WHAT HAVE WE LEARNED ABOUT AVOIDING SONG-BEVERLY ACT CLASS ACTIONS?

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Shortly after the California Supreme Court held that zip codes were "personally-identifiable information" ("PII") in *Pineda v. Superior Court*, 51 Cal. 4th 524, 120 Cal. Rptr. 3d 531, 246 P.3d 612 (2011), an avalanche of consumer class action lawsuits descended upon California merchants based on claimed violations of the Song-Beverly Credit Card Act of 1971 ("Credit Card Act"). Retailers that sold everything from DVDs to kitchen sinks were served with state and federal lawsuits claiming that they had illegally requested and obtained PII from consumers in connection with credit card transactions, and seeking damages ranging from $250 to $1,000 for each violation.

Since that time, the California courts have issued numerous rulings outlining when, and under what circumstances, retailers can request information - including consumers' names, addresses, zip codes, telephone numbers, email addresses and more - without running afoul of the privacy protections set out in the Credit Card Act.

Significantly, *Pineda* also instructed retailers to be cautious about relying on lower court decisions for certainty on Credit Card Act issues. The *Pineda* court overturned an earlier Court of Appeals ruling - *Party City Corp. v. Superior Court,* 169 Cal. App.4th 497, 86 Cal. Rptr.3d 721 (2008) - which for more than two years had stood as guidance to retailers that zip codes were not PII and therefore could be collected by merchants without violating the Credit Card Act. The Supreme Court's reversal of that decision was the triggering event that opened the floodgates of litigation on retailers who relied on *Party City* and began collecting zip codes from their customers.

So what have we learned at this point?

1. Online Transactions Are Not Covered By The Credit Card Act

First, the courts appear to have finally reached a consensus that online retail transactions are not subject to the Credit Card Act prohibitions. On February 4, 2013, the California Supreme Court held in *Apple v. Superior Court*, 56 Cal.4th 128, 292 P.3d 883 (Feb. 4, 2013), that the Credit Card Act does not prohibit online merchants from collecting PII in connection with transactions that involve the purchase of electronically downloadable products, such as songs and software programs and applications.

In *Apple*, the Court analyzed the statutory scheme and legislative history behind the Credit Card Act and determined that the Legislature expressed a "concern that there be ***some mechanism*** by which retailers can verify that a person using a credit card is authorized to do so." *Id.* at 143, 891 (emphasis same as original). Where online merchants do not have access to many of the protections, that are available to retailers that deal face-face with customers (such as the ability to compare an identification photo to the consumer's face), the Court found that the Credit Card Act implicitly recognized that sellers on the Internet need to be able to obtain additional information in order to protect themselves from fraud. However, the Court left open the question whether the Credit Card Act's protections are available to purchasers of products that are ***not downloadable*** from the merchant's website, such as items that are mailed or shipped to consumers.

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Shortly after the issuance of the *Apple* decision, the federal court for the Southern District of California (the San Diego area) published *Yeoman v. IKEA*, No. 3:11-cv-00701-WQH-BGS (S.D. Cal. Feb. 27, 2013), which held that a consumer's voluntary submission of PII in the course of making an electronic purchase on a self-service kiosk likewise was not prohibited by the Credit Card Act.

Most recently, in *Ambers v. BUY.COM, Inc.,* 2013 U.S. Dist. LEXIS 69219, 2013 WL 1944430 (C.D. Cal. April 30, 2013), the federal court for the Central District of California (the Southern California area) followed the *Apple* decision (as well as two prior federal court rulings - *Saulic v. Symantec Corp*., 596 F.2d 1323 (C.D. Cal. 2009) and *Mehrens v. Redbox Automated Retail LLC,* 2012 U.S. Dist. LEXIS 6386, 2012 WL 77220 (C.D. Cal. 2012)) in reaching the conclusion that the Credit Card Act does not apply to online transactions ***of any kind***, whether the products purchased are downloadable or not. The *Ambers* case arose from the plaintiff's purchase of a set of DVDs from a seller's website that required the plaintiff to submit his PII. The *Ambers* court held that Section 1747.08(d) of the Credit Card Act "clearly reflects the Legislature's intent to give retailers a way to verify that the person making the credit card purchase is authorized to do so." *Ambers*, 2013 U.S. Dist. LEXIS 69219, at *17.

2. PII Can Be Collected For Purposes That Are Not Related To Credit Card Transactions

The second lesson we have learned from the courts is collecting customer information for purposes that are not related to a credit card transaction is not prohibited by the Credit Card Act. First, the Credit Card Act's prohibition on the collection of PII, which is found in Section 1747.08(a), expressly applies only to ***purchase transactions*** – in other words, if there is no purchase involved, there can be no violation of the Credit Card Act. In addition, Section 1747.08(c)(4) exempts transactions for a "special purpose incidental but related to the individual credit card transaction, including but not limited to information relating to shipping delivery, servicing, or installation of the purchased merchandise, or for special orders."

As the courts discussed in *Apple* and *Ambers*, this means that merchants may collect PII in the course of processing refund transactions in order to safeguard against potential abuses. *See Absher v. Auto Zone, Inc.,* 164 Cal.App.4th 332, 346, 345 Cal.Rptr.3d 817 (2008). Retailers are also allowed to collect consumer information in order to register a warranty on a product purchased by a customer. *See Watkins v. Autozone Parts, Inc.,* 2009 U.S. Dist. LEXIS 89745, 2009 WL 3214341 (S.D. Cal. 2009). And, a merchant does not violate the Credit Card Act by requesting PII in the course of enrolling or crediting a customer with the benefits of a rewards program. *See Gass v. Best Buy Co*., 279 FRD 561, 2012 U.S. Dist. LEXIS 20420 (2012)

3. "Timing Is Everything"

Significantly, cases decided both before and after the *Pineda* decision confirm that "timing is everything" in Credit Card Act compliance. The courts have made it clear that the question whether a request for information violates the Credit Card Act must be evaluated objectively from the consumer's point of view. "The permissibility of a retailer's request for a customer's personal information turns on 'whether a consumer would perceive the store's request for information as a condition of the use of a credit card.'" *Davis v. Delvanlay Retail Group, Inc.*, 2012 U.S. Dist. LEXIS 178252 at * 8-9 (E.D. Cal, 2012) (citing *Florez v. Linen 'N Things, Inc.,* 108 Cal. App.4th 447, 451, 133 Cal. Reptr.2d 465 (2003)). *continued on page 9*

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As far back as 2003, the California Court of Appeals set out guidelines for retailers to avoid running afoul of the Credit Card Act if they want to collect personal information from their customers. In *Florez*, *id.* at 451-52, the court stated:

> We note that nothing prevents a retailer from soliciting a consumer's address and telephone number for a store's mailing list, if that information is provided voluntarily…. A merchant can easily delay the request until the customer tenders payment or makes his or her preferred method of payment known. If the payment is made with cash, and the customer is so inclined, personal identification information can be recorded at that time. Alternatively, retailers could delete a customer's personal identification information as soon as the customer reveals an intention to pay by credit card.

Florez also taught that retailers should not request consumer information before or during a credit card transaction since, from the perspective of a reasonable customer, they can be viewed as a condition of completing the transaction. *Florez*, 108 Cal. App. 4th at 453. As the court stated in *Davis*, "the critical issue … is not whether the transaction has reached an official end when the cashier requests personal information from the customer; it is whether under [the retailer's] policy, a customer would reasonably believe that providing the … information is necessary to complete the transaction." *Id.* at 2012 U.S. Dist. LEXIS 178252, at *11.

Similarly, in *Juhline v. Ben Bridge Jeweler, Inc.*, 2012 U.S. Dist. LEXIS 129413, 2012 WL 3986316, at *5 (S.D. Cal. 2012), the court held that the retailer's request for personal information after the customer handed their credit card to the cashier, but before receiving the transaction receipt, violated the Credit Card Act.

Finally, in *Davis v. Delvanlay Retail Group, Inc.,* a Central District federal court found an instance where the timing of a merchant's PII request from the consumer complied with the Credit Card Act. The court held that the merchant's procedures, which required the cashiers to wait until after the customer had been provided with his or her receipt before requesting any PII, satisfied the requirements of the Credit Card Act. Under these circumstances, the court ruled that, "[v]iewed 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." *Davis*, 2012 U.S. Dist. LEXIS 178252, at *11-12.

4. Written Policies and Documented Training Are Your Best Defense!

In all of the cases that have analyzed whether the Credit Card Act has been violated, the courts have not only considered the testimony of the consumers and the merchants' employees in an effort to establish the circumstances of the transactions, but have also reviewed the businesses' written policies and procedures, looking to determine whether the merchant employed uniform practices that would provide the basis for certification of a class of consumers who were treated in like fashion.

This suggests that retailers should carefully prepare and document their consumer information collection policies in writing so that they comply with the Credit Card Act and the guidelines that have been provided by the

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courts to date. In addition, retailers should implement those procedures through well-documented training and monitoring programs.

This approach, which is consistent with the "Compliance Readiness" approach we counsel our clients to use, is designed to ensure that the merchant's collection of consumer PII conforms to the law. Alternatively, in the event of a failure by an individual employee to comply with the merchant's written policies and training, such breakdowns will viewed as isolated incidents that cannot serve as grounds for a class action.

Written policies and training materials also support the availability of the "bona fide error" defense under Song-Beverly's safe harbor provisions, which protect a retailer from penalties for violations if they can demonstrate that the violation was not intentional and resulted from a bona fide error that was made notwithstanding the retailer's procedures designed to avoid the error. In order to be effective, however, the courts have held that the bona fide error defense requires a showing by the merchant of evidence of the circumstances relating to the plaintiff's claims.

In short, during the two years since *Pineda*, California court decisions have shaped the outlines for how and when merchants can collect personal information from consumers. Online merchants may collect PII for the purpose of preventing and/or detecting fraud. Face-to-face requests must occur under circumstances where the customer knows, or should reasonably know, that any information is voluntarily provided and is not required for the use of a credit card. And merchants should develop, and train their employees to follow, clear written policies and procedures that comply with the Credit Card Act's rules. These steps should help retailers avoid Credit Card Act class actions in the first place or position such cases for early dismissal at the class certification and/or summary judgment stages.

CRA MEMBERS GATHER FOR LARGEST ANNUAL MEETING EVER

More than 60 members gathered for CRA's Annual Meeting June 12-13 in Sacramento. Dan Walters, political columnist from the Sacramento Bee kicked off a full day of speakers including California Treasurer Bill Lockyer, Assembly Speaker John Perez and Lottery Director Robert O'Neill. Other speakers included Tupper Hall, Western States Petroleum Association and Jonathan Mayes, Safeway regarding the implementation and impact of AB 32; Jeff Margulies, Norton Rose Fulbright discussing Prop 65 and David Faustman, Fox Rothschild reviewing Song-Beverly Appeals and other California Supreme Court Suits. Other topics included the latest update on AB 880 and the Latino Consumer Federation. The day concluded with CRA staff, lobbyists and members providing a full discussion of the latest legislation, regulatory issues and local ordinances.