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# Consumer Protection

University of the Pacific; McGeorge School of Law

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# Consumer Protection

## Consumer Protection; revisions to the Song-Beverly Consumer Warranty Act

Civil Code §§1794, 1794.2 (repealed); §1794 (new).

AB 3560 (Tanner); STATS. 1982, Ch 385

Support: Department of Consumer Affairs

In an attempt to foster the voluntary resolution of consumer transaction disputes, Chapter 385 clarifies the consequences if resolution is not achieved.<sup>1</sup> Prior to the enactment of Chapter 385, a buyer<sup>2</sup> of consumer goods<sup>3</sup> had to look to the Commercial Code,<sup>4</sup> general contract law,<sup>5</sup> the Song-Beverly Consumer Warranty Act<sup>6</sup> (hereinafter referred to as the Song-Beverly Act), and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act<sup>7</sup> to determine the available remedies for a breach of a consumer warranty.<sup>8</sup> Chapter 385 consolidates existing remedies available to a buyer of consumer goods who is damaged<sup>9</sup> by a failure to comply with the Song-Beverly Act, or any other express<sup>10</sup> or implied warranty<sup>11</sup> or service contract.<sup>12</sup> Chapter 385 was designed to aid the parties of consumer transactions in ascertaining what remedies are available to them.<sup>13</sup>

Under prior law, the Song-Beverly Act provided a remedy only for

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1. See Letter from Richard B. Spohn, Director, Department of Consumer Affairs to Honorable Omer Rains, Chairman, Senate Judiciary Committee (June 3, 1982) [hereinafter referred to as Spohn letter] (copy on file at the *Pacific Law Journal*).

2. CAL. CIV. CODE §1791(b) (definition of buyer).

3. *Id.* §1791(a) (definition of consumer goods).

4. See CAL. COM. CODE §§2711-2725.

5. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §9-23 (2d ed. 1977).

6. CAL. CIV. CODE §1790.

7. 15 U.S.C. §§2301-2312 (1976).

8. See Letter from Sally Tanner, Chairwoman, California Legislature Assembly Committee on Consumer Protection and Toxic Materials to Honorable Edmund G. Brown, Jr., Governor of California (June 29, 1982) [hereinafter referred to as Tanner letter] (copy on file at the *Pacific Law Journal*); Spohn letter, *supra* note 1. Compare CAL. STATS. 1978, c. 991, §10, at 3065 (amending CAL. CIV. CODE §1794) and CAL. STATS. 1979, c. 1023, §6, at 3496 (enacting CAL. CIV. CODE §1794.2) with CAL. CIV. CODE §1794.

9. See BLACK'S LAW DICTIONARY 351 (5th ed. 1979) (damage is synonymous with injury).

10. CAL. CIV. CODE §1791.2(a) (definition of express warranty).

11. *Id.* §1791.1(a), (b) (definition of implied warranty).

12. See *id.* §1794; Tanner letter, *supra* note 8; Spohn letter, *supra* note 1; CAL. CIV. CODE §1791(1) (definition of service contract).

13. See Tanner letter, *supra* note 8.

willful<sup>14</sup> violations of its provisions or willful violations of any express or implied warranties.<sup>15</sup> Chapter 385, regardless of the willfulness of the violation, now provides a remedy for failure to comply with any obligations under (1) the Song-Beverly Act, (2) any express or implied warranty or (3) any service contract.<sup>16</sup>

Chapter 385 establishes a measure of the damages to be awarded to the buyer.<sup>17</sup> Specific remedies are provided for a buyer who has rightfully rejected<sup>18</sup> or justifiably revoked acceptance<sup>19</sup> of the goods or exercised any right to cancel<sup>20</sup> the sale.<sup>21</sup> Other remedies are provided for the buyer who has accepted<sup>22</sup> the goods.<sup>23</sup> In addition, Chapter 385 still permits a buyer of consumer goods injured by a willful violation of the Song-Beverly Act or of any implied or express warranty or service contract to bring an action for the recovery of three times the amount of actual damages.<sup>24</sup>

Existing law allows a buyer who prevails in an action under the Song-Beverly Act to recover attorney fees that were reasonably incurred<sup>25</sup> as part of the judgment.<sup>26</sup> Chapter 385 conforms state law to federal law<sup>27</sup> by providing that the court has within its discretion the right to deny an award of attorney fees if it feels that this award would be inappropriate.<sup>28</sup>

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14. See Comment, *Toward an End to Consumer Frustration-Making the Song-Beverly Consumer Warranty Act Work*, 14 SANTA CLARA LAW. 575, 604 (1974) (definition of willful).

15. CAL. STATS. 1978, c. 991, §10, at 3065 (amending CAL. CIV. CODE §1794).

16. CAL. CIV. CODE §1794(a).

17. *Id.* §1794(b).

18. See CAL. COM. CODE §§2602-2604 (manner, effect and duties of rightful rejection).

19. See *id.* §2608 (manner of revocation of acceptance).

20. *Id.* §2106(4) (definition of cancellation).

21. See CAL. CIV. CODE §1794(b)(1) (California Commercial Code sections 2711-2713 embody the applicable remedies); CAL. CIV. CODE §1791(k) (definition of sale).

22. CAL. COM. CODE §§2606-2607 (definition and effect of acceptance of goods).

23. See CAL. CIV. CODE §1794(b)(2) (California Commercial Code sections 2714-2715 contain the applicable remedies and the measure of damages includes the cost of repairs necessary to make the goods conform). See generally CAL. COM. CODE §2106(2) (definition of conform).

24. Compare CAL. STATS. 1978, c. 991, §10, at 3065 (amending CAL. CIV. CODE §1794) with CAL. CIV. CODE §1794(c). Note that under California Civil Code section 1794(c) the recovery is two times the amount of actual damages *in addition to* amounts recovered under subdivision (a) and therefore remains as three times the amount of actual damages. This subdivision does not apply in any class action under California Code of Civil Procedure section 382 or California Civil Code section 1781 or with respect to a claim based solely on a breach of an implied warranty. CAL. CIV. CODE §1794(c).

25. See generally Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977). This article provides an in-depth analysis of when the awarding of attorney fees is reasonable.

26. CAL. CIV. CODE §1794(d).

27. See Department of Consumer Affairs, *Explanation and Analysis of A.B. 3560*, at 7-8 (March 1982) (copy on file at the *Pacific Law Journal*). Compare 15 U.S.C. §2310(d)(2) (1976) with CAL. CIV. CODE §1794(d).

28. CAL. CIV. CODE §1794(d).

## Consumer Protection; patient access to health records

Health and Safety Code §§25250, 25251, 25252, 25253, 25254, 25255, 25256, 25257, 25258 (new).

AB 610 (Berman); STATS. 1982, Ch 15

Support: Department of Consumer Affairs; Department of Finance; Health and Welfare Agency

The United States Privacy Protection Study Commission has recommended the adoption of laws acknowledging that individuals have the right of access to their medical records, including the right to copy the records.<sup>1</sup> Arguments advanced in favor of direct patient access include the following: (1) direct access provides the patient with information necessary both to promote meaningful participation in the medical care process<sup>2</sup> and to make informed decisions regarding medical treatment,<sup>3</sup> and (2) direct access provides for continuity of records when patients move and prevents unnecessary expense incurred in repetitive testing.<sup>4</sup> In an apparent response to these arguments,<sup>5</sup> Chapter 15 declares that it is the intent of the Legislature that all persons have a right of access to complete information regarding their own health care or the health care of those for whom they are legally responsible.<sup>6</sup> Chapter 15 establishes procedures for gaining access to health care records or summaries<sup>7</sup> by a patient<sup>8</sup> or patient's representative (hereinafter referred to as representative).<sup>9</sup> Chapter 15 also delineates exceptions to the right of direct access<sup>10</sup> and provides sanctions for violations of access provisions.<sup>11</sup>

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1. U.S. PRIVACY PROTECTION STUDY COMMISSION, *PERSONAL PRIVACY IN AN INFORMATION SOCIETY* 277, 293 (1977).

2. Connelly, *Medical Records: How Much Patient Access?*, 10 *LEGAL ASPECTS OF MEDICAL PRACTICE*, Jan. 1982, at 1, 2; *Controversies in Law and Medicine*, 5 *MEDICOLEGAL NEWS*, Fall 1977, at 12, 13.

3. Connelly, *supra* note 2, at 1, 2.

4. *Id.*

5. See Assemblyman Howard L. Berman, Press Release, Feb. 8, 1982 (copy on file at the *Pacific Law Journal*).

6. CAL. HEALTH & SAFETY CODE §25250.

7. *Id.*

8. See *id.* §25251(c) (defining patient as patient or former patient).

9. See *id.* §§25252, 25253, 25256; see also *id.* §25251(e) (defining patient's representative as a minor patient's parent or guardian; guardian or conservator of an adult patient).

10. *Id.* §§25253, 25255.

11. *Id.* §§25252(f), 25254.

*Procedures for Direct Access*

Existing law empowers a patient's authorized attorney to gain access to the patient's records prior to filing an action in which the patient's health is a relevant factor.<sup>12</sup> Similarly, existing law authorizes a court to compel production of these records for use in health-related litigation.<sup>13</sup> Chapter 15 allows an adult patient, a minor patient legally authorized to consent to medical treatment,<sup>14</sup> and a representative to gain direct access to patient records<sup>15</sup> from the health care provider (hereinafter referred to as provider)<sup>16</sup> even when there is no litigation or court action.<sup>17</sup>

Chapter 15 requires the patient or representative to submit a written request for the records and to pay the reasonable clerical costs incurred in locating and making the records available.<sup>18</sup> Within five working days after the receipt of both the written request and payment of the clerical costs, the provider must permit the requesting party to inspect the patient's records.<sup>19</sup> Furthermore, Chapter 15 provides that when the patient or representative makes a written request for copies of the records the patient or representative must pay for copying costs, not in excess of twenty-five cents per page or fifty cents per page for copies from microfilm,<sup>20</sup> and for reasonable clerical costs.<sup>21</sup> Upon compliance with these requirements, the provider must forward the copies within fifteen days.<sup>22</sup> The provider, however, is not required to furnish the patient or representative with copies of X-rays or tracings<sup>23</sup> if the provider transmits the original X-rays or tracings to another health care provider, at the request of the patient or representative, within fifteen days after receipt of the request.<sup>24</sup>

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12. CAL. EVID. CODE §1158.

13. See CAL. CIV. PROC. CODE §1985.3.

14. See CAL. CIV. CODE §§25.6, 25.7, 34.5-34.10, 63.

15. CAL. HEALTH & SAFETY CODE §25251(d) (definition of patient records); see *id.* §25251(b),(f) (mental health records and alcohol and drug abuse records are defined as patient records or discrete portions thereof, relating to evaluation or treatment).

16. See *id.* §25251(a) (a health care provider as defined in this section is any licensed health facility, clinic, home health agency, physician and surgeon or osteopath, podiatrist, dentist, optometrist or chiropractor). The term "health care provider" has been defined inconsistently throughout the California codes. Compare *id.* with CAL. CIV. CODE §56.05(d), CAL. BUS. & PROF. CODE §6146(c)(2) and CAL. CIV. PROC. CODE §1295(g)(1).

17. Compare CAL. HEALTH & SAFETY CODE §25252 with CAL. EVID. CODE §1158 and CAL. CIV. PROC. CODE §1985.3 (expands existing law to allow direct access).

18. CAL. HEALTH & SAFETY CODE §25252(a),(b).

19. *Id.* §25252(a).

20. *Id.* §25252(b).

21. See *id.* (clerical costs incurred in making the records available).

22. See *id.*

23. See *id.* §25252(c) (tracings derived from electrocardiography, electroencephalography, or electromyography).

24. See *id.*

Chapter 15 gives the provider the option of preparing and providing a summary of the patient's records for inspection and copying, in lieu of permitting access to the entire record.<sup>25</sup> Reasonable fees incurred in preparing the summary, computed on the basis of actual time spent in summary preparation, may be charged by the provider.<sup>26</sup> Chapter 15 also allows the provider to confer with the patient to determine the patient's purpose for obtaining the records.<sup>27</sup> If as a result of the conference, the patient requests information concerning only certain injuries, illnesses or episodes, the provider must include in the summary<sup>28</sup> specified information,<sup>29</sup> in addition to a list of all current prescribed medications.<sup>30</sup>

Chapter 15 expressly exempts a provider from liability for any consequences resulting from authorized disclosure of patient records.<sup>31</sup> Furthermore, Chapter 15 specifies that existing law regulating the quality and maintenance of patient records<sup>32</sup> is not affected by its provisions.<sup>33</sup>

### *Exceptions to the Right of Direct Access*

Chapter 15 provides that a minor patient's parent or guardian may be denied access to the minor patient's records if<sup>34</sup> (1) the minor is legally authorized to consent to the treatment described in the records,<sup>35</sup> or (2) the provider determines that granting access to the records will have an adverse effect on the provider's professional relationship with the minor patient.<sup>36</sup> The provider is not liable for the decision to refuse access to the minor's records, unless it is established that the provider has acted in bad faith.<sup>37</sup>

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25. *Id.* §25256(a).

26. *Id.* §25256(f).

27. *Id.* §25256(b).

28. *Id.*

29. *See id.* (includes chief complaints or complaints including pertinent history; findings from consultations and referrals; diagnosis; treatment plan and regimen; progress of treatment; prognosis including significant continuing problems or conditions; pertinent reports of diagnostic procedures and tests; objective findings from most recent physical examination).

30. *See id.* §25256(d).

31. *Id.* §25252(e).

32. *See* 22 CAL. ADM. CODE §§70749, 70751(c) (general acute care hospital), 71549, 71551 (acute psychiatric hospital), 72543, 72547 (skilled nursing facility), 73543, 73547 (intermediate care facility), 74731, 74735 (home health agencies), 75055 (primary care clinics), 76557 (intermediate care facility for the developmentally disabled); *see also* 9 *id.* §§130-132 (mental health institutions).

33. *See* CAL. HEALTH & SAFETY CODE §25252(d),(e).

34. *Id.* §25253(a).

35. *Id.* §25253(a)(1).

36. *Id.* §25253(a)(2).

37. *Id.*; *cf.* *Cobbs v. Grant*, 8 Cal.3d 229, 242, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 513 (1972) (inability of minor patient to objectively evaluate data exempts physician from duty of informed consent).

Chapter 15 further allows the provider to refuse patient access to mental health records<sup>38</sup> when the provider determines that there is a substantial risk that disclosure will result in detrimental consequences to the patient.<sup>39</sup> When this determination is made, the provider is required to (1) make a written record of the request, noting the date of the request and explaining the reason for refusal to make direct patient access available,<sup>40</sup> and (2) inform the patient of the decision to refuse direct access to the records, and of the patient's right to authorize a physician, surgeon, psychologist, or clinical social worker to inspect and copy the records.<sup>41</sup> In addition, the provider must make the records accessible to a licensed physician, surgeon, or psychologist<sup>42</sup> at the patient's request, and indicate in the record that the patient has made this request.<sup>43</sup>

The provisions of Chapter 15 are subject to existing federal law governing the disclosure of records relating to the treatment of alcohol and drug abuse,<sup>44</sup> and to existing law regarding confidentiality of information concerning communicable disease carriers.<sup>45</sup> In addition, existing law relating to access to patient records<sup>46</sup> by parties other than the patient or representative, remains unaffected by Chapter 15.<sup>47</sup>

### Sanctions

Chapter 15 allows a patient or representative to pursue any remedy available for violations of the access provisions and to bring an action against the health care provider for enforcement of these provisions.<sup>48</sup> The prevailing party in the action may, at the discretion of the court, recover costs and reasonable attorneys' fees.<sup>49</sup> Willful violation, designated by Chapter 15 as unprofessional conduct, may result in discipli-

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38. *Id.* §25251(b) (definition of mental health records).

39. *Id.* §25253(b).

40. *Id.* §25253(b)(1).

41. *Id.* §25253(b)(3). Only *licensed* physicians, surgeons, psychologists and clinical social workers are entitled to access under this section. *Id.* §25253(b)(3).

42. *Id.* §25253(b)(2).

43. *Id.* §25253(b)(4).

44. *See* 21 U.S.C. §1175 (1976 & Supp. V 1981); 42 U.S.C. §4582 (1976); *see also* 42 C.F.R. §§2.1 to 2.67-1 (1980).

45. CAL. HEALTH & SAFETY CODE §25255; *see* 17 CAL. ADM. CODE §2636 (venereal disease). No part of the records may be divulged, except as necessary for the preservation of the public health. *Id.* §2636(b).

46. *See* CAL. CIV. CODE §§56-56.37 (Confidentiality of Medical Information Act); CAL. INS. CODE §§791-791.26 (Insurance Information and Privacy Protection Act); CAL. CIV. CODE §§1798-1798.76 (Information Practices Act).

47. *See* CAL. HEALTH & SAFETY CODE §§25257, 25258.

48. *Id.* §25254.

49. *Id.*

nary action by the appropriate licensing authority.<sup>50</sup>

### Conclusion

In an attempt to enable individuals to become more personally involved in their own health care or the health care of those for whom they are responsible,<sup>51</sup> Chapter 15 establishes procedures for gaining access to health care records.<sup>52</sup> Furthermore, Chapter 15 provides for exceptions to the right of direct access.<sup>53</sup> Finally, Chapter 15 authorizes sanctions for violations of the access provisions.<sup>54</sup>

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50. *Id.* §25252(f).

51. See Assemblyman Howard L. Berman, Press Release, Feb. 8, 1982 (copy on file at the *Pacific Law Journal*).

52. See CAL. HEALTH & SAFETY CODE §§25252, 25253, 25256.

53. *Id.* §§25253, 25255.

54. *Id.* §§25252(f), 25254.

## Consumer Protection; express warranties, new motor vehicles

Civil Code §1793.2 (amended).

AB 1787 (Tanner); STATS. 1982, Ch 388

Support: Department of Consumer Affairs; Los Angeles City Attorney; State Consumer Advisory Council

Under existing law, manufacturers of consumer goods<sup>1</sup> who provide express warranties for their products are required by the Song-Beverly Consumer Warranty Act<sup>2</sup> to maintain repair facilities in California.<sup>3</sup> Moreover, the manufacturer must either replace the defective goods or refund the prorated purchase price of the goods if the manufacturer is unable to repair the defective product after a reasonable number of attempts.<sup>4</sup>

Chapter 388 alleviates any possible ambiguity regarding what constitutes a reasonable number of repair attempts in the case of defective new motor vehicles.<sup>5</sup> Specifically, Chapter 388 establishes a rebuttable

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1. CAL. CIV. CODE §1791(a) (definition of consumer goods).

2. *Id.* §§1790-1795.7.

3. *Id.* §1793.2(a)(1); see also *id.* §1793.5 (a manufacturer who fails to provide service and repair facilities is liable to all retailers who incur liability by giving effect to the manufacturer's express warranties).

4. *Id.* §1793.2(d).

5. *Id.* §1793.2(e)(4)(B) (new motor vehicles include those which are used or bought for use primarily for personal, family, or household purposes, but do not include motorcycles, motorhomes, or off-road vehicles); see also Assemblywoman Sally Tanner, Press Release, April 27, 1981 (copy on file at the *Pacific Law Journal*).



presumption<sup>6</sup> that a reasonable number of repair attempts has been made when the same nonconformity<sup>7</sup> has been subject to repair four or more times<sup>8</sup> or when the vehicle has been out of service for a cumulative total of thirty calendar days within either one year from delivery to the buyer or 12,000 miles, whichever comes first.<sup>9</sup>

Furthermore, Chapter 388 provides an incentive for manufacturers to create informal dispute settlement mechanisms by requiring consumers to submit their dispute to a qualified dispute resolution process, when timely notified<sup>10</sup> of its availability and effect, before asserting the presumption.<sup>11</sup> A qualified third party dispute resolution process is one that complies with the Federal Trade Commission's minimum requirements and renders decisions that are binding on the manufacturer if the buyer elects to accept the decision.<sup>12</sup>

When a qualified third party dispute resolution process does not exist, or the buyer is dissatisfied with the third party decision, or the manufacturer or its agent fails to fulfill the terms of the third party decision within 30 days,<sup>13</sup> the buyer may assert the presumption created by Chapter 388 and seek replacement of the defective motor vehicle or a substantial refund<sup>14</sup> of the purchase price.<sup>15</sup> Additionally, the findings and decisions of the third party are admissible in evidence in the action without further foundation, and applicable statutes of limitations are tolled during the dispute resolution process.<sup>16</sup>

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6. CAL. CIV. CODE §1793.2(e)(1) (rebuttable presumption may be used in any action to enforce the buyer's rights).

7. *Id.* §1793.2(e)(4)(A) (a nonconformity is any condition which substantially impairs the use, value, or safety of the new motor vehicle).

8. *Id.* §1793.2(e)(1)(A) (the buyer is required to directly notify the manufacturer of the need for repair of the nonconformity only if the manufacturer has clearly and conspicuously disclosed in its warranty or owner's manual the buyer's rights and responsibilities under Chapter 388).

9. *Id.* §1793.2(e)(1)(B). The 30 day limit may be extended if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. *Id.* §1793.2(e)(1).

10. *Id.* §1793.2(e)(2) (notification is not timely if the buyer suffers any prejudice resulting from any delay in giving the notification).

11. *Id.* §1793.2(e)(2); 15 U.S.C. §2310 (1976); see also Comment, *Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms*, 52 S. CAL. L. REV. 235 (1978). See generally Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73 (1978); Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act*, 66 CAL. L. REV. 1 (1978); Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W. L. REV. 391 (1977); Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts*, 26 U.C.L.A. L. REV. 583 (1978).

12. CAL. CIV. CODE §1793.2(e)(3); 16 C.F.R. §703.

13. CAL. CIV. CODE §1793.2(e)(3).

14. *Id.* §1793.2(d) (an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity).

15. *Id.* §1793.2(e)(2).

16. *Id.*

## Consumer Protection; rights and liabilities of credit card issuers and users

Civil Code §§1747.10, 1747.20, 1747.30, 1747.90 (repealed); §§1747.01, 1747.10, 1747.20, 1747.90 (new); §§1747.02, 1747.05, 1747.50 (amended).

SB 1919 (Roberti); STATS. 1982, Ch 545

Support: California Bankers Association; Department of Consumer Affairs

Chapter 545 amends provisions of the Song-Beverly Credit Card Act<sup>1</sup> by redefining terms used in the act,<sup>2</sup> revising cardholder liability for unauthorized use of credit cards,<sup>3</sup> and changing the procedure for the resolution of billing errors.<sup>4</sup> Chapter 545 also imposes liability on card issuers<sup>5</sup> for all claims and defenses that might arise out of credit card transactions when specific conditions are met,<sup>6</sup> and limits the liability to the amount of credit outstanding, as defined.<sup>7</sup> Finally, Chapter 545 requires the provisions of the Song-Beverly Credit Card Act to be interpreted in accordance with federal regulations dealing with credit transactions.<sup>8</sup>

### Definitions

Under prior law, a cardholder was defined as any person<sup>9</sup> to whom a credit card was issued or any person who agreed with the card issuer to pay the obligations arising from the issuance of a credit card to another person.<sup>10</sup> Chapter 545 redefines a cardholder, except in specified circumstances,<sup>11</sup> to be a natural person to whom a credit card is issued for

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1. CAL. CIV. CODE §§1747-1747.90.

2. *See id.* §§1747.02(d) (definition of cardholder), 1747.02(f) (definition of unauthorized use), 1747.02(g) (definition of inquiry), 1747.01(i) (definition of timely response).

3. *See id.* §1747.02(f) (definition of unauthorized use). *See generally id.* §1747.10 (limitation of cardholder liability for unauthorized use).

4. *Id.* §1747.02(j) (definition of billing error). *See generally id.* §1747.50 (procedures outlining card issuer action in response to inquiry about billing errors).

5. *Id.* §1747.02(c) (definition of card issuer).

6. *See generally id.* §1747.90 (conditions when card issuers are liable for claims arising out of disputed credit card transactions).

7. *See id.* §1747.90(b) (formula to determine credit outstanding).

8. *See id.* §1747.01 (the Song-Beverly Credit Card Act is to be interpreted with the federal Truth in Lending Act).

9. *See* CAL. EVID. CODE §175 (definition of person).

10. *See* CAL. STATS. 1979, c. 574, §1, at 1802 (amending CAL. CIV. CODE §1747.02(d)).

11. *See* CAL. CIV. CODE §1747.02(d) (definition to remain the same for purposes of Califor-

consumer credit purposes<sup>12</sup> or a natural person who has agreed with the card issuer to pay consumer credit obligations<sup>13</sup> resulting from the issuance of a credit card to another natural person.<sup>14</sup>

Under existing law, unauthorized use of a credit card by a person other than the cardholder is defined as use by a person without actual, implied, or apparent authority to use the credit card as long as the use does not confer a benefit on the cardholder.<sup>15</sup> Chapter 545 specifically excludes from the definition of unauthorized use the use of a credit card by a person whose previous authority to use the card has been revoked or terminated by the cardholder.<sup>16</sup> Chapter 545 requires the cardholder to comply with the card issuer's required procedure in order to terminate any grant of authority.<sup>17</sup> Once the card issuer receives a cardholder's oral or written notice of the termination of authority, however, it is required to follow its usual procedures for precluding further credit card use by an unauthorized person.<sup>18</sup>

Under existing law, an inquiry by a cardholder concerning a possible billing error must be stated in writing and mailed to the address of the card issuer where payments are normally tendered or to another address if the card issuer specifically indicates a different address.<sup>19</sup> Chapter 545 requires that all inquiries must be received by the card issuer no later than 60 days after the transmission of the first statement reflecting the alleged billing error.<sup>20</sup>

A timely response to a cardholder's inquiry about a possible billing error was defined under prior law to be a response<sup>21</sup> mailed within 60 days from the date in which the inquiry was mailed.<sup>22</sup> Chapter 545 redefines a timely response as a response that is mailed within two complete billing cycles but in no event later than 90 days, after the card issuer receives the inquiry.<sup>23</sup>

### *Cardholder Liability for Unauthorized Use*

Cardholders were not liable, under prior law, for any unauthorized

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nia Civil Code sections 1747.05 (issuance of credit cards), 1747.10 (liability for unauthorized use), and 1747.20 (credit cards issued to ten or more employees of an organization)).

12. See CAL. CIV. CODE §1799.90(a) (definition of consumer credit contract).

13. See *id.* (list of consumer credit obligations).

14. Compare CAL. CIV. CODE §1747.02(d) with CAL. STATS. 1979, c. 574, §1, at 1802.

15. See CAL. CIV. CODE §1747.02(f).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* §1747.02(g).

20. Compare CAL. CIV. CODE §1747.02(g) with CAL. STATS. 1979, c. 574, §1, at 1802.

21. CAL. CIV. CODE §1747.02(h) (definition of response).

22. CAL. STATS. 1979, c. 574, §1, at 1802 (amending CAL. CIV. CODE §1747.02(i)).

23. Compare CAL. CIV. CODE §1747.02(i) with CAL. STATS. 1979, c. 574, §1, at 1802.

use of a credit card that had not become an accepted credit card<sup>24</sup> and was renewed or issued on or after November 10, 1969.<sup>25</sup> Furthermore, for cards issued or renewed on or after that date, the liability of a cardholder for the unauthorized use of a credit card was limited to \$50 when a credit card was lost or stolen and the cardholder had notified<sup>26</sup> the card issuer within a reasonable time after discovery of the loss or theft.<sup>27</sup> Chapter 545 repeals both of these provisions,<sup>28</sup> and imposes liability on a cardholder for an unauthorized credit card use only if (1) the card is an accepted credit card,<sup>29</sup> (2) the liability does not exceed \$50,<sup>30</sup> (3) adequate notice<sup>31</sup> of potential liability is given to the cardholder by the card issuer,<sup>32</sup> (4) the card issuer has described to the cardholder how to notify the card issuer of the loss or theft of the card,<sup>33</sup> (5) the unauthorized use occurs before notification to the card issuer that the card has been lost or stolen and that unauthorized use may result,<sup>34</sup> and (6) the card issuer has provided a method enabling it to be determined if the user of the card is the person authorized to use it.<sup>35</sup>

Chapter 545 allows card issuers who issue ten or more credit cards for use by employees of an organization the right to negotiate with the organization and agree on standards of liability for unauthorized use by the employees instead of imposing the standards of liability set out in existing law.<sup>36</sup> Prior to the imposition of any liability on an employee of the organization by either the organization or the card issuer, however, the statutory criteria for unauthorized credit card use must be satisfied.<sup>37</sup>

### *Card Issuer Liability in Credit Transaction Disputes*

Prior law established that cardholder defenses could be asserted in

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24. CAL. CIV. CODE §1747.02(b) (definition of accepted credit card).

25. See CAL. STATS. 1971, c. 1019, §4, at 1960 (enacting CAL. CIV. CODE §1747.10).

26. See CAL. STATS. 1971, c. 1019, §4, at 1960 (enacting CAL. CIV. CODE §1747-.20) (notification was required within a reasonable time by telephone, telegraph, letter, or any other reasonable means).

27. *Id.*

28. See CAL. STATS. 1982, c. 545, §4, at — (repealing CAL. CIV. CODE §1747.10), and §6 at — (repealing CAL. CIV. CODE §1747.20).

29. CAL. CIV. CODE §1747.10(a).

30. *Id.* §1747.10(b).

31. *Id.* §1747.02(k) (definition of adequate notice).

32. *Id.* §1747.10(c).

33. *Id.* §1747.10(d).

34. *Id.* §1747.10(e).

35. *Id.* §1747.10(f).

36. CAL. CIV. CODE §1747.20. Compare *id.* with *id.* §1747.10.

37. See *id.* §1747.20. See generally §1747.10 (statutory limitations on cardholder liability for unauthorized use).

any action by the card issuer to recover the credit extended.<sup>38</sup> Chapter 545 repeals this provision.<sup>39</sup>

Chapter 545 imposes liability on a card issuer for all claims and defenses, other than tort claims, that might arise out of any transactions when the credit card is used and all of the following conditions are met:<sup>40</sup> (1) the cardholder has made a good faith effort to satisfactorily resolve conflicts relative to a disputed transaction with the person honoring the credit card,<sup>41</sup> (2) the initial transaction amount exceeds \$50,<sup>42</sup> and (3) the transaction occurred in California or within 100 miles from the cardholder's California address.<sup>43</sup> When the person honoring the credit card (1) is the same person as the card issuer, (2) is controlled by the card issuer, (3) is under direct or indirect common control with the card issuer, (4) is a franchised dealer of the card issuer's products or services, or (5) obtained the disputed order as a result of a mail solicitation offer made by or participated in by the card issuer,<sup>44</sup> the only condition that needs to be met by the cardholder is the good faith requirement to obtain a satisfactory resolution to the problem arising from the transaction.<sup>45</sup> If this requirement is met, the card issuer is subject to all claims and defenses arising from the transaction as if it were a party to the original transaction.<sup>46</sup>

Furthermore, Chapter 545 provides that the amount of claims or defenses asserted by the cardholder may not exceed the amount of credit outstanding<sup>47</sup> with respect to the disputed transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the claim or defense.<sup>48</sup> This provision, however, does not apply to the use of a check guarantee card, a debit card in connection with an overdraft credit plan, or a check guarantee card used in connection with cash advance checks.<sup>49</sup>

Chapter 545 deletes a prior requirement that card issuers separately state and label all fees, charges, or penalties assessed against a card-

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38. See CAL. STATS. 1971, c. 1019, §4, at 1916 (enacting CAL. CIV. CODE §1747.90).

39. Compare CAL. CIV. CODE §1747.90 with CAL. STATS. 1971, c. 1019, §4, at 1960.

40. CAL. CIV. CODE §1747.90n (a)(1).

41. *Id.* §1747.90(a)(1)(A).

42. *Id.* §1747.90(a)(1)(B).

43. *Id.* §1747.90(a)(1)(C).

44. *Id.* §1747.90(a)(2).

45. *Id.*

46. *Id.*

47. See *id.* §1747.90(b) (credit outstanding is determined by applying the cardholder's payments and credits to the credit card account as payment of (1) any late charges, in the order of their entry into the account; (2) any finance charges; and (3) any other debits entered into the account, in the order of their entry into the account).

48. *Id.*

49. *Id.* §1747.90(c).

holder for the use of a credit card.<sup>50</sup> Finally, Chapter 545 announces the legislative intent that all these provisions, along with those comprising the Song-Beverly Credit Card Act, are to be interpreted as similar provisions of the Federal Truth in Lending Act have been interpreted.<sup>51</sup>

In conclusion, Chapter 545 is a legislative attempt to redefine provisions of existing credit card law.<sup>52</sup> It also redefines the liability of cardholders in cases of unauthorized use,<sup>53</sup> defines the limits of card issuer liability in disputes arising from credit card transactions,<sup>54</sup> and ensures uniform interpretation of state and federal consumer protection legislation.<sup>55</sup>

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50. Compare *id.* §1747.30 with CAL. STATS. 1971, c. 1019, §4, at 1960.

51. See CAL. CIV. CODE §1747.01.

52. See CAL. STATS. 1982, c. 545, §2, at — (amending CAL. CIV. CODE §1747.02).

53. See *id.* §5, at — (enacting CAL. CIV. CODE §1747.10). Compare *id.* with CAL. STATS. 1971, c. 1019, §4, at 1960.

54. See CAL. STATS. 1982, c. 545, §11, at — (enacting CAL. CIV. CODE §1747.90).

55. See *id.* §1, at — (enacting CAL. CIV. CODE §1747.01).

## Consumer Protection; tenant reporting agencies

Civil Code §§1785.1, 1785.3, 1785.11, 1785.13, 1785.20, 1786, 1786.2, 1786.12, 1786.16, 1786.18, 1786.40 (amended).

SB 1406 (Boatwright); STATS. 1982, Ch 1127

Support: California Apartment Association; California Association of Realtors; Department of Consumer Affairs; Department of Housing and Community Development

Existing law regulates consumer credit reporting agencies<sup>1</sup> and investigative consumer reporting agencies.<sup>2</sup> Chapter 1127 broadens the Consumer Credit Reporting Agencies Act<sup>3</sup> and the Investigative Consumer Reporting Agencies Act<sup>4</sup> to include agencies investigating or reporting on a consumer's worthiness for the hiring of a dwelling unit.<sup>5</sup> Prior to the enactment of Chapter 1127, tenant reporting agencies<sup>6</sup> were

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1. See generally CAL. CIV. CODE §§1785.1-1785.35.

2. See generally *id.* §§1786-1786.56.

3. See generally *id.* §§1785.1, 1785.3, 1785.11, 1785.13, 1785.20.

4. See generally *id.*, §§1786, 1786.2, 1786.12, 1786.16, 1786.18, 1786.40.

5. Compare *id.* §1785.1(d) with CAL. STATS. 1976, c. 666, §1, at 1638 (amending CAL. CIV. CODE §1785.1). Compare CAL. CIV. CODE §1786(c) with CAL. STATS. 1975, c. 1272, §1, at 3378 (enacting CAL. CIV. CODE §1786).

6. *Tenant reporting agencies* is not a legal expression but is used herein to mean agencies investigating or reporting on a consumer's worthiness for the hiring of a dwelling unit.

not regulated by state law.<sup>7</sup> Although the Federal Fair Credit Reporting Act (hereinafter referred to as FCRA),<sup>8</sup> which regulates the consumer reporting industry,<sup>9</sup> could possibly be held to extend to tenant reporting agencies,<sup>10</sup> California tenants are still not adequately protected from the publication of unlawful detainer listings.<sup>11</sup> Furthermore, the FCRA establishes only a minimum standard and invites more stringent state legislation by specifically providing that the state legislation is controlling unless it is inconsistent with the FCRA.<sup>12</sup>

Chapter 1127 requires that tenant reporting agencies adopt reasonable procedures for meeting the needs of commerce in a manner that is fair and equitable to the consumer, with regard to confidentiality, accuracy, relevancy, and proper use of information.<sup>13</sup> Chapter 1127 further provides that a tenant reporting agency may submit a report to a person only if it has reason to believe that the information is to be used in connection with the hiring of a dwelling unit.<sup>14</sup>

Existing law prohibits consumer credit reporting agencies and investigative consumer reporting agencies from reporting (1) bankruptcies after 14 years;<sup>15</sup> (2) unsatisfied judicial judgments after 10 years;<sup>16</sup> (3) satisfied judicial judgments after seven years;<sup>17</sup> (4) paid tax liens after seven years;<sup>18</sup> (5) accounts placed for collection or charged to profit and loss after seven years;<sup>19</sup> (6) criminal records after seven years or after it is learned that a full pardon has been granted or that a conviction did not result from arrest, indictment, information, or misdemeanor complaint;<sup>20</sup> or (7) other adverse information after seven years.<sup>21</sup> Chapter 1127 extends these prohibitions to tenant reporting agencies.<sup>22</sup> In addition, Chapter 1127 states that unlawful detainer actions in which the defending party has prevailed may not be reported

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7. See Benson, *Tenant Reports as an Invasion of Privacy: A Legislation Proposal*, 12 *LOV. L. REV.* 301, 303 (1979).

8. 15 U.S.C. §§1681-1681t (1976).

9. *Id.*

10. See *Belshaw v. Credit Bureau of Prescott*, 392 F. Supp. 1356, 1359 (D. Ari. 1975).

11. See Benson, *supra* note 7, at 317 (this problem is unique to states with an unlawful detainer cause of action).

12. *Id.*; see 15 U.S.C. §1681t (1976); Comment, *Preemption of State Credit Reporting Legislation: Toward Validation of State Authority*, 24 *U.C.L.A. L. REV.* 83, 100 (1976).

13. CAL. CIV. CODE §§1785.1(d), 1786(c).

14. *Id.* §§1785.11(d)(5), 1786.12(d)(5).

15. *Id.* §§1785.13(a)(1), 1786.18(a)(1).

16. *Id.* §§1785.13(a)(3), 1786.18(a)(3).

17. *Id.* §§1785.13(a)(2), 1786.18(a)(2).

18. *Id.* §§1785.13(a)(5), 1786.18(a)(5).

19. *Id.* §§1785.13(a)(6), 1786.18(a)(6).

20. *Id.* §§1785.13(a)(7), 1786.18(a)(7).

21. *Id.* §§1785.13(a)(8), 1786.18(a)(8).

22. See *id.* §§1785.3(c), 1785.13(a).

by *any* consumer reporting agency.<sup>23</sup> Chapter 1127, however, allows an agency to report the above information without restriction when the information relates to the rental of a dwelling unit whose rent exceeds one thousand dollars per month.<sup>24</sup>

Chapter 1127 requires a landlord who declines to rent a dwelling unit, or increases the rent, either wholly or partly, because of information contained in the report of a tenant reporting agency, to advise the consumer of the use of the report and supply to the consumer the name and address of the tenant reporting agency making the report.<sup>25</sup> Chapter 1127 also requires the landlord, within three days of requesting an *investigative consumer report*, to notify the consumer that a report will be made.<sup>26</sup> This notice must be in writing and it must explain that an investigative report will be made regarding the consumer's character, general reputation, personal characteristics, and mode of living.<sup>27</sup> The notification must also include the name and address of the tenant reporting agency.<sup>28</sup>

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23. *Id.* §§1785.13(b), 1786.18(b). Data compiled from court records relating to unlawful detainer actions filed and not adjudicated or filed and adjudicated in favor of the complaining party may still be reported. *Id.* §§1785.13(a)(4), 1786.18(a)(4).

24. *Id.* §§1785.13(a)(4), 1786.18(a)(4).

25. *See id.* §§1785.20(a), 1786.40(a).

26. *See id.* §1786.16(a)(3).

27. *Id.*

28. *Id.*

## Consumer Protection; invasion of privacy

Penal Code §637.5 (new).

AB 2735 (Moore); STATS. 1982, Ch 1519

Support: California Cable Television Association; San Diego County

Interactive cable television information services<sup>1</sup> presently enable subscribers to transmit information through the home cable system.<sup>2</sup> In addition to providing computerized banking, home security and shop-at-home transactional services, interactive systems allow the viewer to respond to public opinion polls and to select various forms of televised entertainment on an individual basis.<sup>3</sup> The viewer's transmis-

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1. CAL. PENAL CODE §637.5(f)(4) (definition of interactive service).

2. *See generally* Westin, *Home Information Systems: The Privacy Debate*, DATAMATION, July 1982, at 100.

3. *See generally id.*



sions are conveyed to a central computer making it possible for a significant amount of personal information about the viewer to be aggregated<sup>4</sup> and creating the risk that confidential information will be disseminated to third parties or governmental agencies.<sup>5</sup> In apparent response to this potential risk<sup>6</sup> and for the purpose of curtailing the use of electronic eavesdropping devices,<sup>7</sup> Chapter 1519 establishes provisions that protect the privacy of subscribers to cable television.<sup>8</sup>

Chapter 1519 enacts restrictive provisions regarding compilation of subscriber information.<sup>9</sup> With the exception of periodic sweeps to monitor signal quality, Chapter 1519 expressly prohibits cable corporations<sup>10</sup> from monitoring or recording any event that occurs in the subscriber's home or business without the written consent of the subscriber.<sup>11</sup> In addition, Chapter 1519 restricts the retention of information that could individually identify<sup>12</sup> the subscriber by allowing only information necessary for billing or internal business purposes, and for the detection of unauthorized use of cable services to be retained.<sup>13</sup> Moreover, Chapter 1519 requires that information that could individually identify the subscriber be made available for the subscriber's examination and further requires that the cable corporation correct any inaccuracies.<sup>14</sup>

Furthermore, Chapter 1519 enacts express prohibitions regarding the dissemination of subscriber information.<sup>15</sup> Chapter 1519 prohibits cable corporations from providing information that could individually identify the subscriber to any person<sup>16</sup> or governmental agency.<sup>17</sup> If

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4. See generally Margulies, *Privacy and 2-Way Cable TV*, L.A. Times, Mar. 3, 1981, §6, at 1, col. 1.

5. See generally Neustadt, *Privacy and Cable: How Severe the Problem?*, TVC, May 1, 1982, at 146.

6. See generally *id.*; Westin, *supra* note 2, at 100; telephone interview with Carolyn Perkins, Community Liaison for Program Development for Warner-Amex Cable Communications, Inc. (Aug. 10, 1982) (notes on file at the *Pacific Law Journal*).

7. See CAL. PENAL CODE §630.

8. *Id.* §637.5. See generally *id.* §637.5(l) (providing that Chapter 1519 provisions are not intended to preempt more restrictive local standards).

9. See *id.* §§637.5(a)(1), 637.5(b).

10. See generally *id.* §637.5(f)(1) (definition of cable television corporation).

11. *Id.* §637.5(a)(1).

12. See generally *id.* §637.5(f)(2) (individually identifiable information is defined as any information identifying an individual or an individual's use of any service provided by a cable system other than the fact that the individual is a cable television subscriber).

13. *Id.* §637.5(b).

14. *Id.* §637.5(d) (the information must be made available at the cable corporation premises within 30 days of the subscriber's request, and corrections made upon a reasonable showing of inaccuracy).

15. See *id.* §§637.5(a)(2), 637.5(b), 637.5(c).

16. See generally *id.* §637.5(f)(3) (a person is defined as an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government, or subdivision thereof, whether federal, state, or local).

17. *Id.* §§637.5(a)(2), 637.5(c) (individually identifiable information includes, but is not lim-

the cable corporation is legally compelled<sup>18</sup> by a governmental agency to produce individual subscriber information, Chapter 1519 requires that the subscriber be notified unless notification is prohibited by law.<sup>19</sup> Under Chapter 1519, however, a cable corporation may maintain and distribute a list of the names and addresses of subscribers, if each subscriber is given the opportunity to choose not to be included.<sup>20</sup> In addition, Chapter 1519 demands that any applicant for cable services be provided with a separate notice of legal provisions that guarantee subscriber privacy.<sup>21</sup>

Any person who violates the privacy of a subscriber is subject to a \$3,000 fine, incarceration in the county jail for no longer than one year, or both.<sup>22</sup> Additionally, Chapter 1519 provides that persons receiving subscriber information from a cable corporation are subject to these same penalties.<sup>23</sup> Finally, Chapter 1519 expressly provides that the subscriber may commence a civil action in the event of a violation of privacy and will not be precluded from civil relief because of a corresponding criminal action.<sup>24</sup>

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ited to, the subscriber's television viewing habits, shopping choices, interests, opinions, energy uses, medical information, banking data or any other personal or private information).

18. *See id.* §637.5(c) (legal compulsion includes, but is not limited to, a court order or subpoena).

19. *Id.* (local franchising authorities are authorized to obtain information for the sole purpose of monitoring franchise compliance, however, cable corporations are required to omit information that could individually identify subscribers whenever possible).

20. *Id.* §637.5(b) (the cable corporation must provide adequate safeguards to secure the confidentiality of individual subscriber information).

21. *Id.* §637.5(e).

22. *Id.* §637.5(j).

23. *Id.* §637.5(h).

24. *Id.* §§637.5(i), 637.5(k).

