

# Morrison & Foerster Client Alert.

January 9, 2012

## With A Focus On Fraud, California Federal Court Finds Song-Beverly Act Does Not Apply to Online Transactions

By Purvi G. Patel and Megan T. Low

The California Supreme Court's February 2011 decision in *Pineda v. Williams-Sonoma Stores, Inc.*<sup>1</sup> spawned hundreds of lawsuits against brick-and-mortar retailers complaining that retailers collected customers' "personal identification information" (PII) in violation of the Song-Beverly Credit Card Act (the "Act"). *Pineda* also triggered a wave of lawsuits against *online* businesses, raising the question of whether the Act applies to online transactions. In a case brought against Microsoft Corporation, a California federal court has recently answered that question in the negative — reasoning that *Pineda* supports the conclusion that online transactions are outside the scope of the Act.

On January 6, 2012, the United States District Court for the Central District of California dismissed a case against Microsoft Corporation on the grounds that the Act does not apply to online transactions.<sup>2</sup> On the same day, the Court dismissed a similar case against Redbox Automated Retail, LLC holding that the Act does not apply to transactions involving self-service DVD kiosks.<sup>3</sup> The Court's analysis in both cases was similar, focusing on the statutory language and purpose of the Act.<sup>4</sup>

The Act prohibits businesses from requesting that cardholders provide PII during credit card transactions and then recording that information. *Saulic v. Symantec*

<sup>1</sup>In February 2011, the California Supreme Court concluded in *Pineda v. Williams-Sonoma Stores, Inc.* that a retailer who requests and records a customer's ZIP code during a credit card transaction violates the Act. *Pineda v. Williams-Sonoma Stores, Inc.*, 246 P.3d 612, 614 (Cal. 2011). Following *Pineda*, more than 200 lawsuits have been filed against retailers doing business in California. Please see [here](#) for additional background about the Song-Beverly Act and *Pineda* decision.

<sup>2</sup> *Salmonson v. Microsoft Corp.*, No. 2:11-cv-05449-JHN-JC (C.D. Cal. Jan. 6, 2012).

<sup>3</sup> *Mehrens v. Redbox Automated Retail LLC et al.*, No. 2:11-cv-02936-JHN-Ex (C.D. Cal. Jan. 6, 2012).

<sup>4</sup> Although the analysis in the *Microsoft* and *Redbox* orders is similar, for the purposes of this Client Alert, we reference the *Microsoft* order throughout.

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*Corporation*, a pre-*Pineda* case out of the Central District of California, was the first case to conclude that online transactions are not covered by the Act.<sup>5</sup> *Pineda*, however, created uncertainty surrounding the continued viability of *Saulic*.

The *Microsoft* court's analysis eliminates some of that uncertainty. The Court found that the plain language of the Act prohibits *writing* PII on the credit card form and utilizing *preprinted* spaces for PII; the Act makes no specific reference to online transactions.<sup>6</sup> This language, according to the Court, contemplates "pen and paper" transactions, rather than "electronic entry of numbers on a keypad or touchscreen"<sup>7</sup> and thus does not apply to online transactions.

The Court also found that the purpose of the Act supports an interpretation that the Act is limited to brick-and-mortar transactions. The Court's analysis of the Act's legislative history echoed the analysis in *Saulic*, which differentiated between the goals of the Act and the "unique fraud concerns" associated with online transactions.<sup>8</sup> The *Saulic* court noted that because "online merchants must ultimately accept payment with nothing more than a name and credit card number," they therefore have no means other than through PII to verify the cardholder's identity.<sup>9</sup> Following this reasoning, the *Microsoft* court recognized that "collection of personal information in an online transaction may be the only means of verifying a customer's identity in order to prevent credit card fraud."<sup>10</sup> Both the *Saulic* and *Microsoft* courts reasoned that because the Act was concerned with the use of PII for unsolicited marketing — not as a fraud prevention measure — the language of the Act cannot "reasonably be read to encompass online transactions."<sup>11</sup>

The *Microsoft* court concluded that *Pineda* supports dismissal (and in the process reconciled *Saulic* and *Pineda*) by turning again to the legislative history, which "demonstrates 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."<sup>12</sup> The Court further explained that *Pineda* involved face-to-face transactions where there was "no legitimate need" to obtain PII from credit card holders and the PII was therefore "unnecessary to the credit card transaction."<sup>13</sup> In contrast, the "unique fraud concerns" present in online transactions and the absence of any evidence that the Legislature intended to cover online transactions or considered the fraud concerns raised in the context of online transactions led the Court to conclude that the Act does not apply to online transactions.

The *Microsoft* order comes about four months after an order issued by the San Francisco Superior Court that dismissed a similar lawsuit against Craigslist.<sup>14</sup> The *Craigslist* court found that the Act "on its face does not apply to online transactions" and that the "applicable case law, legislative intent and public policy indicate that such transactions are not,

<sup>5</sup> *Saulic v. Symantec Corp.*, 596 F. Supp. 2d 1323 (C.D. Cal. 2009).

<sup>6</sup> Order at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Gonor v. Craigslist, Inc.*, No. CGC-11-511332 (S.F. Super. Ct. Aug. 24, 2011). Please see [here](#) for additional information regarding the *Craigslist* order.

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and should not be encompassed by [the Act].”

Although the *Craigslist*, *Microsoft*, and *Redbox* decisions are important wins for online and “self-service kiosk” businesses because they conclude in no uncertain terms that such transactions are outside the scope of the Act, not all courts have been willing to dismiss Song-Beverly Credit Card Act claims against online retailers at the pleading stage. At least one California state court allowed a case against Ticketmaster and other online businesses to proceed, stating that the Court was “not prepared, at the pleading stage, to read the Act as completely exempting online credit transactions from its reach.”<sup>15</sup> Thus, while a trend is emerging limiting the reach of the Act to brick-and-mortar transactions, there is still conflict among the trial courts, and an appellate court has yet to consider the issue.

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<sup>15</sup> *Luko v. Ticketmaster*, *Luko v. eHarmony, Inc.*, and *Krescent v. Apple, Inc.*, Los Angeles Superior Court Nos. BC462492, BC462494, and BC463305, respectively.