LOEB & LOEB LLP

Consumer Protection Defense Law

ALERT

DECEMBER 2012

LOEB & LOEB adds Knowledge.

Déjà Vu All Over Again: California Federal Court Finally Tells Merchants When They Can Ask Consumers for Personal Information – But Will the California Supreme Court Agree?

A federal judge in the U.S. District Court for the Eastern District of California issued an opinion Dec. 17, 2012, that seems to answer definitively a question that has weighed on the minds of California merchants for the past several years: When – if ever – can a retailer ask customers for personal information, enabling future communications and marketing to customers after they leave the store?

U.S. District Court Judge Kimberly J. Mueller ruled in *Tammie Davis v. Devanlay Retail Group, Inc.*, that merchants may ask for customers' personal information, but only after customers have received a receipt, objectively signaling the conclusion of the transaction. The judge ordered the dismissal of a class action filed against Devanlay Retail Group, Inc., operator of Lacoste® brand clothing stores, in the Sacramento federal court.

The question of when and how merchants could collect consumer information became important when a February 2011 ruling by the California Supreme Court in effect threw open courthouse doors around the state, inviting a stampede of class actions premised on alleged violations of the Song-Beverly Credit Card Act (Section 1747.08 of the California Civil Code). In *Pineda v. Williams-Sonoma, Inc.*, the California Supreme Court held that, despite a prior lower court ruling to the contrary, merchant requests for consumers' zip codes in connection with retail credit card transactions violated the Act. The court held that zip codes should be included in the Act's definition of "personal information," in part due to evidence that they could be used to "reverse engineer" the identities and locations of consumers.

The court's ruling in *Pineda* unleashed a torrent of class actions against both brick-and-mortar and online merchants in California state and federal courts, asserting that the merchants had improperly requested consumer information in connection with credit card transactions in violation of the Act and seeking statutory damages of up to $1,000 for repeat violations.

After meticulously tracing the statutory and judicial history of the Song-Beverly Act, Judge Mueller concluded that the merchant's clear and well-documented policy directing its clerks to wait until after they hand customers a cash register receipt before requesting their personal information complied with the Act's requirements. The judge wrote:

> [T]he crucial issue … is not whether the transaction has reached an official end when the cashier requests personal information from the customer; it is whether under Devanlay's policy a customer would reasonably believe that providing the zip code is necessary to complete the transaction. … Viewed objectively, Devanlay's policy of waiting until the customer has her receipt in hand conveys that the transaction has concluded and that providing a zip code is not necessary to complete the transaction.

The court also indicated that even if a particular clerk had failed to comply with the merchant's policy and asked for the customer's information before the receipt had been produced (as plaintiff claimed occurred in this case), the company's written procedures would be sufficient to comply with the "safe harbor" provisions of the Song-Beverly Act, protecting the merchant from liability.

This publication may constitute "Attorney Advertising" under the New York Rules of Professional Conduct and under the law of other jurisdictions.

The takeaways for retail merchants that wish to collect personal information from customers in connection with face-to-face credit card transactions include:

First, they should develop written policies and procedures that, at a minimum, require salespeople to delay making any requests for personal information until after the customer's transaction is completed, as evidenced by the delivery of a receipt to the customer. A better policy would be to require salespeople to inform customers that providing such information is completely voluntary (as did Devanlay's policy) and instruct them to wait until both the merchandise and receipt have been provided to the customer before requesting the information.

Second, retailers should institute training materials and programs, and document the completion of those programs, to ensure that employees are familiar with the procedures for collecting consumer information and understand that they must follow these procedures. These materials and training records will be invaluable in demonstrating the company's compliance with the Act and its "safe harbor" provisions.

Finally, merchants should not yet breathe too easily. As the California Supreme Court showed in *Pineda*, it will not hesitate to take positions on Song-Beverly that are inconsistent with those taken by other reviewing courts. Until the state's highest court actually addresses this issue, merchants cannot be 100 percent certain that their information collection methods are consistent with the Act's requirements. In the words of the late, great Yogi Berra, "It ain't over 'til it's over."

For more information about the content of this alert, please contact Michael Mallow or Michael Thurman.

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

Circular 230 Disclosure: To ensure compliance with Treasury Department rules governing tax practice, we inform you that any advice contained herein (including any attachments) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer; and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

© 2012 Loeb & Loeb LLP. All rights reserved.

For more information about Loeb & Loeb's Consumer Protection Department, please contact:

ARTHUR W. ADELBERG	AADELBERG@LOEB.COM	202.618.5020
ROBERT M. ANDALMAN	RANDALMAN@LOEB.COM	312.464.3168
MARK D. CAMPBELL	MCAMPBELL@LOEB.COM	310.282.2273
CHRISTIAN D. CARBONE	CCARBONE@LOEB.COM	212.407.4852
TAMARA CARMICHAEL	TCARMICHAEL@LOEB.COM	212.407.4225
DARLENE M. CHO	DCHO@LOEB.COM	310.282.2168
AURELE A. DANOFF	ADANOFF@LOEB.COM	310.282.2398
THERESA L. DAVIS	TDAVIS@LOEB.COM	312.464.3188
PATRICK N. DOWNES	PDOWNES@LOEB.COM	310.282.2352
ERIC GUERRERO	EGUERRERO@LOEB.COM	310.282.2214
EMILY R. HAUS	EHAUS@LOEB.COM	312.464.3126
JESSICA M. HIGASHIYAMA	JHIGASHIYAMA@LOEB.COM	310.282.2072
DEREK K. ISHIKAWA	DISHIKAWA@LOEB.COM	310.282.2364
MICHAEL W. JAHNKE	MJAHNKE@LOEB.COM	212.407.4285
JENNIFER A. JASON	JJASON@LOEB.COM	310.282.2195
THOMAS P. JIRGAL	TJIRGAL@LOEB.COM	312.464.3150
IEUAN JOLLY	IJOLLY@LOEB.COM	212.407.4810
BENJAMIN KING	BKING@LOEB.COM	310.282.2279
LIVIA KISER	LKISER@LOEB.COM	312.464.3170
RICHARD M. LORENZO	RLORENZO@LOEB.COM	212.407.4288
MICHAEL MALLOW	MMALLOW@LOEB.COM	310.282.2287
DOUGLAS N. MASTERS	DMASTERS@LOEB.COM	312.464.3144
FIONA P. MCKEOWN	FMCKEOWN@LOEB.COM	310.282.2064
DANIEL G. MURPHY	DMURPHY@LOEB.COM	310.282.2215
JAY K. MUSOFF	JMUSOFF@LOEB.COM	212.407.4212
JERRY S. PHILLIPS	JPHILLIPS@LOEB.COM	310.282.2177
RACHEL RAPPAPORT	RRAPPAPORT@LOEB.COM	310.282.2367
CHRISTINE M. REILLY	CREILLY@LOEB.COM	310.282.2361
AMANDA J. SHERMAN	ASHERMAN@LOEB.COM	310.282.2261
MICHAEL B. SHORTNACY	MSHORTNACY@LOEB.COM	310.282.2315
MEREDITH J. SILLER	MSILLER@LOEB.COM	310.282.2294
DENISE A. SMITH-MARS	DMARS@LOEB.COM	310.282.2028
WALTER STEIMEL, JR.	WSTEIMEL@LOEB.COM	202.618.5015
MICHAEL A. THURMAN	MTHURMAN@LOEB.COM	310.282.2122
LAURA A. WYTSMA	LWYTSMA@LOEB.COM	310.282.2251
MICHAEL P. ZWEIG	MZWEIG@LOEB.COM	212.407.4960