

## Why Liability Is Unlikely in Many ZIP Code Credit Card Transaction Cases

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The Song-Beverly Credit Card Act, which regulates the use of consumer data in connection with credit card transactions, was enacted in 1971 when the Internet and electronic transactions were in their infancy. While much has changed since 1971 in regard to the way credit card transactions take place, the Act has seen minimal changes since its enactment. While the state Supreme Court's recent decision in *Pineda v. Williams-Sonoma Stores Inc.*, 2011 DJDAR 2278, clarified one aspect of the Act, it has also prompted a surprising number of new case filings, which may not be supported by either the Act or the Court's

decision.

In *Pineda*, the defendant was alleged to have collected and recorded plaintiff's ZIP code in the course of an in-store purchase with her credit card. The plaintiff alleged that the defendant then used commercially available software to identify her by cross-checking her name against her ZIP code, and to create and maintain a marketing profile, which included her complete home address. Plaintiff claimed that defendant used this profile to create an individualized marketing strategy. She also alleged that this information, together with that of other customers, was sold to third parties for marketing purposes.

The case addressed the Act's failure to specifically reference the collection of ZIP codes. In recent years, many merchants have used that lack of reference as a justification to collect customer ZIP codes in the course of a credit card transaction. The resulting database can have significant marketable value. The Supreme Court, however, found that a customer's ZIP code is to be considered protected personal information to the same extent as a customer's address and telephone number. The Court found that the Act, as set forth in Civil Code Section 1747.08, had always specifically prescribed the collection of such personal information. This finding is what has opened the door to a number of claims against merchants engaging in this practice, even prior to this decision.

Since the Court's decision, at least 20 class actions have been filed in Superior Courts throughout the state. *Pineda* has caused many retailers to re-evaluate their current exposure to claims concerning their past practices and question their conduct in connection with credit card transactions going forward. Some of this concern on the part of retailers may be unnecessary.

Retailers are permitted under the Act to request identification of the cardholder. (Civil Code Section 1747.08(d)) There are also other specific exemptions within the Act itself. Among the recent filings are several claims against oil companies questioning the common practice of collecting ZIP code information in connection with the purchase of gasoline at an automated terminal. It is unknown how these claims intend to survive the exemptions of Civil Code Section 1747.08(c)(3), which specifically permits the collection of ZIP codes for this purpose. There is also a specific exception for a retailer to request personal information during a credit card transaction when the retailer is contractually obligated to do so in order to complete the transaction. (Civil Code Section 1747.08(c)(3)) It is unclear whether a

Monday, March 7, 2011

### Criminal Helping Nonprofit Earned Karatz No Prison

Former KB Home CEO Bruce Karatz dodged a prison sentence on three felony fraud convictions after he pledged to help save a struggling nonprofit favored by the federal judge who sentenced him.

### Litigation Metrolink Victims Make Case for Cash

Beginning this month, victims of the deadly 2008 Chatsworth Metrolink crash will formally ask a judge to give them a slice of a \$200 million settlement that they and their attorneys believe is woefully inadequate.

### Law Practice On the Move

After 25 years on state and federal benches, former state Supreme Court Justice Carlos R. Moreno hung up his robes March 1 to join Irell & Manella LLP, where he is of counsel.

### Litigation Phil Spector Suit Over Legal Fees Settles

The long-running fee dispute between convicted murderer Phil Spector and his ex-lawyer Robert L. Shapiro has settled. With it a chance may have passed for courts to clarify what is a "true retainer."

### Transportation How Many More Have to Die?

A seemingly innocent act may in fact be just as deadly as driving under the influence of alcohol. By **Jonathan Michaels** of Michaels Law Group.

### Law Practice Former Assistant U.S. Attorney Joins BofA

Former Assistant U.S. Attorney Robert J. McGahan departed from Goodwin Procter LLP's Los Angeles office to accept a position as associate general counsel at Bank of America Corp.

### If I Am Winning, Why Do I Have Fewer Chips?

Do you feel like your captial investment in your law firm is holding you hostage? By **Edwin B. Reeser**.

### Legal Industry Lost Jobs in February

The legal services industry lost 2,900 jobs in February, adding a bleak slice to what was otherwise good news for the U.S. jobless rate.

### Litigation ZIP Codes Suits Keep Piling Up

Nearly two dozen more lawsuits have been filed against retailers over the practice of asking for ZIP code information during credit card transactions.

contractual requirement upon a merchant by a credit card processing company to collect this information in connection with a transaction would fall within this exception.

In *Pineda*, the Supreme Court considered only an in-store transaction between a customer and a sales clerk. Since the individual behind the counter had the ability to verify the identity of the customer by requesting to see (without recording) the customer's driver's license, the only purpose for separately requesting and recording the customer's ZIP code would have been to create a marketing profile. That, however, is simply not the case in a transaction for gasoline at a pump or presumably any other electronically based transaction, including one over the Internet, as contemplated by Civil Code Section 1747.08(c)(3). Often the collection of information is necessary to facilitate the transaction. This is another specific exemption under Civil Code Section 1747.08(d), which applies to situations where the card is not present at the time of the transaction.

The addition of credit card terminals at gas pumps has significantly increased the efficiency and prevalence of these types of automated transactions. Marketing to the consumer directly at these terminals has proliferated in the form of radio and television ads at the pump, which is arguably even more effective and better targeted than any subsequent communication to the customer's home address. Some credit card processors have begun to require or incentivize data collection where permitted.

While the question has not been answered explicitly, the clear message from the exceptions set forth in the Act, taken together with the ruling in *Pineda*, is that a merchant requesting a driver's license or other proof of identity in connection with a credit card transaction remains well within the bounds of the Act. Collecting a ZIP code where it is either required by contract or used purely for identity verification purposes is likely lawful as well. Furthermore, collecting identifiable information, as part of an online transaction, remains permissible, as does the collection of personally identifiable information necessary to facilitate a transaction.

The change, if any, to the law as the result of the *Pineda* case is likely to be very narrowly construed as simply preventing merchants from requesting and recording ZIP codes without any other reason but to develop its customer list for marketing purposes. Therefore, the proliferation of cases in this area and the potential liability to merchants is likely to be minor in scope and duration. Hopefully, the same is true of the recent increase in prices.

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## **Constitutional Law** **In Ditching Gay Marriage Ban, Obama Reveals Surprising Views on Presidential Power**

The Obama administration's decision not to defend the Defense of Marriage Act is indicative of an expansive view of executive authority. By **Ben Feuer** of Eisenberg & Hancock LLP.

## **Law Practice** **Agency Charges Blind Bar Exam Takers**

Following two federal court cases filed in California of behalf of blind law school graduates, the agency that administers the Multistate Bar Exam is putting a hefty \$5,000 price tag on some special accommodations for disabled test takers.

## **Health Care & Hospital Law** **Device Maker Sued for Malfunction**

A woman who decided against a mastectomy to treat her cancer is suing a medical device company and an Orange County hospital because she still may lose her breasts, not from the disease, but from a malfunction during radiation therapy.

## **Corporate** **Why Liability Is Unlikely in Many ZIP Code Credit Card Transaction Cases**

Lawsuits challenging ZIP code transactions stand to gain nothing. By **Jeffrey A. Cohen** and **Alexander Yoffe** of Cohen & Richardson PC.

## **Judges and Judiciary** **Judges Tap L.A. Prosecutors to Join Bench**

Two senior prosecutors from the Los Angeles U.S. Attorney's office will likely join the federal bench as magistrate judges later this year.

## **Pioneering Lesbian Judge Retires**

San Francisco County Superior Court Judge Mary C. Morgan, a judicial policy innovator who advanced gay rights as the first openly lesbian judge in the U.S., retired March 3, court officials announced Friday.

## **Law Practice** **Lawyers Exempted From Red Flags Rule**

Lawyers and law firms do not fall under a Federal Trade Commission regulation designed to stymie identity theft known as the red flags rule, a federal appeals court ruled Friday.

## **Judges and Judiciary** **The Play's the Thing**

If the legal system had it's version of the Academy Awards, who would win the honor of Best Picture? By **Arthur Gilbert** of the 2nd District Court of Appeal.

## **Health Care & Hospital Law** **Nurse Bill May Boost Malpractice Cases**

A union-backed proposal to enforce nurse-to-patient staffing ratios in California hospitals could aid plaintiff's attorneys in malpractice suits.

## **Government** **State-of-Judiciary Speech On Hold**

Cantil-Sakauye's decision to delay the speech came amid some legislators' call for greater oversight of the branch. But Cantil-Sakauye said