

Today's Retailers Are Fighting Yesterday's Privacy Laws

Law360, New York (June 27, 2014, 11:21 AM ET) -- Earlier this month, the Ninth Circuit rejected an attempt to revive a class action against Redbox Automated Retail LLC alleging illegal collection of customers' ZIP codes from an automated kiosk. This case is the latest in an onslaught of class actions alleging privacy violations by consumers under the California Song-Beverly Credit Card Act of 1971 and similar statutes in other states. The Song-Beverly Credit Card Act generally prohibits the collection of personal identification information from consumers during credit card transactions.

When the California Supreme Court held three years ago in *Pineda v. [Williams-Sonoma Stores Inc.](#)* that ZIP codes are personal identification information that retailers are prohibited from collecting at point of sale in connection with credit card purchases, that decision opened the door to hundreds of putative class actions against both brick-and-mortar and online retailers. But because the Song-Beverly Credit Card Act predates the advent of modern electronic payment methods, online transactions, downloadable products and the Internet, the courts are often required to apply laws in circumstances that lawmakers never contemplated. The Redbox decision is yet another effort by a court to fit a square peg into a round hole.

Sinibaldi v. Redbox Automated Retail LLC dealt with the collection of ZIP codes in connection with movie and video game rentals at self-service kiosks that plaintiffs asserted fell afoul of the same prohibition as in *Pineda*. The district court dismissed the complaint on the ground that the California Legislature could not have contemplated unmanned kiosk transactions when it passed the law in 1971. The issues presented by Redbox, and how the Ninth Circuit dealt with them, are illustrative of the challenges faced both by courts in applying aged laws to modern commercial settings, and by retailers in complying with the resulting uncertainty.

Pineda was the catalyst for this recent onslaught of privacy cases. The California Supreme Court decided in February 2011 that a customer's ZIP code is not necessary to complete a credit card transaction, and thus the collection of ZIP codes during credit card sales violated consumer privacy under the Song-Beverly Credit Card Act. That statute prohibits businesses from requesting "as a condition to accepting the credit card as payment in full or in part for goods and services, the cardholder to provide personal identification information" that is written or recorded by the seller. The state high court held that a ZIP code, being part of a consumer's address, was just such personal identification information. Within months, more than a hundred class actions alleging similar Song-Beverly Act violations were filed in California.

At least 15 states and the District of Columbia have laws similar to the Song-Beverly Credit Card Act. Many are not as far-reaching, in that they apply only to certain types of information (e.g., a telephone number), perhaps only if recorded on a "transaction form" or from specific sources (e.g., from a driver's license), or they apply only when the business requires the information as a condition of accepting credit card payment. Others are broader, extending to check payment transactions. Many, including California, have statutory exemptions for special purposes. But nearly all of these laws were enacted decades ago, when credit card transactions involved manually imprinted and itemized receipts on which a cashier might also write driver's license or other identifying information, and states wanted to protect their consumers from unwarranted

privacy invasions or barriers to credit card use.

And that is the crux of the problem: Courts must interpret these laws — written for a paper-based credit card transaction at a time when credit cards were less frequently used — in the context of today’s pervasive electronic payment systems and shift to online retailing. In doing so, the courts generally try to find a way within the outdated wording of the statute to balance competing interests of consumer privacy and fraud prevention.

The result has been a series of court-made exceptions to these antiquated laws, addressing such issues as retailer loyalty programs, online purchases of downloaded products, product returns and collection of personal information after a transaction is completed. Courts have also interpreted statutory exemptions for “special purposes” to include fraud prevention, in recognition of the increasing risk of fraud and identity theft in the modern electronic payment environment.

Lawmakers have also attempted to modernize statutes. The California Legislature, for example, amended the Song-Beverly Act several times, including to permit a retailer to request personal identification information, including ZIP codes, as a fraud prevention measure in automated fuel pump credit card transactions. And after the California Supreme Court held in its 2013 decision in [Apple Inc. v. Superior Court](#) that Song-Beverly does not apply to online purchases of electronically downloadable products, lawmakers introduced SB 363, which in its current form would restrict the types of information that online retailers may collect from consumers in connection with such purchases and the time period in which the retailer may store that information.

Yet, retrofitting statutes piecemeal can lead to other issues, such as the inconsistent interpretation of statutory terms like “address.” Both the California Supreme Court (in [Pineda](#)) and the Massachusetts Supreme Judicial Court (in [Tyler v. Michaels Stores](#)) decided that a ZIP code, on its own, is personal identification information because it is part of a consumer’s address, even though it cannot be used alone to identify any specific individual. The District Court for the District of Columbia, by contrast, held in [Hancock v. Urban Outfitters Inc.](#) that a ZIP code, as a mere component of an address, is not itself an address, and thus was not personal identification information. Moreover, amending statutes in response to court decisions does not provide much guidance to courts later faced with cases arising in other contexts, such as online transactions for products later shipped to the consumer ([Ambers v. Buy.com Inc.](#); [Sualic v. Symantec Corp.](#)) or picked up at a retail location, in-store purchases where the receipt is emailed to the customer ([Capp v. Nordstrom Inc.](#)), self-checkout stations in retail stores, mail order or telephone transactions (an issue specifically left undecided in [Apple](#)), return transactions ([Absher v. AutoZone Inc.](#)) and rewards or loyalty programs ([Gass v. Best Buy Co. Inc.](#); [Dean v. Dick’s Sporting Goods Inc.](#)).

Nor do the statutes address credit card transactions at unmanned, automated kiosks, which was the issue faced by the Ninth Circuit in [Redbox](#). At issue there was whether Redbox violated the Song-Beverly Act by requiring that customers at their self-service kiosks provide their ZIP code in conjunction with credit card information when paying for movie and video game rentals. Redbox invited the Ninth Circuit to affirm dismissal of the complaint on the ground relied upon by the district court — that the Act did not apply to unmanned kiosk transactions because the

California Legislature could not have meant for it to apply in light of the potential for fraud — but the court of appeals relied instead on the explicit statutory exemption associated with the use of a credit card as a deposit.

Specifically, the Ninth Circuit found that when a customer uses a credit card at the Redbox kiosk, any additional future charges, such as for extra rental days or lost product, are secured with the customer's credit card, and that Redbox uses the information provided, including personal identification information, to complete that future transaction. In that way, the court reasoned, the credit card is used for security, and thus falls within the statutory exemption for the use of a credit card "as a deposit to secure payment in the event of default, loss, damage or similar occurrence." In upholding the dismissal on an explicit statutory exemption in its June 2014 decision, the Ninth Circuit avoided reliance on stated statutory purpose, inferred legislative intent, balancing tests or determinations of how the state's highest court may rule in a similar circumstance — all of which have been cited by other courts in interpreting the Song-Beverly Act or similar statutes.

Yet, despite the three-year history of applying to current transactions a statute designed for out-of-date retail experiences, it does not appear that comprehensive modernization of these statutes is on the horizon. Given that, and the increasing sensitivity to targeted marketing, retailers may wish to establish or modify their policies regarding point-of-sale data collection to address, for example, identifying the purpose for collecting personal identifying information (e.g., for establishing customer loyalty or rewards programs), notifying customers of the purpose for requesting the information, the timing of collection (e.g., after the transaction is complete), the opportunity not to provide the information, the method of collection (e.g., guest book versus point of sale), and how long the requested information will be stored.

Even in an environment where twenty-first century payment and retail practices are governed by twentieth-century laws, practices that safeguard consumer privacy and privacy choices, while still providing for fraud and identity-theft prevention, are less likely to be actionable.

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