

Mr. ZIP's California adventure

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The California Supreme Court's February ruling in *Pineda v. Williams-Sonoma Stores Inc.*, 51 Cal. 4th 524, 246 P.3d 612 (2011), that customer ZIP codes constituted "personally identifiable information" under that state's Song-Beverly Credit Card Act¹ caught many people off guard. They could understand why the law might want to protect a phone number or a credit card account number — but a postal code?

After all, the U.S. Postal Service says there are more than 42,000 ZIP codes nationwide. More than 100,000 people on Manhattan's Upper East Side share just one ZIP code, 10021, and everybody remembers how many different characters there were in "Beverly Hills 90210." Intuitively, all by itself, a ZIP code just doesn't sound very private or individual.

But in the world of contemporary cyber data, no bit of information stands alone. The *Pineda* ruling is in step with growing concerns that new abilities to crunch unprecedented amounts of data in novel fashions have reshaped the universe of information in ways that once were unimaginable. Bright, clear lines between information that can and cannot identify a given individual are growing increasingly indistinct. The trend is likely only to accelerate with the advent of even more individuated data to afford more mobile, more continuous and more omni-locational communication.

THE PINEDA DECISION

Since 1991, California's Song-Beverly Act specifically has prohibited retailers from requiring or even requesting, "personally identifying information" in a credit card transaction and recording it, "including but not limited to the cardholder's address and telephone number." The *Pineda* suit claimed, for the plaintiff herself and on behalf of a proposed class, that Williams-Sonoma had violated the statute by asking for and recording her ZIP code when it processed a purchase she made using a credit card at one of its retail stores.

She further alleged that Williams-Sonoma then had fed her name and ZIP code into reverse-search computer software with the object of learning her street address for marketing purposes. She asserted that her home address was then subject to use for distribution of catalogs or advertisements by

This time, however, the Supreme Court granted review after the 4th District court dismissed the Song-Beverly Act claim, and came to a different result. The Supreme Court's unanimous opinion in *Pineda* discussed ways in which a ZIP code forms part of an address, and rejected defense

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Williams-Sonoma, or even might be sold or rented to others.

Pineda sought relief under the Song-Beverly Act and the state's Unfair Competition Law.² The former requires a civil penalty to be imposed if liability is found, up to a maximum of \$250 for a first violation and up to \$1,000 for a subsequent violation.

When the *Pineda* case was still in the intermediate appellate court, its outcome must have seemed a foregone conclusion. Just a few years earlier, that same 4th District Court of Appeal had decided *Party City Corp. v. Superior Court*, 169 Cal. App. 4th 497, 86 Cal. Rptr. 3d 721 (2008). The status of ZIP codes as falling outside the class of personally identifiable information under the Song-Beverly Act seemed settled.

The *Party City* court had stated:

A ZIP code is not an address, but only a portion of it, and knowing a stand-alone ZIP code has not been shown to be potentially more helpful in locating a specific person than knowing his or her state or county of residence. A ZIP code is not an individualized set of identification criteria, such as telephone numbers would be, but rather provide identification of a relatively large group, on the present record.

169 Cal. App. 4th at 518.

Moreover, the California Supreme Court had denied review of the *Party City* decision.

arguments that a ZIP code is not particular to a specific individual.

More importantly, however, the Supreme Court observed that a ZIP code is "information unnecessary to the sales transaction that, alone or together with other data such as a cardholder's name or credit card number, can be used for the retailer's business purposes." Whereas *Party City* seemed to treat the ZIP code information in isolation, *Pineda* put it into the context of potential combination with other data.

THE IMPACT

The California Supreme Court did not give its *Pineda* decision only prospective effect. Unsurprisingly, this sparked the filing of numerous class-action claims against retailers in California, reaching back at least for the one-year statute of limitations in the state for an action upon a statute for a penalty.³ Reuters reported that more than 150 proposed class actions had been filed through the beginning of May.

Despite the flurry of filings, there have been few rulings, however, and much about the impact of the decision remains unclear. Nordstrom won a stay of a proposed class action in federal court on an abstention theory, given the nearly identical class claims already pending against it in the California state courts.⁴

Lamps Plus beat constitutional privacy and common-law invasion-of-privacy claims, as

well as an unfair-competition claim grounded in a purported “intellectual property right” in one’s address — all based on asking for ZIP codes — but could not eliminate the Song-Beverly Act claim against it.⁵

United Rentals won a ruling holding that *Pineda* claims cannot be brought on behalf of cardholders who are not natural persons or who were not issued their cards for consumer credit purposes. The question of whether distinguishing cards issued for personal- or business-credit purposes rendered the claim inappropriate for class treatment was remanded for further consideration.⁶

Pineda leaves many questions open.

WHEN IS ASKING FOR A ZIP CODE PERMISSIBLE?

The Song-Beverly Act allows merchants to gather otherwise interdicted data if doing so is necessary to complete the transaction. Cal. Civ. Code § 1747.08(c)(4). Therefore, asking for a ZIP code to be able to make home delivery of something a customer ordered should be different, from a legal perspective, from asking for a ZIP code when a customer takes the purchase with him or her.

The *Pineda* opinion itself notes that the statute also lets ZIP codes or other personally identifiable information be collected if the retailer is contractually bound to do so, say, by a bank accepting the charge transaction. Similarly, collection of such data is allowed if required by federal law or regulation.⁷

California’s Song-Beverly Act specifically has prohibited retailers from requiring or even requesting “personally identifying information” in a credit card transaction.

Nonetheless, one commentator has written that gas stations are being sued under *Pineda* for requiring credit customers to key in ZIP codes, although typically they are required to do so for security purposes.⁸

Online retailers, such as Redcats and Netflix, have been among those sued under *Pineda*, even though it would appear that they need to obtain a customer ZIP code for shipping purposes. Moreover, at least one federal court in California concluded in 2009 that the Song-Beverly Act should not apply at all to online transactions, because collection of personally identifiable information is necessary for security purposes.⁹

WHAT IS THE JURISDICTIONAL SCOPE OF THE RULING?

If the statute’s “overriding purpose was to ‘protect the personal privacy of consumers who pay for transactions with credit cards,’” *Pineda*, 51 Cal. 4th at 534 (quoting legislative history), some might argue that out-of-state retailers reaching into California to serve its residents should be covered.

Indeed, if it is the data itself that is being protected, might not California assert its citizens’ data is governed by the Song-Beverly Act wherever that data is gathered, within or without the state, much as Massachusetts has done in its new standards for protecting personal data of its citizens?¹⁰

Proposed legislation, dubbed the California Business Protection Act of 2011, was introduced in the California Assembly and would have limited the application of the *Pineda* decision to situations in which the customer physically hands a store employee a credit card and it is read electronically at point of sale. Although the bill cleared that house’s Banking and Finance Committee, it failed to become law.

California is not the only state to bar asking credit card customers for certain additional data.¹¹ However, so far only California has seen a wave of ZIP code litigation. That may be because California specifies mandatory civil penalties and also allows any private citizen to sue.

WHAT ARE THE RECOVERABLE DAMAGES FOR ASKING FOR A ZIP CODE?

Because the statute sets only maximum penalties, and allows them to be waived where data is collected inadvertently, the circumstances of a defendant’s seeking or obtaining particular individuals’ ZIP codes will be critical. If sufficiently various as a matter of fact, those circumstances may well create impediments to treatment of the plaintiffs as a class.

It also may be significant to defendants for insurance coverage purposes, whether sums claimed by or awarded to plaintiffs

are deemed exclusively to be penalties or potentially constitute damages. Whether or not a recovery can be had apart from the mandated penalties and in the absence of a proximately caused identity theft is not at all clear.

One recent California federal case sustained an allegation of harm from disclosure of personally identifiable information as sufficient to establish plaintiff’s standing at the pleading stage, but voiced “doubts” about what the proof ultimately would show. Significantly, the court found no sufficient claim of damage, even at the pleading stage, under California’s Unfair Competition Law, because no loss of money or property was asserted. *Claridge v RockYou Inc.*, No. 09-cv-6032 (PJH) (N.D. Cal. Apr. 11, 2011), slip op. at 7, 9-10. *Accord Archer v. United Rentals Inc.*, 2011 WL 1888199 (Cal. Ct. App., 2d Dist. May 19, 2011).

In some respects the ZIP code situation recalls that of false marking patent litigation, where the ability to bring suit has been extended broadly and only an upper boundary per falsely marked unit has been set for potential damages. Increasingly, courts in those cases are concluding the upper boundary figure should not simply be multiplied by the number of units falsely marked.

THE BIGGER PICTURE

As the Federal Trade Commission stated in its December preliminary staff report on consumer privacy, there has been a “blurring of the distinction between personally identifiable information and supposedly anonymous or de-identified information.”¹²

In particular, the ability to correlate data in increasingly sophisticated ways makes it easier to track distinct groups or individuals. For example, just knowing someone’s gender, birthday and ZIP code allows the prediction of that person’s identity 87 percent of the time.¹³

Viewed in this context, protecting a ZIP code from disclosure seems less peculiar. As Sherlock Holmes remarked in “The Boscombe Valley Mystery,” “Singularity is almost invariably a clue.” Combining ZIP codes and other data can point to specific individuals.

California’s statutes already make a nod in this direction, by treating otherwise non-personal data as personally identifiable information if it is stored in a way that links

it to identifiable data.¹⁴ Proposed federal privacy legislation recently introduced in the Senate takes a similar approach, protecting specified data if stored in a way associating it with personally identifiable information.¹⁵

The fact that someone's favorite ice cream flavor is mint mocha cappuccino can become personally identifiable information if you link that preference to information identifying the person.

Nor is it just the lawmakers and law enforcers who have realized this. Some of the most recent major security breaches have involved hackers trying to retrieve not merely financial data, but personally identifiable information. The ballooning of behavioral advertising and the gathering of disparate data to permit it only has underscored the market value of humdrum data that, standing alone, may seem anonymous and inconsequential.

The *Pineda* case will return to the lower courts for further consideration, and answers to questions about what constitutes an appropriate class, when a ZIP code is needed to process a transaction and what, if any, damages plaintiffs suffer will be hard fought.

But as much as *Pineda* surprised people, it is likely to turn out to be not so much an outlier as just an early adopter of the view that more inclusive protection for data is appropriate in consideration of its utility when taken in combination with other data. **WJ**

NOTES

¹ Cal. Civ. Code § 1747.08.

² Cal. Bus. & Prof. Code § 17200 *et seq.*

³ Cal. Civ. Proc. Code § 340, applied to the Song-Beverly Act in *TJX Cos. v. Super. Ct.*, 163 Cal. App. 4th 80, 77 Cal. Rptr. 3d 114 (2008).

⁴ *Dardarian v. Nordstrom Inc.*, 2011 WL 1740103 (N.D. Cal. May 5, 2011).

⁵ *Folgelstrom v. Lamps Plus Inc.*, 2011 WL 1601990 (Cal. Ct. App., 2d Dist. Apr. 29, 2011) (nonpublished opinion).

⁶ *Archer v. United Rentals*, 2011 WL 1888199 (Cal. Ct. App., 2d Dist. May 19, 2011).

⁷ The statute also permits personally identifiable information to be collected if the credit card is used either to make a deposit or for a cash advance.

⁸ Scott Barlow, Is a ZIP Code Really Personal Identification Information?, 34 L.A. LAWYER 49 (May 2011).

⁹ *Saulic v. Symantec Corp.*, 596 F. Supp. 2d 1323 (C.D. Cal. 2009).

¹⁰ Mass. Regs. Code tit. 201, § 17.02.

¹¹ *See, e.g.*, N.Y. Gen. Bus. Law § 520(a)(3).

¹² Federal Trade Commission, preliminary staff report, Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers (December 2010), at iv.

¹³ Based on research conducted by Carnegie-Mellon University computer science professor Latanya Sweeney. *See* <http://www.eff.org/deeplinks/2009/09/what-information-personally-identifiable>.

¹⁴ Cal. Bus. & Prof. Code §§ 22575-22579.

¹⁵ *See* Section 3(5)(B) of proposed Commercial Privacy Bill of Rights Act of 2011, S. 799.



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