

## Memorandum

To: Concerned Parties  
From: Steven McNichols  
Date: June 15, 2008  
Re: Some Constitutional and Statutory Rights Protecting California Consumers

### Issue

What rights do consumers have under the United States Constitution, the California Constitution, the Fair Credit Reporting Act, and Civil Code section 1747.85?

### Privacy Rights

Article I, section 1, of the California Constitution makes acquiring property and enjoying privacy inalienable rights.<sup>1</sup> “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”<sup>2</sup> Homage to “personhood” is the foundation for individual rights secured by the United States and California constitutions.<sup>3</sup>

“The right of privacy now incorporated expressly in article I, section 1 of the California Constitution exists to prevent governmental ‘snooping,’ to inhibit the overly broad collection and retention of unnecessary personal information, the improper use of information properly obtained for a specific purpose, and to avoid the evils incident to lack of a reasonable check on the accuracy of existing records.”<sup>4</sup>

The privacy initiative’s purpose was to guard against unchecked information gathering by government and business.<sup>5</sup> Personal financial information is within the zone of

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<sup>1</sup>*Chico Feminist Women’s Health Center v. Scully* (3d Dist. 1989) 208 Cal. App. 3d 230, 241.

<sup>2</sup>Cal. Const., art. 1, § 1.

<sup>3</sup>*In re William G.* (1985) 40 Cal.3d 550, 563.

<sup>4</sup>*Richards v. Superior Ct.* (2d Dist. 1978) 86 Cal.App.3d 265.

<sup>5</sup>*People v. Weiner* (4th Dist. 1994) 29 Cal.App.4th 1300, 1311, quoting *White v. Davis* (1975) 13 Cal.3d 757, 774 and citing *Hill, supra*, 7 Cal.4th 1, 21.

privacy protected by article I, section 1 of the California Constitution.<sup>6</sup> “[T]here is a right to privacy in confidential customer information *whatever* form it takes, whether that form be tax returns, checks, statements, or other account information.”<sup>7</sup>

“[W]e may safely assume that the right of privacy extends to one’s confidential financial affairs as well as to the details of one’s personal life. Indeed, we recently discussed at length the ‘reasonable expectation of privacy’ which a bank customer entertains with respect to financial information disclosed to his bank.”<sup>8</sup>

The initiative’s framers created enforceable privacy rights against both governmental and nongovernmental entities, so the right to privacy may be enforced against private parties.<sup>9</sup>

“[I]f sensitive information is gathered and feasible safeguards are slipshod or nonexistent, or if defendant’s legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced.”<sup>10</sup>

So a plaintiff alleging invasion of privacy in violation of California Constitution article I, section 1, must establish:

- a legally protected privacy interest,
- a reasonable expectation of privacy, and
- conduct constituting a serious invasion of privacy.<sup>11</sup>

Confronted with a defense based on countervailing interests, plaintiff may demonstrate the availability of “protective measures, safeguards, and alternatives to defendant’s conduct that would minimize the intrusion on privacy interests.”<sup>12</sup>

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<sup>6</sup>*Moskowitz v. Superior Ct.* (2d Dist. 1982) 137 Cal.App.3d 313, 315-316, citations omitted.

<sup>7</sup>*Fortunato v. Superior Ct.* (2d Dist. 2003) 114 Cal.App.4th 75, 86, citations omitted, original emphasis.

<sup>8</sup>*Valley Bank of Nevada v. Superior Ct.* (1975) 15 Cal.3d 652, 656, citing *Burrows v. Superior Court* (1974) 13 Cal.3d 238.

<sup>9</sup>*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 17-18, citation omitted.

<sup>10</sup>*Id.* at p. 38.

<sup>11</sup>*Id.* at p. 31.

<sup>12</sup>*Id.* at p. 38, citation omitted.

## Property Rights

According to the Code of Federal Regulations, credit is “. . . the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.”<sup>13</sup>

“The annual credit card fee is a fee relating to the card holder’s acquisition of a property right and not a fee for services . . . [T]he fee is analogous to a standby loan commitment fee, which is treated as **a payment for acquisition of a property which is treated as a payment for acquisition of a property right** . . . .”<sup>14</sup>

Other analogous fees are also charges for acquiring the right to use money. “A loan commitment fee in the nature of a standby charge is an expenditure that results in **the acquisition of a property right, that is, the right to the use of money.**”<sup>15</sup>

## The Fair Credit Reporting Act

“The FCRA<sup>16</sup> was enacted to ensure fair and accurate credit reporting and to protect consumers’ right to privacy.”<sup>17</sup> It establishes basic requirements for users of consumer credit reports—e.g., credit unions, merchants, banks. Report users *inter alia* shall:

- “provide oral, written, or electronic notice of the adverse action to the consumer;<sup>18</sup>
- “provide to the consumer orally, in writing, or electronically—

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<sup>13</sup>12 C.F.R. 202.2(j) (1978).

<sup>14</sup>Gen. Counsel Memoranda 39434 § 0446 1985 IRS GCM LEXIS 99, emphasis added. [As a private ruling, it states, “This document is not to be relied upon or otherwise cited as precedent by taxpayers.” No such admonition arguably applies to consumers or credit card holders.]

<sup>15</sup>Rev. Rul. 81-160, 1981-1 C.B. 312, emphasis added. But the Ninth Circuit Court of Appeals cautioned that while “credit” includes the right to purchase property and a “credit card” is used to obtain property, these definitions don’t “compel the conclusion that credit from a credit card company is **in itself** a tangible property right.” *Pierce v. Citibank* (9th Cir. 1996) 1996 U.S. App. LEXIS 18496, citing 12 C.F.R. § 202.2 (j) and (k), emphasis added.

<sup>16</sup>Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., emphasis added.

<sup>17</sup>*Bruce v. Grieger's Motor Sales, Inc.* (Northern Dist. 2006) 422 F.Supp.2d 988, 990 (citing 15 U.S.C. § 1681(a)).

<sup>18</sup>*Id.* § 1681m(a)(1).

- “the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and
- “a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and<sup>19</sup>
- “provide to the consumer an oral, written, or electronic notice of the consumer’s right—
  - “to obtain, under section 612 [15 USCS § 1681j], a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and
  - “to dispute, under section 611 [15 USCS § 1681i], with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.”<sup>20</sup>

The FCRA authorizes report users to establish reasonable alternative procedures to assure compliance<sup>21</sup> and requires them *inter alia* to:

- include the address and toll-free telephone number for an appropriate notification system established to exclude a consumer’s name and address from reporting agency lists,<sup>22</sup>
- provide an oral, written, or electronic notice to the consumer of any report regarding an application for—or a grant, extension, or other provision of—credit on material terms less favorable than the most favorable terms available to a substantial proportion of consumers from or through the person offering credit.<sup>23</sup>
- No civil action may be filed against any person who fails to comply with section 1681m.<sup>24</sup>

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<sup>19</sup>*Id.* § 1681m(a)(2).

<sup>20</sup>*Id.* § 1681m(a)(3).

<sup>21</sup>*Id.* § 1681m(c).

<sup>22</sup>*Id.* § 1681m(e), citing section 15 USCS § 604(e).

<sup>23</sup>*Id.* § 1681m(e)(1).

<sup>24</sup>*Id.* § 1681m(h)(8)(A). [The Fair and Accurate Credit Transactions Act (“FACTA”) of 2003 became effective on December 1, 2004, adding subsection (h) to section 1681m of the

- But this section shall be enforced through administrative action by the Federal Trade Commission, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Secretary of Agriculture, state regulators, and other governmental entities.<sup>25</sup>

“Consumers’ privacy rights remain protected under the amended FCRA; Congress has merely chosen to grant federal agencies, rather than private individuals, the power to enforce section 1681m.”<sup>26</sup>

### **Civil Code Section 1747.85**

The California Legislature adopted the first paragraph of Civil Code section 1747.85 in 1976.<sup>27</sup>

“[N]o card issuer shall cancel a credit card without having first given the cardholder 30 days’ written notice . . . unless the cardholder is or has been within the last 90 days in default of payment or otherwise in violation of any provision of the agreement between the card issuer and the cardholder . . . or unless the card issuer has evidence or reasonable belief that the cardholder is unable or unwilling to repay obligations incurred . . . or that an unauthorized use of the card may be made.”<sup>28</sup>

While section 1747.85 give issuers wide latitude to cancel credit cards—for all but the most circumspect and conscientious card holders—careful cancellation procedures should be implemented to protect card holders and avoid litigation.

### **Conclusion**

Both the United States Constitution and the California Constitution guarantee privacy and property rights and authorize consumers to file court actions to enforce these rights.

The Fair Credit Reporting Act establishes basic requirements for users of consumer credit reports—e.g., credit unions, merchants, and banks. It offers only administrative

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FCRA. (See FACTA, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952, 1988-89 (2003)).

<sup>25</sup>§ 1681m(h)(8)(B), citing 15 USCS § 1681s.

<sup>26</sup>*Bruce, supra*, at p. 992 (see 15 U.S.C. § 1681m(h)(8)(B)).

<sup>27</sup>Civ. Code §1747.85 [paragraph two reinforcing a card issuer’s right to place dormant cards on inactive status was adopted in 1983].

<sup>28</sup>*Ibid.*

enforcement rather than the right to sue. But the Fair Credit Reporting Act's strong declarations about privacy rights reinforces the California Constitution's broader access to the courts.

While Civil Code section 1747.85 give issuers wide latitude to cancel credit cards—for all but the most circumspect and conscientious card holders—careful cancellation procedures should be implemented to protect card holders and avoid litigation.