

## Retailers Recording ZIP Codes: Class Action Fuel in California, Uncertainty In New Jersey

by Deborah S. Thoren-Peden, Catherine D. Meyer, Christine A. Scheuneman, Fusae Nara, and Amy L. Pierce

*Within weeks of each other, New Jersey Superior Court Judge Hansbury and U.S. District Court Judge Walls—each ruling on a motion to dismiss a claim brought under New Jersey's Truth in Consumer Contract, Warranty and Notice Act—disagreed about whether such a claim may be premised on an alleged violation of New Jersey's privacy law, N.J.S.A. 56:11-17. Whether New Jersey will follow California, interpreting "personal identification information" to include a ZIP code, remains to be seen.*

The California Supreme Court's ruling in *Pineda v. Williams-Sonoma Stores, Inc.*, on February 10, 2011, was the catalyst to the filing of over 200 class actions in California in the last seven months. The court, considering the plain language of Civil Code Section 1747.08 of California's Song-Beverly Credit Card Act of 1971 and the intent and legislative history of the Act, held that "a ZIP code constitutes 'personal identification information' as that phrase is used in section 1747.08." Section 1747.08 defines personal identification information to include "information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number." It confirmed that the word "address" encompasses not only a complete address but also its components, and concluded that "requesting and recording a cardholder's ZIP code, without more, violates the Credit Card Act." Many states, including New Jersey, have similar laws regulating requesting and/or recording consumers' personal identification information (PII) in connection with credit card transactions.

Within weeks of each other, Superior Court Judge Stephan Hansbury and New Jersey U.S. District Court Senior District Judge William H. Walls disagreed about whether New Jersey's Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14, *et seq.*, provides a consumer with a vehicle for enforcement of a New Jersey Act which prohibits requiring PII for recordation in connection with a credit card transaction, **an act that does not provide consumers with a private right of action**. On September 16, 2011, Judge Hansbury, in *Imbert v. Harmon Stores Inc.*, **denied** the defendant's demurrer to the class action, adopting the plaintiff's position that the TCCWNA allows a plaintiff to sue for an alleged violation of N.J.S.A. 56:11-17. In contrast, on September 26, 2011, Judge Walls, in *Feder v. Williams-Sonoma Stores*,

*Inc.*, **granted** the defendant's motion to dismiss a nearly identical cause of action under the TCCWNA for failure to state a claim.

### **New Jersey Act Regulating Recording of PII In Connection With a Credit Card Transaction**

N.J.S.A. 56:11-17 provides that "[n]o person which accepts a credit card for a consumer transaction shall require the credit card holder, as a condition of using a credit card in completing the consumer transaction, to provide for recordation on the credit card transaction form or any other form, any [PII] that is not required by the issuer to complete the credit card transaction, including, but not limited to, the credit card holder's address or telephone number, or both; provided, however, that the credit card holder's telephone number may be required on a credit card transaction form if the credit card transaction is one for which the credit card issuer does not require authorization. Any person who violates the Act shall be liable to a civil penalty of not more than \$250 for the first offense and not more than \$1,000 for the second and each subsequent offense, but "[a]ny penalty imposed pursuant to this section shall be collected by summary proceedings instituted by the Attorney General..." See N.J.S.A. 56:11-18.

### **New Jersey's Truth in Consumer Contract, Warranty and Notice Act**

N.J.S.A. 56:12-15 makes it unlawful for a seller in the course of his business to (1) offer to any consumer or prospective consumer, (2) enter into any written consumer contract, or (3) give or display any written consumer notice or sign, which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller as established by State or Federal law at the time the offer is made, the contract is signed, or a notice or sign is given or displayed. Any person who violates this section shall be liable for a civil penalty of not less than \$100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney fees and court costs. See N.J.S.A. 56:12-17.

### **Plaintiffs Imbert and Feder Allege Similar Facts to Support Their Class Actions**

Both complaints allege that the defendants requested and recorded their ZIP codes in connection with a credit card transaction in violation of New Jersey's privacy law. Their complaints also allege that they may pursue recourse for a violation of N.J.S.A. 56:11-17 under New Jersey's TCCWNA, and included a common law claim for invasion of privacy. Both plaintiffs pursue recourse under the TCCWNA because New Jersey's privacy law does not provide individuals with a private right of action, leaving enforcement to the New Jersey Attorney General. In contrast, N.J.S.A. 56:12-17 of the TCCWNA allows for statutory damages of \$100 per incident, in addition to legal fees to a prevailing plaintiff. Each complaint alleges class claims going back six years.

### **Superior Court Judge Focuses on Alleged Violation of Privacy Law, N.J.S.A. 56:11-17**

In *Imbert v. Harmon Stores Inc.*, denying the defendant's demurrer, Judge Hansbury adopted the plaintiff's position that the TCCWNA permits a plaintiff to sue for a violation of N.J.S.A. 56:11-17. He was not persuaded by the defendant's arguments that the present case is dissimilar to *Pineda* because the California statute specifically prohibits requesting and recording a consumer's PII, but N.J.S.A. 56:11-17 does not prohibit requesting this information. He also rejected defendant's arguments that: (1) Mr. Imbert had no reasonable expectation of privacy in his ZIP code, (2) Mr. Imbert failed to demonstrate that the defendant's collection of ZIP codes would be offensive to the average person, and (3) Mr. Imbert's exclusive remedy is with the New Jersey attorney general because Section 56:11-17 does not provide consumers with a private right of action. No written decision is provided by Judge Hansbury.

**Federal Court Judge Focuses on Alleged Violation of TCCWNA, N.J.S.A. 56:12-15**

In *Feder v. Williams-Sonoma Stores, Inc.*, the defendant filed a motion to dismiss the complaint for failure to allege injury and failure to state a claim, respectively. In an **unpublished** order, ruling on the defendant's first argument, Judge Walls held that because plaintiff alleged that the fact that she was personally subject to the conduct that allegedly violates the TCCWNA was enough to establish the injury element of standing. Ruling on the defendant's second argument, however, Judge Walls concluded:

"Even assuming that the credit card transaction form constitutes a 'written consumer contract' to which the TCCWNA applies, the only writing the plaintiff alleges can be found on the credit card transaction form is information obtained from her credit card swipe and her zip code. The existence of the recorded zip code itself, which consists solely of numbers, does not constitute a contract provision that violates the plaintiff's rights... It is this requirement that the plaintiff provide her zip code, not the recordation of the zip code itself, that the plaintiff alleges is the contract provision that violates her rights under New Jersey law, specifically N.J. Stat. Ann. § 56:11-17.

Ultimately, Judge Walls concluded that requiring plaintiff to provide her ZIP code would only violate the TCCWNA if it was a provision of a written contract and "plaintiff has not alleged that this 'contract' contains a written provision that violates State or Federal law." Judge Walls concluded that he need not address whether plaintiff sufficiently plead a violation of N.J.S.A. 56:11-17. Plaintiff was also permitted to withdraw her invasion of privacy claim.

Class actions continue to be filed in California following the *Pineda* decision. A similar trend may be beginning in New Jersey if the term PII in N.J.S.A. 56:11-17 is interpreted to include consumers' ZIP codes, and requesting and recording a consumer's ZIP code in connection with a credit card transaction is found to be a violation of N.J.S.A. 56:11-17 and, in turn, a violation of New Jersey's TCCWNA.

[Click here to read Pillsbury Client Alert "California Supreme Court: "Requesting and Recording a Cardholder's ZIP Code" Violated State Law."](#)

---

If you have questions, contact the Pillsbury attorney with whom you regularly work or the following:

Deborah S. Thoren-Peden **(bio)**  
Los Angeles  
+1.213.488.7320  
deborah.thoren-peden@pillsburylaw.com

Catherine D. Meyer **(bio)**  
Los Angeles  
+1.213.488.7362  
catherine.meyer@pillsburylaw.com

Christine A. Scheuneman **(bio)**  
Los Angeles  
+1.213.488.7487  
christine.scheuneman@pillsburylaw.com

Fusae Nara **(bio)**  
New York  
+1.212.858.1187  
fusae.nara@pillsburylaw.com

Amy L. Pierce **(bio)**  
Sacramento  
+1.916.329.4765  
amy.pierce@pillsburylaw.com

John A. Fedun **(bio)**  
New York  
+1.212.858.1923  
john.fedun@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2011 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.