



Burnham Brown represents a wide variety of clients in the retail and hospitality industry. Through an interdisciplinary approach that combines expertise and resources from multiple legal specialties, the firm is well equipped to service client needs. This group regularly provides business counseling and litigation services to clients in an efficient and cost effective manner.

Our firm has a long history of providing skilled and knowledgeable advocates in civil litigation involving a wide variety of commercial and business issues. Centrally located in Oakland, Burnham Brown is well positioned to serve clients throughout Northern California.

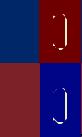
Derek Lim is a member of Burnham Brown's Retail Industry Group. His practice focuses on commercial litigation in both federal and state courts. Mr. Lim counsels and represents various entities, including publicly traded companies, small businesses, contractors and transportation companies. He can be reached at 510.835.6718 or dlim@burnhambrown.com.

Tips For Avoiding The Pitfalls Of The Song-Beverly Credit Card Act

As we all know, credit cards are a widely accepted form of payment in the retail industry. Retailers' acceptance of credit cards, however, can come with potential pitfalls. Recently, retailers have faced class action litigation for seeking their customers' personal information including, but not limited to, addresses and telephone numbers. Although most retailers use the information for internal marketing and mailing lists, some retailers sell the information to outside direct-mailing services. The Song Beverly Credit Card Act (California Civil Code section 1747 *et seq.*) was designed to protect consumer privacy. The Act places limits on retailers' abilities to request or record personal information when dealing with credit card transactions.

Civil Code § 1747.08 (a) provides in pertinent part that retailers shall NOT do any of the following:

- (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.



The foregoing, however, does not apply in all instances. Civil Code § 1747.08(c), outlines instances when retailers are permitted to ask for personal identification information:

- (1) The credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence.
- (2) Cash advance transactions.
- (3) The retailer is contractually obligated to provide personal identification information in order to complete the credit card transaction or is obligated to collect and record the personal identification information by federal law or regulation.
- (4) The 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

Violators of the Song-Beverly Credit Card Act are subject to civil penalties not to exceed two hundred fifty dollars (\$250) for the first violation and one thousand dollars (\$1,000) for each subsequent violation. However, a penalty will not be assessed if the defendant can show by a preponderance of the evidence that the violation was unintentional, resulted from a bona fide error and there were procedures designed to avoid the error. Civil Code §1747.08(e)

Currently, there are very few published decisions in this area. The California Court of Appeal, however, has taken a rather liberal view in analyzing these matters. In Florez v. Linens'N Things, Inc., 108 Cal. App. 4th 447 (2003), a customer brought items to a cashier for purchase. During the checkout process, she was asked for her telephone number. The customer provided the information on the belief that it was required for the transaction. The cashier recorded the information into the electronic cash register. Subsequently, the customer paid for the merchandise with a credit card. In determining that Plaintiff's cause of action survived demurrer, the Court held a request for personal identification information in conjunction with the use of a credit card is prohibited. The Court looked to the legislative intent underlying the statute, which was to protect the personal privacy of consumers and to prevent retailers from requesting personal identification information and then matching it with the consumer's credit card. The Court further reasoned that a 1991 amendment to the statute inserting the term "request" was designed to prevent retailers from making an end-run around the law claiming the data was provided voluntarily. Id. at 453. As such, the Court did not find persuasive the retailer's argument that the request was voluntary, and made before the method of payment was known.

The Court, however, provided some insight into ways to avoid the pitfalls of the Song-Beverly Credit Card Act. A retailer can delay a request for personal identification information until the form of payment is known. If the purchase is made with cash, personal information may be recorded. Alternatively, retailers can delete the personal information as soon as it is learned that the customer will pay via credit card. Id. at 451-452. Additional steps that retailers may want to consider are written policies and procedures that comply with the aforementioned requirements of Civil Code §1747. Furthermore, if a retailer has written policies and procedures, it may want to consider training programs to educate their new and continuing employees on the applicable policies and procedures and to confirm they are being implemented.