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Obtaining Insurance Coverage for the New Wave of Class Action Lawsuits Filed Against Merchants Recording Zip Codes

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The California Supreme Court's February 10 decision in Pineda v. Williams-Sonoma has already spawned a wave of class action lawsuits, many of which may constitute covered losses under a business's Directors and Officers ("D&O") or Commercial General Liability ("CGL") insurance policies.

In *Pineda v. Williams-Sonoma Stores, Inc.*, the California Supreme Court considered whether a business violates California's Song – Beverly Credit Card Act of 1971, Civil Code section 1747, et seq. (the "Credit Card Act") when it requests and records a customer's ZIP code during a credit card transaction. Under Credit Card Act section 1747.08, a business may not condition the acceptance of a credit card as payment for goods or services on a requirement or request that the cardholder provide personal identification information.

The *Pineda* court unanimously held that retailers abridge the Credit Card Act when they ask credit card customers for ZIP codes. The Court reasoned that because ZIP codes constitute personal identification information, requesting and recording that data violates the Credit Card Act. In the decision, the Court noted that defendant Williams-Sonoma added each cardholder's name and ZIP code to its database and used that information to "market products" and subsequently sell the compiled information. The Court further held that in enacting the Credit Card Act, the legislature sought to prevent retailers from improperly using personal and private data for marketing purposes.

Following the Court's decision, a handful of plaintiff's lawyers have filed more than 50 cases against retailers. Generally, the lawsuits contain allegations that the retailers wrongfully obtained private ZIP code information and used the information for advertising, promotion, and marketing. The lawsuits seek excessively high damages, including up to \$1000 per violation of the Credit Card Act, as well as attorneys fees, costs of suit, and prejudgment interest.

The nature of the claims, the lack of quantifiable harm, and the massive nature of potential damages under the Credit Card Act are closely similar to a wave of recent lawsuits under the federal corollary to the Credit Card Act, the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). Under FACTA, plaintiffs' lawyers also targeted retailers in hundreds of FACTA class actions across the country. Many of these

defendants were able to defeat class certification or settle FACTA claims for nuisance value, but an equally important consideration was the question of whether insurance companies would provide coverage for these claims.

In our experience, many FACTA defendants successfully obtained insurance coverage defense cost reimbursement and indemnity under D&O or CGL policies. Like many of the FACTA class action claims, the claims asserted in the Credit Card Act class actions may also be covered under a business's D&O or CGL policy. While each policy must be individually evaluated, private D&O policies often cover a range of broadly defined "wrongful acts" that encompass the allegations in these Credit Card Act class actions. Likewise, CGL policies may also provide coverage for the Credit Card Act class actions because these policies frequently cover personal or advertising injuries arising out of violations of a victim's right of privacy as well as other types of advertising injuries.

Insurance coverage questions are fundamentally contract questions that require careful consideration of the specific policy in question in addition to legal precedent. Given that class actions can be costly to defend and settle, a careful evaluation of insurance coverage and pursuit of denied claims can be a cost effective strategy.

In order to avoid risking a loss of coverage, businesses sued in Credit Card Act class actions should promptly notify their insurance carriers of the claim. Moreover, businesses should not be deterred by an initial coverage denial. In our experience, although insurance carriers frequently initially denied coverage for FACTA class actions, insurance coverage for those cases was secured under both D&O and CGL policies.

If you have any questions about the content of this publication, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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