

Global Regulatory Enforcement Alert

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Client Alert 12-019
January 2012
reedsmith.com

ZIP Code Privacy Litigation Update: Massachusetts

We previously reported on *Pineda v. Williams-Sonoma Stores, Inc.* (found at: <http://www.globalregulatoryenforcementlawblog.com/2011/02/articles/data-security/california-reins-in-retail-marketing/>), in which the California Supreme Court found that retailers could violate the Song-Beverly Credit Card Act by collecting ZIP codes at point of sale for credit card transactions.

In the wake of *Williams-Sonoma*, retailers all across the United States have faced criticism and suit over their alleged collection of customer ZIP codes at point of sale. Privacy advocates claim that retailers have no legitimate purpose for collecting that information, and will only use it to subject the customer to unwanted solicitations. In addition, consumer groups claim that the practice of collecting ZIP codes at point of sale exposes customers to an unnecessary risk of fraud. This has played out as an issue of state law, state by state. Some states have passed specific laws restricting the collection of personal information at point of sale, in some cases including ZIP codes. Other states have not. Whether a specific law against the practice is on the books in a given state or not, the plaintiffs' bar has attempted to make a cottage industry of ZIP code class actions against retailers in states around the nation.

The most recent decision in this ongoing controversy comes from a Federal District Court in Massachusetts. In *Tyler v. Michaels Stores, Inc.*, No. 11-10920, plaintiffs had brought suit under Massachusetts General Laws, chapter 93A, section 105(a). That section of Massachusetts law prohibits the collection of certain personal identification information in connection with credit card transactions. The court in *Tyler* found that the primary concern of the Massachusetts legislature in passing section 105(a) was the prevention of fraud. The court equated ZIP codes with the use of PIN numbers in ATM/Debit Card transactions, because in certain circumstances the ZIP code is required to authorize the transaction, and "may be used fraudulently to assume the identity of the cardholder." As such, the court held that a ZIP code is personal identification information under section 105(a). Therefore, unless a ZIP code is required to complete the transaction, a retailer **may not** request that information from the consumer. The court concluded that this construction is "consistent with the Massachusetts legislative intent to prevent fraud." (emphasis added).

It is unclear if the ruling will also expand to online transactions in Massachusetts. The court explicitly held that the reach of section 105(a) did include the entry of ZIP codes into electronic card terminals. Alternatively, the primary purpose of the Massachusetts statute is fraud prevention, and ZIP codes are key tools in fraud prevention for online retailers. As such, it is an open question whether the collection of ZIP codes by online retailers is still permissible under the *Tyler* court's reading of the law.

Faced with a similar question in the wake of *Pineda*, a Federal District Court in California recently held that the reach of the Song-Beverly Credit Card Act is limited to traditional brick-and-mortar retailers. In *Salmonson v. Microsoft Corp.*, No. 2:11-cv-05449 (C.D. Cal.), the court relied on the lack of legislative intent to apply the Act to online transactions, and the "unique fraud concerns" presented by online transactions, in which retailers have less ability to verify the identity of consumers. The court stated that the Act only applies to "pen and paper transactions."

Lastly, the *Tyler* court's ruling also provided a silver lining for retailers. Despite holding that Michaels Stores' actions violated the Massachusetts law, the court nonetheless dismissed the case because Tyler was not injured. As section 105(a) was enacted to prevent fraud, a statutory violation without more was not enough to maintain a case. Similarly, misappropriation of "valuable address information" and the receipt of unwanted mail are not cognizable injuries. Without a showing that the collection of ZIP codes caused an unreasonable risk of fraud, it is unclear if a lawsuit could be maintained.

As the nationwide ZIP code controversy continues to unfold, retailers are well-advised to carefully consider their point-of-sale information collection practices under the laws of every state in which they operate, and whether they can take any proactive measures to mitigate the risk that such liability theories creep into online sales activities.

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