

Dear Retail Clients and Friends,

The California Supreme Court recently issued an opinion that prohibits retailers from requesting and recording at the point of sale the ZIP codes of customers paying with credit cards under the state's Song-Beverly Credit Card Act. Not only does this ruling impact retailers whose marketing campaigns encourage their sales associates to elicit ZIP codes, but it also casts substantial doubt on the legality of requests for nearly any other piece of customer information. This edition of ***Morgan Lewis Retail Did You Know?*** examines that opinion and its impact on the industry.

Background

The Song-Beverly Credit Card Act of 1971 (Song-Beverly Act) (Cal. Civ. Code §§ 1747 et seq.) is designed to protect consumer privacy. Section 1747.08(a)(2) of the Song-Beverly Act prohibits retailers from asking customers for "personal identification information" during credit card transactions and then recording that information. The Song-Beverly 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." Subdivision (c) then provides a list of exceptions, including when a credit card is being used as a deposit or for cash advances, when the entity accepting the card is contractually required to provide the information to complete the transaction or is obligated to record the information under federal law or regulation, or when the information is required for incidental purposes, like shipping, delivery, servicing, or installation. Over the years, a series of cases have slowly defined the parameters of "personal identification information," and the recent California Supreme Court decision, *Pineda v. Williams-Sonoma Stores, Inc.* (Pineda), has now added ZIP codes—and potentially much more—to that definition.

Pineda v. Williams-Sonoma Stores, Inc.

Pineda provides a cautionary tale for the retail industry. According to the plaintiff, Jessica Pineda, a Williams-Sonoma Stores, Inc. (Company) sales associate asked her for her ZIP code while she was purchasing items with a credit card at the checkout counter. She alleges that she provided the information believing it to be necessary for the completion of the transaction. The sales associate then recorded the information in the Company's database. The Company then allegedly inputted her name and ZIP code into a sophisticated software program to obtain her previously undisclosed address, which it retained in its system for marketing purposes and for resale to other businesses.

Ms. Pineda filed a class action suit against the Company alleging that its action of requesting and recording her ZIP code violated section 1747.08(a)(2) of the Song-Beverly Act. The trial court disagreed and found that a ZIP code is not "personal identification information" under section 1747.08 because it applies to such a large group of people. The court of appeal affirmed that decision in all respects, relying on an earlier court of appeal decision in *Party City Corp. v. Superior Court*, which explicitly held that ZIP codes are not "personal identification information." The California Supreme Court then agreed to review the plaintiff's Song-Beverly Act claim and reversed the court of appeal's decision, overturning *Party City*.

After determining that the Song-Beverly Act should be broadly construed in favor of protecting consumer privacy, the California Supreme Court held that ZIP codes are "personal identification information" that cannot be requested and recorded during credit card transactions. The court cited the fact that the Song-Beverly Act explicitly classifies consumer addresses as "personal identification information," and reasoned that the various

components of the address, including the ZIP code, must also be “personal identification information.” The court then went further, holding that a ZIP code could be considered “personal identification information” because it, like an address or telephone number, is information that is “unnecessary to the sales transaction that . . . can be used for the retailer’s business purposes,” particularly since it is possible to derive a consumer’s address using only his or her name and ZIP code. The court’s expansive interpretation of the statute severely restricts whether, when, and how retailers may request information from customers that is not necessary to a sales transaction, directly impacting their marketing and market research efforts.

Practical Advice

The California Legislature has adopted numerous consumer protection statutes over the years, as well as a variety of laws specifically focused on consumer privacy, and the *Pineda* decision underscores the court’s willingness to enforce those statutes broadly. Retailers should review the *Pineda* decision and determine whether and how it will impact their requests for consumer information, as well as how it will affect their privacy practices and policies generally. Given the court’s broad construction of the Song-Beverly Act, retailers should be wary of requesting *any* consumer information at the point of sale that is not necessary to complete the transaction, covered by one of the statutory exclusions, or pursuant to the consumer’s express consent, and should ensure compliance with privacy laws and their own privacy policies.

How We Can Help

We can assist our clients with understanding the evolving Song-Beverly Act and its impact on current business practices, as well as the variety of state and federal laws and regulations addressing increasing concerns over privacy. Our team has the resources to assist our clients with the development of retail marketing programs that comply with current state laws and follow retail industry “best practices.” Moreover, we have actively litigated numerous Song-Beverly Act cases in California over the past few years and are familiar with the plaintiffs’ attorneys who bring these matters.

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact or any of the following:

Joseph Duffy, Litigation
Los Angeles
213.612.7378
jduffy@morganlewis.com

Greg Parks, Litigation
Philadelphia
215.963.5170
gparks@morganlewis.com

Anne Marie Estevez, Labor and Employment
Miami
305.415.3330
aestevez@morganlewis.com

Joan M. Haratani, Litigation
San Francisco
415.442.1262
jharatani@morganlewis.com

Diane Webb, Litigation
San Francisco
415.442.1353
dwebb@morganlewis.com

Carla B. Oakley, Intellectual Property
San Francisco
415.442.1301
coakley@morganlewis.com

Ron N. Dreben, Intellectual Property
Washington, D.C.
202.739.5213
rdreben@morganlewis.com

Kevin J. Fee, Intellectual Property
Washington, D.C.
202.739.5353
jkfee@morganlewis.com

These individuals are part of our international Retail Practice. Attorneys from our 23 offices regularly represent national, regional, and local retailers in a broad array of subject matters including litigation, labor and employment, real estate, tax, transactional, and regulatory.

About Morgan Lewis Retail Did You Know? This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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