

RESOLUTION 03-12-2008

DIGEST

Notice to Consumer: Expanding Definition of Consumer

Amends Code of Civil Procedure section 1985.3 to expand the definition of “consumer” to include corporations and companies or partnerships with more than five persons.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1985.3 to expand the definition of “consumer” to include corporations and companies or partnerships with more than five persons. This resolution should be disapproved because it unnecessarily protects large corporations and partnerships.

Code of Civil Procedure section 1985.3, subdivision (a)(2) defines “consumer” as “any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness for whom the witness has acted as agent or fiduciary.” All of the above-defined persons or entities are entitled to notice when a party seeks their personal information from a third party. (Code Civ. Proc., § 1985.3, subd. (b).) They also have the right to object to the release of any information sought by the subpoena. (Code Civ. Proc., § 1985.3, subd. (g).)

This resolution seeks to afford the same rights and protections to large corporations. There is no good policy reason for extending the protection that the Legislature put in place to protect small businesses to mega corporations, which have more resources than a small business or partnership. This resolution is unnecessary and it does not serve any great public need.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure Section 1985.3 as follows:

- 1 § 1985.3
- 2 (a) For purposes of this section, the following definitions apply:
- 3 (1) "Personal records" means the original, any copy of books, documents, other
- 4 writings, or electronic data pertaining to a consumer and which are maintained by any
- 5 "witness" which is a physician, dentist, ophthalmologist, optometrist, chiropractor,
- 6 physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary
- 7 clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center,
- 8 clinical or diagnostic laboratory, state or national bank, state or federal association (as
- 9 defined in Section 5102 of the Financial Code, state or federal credit union, trust

10 company, anyone authorized by this state to make or arrange loans that are secured by
11 real property, security brokerage firm, insurance company, title insurance company,
12 underwritten title company, escrow agent licensed pursuant to Division 6 (commencing
13 with Section 17000) of the Financial code or exempt from licensure pursuant to Section
14 17006 of the Financial Code, attorney, accountant, institution of the Farm Credit System,
15 as specified in Section 2002 of Title 12 of the United States Code, or telephone
16 corporation which is a public utility, as defined in Section 216 of the Public Utilities
17 Code, or psychotherapist, as defined in Section 1010 of the Evidence Code, or a private
18 or public preschool, elementary school, secondary school, or postsecondary school as
19 described in Section 76244 of the Education Code.

20 (2) "Consumer" means any individual, partnership, association, limited liability
21 company, corporation, or trust which has transacted business with, or has used the
22 services of, the witness or for whom the witness has acted as agent or fiduciary.

23 (3) "Subpoenaing party" means the person or persons causing a subpoena duces
24 tecum to be issued or served in connection with any civil action or proceeding pursuant to
25 this code, but shall not include the state or local agencies described in Section 7465 of the
26 Government Code, or any entity provided for under Article VI of the California
27 Constitution in any proceeding maintained before an adjudicative body of that entity
28 pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and
29 Professions Code.

30 (4) "Deposition officer" means a person who meets the qualifications specified in
31 Section 2020.420.

32 (b) Prior to the date called for in the subpoena duces tecum for the production of
33 personal records, the subpoenaing party shall serve or cause to be served on the consumer
34 whose records are being sought a copy of the subpoena duces tecum, of the affidavit
35 supporting the issuance of the subpoena, if any, and of the notice described in subdivision
36 (e), and proof of service as indicated in paragraph (1) of subdivision (c). This service
37 shall be made as follows:

38 (1) To the consumer personally, or at his or her last known address, or in
39 accordance with Chapter 5 (commencing with Section 1010) of Title 14 of Part 3, or, if
40 he or she is a party, to his or her attorney of record. If the consumer is a minor, service
41 shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one
42 of them cannot be located with reasonable diligence, then service shall be made on any
43 person having the care or control of the minor or with whom the minor resides or by
44 whom the minor is employed, and on the minor if the minor is at least 12 years of age.

45 (2) Not less than 10 days prior to the date for production specified in the subpoena
46 duces tecum, plus the additional time provided by Section 1013 if service is by mail.

47 (3) At least five days prior to service upon the custodian of the records, plus the
48 additional time provided by Section 1013 if service is by mail.

49 (c) Prior to the production of the records, the subpoenaing party shall do either of
50 the following:

51 (1) Serve or cause to be served upon the witness a proof of personal service or of
52 service by mail attesting to compliance with subdivision (b).

53 (2) Furnish the witness a written authorization to release the records signed by the
54 consumer or by his or her attorney of record. The witness may presume that any attorney
55 purporting to sign the authorization on behalf of the consumer acted with the consent of

56 the consumer, and that any objection to release of records is waived.

57 (d) A subpoena duces tecum for the production of personal records shall be served
58 in sufficient time to allow the witness a reasonable time, as provided in Section 2020.410,
59 to locate and produce the records or copies thereof.

60 (e) Every copy of the subpoena duces tecum and affidavit, if any, served on a
61 consumer or his or her attorney in accordance with subdivision (b) shall be accompanied
62 by a notice, in a typeface designed to call attention to the notice, indicating that (1)
63 records about the consumer are being sought from the witness named on the subpoena;
64 (2) if the consumer objects to the witness furnishing the records to the party seeking the
65 records, the consumer must file papers with the court or serve a written objection as
66 provided in subdivision (g) prior to the date specified for production on the subpoena;
67 and (3) if the party who is seeking the records will not agree in writing to cancel or limit
68 the subpoena, an attorney should be consulted about the consumer's interest in protecting
69 his or her rights of privacy. If a notice of taking of deposition is also served, that other
70 notice may be set forth in a single document with the notice required by this subdivision.

71 (f) A subpoena duces tecum for personal records maintained by a telephone
72 corporation which is a public utility, as defined in Section 216 of the Public Utilities
73 Code, shall not be valid or effective unless it includes a consent to release, signed by the
74 consumer whose records are requested, as required by Section 2891 of the Public Utilities
75 Code.

76 (g) Any consumer whose personal records are sought by a subpoena duces tecum
77 and who is a party to the civil action in which this subpoena duces tecum is served may,
78 prior to the date for production, bring a motion under Section 1987.1 to quash or modify
79 the subpoena duces tecum. Notice of the bringing of that motion shall be given to the
80 witness and deposition officer at least five days prior to production. The failure to
81 provide notice to the deposition officer shall not invalidate the motion to quash or modify
82 the subpoena duces tecum but may be raised by the deposition officer as an affirmative
83 defense in any action for liability for improper release of records.

84 Any other consumer or nonparty whose personal records are sought by a
85 subpoena duces tecum may, prior to the date of production, serve on the subpoenaing
86 party the witness, and the deposition officer, a written objection that cites the specific
87 grounds on which production of the personal records should be prohibited.

88 No witness or deposition officer shall be required to produce personal records
89 after receipt of notice that the motion has been brought by consumer, or after receipt of a
90 written objection from a nonparty consumer, except upon order of the court in which the
91 action is pending or by agreement of the parties, witnesses, and consumers affected.

92 The party requesting a consumer's personal records may bring a motion under
93 Section 1987.1 to enforce the subpoena within 20 days of service of the written objection.
94 The motion shall be accompanied by a declaration showing a reasonable and good faith
95 attempt at informal resolution of the dispute between the party requesting the personal
96 records and the consumer or the consumer's attorney.

97 (h) Upon good cause shown and provided that the rights of witnesses and
98 consumers are preserved, a subpoenaing party shall be entitled to obtain an order
99 shortening the time for service of a subpoena duces tecum or waiving the requirements of
100 subdivision (b) where due diligence by the subpoenaing party has been shown.

101 (i) Nothing contained in this section shall be construed to apply to any subpoena

102 duces tecum which does not request the records of any particular consumer or consumers
103 and which requires a custodian of records to delete all information which would in any
104 way identify any consumer whose records are to be produced.

105 (j) This section shall not apply to proceedings conducted under Division 1
106 (commencing with Section 50), Division 4 (commencing with Section 3200), Division
107 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200)
108 of the Labor Code.

109 (k) Failure to comply with this section shall be sufficient basis for the witness to
110 refuse to produce the personal records sought by a subpoena duces tecum.

111 (l) If the subpoenaing party is the consumer, and the consumer is the only subject
112 of the subpoenaed records, notice to the consumer, and delivery of the other documents
113 specified in subdivision (b) to the consumer, is not required under this section.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Defines “Consumer” as any individual, partnership of five or fewer persons, association, or trust.” Under the existing law, if a party seeks personal records of a consumer from any witness, the party must first provide the consumer with notice and an opportunity to object.

This Resolution: Ensures that corporations and limited liability companies whose personal records are being sought shall have notice and the opportunity to protect their privacy interests.

The Problem: Under the existing law, a party can obtain documents and information, including a corporation, limited liability company or partnership of greater than five person’s (hereinafter business entity) confidential banking, accounting, tax and legal records without providing any notice of any kind to the business entity.

However, California law recognizes that business entities, including corporations, limited liability companies, and partnerships have privacy rights concerning sensitive financial, proprietary and trade secret information, as well as tax records. Notably, a business entity’s banking and accounting records may reveal trade secret information regarding the identity of customers, vendors, and pricing. (Evid. Code, § 1060; Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal.App.4th 1384, 1393; Ameri-Medical Corp. v. Workers’ Comp. Appeals Bd. (1996) 42 Cal.App.4th 1260, 1289.) Likewise, the taxpayer’s privilege and the attorney-client privilege also extend to business entities. The fact that a corporation or limited liability is not a “consumer” within the current definition of the Code should not deprive the entity of the opportunity to protect highly sensitive and privileged information regarding its business and finances.

Under the current legislation, the opportunity for tremendous abuse exists, especially where a business entity is not even a party to the pending litigation. In such case, any competitor who is a party to litigation may obtain banking records, accounting records or legal records of a third party competitor which is a business entity without providing any notice of any kind to the

business entity simply by serving a subpoena on the competitor's banking institution or accounting firm.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution would be impractical and unwieldy. There is no distinction between public and non-public or closely held corporations. Corporations do not have a right to privacy. Other legal mechanisms, procedures and resources exist for business entities to protect their private, proprietary and/or trade secret information. Finally, these entities are just not "consumers," such as this statute was designed to protect.