Cooley

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Last week, in *Pineda v. Williams-Sonoma Stores, Inc.,* 2011 WL 446921, — Cal. 4th — (Cal. Feb. 11, 2011) (*"Pineda"*), the California Supreme Court held that "a ZIP code constitutes 'personal identification information'" as that phrase is used in California Civil Code section 1747.08 ("Section 1747.08"), and as such, "requesting and recording a [credit] cardholder's ZIP code" is prohibited by Section 1747.08 if it is requested as part of a credit card transaction.[1]

Background on Section 1747.08

Section 1747.08 is part of the Song-Beverly Credit Card Act of 1971 as amended. With certain exceptions and exclusions, Section 1747.08 prohibits businesses from requesting or requiring customers who use credit cards as tender to provide personal identification information, and then recording such information.[2] The statute also bans the use of forms that facilitate the obtaining of such information.[3] The statute 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."[4] The statute provides for a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation and one thousand dollars ($1,000) for each subsequent violation. Among other exceptions, the statute does not apply to instances where "personal identification information is required for a special purpose incidental but related to the individual credit card transaction, including, but not limited to, information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders."[5]

California Appellate Court decisions regarding whether ZIP codes constitute personal identification information before *Pineda*

Prior to *Pineda,* two California appellate decisions had addressed the issue of whether ZIP codes constitute personal identification information under Section 1747.08. In *Party City Corp. v. Superior Court,* 169 Cal. App. 4th 497 (2008), the appellate court held that "[a] five-digit ZIP code is not, as a matter of law, that kind of personalized or individual identification information" that the statute was intended to protect.[6] The California Supreme Court denied the petition for review of the decision in *Party City.* A little under a year later, in *Pineda v. Williams-Sonoma Stores, Inc.,* 178 Cal. App. 4th 714 (2009), review granted Feb. 10, 2010, S178241, the same appellate court re-affirmed its earlier decision in *Party City.* In *Pineda,* the plaintiff had alleged: (1) she went to the cashier at defendant's store to pay for an item with her credit card; (2) the cashier asked plaintiff for her ZIP code and, believing she was required to provide the requested information to complete the transaction, plaintiff provided it; (3) the cashier entered plaintiff's ZIP code into the electronic cash register and then completed the transaction; (4) at the end of the transaction, defendant had plaintiff's credit card number, name, and ZIP code recorded in its database; (5) defendant matched plaintiff's name and ZIP code with plaintiff's previously undisclosed address, giving defendant the information, which it now maintains in its own database; and (6) defendant uses its database to market products to customers and may also sell the information it has compiled to other businesses.[7]

The California Supreme Court's decision in *Pineda*

Although it denied the petition for review of *Party City,* the California Supreme Court accepted review of *Pineda.* In a unanimous opinion, the Supreme Court reversed the appellate court's decision, holding that in light of Section 1747.08's "plain language, protective purpose, and legislative history…a ZIP code constitutes 'personal identification information'…."[8] In doing so, the Court noted that Section 1747.08 should be "liberally construe[d]...in favor of [its] protective purpose…which, in the case of section 1747.08, includes addressing the misuse of personal identification information for, inter alia, marketing purposes."[9] Further, the Court found "the

legislative history of…section 1747.08…demonstrates the Legislature intended to provide robust consumer protections by prohibiting retailers from soliciting and recording information about the cardholder that is unnecessary to the credit card transaction."[10]

Pineda addressed a narrow issue under Section 1747.08 and left others unaddressed

The California Supreme Court's holding in *Pineda* was focused on the limited issue of whether ZIP codes constitute personal identification information under Section 1747.08. It did not, however, address other issues regarding the statute's reach. During the oral argument in *Pineda,* the justices raised one such issue—whether Section 1747.08 precludes collection of personal identification information during a credit card transaction where the business has disclosed to the customer that providing the information is voluntary, is not required to complete the purchase transaction, and may be used for marketing or other purposes (i.e., a *"Miranda"* type warning or disclosure). But the California Supreme Court's opinion in *Pineda* did not address this issue. Also unaddressed is the meaning of the phrase "as a condition to accepting the credit card" as used in the statute.

In short, after *Pineda,* issues regarding the scope of Section 1747.08 remain unaddressed, and it is unclear under what circumstances businesses may collect personal identification from customers who pay by credit card.

Recent California appellate court and Federal District Court decisions regarding Section 1747.08

Numerous class action lawsuits have been filed under Section 1747.08 against retailers doing business in California since the statute became effective. In the last few years, several California appellate courts have issued opinions regarding the statute's scope, penalty provisions, and limitations period. On these issues, California appellate courts have held as follows:

Scope

Section 1747.08 prohibits a request for personal identification information at the point-of-sale *before* the customer makes his or her manner of payment known, if the customer subsequently pays with a credit card. *Florez v. Linens 'N Things, Inc.,* 108 Cal. App. 4th 447 (2003).

Section 1747.08 does not apply to refund or merchandise return transactions. *TJX Companies., Inc. v. Superior Court,* 163 Cal. App. 4th 80 (2008); *accord Absher v. AutoZone, Inc.,* 164 Cal. App. 4th 332 (2008).

Limitations period

Claims under Section 1747.08 must be filed within one-year of the alleged violation. *TJX Companies, Inc. v. Superior Court,* 163 Cal. App. 4th 80 (2008).

Civil penalty

If a business has been found to violate Section 1747.08, the court must impose a civil penalty, but the range of the penalty imposed could span "between a penny (or even the proverbial peppercorn we all encountered in law school) to the maximum amounts authorized by the statute." *TJX Companies, Inc. v. Superior Court,* 163 Cal. App. 4th 80, 86 (2008).

Although not binding authority, federal district courts have also recently issued opinions regarding the scope of Section 1747.08 as follows:

Scope

Section 1747.08 does not apply to online transactions. *Saulic v. Symantec Corp.,* 596 F. Supp. 2d 1323 (C.D. Cal. 2009).

Requests for personal identification information for the purpose of registering a customer for a product warranty do not violate Section 1747.08. *Watkins v. Autozone Parts, Inc.,* 2009 WL 3214341 (S.D. Cal. Sept. 29, 2009).

Again, these federal district court opinions are not binding on California courts, and these issues of scope have not been addressed by California appellate courts.

Cooley's Commercial Class Action Litigation practice has extensive experience in defending class actions brought under and in counseling businesses regarding Section 1747.08, as well as other privacy laws and regulations. Cooley was counsel of record in the two seminal cases under the statute—*TJX Cos., Inc. v. Superior Court* and *Florez v. Linens 'N Things*—and was counsel for The Gap, Inc., Old Navy, LLC, and Banana Republic, LLC, as Amici Curiae in *Pineda v. Williams-Sonoma Stores, Inc.* If you have any questions about Section 1747.08, privacy issues, or this *Alert,* please contact one of the attorneys listed above.

Notes

1 *Pineda v. Williams-Sonoma Stores, Inc.,* 2011 WL 446921, at *1, — Cal. 4th — (Cal. Feb. 11, 2011).

2 Cal. Civ. Code § 1747.08(a)(1), (2).

3 Cal. Civ. Code § 1747.08(a)(3).

4 Cal. Civ. Code § 1747.08(b).

5 Cal. Civ. Code § 1747.08(c)(4).

6 *Id.* at 503.

7 *Pineda v. Williams-Sonoma Stores, Inc.*, 2011 WL 446921, at *1, — Cal. 4th — (Cal. Feb. 11, 2011).

8 *Id.*

9 *Id.* at *4.

10 *Id.* at *7.

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