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PERSPECTIVE

Question put to high court could curb class actions

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A slew of class actions in California have been triggered by plaintiffs alleging that businesses, such as retailers, request and collect credit cardholders' personal identification information (PII) in violation of the Song-Beverly Credit Card Act. Song-Beverly prohibits businesses in California engaging in credit card transactions from requesting cardholders' PII that the business then records. While California lawmakers enacted Song-Beverly to promote consumer privacy protection, the act's ambiguity as to when a payment card transaction begins and ends has allowed for unnecessary and costly class actions.

But if the California Supreme Court answers a recently certified question from the 9th U.S. Circuit Court of Appeals, California's highest court may provide clarity for businesses requesting PII from individuals using payment cards at the point of sale.

In 2011, the state Supreme Court in *Pineda v. Williams-Sonoma Stores Inc.*, 51 Cal. 4th 524 (2011), held that PII under Song-Beverly includes not only customer's postal address, telephone number or emails, but also a customer's ZIP code. Williams-Sonoma used plaintiff's ZIP code with a reverse directory system to locate her address for marketing purposes. While this decision made clear the type of information retailers should not collect for marketing purposes, it left open the question of when businesses may or may not lawfully seek such information from customers using payment cards.

Recently in *Davis v. Devanlay Retail Group Inc.*, 13-15963 (May 5, 2015), however, the 9th Circuit asked the state high court to answer whether retailers can be held liable under Song-Beverly for request-

ing a customer's PII after a cashier returns a payment card even if it would not be "objectively reasonable" for the customer to believe the PII is required to complete the purchase.

As the three-judge panel in *Davis* pointed out, Song-Beverly's ambiguous language "offers little guidance" about whether courts should apply a subjective or objective standard when determining if a retailer's practices violates the law. Song-Beverly, in relevant part, does not allow a business accepting credit cards to "[r]equest, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information." The ambiguity, as the panel in *Davis* explained, is due to the statute's punctuation — it is unclear whether the clause "as a condition to accepting the credit card as payment" modifies "request" in addition to modifying "require."

This bright-line rule would allow businesses to continue the practice of asking for PII after a payment card transaction is complete and thereby minimize unnecessary class actions for this practice.

The 9th Circuit further explained that if a court interprets that the clause would not modify "request," then the plain meaning of the statute would seemingly prohibit retailers from requesting any PII when a customer uses a payment card. On the other hand, if the clause does modify "request," an objective customer perception test would be used in determining whether a retailer requested PII in violation of Song-Beverly. In other words, Song-Beverly only would prohibit a request for PII if the request could lead a consumer to reason-

ably believe that providing PII is a condition of making a credit card payment.

The state Supreme Court's answer to the 9th Circuit's question could impact California retailers because broad construction of Song-Beverly could prohibit many retailers from requesting customer's PII immediately after they have completed a payment card transaction. For instance, the facts of *Davis* — a putative class action — show the impact of such a construction. In *Davis*, lead plaintiff alleged that after defendant-retailer's cashier returned her credit card, the cashier requested her ZIP code in violation of the act. Plaintiff had placed her credit card in her purse, but does not recall whether she had received a receipt prior to the cashier's request for her PII.

If the state provides that a business could violate Song-Beverly by requesting a customer's PII immediately after the credit card transaction is complete and the customer has received a receipt, then retailers like the defendant in *Davis* would likely need to change their policy of requesting PII immediately after providing customers' with a receipt.

But the state also could respond that a retailer cannot be held liable for requesting PII after a cashier returns a payment card because it would not be objectively reasonable for the customer to believe the PII is required to complete the purchase. If this objective consumer perception test applies, then retailers like the defendant in *Davis* could continue to request PII after a payment card transaction is complete. This bright-line rule would allow businesses to continue the practice of asking for PII after a payment card transaction is complete and thereby minimize unnecessary class actions for this practice.

Of course, whether the state Supreme Court will answer the ques-

tion is discretionary. Indeed, because of a recent California Court of Appeal holding in *Harrold v. Levi Strauss & Co.*, 2015 DJDAR 5487 (May 19, 2015), which could provide guidance in this area, some have suggested that California's highest court may not take the question. There, the court held that once a transaction is concluded, a request for PII "cannot reasonably be considered — by the customer or by anyone else — as a condition of acceptance of the credit card as a form of payment." The appellate court's reasoning rested on its finding that individuals could not reasonably believe that providing PII was "as a condition" of the credit card transaction. Given that the 9th Circuit certified its question in part due to the ambiguity of whether the clause "as a condition to accepting the credit card as payment" modified "request," the Supreme Court should still consider the question despite this case so that it can expressly opine on Song-Beverly's statutory ambiguity.

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