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In *Pineda's* Wake

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In the wake of *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal. 4th 524 ("*Pineda*"), Divisions One and Five of California's Second Appellate District have published two opinions that put some constraints on Song-Beverly class action litigation.

The first case is *Archer v. United Rentals, Inc.* (May 19, 2011, B219089) __ Cal.App.4th ___, [2011 BL 134609, 2011 DJDAR 7158]. In *Archer*, the trial court (Anthony J. Mohr, J.) awarded summary adjudication to the defendants on plaintiffs' claim under the UCL, finding that plaintiffs' lacked standing to proceed "because they did not lose money or property." After a thorough discussion of the California Supreme Court's recent decision in *Kwikset Corp. v. Superior Court* (2011) 51 Cal. 4th 310 ("*Kwikset*"), Division One ruled that plaintiffs "have failed to demonstrate" how the alleged invasion of privacy "translates into a loss of money or property." The trial court's summary adjudication was affirmed. *Archer v. United Rentals, Inc.* (May 19, 2011, B219089) __ Cal.App.4th ___, [2011 BL 134609, 2011 DJDAR 7158] slip op. at p. 8.

Judge Mohr also denied class certification of Mr. Archer's claims brought under the Song-Beverly Credit Card Act ("SBCCA") and the Consumer Legal Remedies Act ("CLRA"). He reasoned that the SBCCA does not apply to business credit cards or personal credit cards used primarily for business purposes. On this basis, he found that determining class membership would be an "intensely fact-driven" and costly process that was not justified. His denial of class certification was based on the ascertainability requirement. *See Sevidal v. Target Corp.* (2010) 189 Cal App. 4th 905, 919; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326.

Division One agreed, in part, with Judge Mohr. The Appellate Court held that "section 1747.08 does not apply to credit cards issued for business purposes," but it does apply to a natural person to whom a credit card is *issued* for consumer credit purposes "without regard to the actual purpose for which the card is used, namely, business or otherwise." *Archer*, slip op. at p. 18. Relying upon the definition of "cardholder" in section 1747.02(d) and certain legislative history, the Court held that "credit cards issued for business purposes are excluded from the privacy protection afforded under section 1747.08." *Id*. at p. 17. However, because 1747.02(d) focuses on the purpose for which the card was "issued," as opposed to "used," the Appellate Court found that

section 1747.08 applies to consumers who are issued credit cards for consumer credit purposes without regard to the purpose for which the card is actually used.

Division One reversed the order denying class certification and remanded the matter to the trial court to conduct further proceedings on the question of whether a class of personal credit card holders could be ascertained, and thus certified. (The Court noted that the parties' treated the CLRA and SBCCA claims as the same in the context of the appeal and did not address any additional issues related to the CLRA claim.)

In sum, the *Archer* opinion impacts the size of putative classes under Song-Beverly. It stands for the proposition that putative classes under Song-Beverly cannot include consumers who used credit cards that were issued for business purposes. Further, it confirms that UCL claims in the context of Song-Beverly violations are subject to summary adjudication, under Proposition 64's standing requirement that a plaintiff show "injury in fact" through the loss of money or property.

The second case, *Folgelstrom v. Lamps Plus, Inc.*, involved an appeal based on a judgment that was entered after demurrers to the plaintiff's SBCCA, invasion of privacy, and UCL claims were sustained by the trial court (Anthony J. Mohr, J.), without leave to amend. Division Five reversed Judge Mohr as to the Song-Beverly claim, in light of *Pineda* (the complaint alleged requests for zip codes). However, the Appellate Court affirmed the judgment as to the invasion of privacy and UCL claims. *Folgelstrom v. Lamps Plus, Inc.* (May 20, 2011, B221376) ___ Cal. App.4th ___, [2011 WL 1902202, 2011 DJDAR 7276].

With reference to the constitutional invasion of privacy claim, Division Five was not convinced that plaintiff had alleged facts demonstrating a protected privacy interest in his home address. But in any event, plaintiff had not alleged facts showing a "serious" invasion of privacy. Allegations that the retailer had obtained plaintiff's address without his knowledge or permission, and mailed him coupons or other advertisements, is not "an egregious breach of social norms, but routine commercial behavior." *Folgelstrom*, slip op. at pp. 5-6.

In addressing the common law tort of invasion of privacy, Division Five looked to § 652B of the Restatement Second of Torts, which has been adopted in California. The Court determine that the intrusion as well as the use of the information obtained from the plaintiff must be "highly offensive." No facts were alleged showing any offensive or improper use. The Court dismissed the plaintiff's argument that he was subject to an increased risk of identity theft.

As in *Archer*, the *Folgelstrom* Court found that the UCL claim failed under *Kwikset* and Proposition 64's requirement that the plaintiff suffer economic injury in fact and loss of money or property. The Court rejected the plaintiff's novel arguments that he had lost intellectual property rights in his home address and that he failed to demonstrate that he suffered any economic injury, lost money, or lost property.

Thus, within the span of a few days, the Second District Court of Appeal has published two important Song-Beverly decisions that put the brakes on attempts to over-plead cases involving requests for personal information from credit card customers.