

# Chicago Daily Law Bulletin®

Volume 160, No. 233

## For companies, perils abound when soliciting information at point of sale

**O**f all of the numbers that are part of your daily personal life, which are important enough to keep private?

Your Social Security number? Definitely. Your date of birth? Maybe — depending on how cautious (and how old) you are. What about your cellphone number? Probably, even though registering on the do-not-call list is supposed to largely insulate you from unwanted phone calls from people you don't know trying to sell you stuff.

But what about your ZIP code? These days, with the proliferation of wearable technology and other devices that collect and communicate tremendous amounts of information that reveal people's lifestyles, activities and detailed preferences, worrying about giving out your ZIP code to a merchant seems almost quaint.

After all, a ZIP code (short for Zone Improvement Plan, a system introduced by the U.S. Postal Service in 1963 to help facilitate the travel of mail) is not personal to you — it's shared by many people living in the same geographical area.

Yet, at least 16 states and the District of Columbia restrict merchants in some way from collecting personal information during a point-of-sale credit card transaction, and ZIP codes — along with street and e-mail addresses — may be included in that category. These state consumer privacy statutes may not only set a per-incident fine, many provide for a private right of action, which makes them an attractive basis for class actions. In California and

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Massachusetts, states known for having especially stringent consumer protection schemes, plaintiffs have successfully argued that ZIP codes are personal identification information for the purpose of those states' credit card point of sale laws, particularly if they also allege that, through knowledge of a customer's name and ZIP code, a merchant possesses enough information to identify through

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public databases the customer's mailing address or phone number.

Such plaintiff-favorable rulings have led to a flurry of lawsuits. The trendsetter was a 2011 decision by the California Supreme Court interpreting the Song-Beverly Credit Card Act.

Song-Beverly makes it illegal to "request, or require as a condition" to accepting payment, to "write any personal identification information upon the credit card transaction form" or to write any personal information on the transaction form (including by using a form containing preprinted spaces specifically designated for filling in the cardholder's information).

In *Pineda v. Williams-Sonoma Inc.*, the California Supreme Court held that a retailer could not require a consumer to provide merely his or her ZIP code, even though it is only one component of a person's address — and a (fairly) public part at that. Massachusetts' highest court came to a similar conclusion in

March 2013 in a case against Michaels Stores Inc. In that case, a plaintiff brought a federal class action against the national craft store company, alleging violations of the Massachusetts consumer privacy statute and, in turn, the state's unfair business practices statute (an attractive

law for plaintiffs because it potentially offers treble damages).

As part of its response to several certified questions from the federal court, the Massachusetts Supreme Judicial Court held that a ZIP code can be personal identification information under Massachusetts' privacy statute. The court also found that a plaintiff need not have been a victim of identity theft to be harmed by a violation of the statute — receiving unwanted marketing material is sufficient injury to bring a claim.

Earlier this year, a Washington, D.C., federal district court declined to adopt the plaintiff-friendly approaches of California and Massachusetts. The district court dismissed a proposed class action against Urban Outfitters seeking damages as a result of the clothing retailer's allegedly impermissible collection of ZIP codes. The court found that the plaintiffs had not sufficiently alleged that provision of a ZIP code was actually a condition of the credit card transaction as required by the District of Columbia's personal identification information statute.

The court also rejected the notion that a ZIP code constitutes a person's address. With one eye on Massachusetts and the other on California, the plaintiffs in that case decided to appeal the district court's ruling, and the question is now pending before the U.S. Court of Appeals for the D.C. Circuit.

Meanwhile, Urban Outfitters and its subsidiaries are facing yet another lawsuit over this issue, this time in the more plaintiff-favorable jurisdiction of Massachusetts. In fact, although the viability of ZIP code class actions in D.C. and elsewhere remains to be seen, plaintiffs in

California and Massachusetts are still relatively unhampered in their pursuit of large recoveries from the deep pockets of prominent national retailers.

Do merchants have good reason to ask for ZIP codes? Retailers sometimes ask for a ZIP code because the credit card issuer requires entry of the ZIP code to complete the transaction as a security measure.

This would appear to be a very defensible reason to request such information, and Massachusetts and California concur. The Massachusetts statute carves out of its ambit any information required by the credit card issuer to complete a transaction. The California statute contains similar language.

Retailers also sometimes use

ZIP code data for demographic purposes — for example, by tracking aggregate sales patterns to determine where to open new stores.

Again, this would not appear to be violating the privacy rights of the individual from whom the ZIP code was obtained because it is not being considered or used to pinpoint specific individuals. It is difficult to discern the injury a consumer suffers if his or her ZIP code is being used in this way.

A problem arises, however, when a merchant requests a ZIP code in connection with a credit card transaction (even for an allowable purpose) and then reuses such data for marketing purposes.

Plaintiffs can then claim the unwanted catalogs and other

marketing materials they subsequently receive from the merchant constitute proof that the merchant is using the ZIP codes to reverse-engineer customers' full mailing addresses, giving rise to claims for personal information misuse (and for potentially violating other state laws). Such claims will almost certainly survive the pleading stage in California and Massachusetts, and possibly elsewhere as well.

For now, retailers should be mindful that any request for a customer's ZIP code in a point-of-sale credit card transaction, particularly if followed by the customer's receipt of the retailer's marketing materials (whether or not related to the customer's disclosure of the ZIP code), may draw a class action.

As courts work their way through the thicket of personal identification information cases presently on their dockets, many of the nuances of whether specific practices and transactions are permissible under the statutes and their various exceptions have yet to be addressed.

Thus far, however, it has proved challenging for merchants to quash these lawsuits at the pleading stage, and plaintiff-favorable rulings have created road maps for future plaintiffs bringing such claims.

Simply put, while ZIP codes do aid the movement of mail between states, they also may facilitate the migration of class actions to states that protect the personal identification information of their residents.