



November 10, 2011

CALIFORNIA CREDIT CARD LAW AMENDED TO ALLOW COLLECTION OF ZIP CODE INFORMATION

Effective October 9, 2011, the California Song-Beverly Credit Card Act has been amended to allow the collection of ZIP code information when the information is being requested in connection with a transaction at a retail motor fuel dispenser or retail motor fuel payment island, and the information is used solely to prevent fraud, theft or identity theft.

This is an update to our March 18, 2011 *Alert*, in which we explained that the Supreme Court of California held that a cardholder's ZIP code, without more, constitutes "personal identification information" within the meaning of Section 1747.08 of the Song-Beverly Act. *Pineda v. Williams-Sonoma Stores, Inc.*, 246 P.3d 612 (Cal. Feb. 10, 2011). The court found that collecting and recording this "personal identification information" was in violation of the Song-Beverly Act. This new exemption, however, would not have helped Williams-Sonoma, as it requested the cardholder's zip code in connection with an in-store, retail transaction.

California retailers not covered by the new exemption should continue to review their policies and procedures with respect to requesting ZIP codes in connection with credit card transactions. Additionally, retailers outside of California also may wish to examine state laws that may be interpreted similarly. □

✧ *Michael Tomkies and Kathleen Caress*

CAN VOICE MAIL MESSAGES SURVIVE FDCPA CHALLENGES?

We recently reported that the United States Court of Appeals for the Eleventh Circuit has held that a debt collector's voice mail messages that followed the ACA International script structure (allowing an unintended recipient to disconnect) could satisfy the "meaningful disclosure" requirement under Section 1692d(6) of the federal Fair Debt Collection Practices Act (FDCPA) (the only challenge presented in that case), but warned that such messages may still be subject to challenge to the extent that they are third party contacts. See *Beeders v. Gulf Coast Collection Bureau*, No. 11-

10560, 2011 WL 2555829, at *1 (11th Cir. June 28, 2011) (not selected for publication in West's Federal Reporter), as reported in our Alert of July 14, 2011. The United States District Court for the Eastern District of California was presented with such a challenge and ruled that a similar voice message violated the FDCPA and the California Rosenthal Fair Debt Collection Practices Act. *Branco v. Credit Collection Servs., Inc.*, No. CIV.S-10-1242 FCD/EFB, 2011 WL 3684503 (E.D. Cal. Aug. 3, 2011). The message in *Branco* stated:

This is for Travis Branco. If the intended party cannot be reached as this number, please call 800-998-5000, and we will cease further attempts to this number. If you are not the intended party, please hang up at this time. This message contains private information and should not be played in a manner where it can be heard by others . . . (music) . . . This call is from CCS, Credit Collection Services. This is an attempt to collect a debt and any information obtained will be used for that purpose. For your privacy protection, please visit our secure website at www.warningnotice.com to access your personal account information. Your file number is 05036201574. Thank you.

The message was left five times on the debtor's parents' answering machine at the number provided by the debtor to the creditor, which the creditor provided to the debt collector. The outgoing message on the answering machine invited callers to leave messages for the parents and the debtor, by giving their first names. However, the debtor was not living with his parents when the messages were left. The debtor's mother heard the messages left by the collector and told the debtor about the messages, but the debtor never returned any calls, nor did anyone contact the collector to request it to cease calling that number.

The debtor moved for summary judgment on grounds that the collector violated (i) Section 1692b(2) of the FDCPA by disclosing the existence of a debt while seeking location information and (ii) Section 1692c(b) by leaving messages that were overheard by a third party. The court denied the debtor's first claim and granted summary judgment to the collector as no evidence was produced demonstrating that the collector was seeking location information. As

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to the second claim, the court joined other courts in finding the voice mail messages were "communications" for FDCPA purposes and granted the debtor's motion for partial summary judgment. *See, e.g., Berg v. Merchants Assoc. Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1338-39 (S.D. Fla. 2008) (warning insufficient to avoid liability); *Zorman v. J.C. Christensen & Assocs.*, Civ. No. 10-3086, 2011 WL 1630935, at *5 (D. Minn. Apr. 29, 2011) (intention immaterial to strict liability). The court rejected the collector's assertions that the debtor had assumed any risk that third parties would overhear or contributed in any way to the collector's violation by failing to return any calls or ask that calls end. The court was unpersuaded by the language in the voice mail asking parties to refrain from listening, particularly where the listener is listening to a voice message left in his or her own home.

The court further rejected the debtor's other claims regarding the calls made based on frequency and harassment, observing that 14 calls over four months (where calls were placed approximately once every seven days) is neither too frequent nor harassing.

Insofar as the debtor's state law claims paralleled the federal claims, the court reached similar conclusions. □

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