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Collection of Email Addresses in Credit Card Transactions May Be Prohibited by California Law

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The U.S. District Court for the Eastern District of California has held that the prohibition against requesting or requiring personal identification information in connection with credit card transactions contained in California's Song-Beverly Credit Card Act extends to consumer email addresses. The ruling is part of the Court's denial of a motion filed by Nordstrom, Inc. to dismiss a complaint filed by Robert Capp on behalf of a purported class. Mr. Capp alleges that Nordstrom violated the Song-Beverly Act by requesting his email address at the time of purchase and subsequently using it to send Capp unsolicited marketing materials. The Court concluded that the California Supreme Court would likely hold that email addresses constitute "personal identification information" under the Song-Beverly Act. Therefore, under the Court's analysis, brick-and-mortar retailers like Nordstrom are prohibited from collecting email addresses at the point of sale while processing a credit card purchase.

Nordstrom made two primary arguments in favor of its motion to dismiss. First, Nordstrom argued that email addresses do not fit within the definition of "personal identification information" under the Song-Beverly Act. Second, Nordstrom argued that to the extent that email addresses are personal identification information, the Song-Beverly Act is preempted by the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"). The Court disagreed on both counts.

The Song-Beverly Act defines "personal identification information" 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." The issue of what type of information is personal identification information was litigated in 2011, when the California Supreme Court, in Pineda v. Williams-Sonoma, held that the definition should include cardholder zip codes, thereby making it illegal for retailers to request zip codes from customers paying by credit card. Nordstrom argued that email addresses are distinguishable from the zip codes in Pineda because email addresses are chosen arbitrarily by the owner, can be anonymous and can be changed easily. Nordstrom also argued that email addresses "cannot be used to call consumers during dinnertime or to show up on their doorstep in the middle of the night … in the way that a home address or phone number can be abused." The Court reasoned, however, that emails permit direct contact with individuals and therefore implicate the privacy interests of cardholders. In addition, the Court referenced exhibits provided by the plaintiff showing that email addresses can be used to gather additional personal information about the consumer which retailers would otherwise be prohibited from collecting directly, expressing concern that excluding email addresses from the definition of personal identification information could permit retailers to circumvent the law's restrictions.

Nordstrom also argued that since the passage of the Song-Beverly Act predates the application of email and e-receipts to consumer transactions, the legislature could not have intended to include email addresses as "personal identification information." In support of this argument, Nordstrom cited the California Supreme Court's decision in Apple, Inc. v. Superior Court, in which the Supreme Court held that the Song-Beverly Act does not apply to online purchases of downloadable music. However, the Court rejected this argument as Nordstrom misreading the Supreme Court's holding in Apple, and clarified that the basis for the Supreme Court's ruling was the unavailability of safeguards against fraud in online transactions, not the unforeseeable nature of online transaction technology.

Ultimately, the Court reasoned that the statute's overriding purpose "to protect the personal privacy of consumers who pay for transactions with credit cards" and the intention to provide robust consumer protections demonstrated by the statute's legislative history support the application of the Song-Beverly Act's prohibitions to Nordstrom's alleged conduct.

The Court also disagreed with Nordstrom's argument that the CAN-SPAM Act preempts the application of the Song-Beverly Act to email addresses. The CAN-SPAM Act contains an express preemption provision which provides that the Act "supersedes any statute, regulation, or rule of a State … that expressly regulates the use of electronic email to send commercial messages." The Court reasoned, however, that

the Song-Beverly Act only regulates the request for email addresses, rather than the use of email addresses or the content of emails, and that it is possible for retailers to comply with the requirements of both the CAN-SPAM Act and the Song-Beverly Act. The Court found that the application of the Song-Beverly Act to email addresses, rather than acting as an obstacle to the CAN-SPAM Act, furthers the goals of the CAN-SPAM Act to reduce the volume of unsolicited, unwanted email.

Depending on how Capp v. Nordstrom proceeds through trial and appeal, the Court's decision to include email addresses in the definition of personal identification information could affect a substantial number of retailers with brick-and-mortar locations. Even if email addresses are finally determined to be included within the definition of "personal identification information," the Song-Beverly Act includes a number of important exceptions. Under the Apple decision, the Song-Beverly Act does not apply to online transactions, where fraud prevention mechanisms are not available. In addition, the Act's prohibitions do not apply:

- if a business requires a purchaser to provide reasonable forms of positive identification so long as the personal identification information is not recorded;
- if the consumer is using a credit card to secure payment in the event of default, loss, damage, or other similar occurrence;
- to cash advance transactions;
- if a business is obligated under contract or federal law or regulation to provide, collect or record personal identification information in order to complete the credit card transaction; or
- if the personal identification information is required for a special purpose incidental but related to the individual credit card transaction, such as for shipping, delivery, servicing, or installation of the purchased product or service.

Nordstrom has argued that collecting email addresses to send the consumer an electronic receipt constitutes collection for an incidental but related purpose, as permitted under the Song-Beverly Act, but the Court determined that this issue could not be resolved on a motion to dismiss, since the Court will need to take into account the surrounding facts and circumstances.

It is likely that the Court's denial of Nordstrom's motion to dismiss will trigger a number of similar suits. In anticipation of further developments, offline retailers should review their processes for completing customer credit card transactions, especially as they pertain to requesting or obtaining information from customers. Going forward, if a business would like to continue the practice of requesting and recording email addresses, that business should ensure that those email collection practices either fall within one of the Act's exceptions or are separated from processing the credit card transaction. For example, the Court specifically noted that it would be permissible to request a customer's email address after that customer has received his or her written receipt.

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