

The State Supreme Court Shakes It Up for Retail Businesses

By Donna L. Wilson and John W. McGuinness

In a decision that deals a potentially harsh blow to retailers still struggling to weather a troubled economy, the state Supreme Court last week held in *Pineda v. Williams-Sonoma Stores Inc.*, 2011 DJDAR 2278 (Feb. 10), that ZIP codes constitute “personal identification information” under the Song-Beverly Credit Card Act (Civil Code Section 1747.08). This will generally expose retailers who request such information from customers paying with a credit card to penalties of up to \$1,000 per request. The decision almost certainly will lead to a wave of putative class action litigation against retailers across the state, including those who have relied on earlier lower court opinions blessing such information requests. And it likely will chill retailers’ marketing and anti-fraud efforts, while impeding customer efforts to obtain the full benefits of the retailers’ services and products.

Subject to certain exceptions, Section 1747.08 prohibits merchants from “requesting, or requiring as a condition of” the credit card transaction “personal identification information” and then recording that information. The Act defines this 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.”

Pineda creates a situation fraught with danger for any retailer attempting to market to its own customers while seeking in good faith to comply with the law.

The plaintiff in *Pineda* brought a putative class action, alleging that while she was purchasing an item from a Williams-Sonoma store, the cashier requested her ZIP code as part of the credit card transaction. According to the plaintiff, she provided the ZIP code, “[b]elieving it necessary to complete the transaction.” The plaintiff further alleged that Williams-Sonoma then used the ZIP code to find her home address information, and that defendant “subsequently used customized computer software to perform reverse searches from databases that contain millions of names, e-mail addresses, telephone numbers, and street addresses.... The software matched plaintiff’s name and ZIP code with plaintiff’s previously undisclosed address, giving defendant the information, which it now maintains in its own database.”

The trial court held that the ZIP code alone did not constitute personal identification information under the Act. The Court of Appeals affirmed, holding that unlike an address or telephone number that is “specific in nature regarding an individual,” a ZIP code more generically applies to a group of individuals. In so hold-

ing, the Court of Appeals followed an earlier opinion, *Party City Corp. v. Superior Court*, 169 Cal. App. 4th 497 (2008), which found that a ZIP code is not personal identification information under the Act.

Rejecting both of these Court of Appeals opinions, the state Supreme Court held that in light of the legislative history, the purpose of the Act and its broad statutory language, the word “address” should be read as “encompassing not only a complete address, but also its components.” According to the Court, “the Legislature intended to provide robust consumer protections by prohibiting retailers from soliciting and recording information about the cardholder that is unnecessary to the credit card transaction.”

Significantly, however, the Court’s analysis appeared deeply colored by the defendant retailer’s specific use of the information at issue — a use known as “reverse appending.” The Court reasoned that, “a cardholder’s ZIP code is similar to his or her address or telephone number, in that a ZIP code is both unnecessary to the transaction and can be used, together with the cardholder’s name, to locate his or her full address.... The retailer can then, as plaintiff alleges defendant has done here, use the accumulated information for its own purposes or sell the information to other businesses.” The Court noted, within the specific context of reverse appending, that to hold otherwise would be to permit retailers to obtain information indirectly that they could not obtain directly.

At a minimum, the opinion will result in retailers being faced with a new wave of litigation — with no requirement that the plaintiff or class prove actual damages and the prospect of substantial penalties, particularly if measured on a class-wide basis. This is particularly true given that the Court rejected the defendant’s argument that the ruling should apply prospectively only.

But what may be most striking about the opinion is its *dicta* and lack of practical guidance for retailers. Although the Court focuses on the specific practice before it — reverse appending — plaintiffs likely will argue that the holding is not expressly limited to such a practice. According to the Court, “[i]n light of the statute’s plain language, protective purpose, and legislative history, we conclude that a ZIP code constitutes ‘personal identification information’ as that phrase is used in [S]ection 1747.08.”

Similarly, plaintiffs may rely on ambiguous *dicta* in the opinion to argue that the Act prohibits any request for information from customers paying by credit card, regardless of whether the request is made as a “condition to accepting the credit card as payment,” and regardless of whether the customer voluntarily provides it. In holding that ZIP codes constitute personal identification information, the Court observed that the 1990 version of Section 1747.08 prohibited businesses from “requir[ing] the cardholder, as a condition to accepting the credit card, to provide personal identification information....” The provision was amended in 1991 to apply more broadly to “request[ing] or requir[ing] [the cardholder], as a condition to accepting the credit card, to provide



personal information.” The Court then quoted an early appellate opinion, *Florez v. Linens ‘N Things Inc.* (2003) 108 Cal.App.4th 447, which vaguely states that the purpose of the amendment was to “prevent retailers from ‘requesting’ personal identification information and then matching it with the consumer’s credit card number.” Left unaddressed by the *Pineda* Court is whether a request that is not made “as a condition to accepting the credit card” constitutes a violation of the Act. Indeed, the Court never mentions the 2nd District Court of Appeal opinion in *Absher v. AutoZone Inc.*, (2008) 164 Cal.App.4th 332, which concluded that such unconditional “requests” do not violate the Act. According to the *Absher* opinion, the Act can only be violated if the request for information is “a condition precedent to accepting payment by credit card.”

Nor did the state Supreme Court provide retailers with any practical guidance as to when the credit card transaction begins and when it ends. Does the credit card transaction — and thus the potential applicability of the Act and its mandatory penalties — begin when the customer approaches the cash register or only after the customer provides a credit card? Does the transaction end only after the credit card is returned to the customer, or after the items are rung-up and the purchase authorized? Or something else altogether? Although common sense and the language of the Act would dictate a narrow reading, plaintiffs of course will argue for the broadest reading possible, regardless of the practical impossibilities imposed on retailers and their customers.

In the wake of *Pineda*, retailers are placed in a potentially intractable position. On the one hand, marketing is the lifeblood of retailing. Maintaining contact with existing customers is the key to growing a retail business. On the other, *retailers* attempting to market

to their own customers while seeking in good faith to comply with the law are faced with the risk of putative class actions and potentially substantial mandatory penalties if they make a misstep. For retailers and other businesses that accept credit cards, it is essential that they consult with counsel to minimize their litigation risk as best as possible in this post-*Pineda* environment, including reviewing their current practices for collecting customer contact information.



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