A Big Year Ahead For The Song-Beverly Credit Card Act

Law360, New York (March 24, 2014, 11:52 AM ET) -- For those seeking clarity in complying with — or litigating — California’s Song-Beverly Credit Card Act, the year 2013 began with a court case that promised to settle whether California’s restrictions on gathering personal information during the course of credit card transactions extended to online purchases. The year 2014, however, has begun with a vote in the California State Senate that could lead to a significant reversal in what had, until recently, appeared to be the emerging status quo. As a result, the upcoming year will likely be an eventful one for Song-Beverly, and online retailers should be monitoring these developments closely, as they could well mean significant changes in their data collection practices and policies.

California Senate Bill 383

Originally passed in 1971, long before the advent of online credit card transactions, California’s Song-Beverly Credit Card Act prohibits merchants from collecting personal identification information as a condition of completing a credit card transaction. On Jan. 30, 2014, the California State Senate passed Senate Bill 383 which amended the Song-Beverly Credit Card Act by making it applicable to online transactions for downloadable goods, such as music, videos, or e-books.

The bill would permit online retailers to collect PII such as ZIP codes and street addresses from customers purchasing downloadable content only if the following three conditions are met: (1) the information collected is used only for the purpose of detecting and preventing credit card fraud, (2) the information is destroyed after it is no longer needed for this purpose, and (3) the information is not aggregated or shared with third-parties, unless required by law.

Additional personal information beyond what is necessary for fraud prevention is permitted as long as the customer (1) is informed of how such information shall be used, (2) freely chooses to provide such information, and (3) has the opportunity to opt out of providing such information before the online transaction is complete.

The bill is now headed to the California Assembly, where it faces an uncertain fate given Republican opposition to the bill. Whether or not the assembly decides that SB 383 is the appropriate vehicle for revising and updating Song-Beverly, the issue of reform has clearly been on the Assembly’s mind.

On Dec. 12, 2013, there was a joint hearing of the assembly’s Judiciary Committee, Business, Professions and Consumer Protection Committee, and Select Committee on Privacy. The hearing was entitled “Balancing Privacy and Opportunity in the Internet Age,” and one topic of discussion was reform of Song-Beverly.
The Judicial Background

All of this activity in the California State Legislature comes in response to the California Supreme Court’s decision last year in Apple v. Superior Court (“Krescent”). After several years of class action litigation testing the applicability of Song-Beverly to online transactions, the Krescent court held in February 2013 that Song-Beverly does not apply to online transactions for the sale of digital downloads.

The 4-3 majority reasoned that the statutory scheme of the statute makes clear that the Legislature did not intend Song-Beverly to deprive retailers of the ability to prevent fraudulent transactions. Extending Song-Beverly to online transactions for digital downloads would, however, have precisely this effect, the majority maintained, since online retailers do not have the same means of verifying a cardholder’s identity (such as asking to see a purchaser’s driver license) as do brick-and-mortar retailers. Therefore, the court concluded, Song-Beverly does not apply to such transactions.

While the Krescent decision itself was narrowly limited to online transactions for electronically downloadable products, the rationale for the holding was soon applied by numerous courts throughout 2013 to online transactions of physical goods. This extension of Krescent was first made by the U.S. District Court for the Central District of California in Ambers v. Buy.com. California Superior Courts followed suit shortly thereafter in at least three different decisions: Salmonson v. Apple, Krescent v. StubHub, and Luko v. Ticketmaster. All of these cases are currently on appeal.

While some courts have actively been shielding online transactions from the reach of Song-Beverly, other courts have been extending the scope of what kinds of information constitutes PII under Song-Beverly. This trend began with the California Supreme Court case of Pineda v. Williams-Sonoma Stores Inc. in 2011, which found that ZIP codes were PII whose collection was prohibited by Song-Beverly. In October 2013, the U.S. District Court for the Eastern District of California in Capp v. Nordstrom, Inc expanded the Pineda decision when it found that Song-Beverly also prohibits the collection of customers’ email addresses as a condition of accepting payment via credit card.

Developments to Watch

Given this fluid state of affairs, the upcoming year could well bring substantive changes to the Song-Beverly Credit Card Act. The most significant development will be how the California Assembly responds to SB 383. While it is still unclear what action will finally be taken, last year’s hearings suggest that some kind of legislative change applying Song-Beverly to at least some online transactions is definitely being considered.

Perhaps the biggest question will be whether the assembly tries to expand the reach of Song-Beverly to include all online transactions, rather than limiting it to downloadable content. Back in May 2013, the bill was amended to include all online transactions, but it was subsequently amended again back to its original language embracing only downloadable content.

While the California State Senate was debating whether or not the bill should encompass all online transactions, a number of California courts weighed in on the issue. Finding no analytic distinction between online transactions involving downloadable content and those involving physical goods, these courts held that Song-Beverly did not apply to online transactions for physical goods. It will be interesting to see if the Assembly is similarly persuaded. The appellate decisions on these cases, which could also come down this year, could be a further factor in determining how this plays out.
If a bill does pass the assembly and Song-Beverly becomes applicable in some fashion to online transactions, there will be a number of issues that online retailers will need to consider. One major issue will be retailers’ retention policies for PII covered by Song-Beverly. The proposed legislation would require that this information be destroyed once it is no longer needed for fraud-detection purposes.

As currently written, the bill does not, however, provide any guidance as to how long such information can be stored. Further, the proposed legislation distinguishes between PII collected for fraud-detection purposes and other PII. Retailers, therefore, will have to set reasonable policies regarding how to handle the PII they collect under Song-Beverly, including how to appropriately segregate the information they collect and how long different types of information should be retained.

One particular category of information may require particular attention: email addresses. Given the holding in Capp, online retailers would have to treat email addresses as being within the scope of Song-Beverly. Online retailers, particularly those offering downloadable content, are very likely to be in the habit of collecting customer’s email addresses. Because email addresses do not assist in fraud detection, however, online retailers will only be able to collect email addresses subject to the disclosure and opt-out requirements of the bill. At the very least, online retailers will likely have to update their privacy policies to comply with these and similar concerns.

At this point, it is uncertain precisely what changes to Song-Beverly will take place this year. It is already clear, however, that 2014 will be just as eventful for Song-Beverly as was 2013.

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