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# Privacy Law

## ALERT

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### Mass High Court: Zip codes Personal Identification Information; Retailers That Collect Zip Codes May Violate Consumer Privacy Law

Massachusetts' highest state court has ruled that ZIP codes constitute personal identification information, and that retailers that request and record consumers' ZIP codes during electronic credit card transactions may violate the state's consumer privacy law and may be subject to suit under the Massachusetts Unfair Trade Practices Act. The Massachusetts Supreme Judicial Court's [opinion](#) in *Tyler v. Michaels Stores Inc.* allows the putative class action filed in Massachusetts federal court to go forward.

The class action alleges that Michaels' electronic recording of customer ZIP codes constituted the writing of personal identification information on a credit card transaction form, in violation of § 105 (a) of Massachusetts' consumer privacy law (G.L. c. 93, Section 105(a)) and was an unfair or deceptive act or practice under the Massachusetts' Unfair Trade Practices Act (G.L. c. 93A, § 2). The district court initially dismissed the complaint against the national crafts retailer, finding that while ZIP codes constitute personal identification information under the Massachusetts statute, plaintiff Melissa Tyler failed to allege that the retailer's collection of ZIP codes caused her an injury for which she could recover. At Tyler's request, the court certified questions concerning the interpretation of the Massachusetts law to the Massachusetts Supreme Judicial Court, including whether ZIP codes constitute personal identification information and whether a plaintiff can sue under the statute absent identity fraud.

In a unanimous ruling, the Massachusetts Supreme Judicial Court held that ZIP codes do constitute personal identifiable information, because "a customer's ZIP code, when combined with the consumer's name, provides the merchant with enough information to identify through publicly available databases the consumer's address or telephone number, the very information § 105 (a) expressly identifies as personal identification information."

Disagreeing with both the district court and Michaels, the Massachusetts Supreme Judicial Court concluded that the principal purpose of § 105 (a) is "to guard consumer privacy in credit card transactions, not to protect against credit card identity fraud." While the supreme court concluded that the law does not require that the plaintiff have suffered identity fraud in order to assert a claim, it did find that in order to state a claim for an unfair or deceptive trade practice under the Massachusetts Unfair Trade Practices Act, the plaintiff must allege some injury or loss as a result of the retailer's unauthorized collection of personal identification information. The retailer's collection of the information alone does not constitute an actionable injury. A retailer must use the information for its own business purposes, and the court identified at least two ways that a retailer's unauthorized collection and use of personal identification could injure a consumer - by sending the customer unwanted marketing materials or by selling the customer's information to a third party for a profit. Plaintiff Melissa Tyler asserted that Michaels had done both. The supreme court left open the question of whether a plaintiff that alleges a different form of injury or loss could maintain a claim under the Massachusetts Unfair Trade Practices Act.

The state high court also suggested that while a merchant's use of a consumer's personal identification information in either of those two ways likely would not cause a quantifiable monetary loss or measurable emotional distress, plaintiffs would still be entitled to damages. The receipt of unwanted marketing material represents an invasion of the consumer's personal privacy that would entitle the consumer to the minimum statutory damage award of \$25 under the Massachusetts Unfair Trade Practices Act. And in cases in

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which the merchant sells consumer personal identification information to a third party, the court suggested that disgorgement of the merchant's profits may be appropriate damages.

The Massachusetts ruling is similar to the California Supreme Court's decision in *Pineda v. Williams-Sonoma Stores Inc.*, in which that court held that ZIP codes were personal identification information, and that California's Song-Beverly Credit Card Act of 1971 prohibits merchants from requesting and storing consumers' ZIP codes as a condition of completing card transactions. One significant difference, however, is that the California statute operates as a strict liability statute: a retailer who violates Song-Beverly may be subject to statutory damages of up to \$250 for the first violation, and up to \$1000 per violation for subsequent violations, regardless of whether the merchant ever uses the information or the consumer can allege any injury.

As was the case after *Pineda v. Williams-Sonoma Stores*, the *Tyler* case is likely to be the first of many consumer class actions for violations of Massachusetts' consumer privacy and unfair trade practices laws related to the collection of ZIP code and other information in the course of credit card transactions.

For more information about the content of this alert, please contact [Jeuan Jolly](#).

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## Advanced Media and Technology Department

ROBERT M. ANDALMAN	RANDALMAN@LOEB.COM	312.464.3168
ALISA C. BERGSTEIN	ABERGSTEIN@LOEB.COM	312.464.3155
IVY KAGAN BIERMAN	IBIERMAN@LOEB.COM	310.282.2327
CHRISTIAN D. CARBONE	CCARBONE@LOEB.COM	212.407.4852
TAMARA CARMICHAEL	TCARMICHAEL@LOEB.COM	212.407.4225
MARC CHAMLIN	MCHAMLIN@LOEB.COM	212.407.4855
MARGARET CHARENDOFF	MCHARENDOFF@LOEB.COM	212.407.4069
CRAIG A. EMANUEL	CEMANUEL@LOEB.COM	310.282.2262
KENNETH R. FLORIN	KFLORIN@LOEB.COM	212.407.4966
DANIEL D. FROHLING	DFROHLING@LOEB.COM	312.464.3122
NOREEN P. GOSELIN	NGOSSELIN@LOEB.COM	312.464.3179
THOMAS A. GUIDA	TGUIDA@LOEB.COM	212.407.4011
NATHAN J. HOLE	NHOLE@LOEB.COM	312.464.3110
MELANIE J. HOWARD	MHOWARD@LOEB.COM	310.282.2143
MICHAEL W. JAHNKE	MJAHNKE@LOEB.COM	212.407.4285
THOMAS P. JIRGAL	TJIRGAL@LOEB.COM	312.464.3150
IEUAN JOLLY	IJOLLY@LOEB.COM	212.407.4810
JULIE E. LAND	JLAND@LOEB.COM	312.464.3161
JESSICA B. LEE	JBLEE@LOEB.COM	212.407.4073
MICHAEL MALLOW	MMALLOW@LOEB.COM	310.282.2287
KATHERINE THERESE MASON	KMASON@LOEB.COM	212.407.4898

NERISSA COYLE MCGINN	NMCGINN@LOEB.COM	312.464.3130
ANNE KENNEDY MCGUIRE	AMCGUIRE@LOEB.COM	212.407.4143
DANIEL G. MURPHY	DMURPHY@LOEB.COM	310.282.2215
BRIAN NIXON	BNIXON@LOEB.COM	202.618.5013
ANGELA PROVENCIO	APROVENCIO@LOEB.COM	312.464.3123
CHRISTINE M. REILLY	CREILLY@LOEB.COM	310.282.2361
KELI M. ROGERS-LOPEZ	KROGERS-LOPEZ@LOEB.COM	310.282.2306
SETH A. ROSE	SROSE@LOEB.COM	312.464.3177
ROBERT MICHAEL SANCHEZ	RSANCHEZ@LOEB.COM	212.407.4173
ALISON POLLOCK SCHWARTZ	ASCHWARTZ@LOEB.COM	312.464.3169
BARRY I. SLOTNICK	BSLOTNICK@LOEB.COM	212.407.4162
REGAN A. SMITH	RASMITH@LOEB.COM	312.464.3137
BRIAN R. SOCOLOW	BSOCOLOW@LOEB.COM	212.407.4872
WALTER STEIMEL, JR.	WSTEIMEL@LOEB.COM	202.618.5015
AKIBA STERN	ASTERN@LOEB.COM	212.407.4235
JAMES D. TAYLOR	JTAYLOR@LOEB.COM	212.407.4895
MICHAEL A. THURMAN	MTHURMAN@LOEB.COM	310.282.2122
JILL WESTMORELAND	JWESTMORELAND@LOEB.COM	212.407.4019
DEBRA A. WHITE	DWHITE@LOEB.COM	212.407.4216
MICHAEL P. ZWEIG	MZWEIG@LOEB.COM	212.407.4960