Class Actions Against Merchants Continue as Courts Interpret Law Protecting Personal Info

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In the wake of several court decisions, four retailers have come under attack for alleged violations of California's Song-Beverly Credit Card Act in the collection and recording of their credit card customers' personal information at the point-of-sale.

In October 2009, four separate class actions were filed in San Diego and Los Angeles Superior Courts, each alleging that a major retailer collected and recorded its credit card customers' personal identification information in its electronic sales registers in violation of California's Song-Beverly Credit Card Act of 1971, Civil Code §§ 1747, *et seq.* (the "Act").[1] The Act prohibits merchants from "**request[ing]**, or **requir[ing]** as a condition to accepting [a] credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information upon [a] credit card transaction form or otherwise" (emphasis added).[2] The Act defines "personal identification information" as 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.

These class actions come as judicial construction evolves on the proper application of the Act to information collected on different transactions, and may signal that more challenges to merchants' point-of-sale information collection practices—including the collection of email addresses—are forthcoming.

Judicial Construction of the Act

Recent Decisions Hold The Act Does Not Apply In Several Contexts

The Act prohibits requesting "personal identification information"; two recent decisions have helped define what constitutes such information. In *Party City Corp. v. Superior Court*, 169 Cal. App. 4th 497 (2008), and again in *Pineda v. Williams-Sonoma Stores, Inc.*, 2009 Cal. App. LEXIS 1699 (Cal. Ct. App. Oct. 8, 2009), California's Fourth District Court of Appeal concluded that a customer's zip code is not, as a matter of law, personal identification information under the Act. Both the *Party City* and *Pineda* courts reasoned that the

[1] Only one of the four complaints specifies that the merchant requested the customer's "address."

[2] Cal. Civ. Code § 1747.08(a)(1), subdivisions (c) and (d), exempt certain transactions, *e.g.*, if the cardholder does not make the credit card available upon request to verify the number, a driver's license or identification card number may be recorded.

Act is intended to protect information that "is of the kind that pertains to individuals, not groups of zip code inhabitants."

The Act specifies that it does not apply in certain circumstances, such as where the personal identification information is required for a special purpose incidental to but related to the credit card transaction (Civil Code § 1747.08(c)). Two courts recently indicated that fraud concerns may constitute such a "special purpose." In *TJX Companies, Inc. v. Superior Court*, 163 Cal. App. 4th 80 (2008) and *Absher v. Autozone, Inc.*, 164 Cal. App. 4th 332 (2008), California's Fourth and Second District Courts of Appeal found that the Act does not apply to merchandise returns. The *TJX* Court found that the Act is "explicitly limited to use of credit cards as 'payment.'" It explained that the considerations that apply to purchases do not apply to merchandise returns—with returns, there are opportunities for fraud and it behooves the merchant to identify the person who returns merchandise in case the merchandise is used, damaged or stolen.

Applying the rationale of *TJX*, the United States District Court, Central District of California recently held in *Saulic v. Symantec Corp.*, 596 F. Supp. 2d 1323 (C.D. Cal. 2009), that online transactions are not covered by the Act's personal information protections because of "unique fraud concerns" associated with online transactions.

Recent Decisions Consider Whether Reverse Searches for Information About Customers Violates the Customers' Privacy Rights

Recent decisions have considered whether a merchant performing a reverse search using a customer's information to search for additional information about that person violates the customer's California constitutional right to privacy. In *Watkins v. Autozone Parts, Inc.*, 2008 WL 5132092 (S.D. Cal. Dec. 5, 2008), the United States District Court, Southern District of California held that Autozone's use of its customer's telephone number and credit card information—both personal identification information—to locate the customer's home address was a serious invasion into the customer's privacy. In contrast, in *Pineda*, the Fourth District Court of Appeal held that Williams-Sonoma's collection of a customer's zip code and use of it in a reverse search to find the customer's address did not invade the customer's privacy because it used legally obtained information (*e.g.*, the customer's name and zip code)—neither of which are personal identification information—to locate the customer's publicly available address. The takeaway appears to be that reverse searches for information about customers **do not** violate their privacy rights so long as the merchant is **not** using the customer's personal identification information.

Merchants' Collection of Customers' Email Addresses Remains Open to Attack

Only one published California decision discusses whether a merchant's collection of email addresses is governed by the Act, and it avoids addressing the subject directly due to the procedural posture of the case. In *Powers v. Pottery Barn, Inc.*, 177 Cal. App. 4th 1039 (2009), the plaintiff alleged that, after she tendered her credit card as payment, she was asked to provide an email address that was recorded in an electronic cash register. More generally, she claimed that Pottery Barn made a practice of asking for personal identification information within the meaning of the Act. Pottery Barn moved to dismiss the complaint. The court denied the motion; while the court did not conclude that the Act covers the collection of email addresses in connection with credit card transactions, it signaled possible agreement with that position by stating that the Act has an "impact on a business's use of email."

In the Midst of the Evolving Judicial Construction of the Act, Polo Settles Two Act Class Actions

This evolution in the judicial construction of the Act coincides with a decision by Polo to settle two Act class actions. In late 2007, David Shabaz and Brian Korn each filed class actions in California alleging that Polo

violated the Act by requesting credit card customers provide their address and telephone number, which Polo allegedly recorded "as part of processing the credit card transaction."[3] Polo moved to, among other things, dismiss the *Shabaz* complaint for failure to state a claim, arguing that the Act requires a plaintiff to allege that the request for personal identification information was made "as a condition of accepting the credit card."[4] The court in *Shabaz v. Polo Ralph Lauren Corporation*, 586 F. Supp. 2d 1205 (C.D. Cal. 2008), **rejected** Polo's argument, emphasizing that the Act requires only that a customer **might** perceive a request for personal identification information as a condition of payment by credit card.[5]

Shortly after the *Shabaz* decision established pleading requirements for Act claims, the parties coordinated the two actions for purposes of mediation and settlement. On July 17, 2009, the court granted preliminary approval of the settlement and a stipulated settlement class defined as "[a]ny and all persons who, from October 11, 2006 through January 31, 2009, (i) purchased merchandise from Polo's stores in the State of California, (ii) used a credit card to make the purchase(s), and (iii) whose telephone number and/or address (mail or email) was requested and recorded by Polo." Upon final approval by the court, Polo agreed to, among other things: (1) pay Shabaz and Korn each $7,500 as the class representatives; (2) provide each class member with a "Summary Class Notice" enclosing a $20 credit certificate for a Polo retail store; and (3) pay Shabaz' and Korn's counsel each $475,000. The Final Settlement Fairness Hearing was held on December 7, and the court "agreed that the terms of the settlement are fair, just and reasonable and that they provide fair compensation for class members."[6]

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

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[3] Polo removed both actions to federal court.

[4] Polo, alternatively, sought to dismiss Shabaz' claim for injunctive relief and to strike certain allegations. The Court agreed that: (1) Shabaz did not have a right to sue for an injunction under the Act; (2) Shabaz did not have an equitable right to assert a claim for injunctive relief; (3) Shabaz' class action allegations should be reviewed during the class certification hearing; (4) the one-year statute of limitations applied; and (5) Shabaz' demand for a jury trial should be stricken. In mid-2008, Korn's cause of action for violation of Section1747.08(a)(3) was dismissed and request for injunctive relief stricken.

[5] The *Shabaz* court relied on *Florez v. Linens 'N Things, Inc.*, 108 Cal. App. 4th 447 (2003) and *Korn v. Polo Ralph Lauren Corp.*, 2008 WL 2225743 (E. D. Cal. May 28, 2008). The *Florez* court concluded that "[a]s evidenced by the 1991 amendment, section 1747.8 is designed to prevent a 'request' for personal information, because a customer might perceive that request as a condition of credit card payment."

[6] One individual out of the approximately 560,000-person class filed a formal objection with the court regarding the settlement.