

Collecting ZIP Codes Could Haunt You

Law360, New York (March 10, 2011) -- In early February 2011, the California Supreme Court opened the door to a new wave of consumer protection class actions. No one saw it coming. A bevy of class actions has since commenced.

On Feb. 10, 2011, the unanimous court held that any business that asks for a customer's ZIP code in completing a credit card transaction, and records that information, has violated the Song-Beverly Credit Card Act of 1971.

The act carries automatic penalties as high as \$250 for the first violation and \$1,000 for any subsequent violation. Though these fines may balloon quickly, the actual penalties are at the discretion of the court. The Supreme Court gave no indication of how that discretion is to be exercised.

The case is *Pineda v. Williams-Sonoma Stores*. The plaintiff alleged that her ZIP code was used by Williams-Sonoma to obtain her address (having already collected her card number and name from the credit card itself). Williams-Sonoma then allegedly used her information to market its products and may have also sold her information to other retailers.

Williams-Sonoma did not deny any of these allegations, relying instead on a 2008 Court of Appeal decision that ZIP codes are not covered by the act.

The Supreme Court overruled the Court of Appeal's decision. It determined that because the ZIP code is part of a customer's address, it is squarely shielded from disclosure to the same extent as the full address.

As such, the court's decision did not require any reverse-engineering from the available information to the full address. Simply seeking and recording a customer's ZIP code are enough to violate the act. This is true even if the ZIP code is never used to locate a customer's address, spam the customer or sold to a third party.

In its analysis, the Supreme Court determined that the ZIP code was simply not necessary to complete the transaction. Williams-Sonoma did not raise customer security or card verification as reasons for seeking the ZIP code. Thus, these issues were not addressed. Nevertheless, it seems unlikely that such an argument would have been persuasive given the court's broad reading of the act.

The Supreme Court's decision is particularly surprising given that it is retroactive, especially in light of the 2008 Court of Appeal decision that ZIP codes are not considered personal identifying information under the act. The Supreme Court simply determined that the broad wording of the act was sufficient to put businesses on notice that obtaining and recording a customer's ZIP code may cost them.

Therefore, the Supreme Court determined that retroactive application presented no due process concerns.

By Feb. 15, 2011, less than a week after the decision issued, class actions had already been filed against Old Navy, Target Corp., Macy's Inc., Cost Plus Inc., Toys 'R Us Inc., Trader Joe's Co., Wal-Mart Stores Inc. and Victoria's Secret Stores LLC.

While some commentators surmised that gas stations were exempt from this flurry of litigation — they presumably only seek, but do not store, a customer's ZIP code, and do so at the behest of credit card companies for verification purposes — some gas stations have already been sued.

In fact, on Feb. 22, 2011, such suits were filed against Chevron Corp., ConocoPhillips Co. (Conoco, Phillips 66 and Union 76), ExxonMobil Corp. (Exxon, Mobil), Royal Dutch Shell PLC, Tesoro Corp. (USA Gasoline) and Thrifty.

Businesses that still appear exempt from this new rule are online retailers. First, online businesses typically need their customer's mailing address for shipping, delivery, servicing or installation. The act itself specifically excludes such situations. Second, in 2009, a federal district court determined that online transactions were not within the purview of the act.

Accordingly, asking for personal identifying information to process a credit card transaction does not violate the act. Notably, the federal case that decided this issue was one where no physical product was being delivered to the consumer; the consumer was simply downloading a computer program.

The California Supreme Court's decision did not address online retailers and appears to leave the 2009 federal district court decision intact. Nevertheless, online retailers should exercise caution and only obtain ZIP codes when necessary.

Err on the side of caution and do not ask for any personal information unless it squarely falls within some exception to the Act. Just as the Supreme Court overruled a prior appellate court decision that seemed to resolve the ZIP codes issue, it may also reverse the law as we know it with respect to online transactions when that case comes before it.

While it may prove cold comfort to the companies already sued, there is a one-year statute of limitations on these types of class actions. Thus, despite the fact that the exposure will surely be high for those already facing litigation, these class actions have a relatively short shelf life.

Companies that have not already done so should quickly assess their credit card policies and ensure that they immediately terminate any practice of asking for customer ZIP codes and any other personal information they may be collecting.

--By Andreea V. Micklis, Snell & Wilmer LLP

Andreea Micklis is an associate in Snell & Wilmer's Orange County, Calif., office.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2011, Portfolio Media, Inc.