



The Perils of Collecting Information at the Register

By Austin V. Schwing and Matthew S. Kahn – September 8, 2011

On February 10, 2011, the California Supreme Court issued its decision in *Pineda v. Williams-Sonoma*, 51 Cal. 4th 525 (Cal. 2011), holding that a retailer can violate California’s Song-Beverly Credit Card Act when it collects a customer’s zip code in connection with a credit-card transaction. *Pineda* created an avalanche of class actions against retailers doing business in California—more than 200 class actions were filed in the next few months—and caused retailers across the country to carefully reexamine their sales processes for credit-card transactions.

Collecting Personal Information in Credit-Card Transactions

Retailers like to know who buys their products. Retailers can use personal identifying information, such as names and addresses, to more effectively market their goods and services through direct mailings and local advertising. They can also use such information to decide where to build additional stores. Information about customers can increase a retailer’s sales and bottom line. But collecting information about customers implicates privacy concerns. Some customers do not want to be forced to provide their addresses or telephone numbers simply because they desire to purchase a new toaster oven. Such customers may be concerned about unsolicited communications (“junk mail”), the security of their personal data, or a retailer simply knowing too much about them.

Many states limit retailers’ ability to collect their customers’ personal identifying information by statute. Oftentimes such states place significant emphasis on limiting retailers’ ability to collect customers’ personal identifying information in connection with credit-card transactions. Some of these state statutes are relatively clear and allow retailers clear notice of which information they can safely collect and under which circumstances collection of such information is permitted. When these statutes’ prohibitions are not clear on their face, however, problems can arise for retailers. Enter California.

California’s Song-Beverly Credit Card Act

California’s Credit Card Act generally prevents a retailer from requesting or requiring a customer to provide personal identifying information to be recorded in connection with a credit-card transaction. Cal. Civ. Code § 1747.08(a). “Personal identifying information” is statutorily defined 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.” *Id.* § 1747.08(b).

Before the California Supreme Court decided *Pineda*, personal identifying information was generally understood to include a cardholder’s full address, telephone number, email address, driver’s license number, and other cardholder-specific information that does not appear on the

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credit card. It was also generally understood that personal identifying information did not include a cardholder's zip code. The California Court of Appeal addressed that issue in *Party City Corp. v. Superior Court*, 169 Cal. App. 4th 497 (Cal. Ct. App. 2008), and clearly ruled that zip codes were not personal identifying information, giving retailers an apparent "green light" to collect zip codes for marketing purposes. In *Party City*, the plaintiff alleged that Party City violated the Credit Card Act by collecting zip codes from customers in connection with credit-card transactions. Party City moved for summary judgment on the basis that zip codes are not personal identifying information, but the trial court disagreed and denied the motion. The court of appeal reversed the trial court, reasoning that zip codes are not personal identifying information because they do not specifically identify a particular customer because thousands of people share a zip code. *Id.* at 518–19. In other words, "even though a ZIP code provides some 'identification,' it is primarily group identification within the meaning of the Act, because tens of thousands of people have the same ZIP code." *Id.* at 519. The California Supreme Court denied review of *Party City* on April 1, 2009. Retailers breathed a sigh of relief—the court of appeal had sided with them, and the California Supreme Court had showed no interest in addressing the matter. With the benefit of hindsight, we now know this was the calm before the storm.

The Decision in *Pineda v. Williams-Sonoma*

In June 2008, Jessica Pineda sued Williams-Sonoma for precisely the same alleged conduct that the court of appeal found permissible in *Party City*—collecting zip codes as part of credit-card transactions. Pineda alleged, on behalf of herself and a purported class of California consumers, that Williams-Sonoma requested customers' zip codes, which Williams-Sonoma purportedly led the customers to believe were required to complete their credit-card purchases. *Pineda*, 51 Cal. 4th at 534. Pineda further alleged that at the end of credit-card transactions, Williams-Sonoma had its customers' credit-card numbers, names, and zip codes. *Id.* Williams-Sonoma, according to Pineda, used this information, along with customized computer software, to identify the location of its customers. *Id.* Williams-Sonoma allegedly used this information for its own marketing purposes and sold the information to other businesses. *Id.* The trial court granted Williams-Sonoma's demurrer to the complaint, finding that zip codes are not personal identifying information, and the court of appeal affirmed based on the same reasoning expressed in *Party City* described above. *Pineda v. Williams-Sonoma Stores, Inc.*, 178 Cal. App. 4th 714, 718–19 (Cal. Ct. App. 2009).

To the surprise of many, the California Supreme Court decided to hear this issue. The court overturned the lower courts, holding that zip codes are personal identifying information. *Pineda*, 51 Cal. 4th at 530–34. Under the Credit Card Act, Justice Moreno explained in his opinion, "personal identifying information" is defined to include "information concerning the cardholder . . . including, but not limited to, the cardholder's address and telephone number." *Id.* at 531 (citing Cal. Civ. Code § 1747.08(b)). The court noted that the word "concerning" is a broad term that means "pertaining to; regarding; having relation to; [or] respecting" and that zip codes

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certainly pertain to cardholders. *Id.* (citing *Webster's New International Dictionary* 552 (2d ed. 1941)). The court further noted that zip codes are, in fact, part of an address, and an address is clearly personal identifying information under the Credit Card Act. *Id.* Further, zip codes, like addresses and telephone numbers, are not necessary to the credit-card transaction and can be used, along with other information, to locate customers' complete addresses. *Id.* at 532. The court also explained that treating zip codes as personal identifying information would best foster the remedial purpose of the statute, would avoid internal inconsistencies in the statutory scheme, and would be most consistent with the legislature's desire to "prohibit[] retailers from soliciting and recording information about the cardholder that is unnecessary to the credit card transaction." *Id.* at 536. The court was particularly focused on the fact that a finding that zip codes are not personal identifying information "would permit retailers to obtain indirectly what they are clearly prohibited from obtaining directly, 'end-running' the statute's clear purpose. This is so because information that can be permissibly obtained under the court of appeal's construction could easily be used to locate the cardholder's complete address or telephone number." *Id.* at 533.

Williams-Sonoma argued that treating zip codes as personal identifying information would violate due process, contending that such an interpretation would be "unconstitutionally oppressive" because it would result in "penalties approaching confiscation of defendant's entire business." *Id.* at 536. Williams-Sonoma pointed out that the Credit Card Act carries a potential \$1,000 penalty per transaction. *Id.* The court was not persuaded because the trial court has substantial discretion under the Credit Card Act to decide the amount of the penalty. *Id.* Nor did the court agree with Williams-Sonoma's arguments that the statute was unconstitutionally vague and that the court's ruling should apply only prospectively. *Id.* The statute was clear enough, the court noted, and an inferior court's ruling cannot "provide a basis to depart from the assumption of retrospective operation." *Id.*

Making Sense of *Pineda*

Pineda's impact was immediate and substantial. In just a few months following the California Supreme Court's decision, more than 200 class actions were filed against major retailers doing business in California. The targets of these lawsuits covered the gamut of retail businesses, including discount retailers, major and specialty clothing stores, home-improvement stores, jewelry stores, online retailers, gas stations, and several other types of businesses. Overall, the stakes are huge. An enormous number of credit-card transactions take place in California each day, which is not surprising given that California is the most populous state in the United States, with more than 37 million residents, and, according to the U.S. Department of Commerce, has the eighth largest economy in the world.

For retailers that collected zip codes prior to *Pineda*, liability is not necessarily a foregone conclusion because collecting personal identifying information is not a per se violation of the Credit Card Act. For example, the law contains an exception permitting retailers to collect

personal identifying information—including zip codes—for a “special purpose incidental to the credit card transaction.” Cal. Civ. Code § 1747.08(c)(4). Under the act, special purposes include, but are “not limited to,” obtaining “information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders.” *Id.* Other exceptions include where “the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence,” in “[c]ash advance transactions,” and where the retailer “is contractually obligated to provide personal identification information in order to complete the credit card transaction or is obligated to collect and record the personal identification information by federal law or regulation.” Cal. Civ. Code § 1747.08(c)(1)–(3).

To attempt to avoid liability for collecting personal identifying information, many retailers likely will try to fit their zip code collections into the “special purpose” exception, and the case law provides some support for this argument under certain circumstances. For example, in *Watkins v. Autozone Parts, Inc.*, No. 08-CV-1509-H (AJB), 2009 WL 3214341 (S.D. Cal. Sept. 29, 2009), the court held that collecting personal identifying information for purposes of registering a product for a warranty “is a special purpose under subdivision (c)(4).” *Id.* at *4. The court observed that “[t]he registration of a product warranty is incidental . . . to the purchase of a covered product” and reasoned that “[o]btaining the personal identification information from a customer is necessary in order to connect the identity of the customer who registers for a warranty to the product covered by the warranty, and to identify potential fraud.” *Id.*

Alternatively, rather than rely on an exception, retailers may argue that their method of collecting personal identifying information is not covered by the Credit Card Act in the first place. For example, in *Saulic v. Symantec Corp.*, 596 F. Supp. 2d 1323 (S.D. Cal. 2009), the court held that online transactions are not covered by the act, in part “because of the unique fraud concerns created by” online transactions. *Id.* at 1332–36. Retailers conducting significant online transactions may look to *Saulic* for protection. As no California state court has yet addressed this issue, the durability of *Saulic*’s holding is unclear. But it is noteworthy that both *Watkins* and *Saulic* found collection of personal identifying information outside the scope of the Credit Card Act’s prohibitions where an underlying reason for collecting the personal identifying information was fraud prevention.

Retailers may also look to defeat the recent spate of lawsuits by claiming their customers voluntarily provided them with the personal identifying information in a context not directly tied to the credit-card transaction. In *Florez v. Linens ’N Things, Inc.*, 108 Cal. App. 4th 447 (2003), the court “note[d] that nothing prevents a retailer from soliciting a consumer’s address and telephone number for a store’s mailing list, if that information is provided voluntarily.” *Id.* at 451. A portion of *Florez* quoted in *Pineda* itself recognizes that voluntariness is not an automatic defense because the Credit Card Act prohibits even *requests* for personal identifying information as part of the credit-card transaction. *Pineda*, 51 Cal. 4th at 540 (“In effect, the 1991 amendment [adding the word “request”] prevents a retailer from making an end-run around the law by

claiming the customer furnished personal identification data ‘voluntarily.’”) (quoting *Florez*, 108 Cal. App. 4th at 453). But the retailer may still have a good defense if the credit-card transaction is “de-linked” from the request for personal identifying information, for example, if the retailer were to “delay the request” until after the transaction is completed, thus removing any apparent connection between the request and the credit-card transaction. *Florez*, 108 Cal. App. 4th at 451. *Florez* suggests that what matters “is whether a consumer would *perceive* the store’s ‘request’ for information as a ‘condition’ of the use of a credit card,” which likely turns on the objective circumstances surrounding the request for personal identifying information. *Id.* Retailers that can present evidence that their customers voluntarily provided their personal identifying information outside the credit-card transactions may have a good defense to post-*Pineda* claims.

Possible Penalties

Another important question in post-*Pineda* litigation is how much exposure retailers face for collecting personal identifying information. The Credit Card Act’s language indicates that each instance of collecting personal identifying information constitutes a “violation.” Under the act, judges imposing civil penalties for unlawful collection have significant discretion: The penalty for an initial violation can be anything from \$0.01 to \$250, and the penalty for each subsequent violation can be anything from \$0.01 to \$1,000. Cal. Civ. Code § 1747.08(e). As the California Supreme Court stated in *Pineda*, “[p]resumably this could span between a penny (or even the proverbial peppercorn we all encountered in law school) to the maximum amounts authorized by the statute.” *Pineda*, 51 Cal. 4th at 536 (quoting *TJX Cos., Inc. v. Super. Ct.*, 163 Cal. App. 4th 80, 86 (2008)). Retailers engaging in many thousands (if not millions) of credit-card transactions each year may face potential exposure in the tens of millions of dollars—or considerably less, depending on how the trial court exercises its discretion.

Because no reported case has addressed how to calculate penalties under the Credit Card Act, it is unclear what factors judges will use when assessing penalties under this provision. There may be reason for retailers facing zip code suits to have some hope for low penalties. As noted above, until the California Supreme Court weighed in on the debate, the court of appeal had twice indicated that zip codes were not personal identifying information—once in *Party City* and once in *Pineda*. Some retailers may have relied on these decisions in collecting or continuing to collect zip codes. Courts may take this extenuating circumstance into account when calculating the appropriate penalty.

Judges also may consider the purpose for which a given retailer was collecting zip codes and what the retailer did with the information. If, for example, the retailer was collecting zip codes to determine shopping patterns in connection with deciding whether to open a store in a new area, the court might be more lenient in its penalties than if the retailer was using the information for unsolicited marketing, one of the animating concerns behind the act.



Relatedly, judges also may consider whether retailers have continued to use improperly collected zip codes even after *Pineda* was decided. Plaintiffs may argue that continued use of zip codes following the supreme court's ruling in *Pineda* is a factor supporting a higher penalty, and retailers therefore may want to carefully consider their current use of previously collected zip codes if they have any doubt regarding whether they collected that information lawfully.

Insurance Coverage

Of course, the discussion of potential penalties raises the question: Who will pay for all of this? While retailers are trying to avoid penalties for collecting zip codes, their insurers may be assessing whether these lawsuits are covered by the retailers' existing policies, such as commercial general liability insurance, errors and omissions insurance, and directors and officers insurance. At least one insurance company has already filed declaratory relief actions seeking determinations that post-*Pineda* suits are not covered by its commercial general liability insurance policies and that the insurance company is not obligated to defend the retailers sued for collecting zip codes. *Hartford Fire Ins. Co. v. Euromarket Designs Inc.*, Case No. 1:11-cv-03008 (N.D. Ill. May 6, 2011); *Hartford Fire Ins. Co. v. Chico's FAS, Inc.*, Case No. 30-2011 00462085 (Super. Ct. Orange Cnty. Mar. 29, 2011). Thus, retailers may find themselves battling not only the plaintiffs in these class actions but also their own insurance companies.

Class Certification

Most of the post-*Pineda* zip code suits are at the pleading stage, but soon they will proceed to the class-certification stage. Several issues will likely recur across these cases as courts consider whether these actions are appropriate for class treatment.

For example, plaintiffs in the post-*Pineda* cases will be faced with the challenge of defining their proposed classes. As noted above, it is permissible to collect personal identifying information in certain circumstances, and plaintiffs will need to define their classes to exclude individuals whose zip codes were lawfully collected. While this might not be difficult with respect to some of the permissible collection examples, if voluntariness is a defense, then excluding individuals who voluntarily provided their personal identifying information may prove problematic. Class definitions that, for example, define the class to include "individuals who did not voluntarily provide personal identifying information" may be susceptible to challenge on the ground that significant individualized inquiries will be necessary to determine whether consumers are part of the class.

Other individualized issues may surface in these cases, further complicating plaintiffs' attempts to certify classes. For example, as noted above, as to individual putative class members, it may be relevant when their personal identifying information was collected in the course of the credit-card transaction; what was said to the customer regarding the collection of personal identifying information; what written materials (such as signs) the customer saw regarding the collection of personal identifying information, if any; and, generally, whether the retailer collected any of the



customers' personal identifying information for a "special purpose," as described above. Courts considering class-certification motions will have to decide whether these individualized issues predominate over class-wide issues and thus render proposed cases inappropriate for class treatment.

Implications for Other Jurisdictions

While *Pineda* applies only to California's Credit Card Act, the case may have implications for other jurisdictions as well. Other states have consumer protection laws that, like California's Credit Card Act, prohibit the collection of personal identifying information in connection with credit-card transactions yet do not exhaustively or clearly define personal identifying information. While these statutes generally prohibit only requiring consumers to provide personal identifying information—as opposed to California's Credit Card Act, which also prohibits requesting it—retailers doing business in these jurisdictions still face the risk of potential lawsuits.

For example, in Pennsylvania, the relevant statute prohibits retailers from "requir[ing]" consumers to provide "any personal identification information, including, but not limited to, the credit cardholder's address or telephone number." 69 Pa. Stat. § 2602(a). It is not clear from the statute whether "address" is meant to apply to a consumer's entire mailing address or whether just requiring the customer to provide his or her zip code would run afoul of the statute. Moreover, the statute's use of the nonexhaustive phrase "including, but not limited to" might enable a court to determine zip codes are included in "personal identification information" even if they are not within the definition of "address." No reported cases in Pennsylvania have yet interpreted the meaning of "personal identification information" in the context of this statute.

Similarly, New York's General Business Law section 520-a(3) prohibits retailers from "requir[ing]" consumers to provide "any personal identification information, including but not limited to the credit or debit card holder's address or telephone number." And, as in Pennsylvania, no reported New York cases discuss what "personal identification information" means in the context of this law, much less whether zip codes might fall within either the general definition or within the meaning of "address."

It remains to be seen whether plaintiffs' attorneys will test *Pineda*'s impact in these and other jurisdictions with similar statutes. *See also* 11 Del. Code § 914; R.I. Gen. Laws § 6-13-16(a); Wis. Stat. Ann. § 423.401. Retailers will want to pay close attention to further developments in these states.

Conclusion

The California Supreme Court's ruling in *Pineda* poses significant challenges to retailers in California and potentially other jurisdictions. A practice at one time widely considered legal under California's Credit Card Act—collecting customers' zip codes—is now unlawful under



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certain circumstances. *Pineda* has already had an impact on many retailers. As the hundreds of California zip code lawsuits move forward and as other states grapple with this issue under their own consumer protection laws, retailers will continue to feel the ramifications of *Pineda*.

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