Legislature...intended to include components of the address. The answer must be yes." Additionally, the court also found that the broad language used in the statute demonstrated that the Legislature intended the statute to be interpreted broadly.

Subsequent to this decision, hundreds of lawsuits have been filed against retailers for violating the Credit Card Act in collecting ZIP codes for a variety of purposes.

Arguments in support.

Several groups, including the California Retailers Association write in support of the bill:

Since the Pineda decision was handed down, over 150 class action suits have been filed against retailers in California. Many of those retailers were collecting zip codes for legitimate reasons that should be allowable under the law. For example, some retailers have been sued simply for collecting zip codes when the customer placed an order online and the zip code was needed for delivery. Others have been sued when they were only collecting the zip code in order to reduce the likelihood of fraud or identity theft.

The purpose of AB 1219 is to continue to limit the collection of PII while still allowing and recognizing the legitimate business need for a retailer to use PII to appropriately process and complete all components of customer transaction. AB 1219 will also help protect against criminal activity, such as identity theft, which is currently the number one source of consumer complaints to the Federal Trade Commission. AB 1219 will help address the potential for identity theft in situations where the person or functioning card is not present.

Arguments in opposition.

The Consumer Attorneys of California write in opposition:

The retailers do not need personal identifying information—instead they use it for marketing or to sell to marketers, a very profitable endeavor for the retailer, but one that puts the consumer at risk. Retailers use customized computer software to perform reverse searches from databases that contain millions of names, e-mail addresses, telephone numbers, and street addresses. The information is then used to create customer records for business purposes, like mailing lists for in-house marketing efforts, or it is sold to direct-mailing specialists. The contents of these records can be viewed, printed, and sold by the store. In a nutshell, they make money off of your personal information.

- *Pineda v. Williams Sonoma was correctly decided and protects the intent of the statute and the privacy interests of consumers.*

Pineda, a unanimous California Supreme Court decision, held that Williams Sonoma had violated the Beverly Song Credit Card Act when it asked customers for their zip codes during a credit card purchase. This decision clarified the law, as the legislative history was perfectly clear that such identifying information was included in the prohibition of requesting personal identifying information.

The retailers now claim that they will be subject to extreme penalties under the law as they had continued to violate the law until the decision was issued. The bill's sponsors want AB 1219 to include language that the decision would be prospective only.

First, the allegation that the sky will fall if the decision is not applied prospectively only is erroneous. The plain language in the statute clearly limits penalty assessment and gives the judge the discretion on the amount of civil penalties to be awarded to the cardholder for each violation of the statute. Section (e) of the statute states that “any person who violates this

section shall be subject to a civil penalty not to exceed \$250 for the first violation and \$1000 for each subsequent violation.” In other words, the judge has complete discretion on how much, the civil penalty should be for violations. Certainly a judge would consider the retailer’s claim that it was relying on a lower court decision when it determines how much, if any, assessment should apply.

Second, CAOC has always opposed, and will continue to oppose, any effort to affect pending litigation. It is simply against public policy to legislatively affect a consumer’s existing legal right in a manner that retroactively guts a claim. We appreciate the retailer’s frankness that this is their main concern, and have met with them several times. However, on this issue, there is no compromise for CAOC.

- *CAOC must oppose AB 1219, as amended on April 25, 2011, unless it is amended.*

The recently amended language is an attempt to clarify that online transactions are not covered under the bill. However, it is too broad. We agree that in some instances (for example fraud prevention or shipping), the statute doesn’t apply. However, this language is not so limited.

For these reasons, CAOC must oppose AB 1219.

Privacy Rights Clearinghouse also writes in opposition to the bill:

The California Legislature recognized the dangers associated with collecting and maintaining consumers’ personal identification information by enacting an amendment to the Song Beverly Credit Card Act in 1990 to protect consumers’ privacy rights. The Pineda decision clearly re-affirmed the consumer privacy protections of the Song Beverly Credit Card Act.

With the rapid advances in technology in recent years, many retailers have begun collecting customer zip codes during credit card purchase transactions in order to match them to customer names and thereby identify their customers and obtain their home addresses. Using customers’ zip codes is an effective subterfuge to obtain their home addresses because consumers are less likely to object to requests for their zip code since they believe it is being used to verify their credit cards. Consumers have become accustomed to this practice at gas stations, where zip codes are required by credit card companies during "pay at the pump" transactions.

Requesting zip codes from customers under the false pretense that zip codes are required to complete credit card transactions, and then utilizing the zip codes, along with the customers’ names obtained from their credit cards, to obtain the customers’ home addresses, clearly defeats the express purpose of the Song Beverly Credit Card Act.

The rights of consumers whose privacy has been violated must be respected. We urge you to honor the privacy rights of consumers, and allow courts the discretion to determine on case by case basis what remedies, if any, are appropriate for violations of the Song Beverly Credit Card Act.

Discussion.

In the *Pineda* case, the retailer was collecting ZIP codes for marketing purposes and potentially for sale to other businesses. However, the court did not address uses of ZIP codes for what could be described as more legitimate purposes. Specifically, ZIP codes are also used for fraud prevention purposes, or at a basic level, as part of the shipping address for an online internet

transaction. The author of this bill is concerned that the court's decision could be interpreted to disallow legitimate uses of ZIP codes that may actually benefit consumers.

Gas stations have commonly required the input of a zip code when the customer uses a credit card to purchase gas as a form of fraud detection. This process originally was implemented as gas stations with high incidences of fraudulent transactions involving stolen cards, but has migrated to include almost all gas stations. While the protection of personal identification information has been a paramount concern of the California Legislature for many years, so has establishing those parameters in which information is necessary to protect the consumer engaged in various electronic transactions.

Other than fraud prevention, another legitimate use for ZIP code is in an online retail transaction in which the retailer needs the address, including ZIP code of the consumer in order to ship the item. Many retailers have expressed concern, and a several lawsuits attest, that the necessity to require an address for shipping is being used as a cause of action in civil litigation.

In order to clarify these issues, this bill provides that the restrictions on collecting personal information within the Credit Card Act only applies to transaction in which the cardholder physically presents the card and it has a functioning magnetic strip or other electronically readable device. Thus far, various interest groups have conducted several meetings to arrive at a solution to this problem that would allow reasonable usage of a ZIP code under specific circumstances.

The bill under consideration is a first attempt to reach a compromise on this issue that is palatable to all parties as the current language in the bill may be too broad to retain essential consumer protections but also allow for legitimate use of ZIP codes. Currently, opponents of the bill find that the language is too broad and would allow use of the use of personal information in circumstances that are not within the intent of the Credit Card Act.

The author of the bill acknowledges that additional clarification of the language will be necessary. Should an appropriate resolution not occur in the future the committee may wish to consider calling this bill back for further review. This bill is double referred to Judiciary.

REGISTERED SUPPORT / OPPOSITION:

Support

California Business Properties Association
California Chamber of Commerce
California Grocers Association
California Retailers Association
Civil Justice Association of California
First Data
International Council of Shopping Centers

Opposition

Consumer Attorneys of California
Privacy Rights Clearinghouse