

[Two New California Supreme Court Decisions Will Impact Landscape of Class Action Litigation Against Retailers](#)

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The California Supreme Court recently has issued two decisions that will require many retailers to change their business practices and litigation strategies immediately.

As of Today, Retailers Prohibited From Requesting ZIP Codes From Customers at Point-of-Sale

The California Supreme Court, in its decision in *Pineda v. Williams-Sonoma Stores, Inc.*, has reversed lower court rulings and held that the Song-Beverly Credit Card Act prohibits retailers from requesting ZIP codes from credit and debit card customers at the point-of-sale.

The Song-Beverly provision at issue prohibits a business from requesting that cardholders provide "personal identification information" during credit card transactions, and then recording that information. The statute expressly states that the definition of "personal identification information" includes addresses and telephone numbers. California's lower courts had previously declined to extend this definition to include ZIP codes on the grounds that ZIP codes are not specific to individual customers because they encompass thousands of people living in the same area. Relying on these rulings, many retailers have continued to ask customers for their ZIP codes at the point-of-sale. However, based on the decision today, retailers are advised to cease this practice immediately as the Supreme Court's ruling expressly states that ". . . requesting and recording a cardholder's ZIP code, without more, violates [Song-Beverly]." The Supreme Court also expressly stated that its interpretation of the law will be applied retroactively, putting retailers that have been requesting ZIP codes at risk for civil penalties or class action lawsuits despite best efforts to change practices in response to this opinion. Businesses that violate the law may be subject to civil penalties of up to \$250 for the first violation, and up to \$1,000 for each subsequent violation.

This opinion comes down despite the well-known fact that businesses request consumer information for marketing purposes, and that providing such information is always voluntary. This opinion will undoubtedly open the doors for increased litigation; however, it does not leave retailers without an avenue for their marketing endeavors. It has long been established by the Court of Appeal that, while personal identification information may not be requested during the course of a credit card transaction, this information may certainly be requested from consumers at other times. The key is to make sure that customers know that providing their ZIP codes – or any information not critical to the transaction – is voluntary, and has nothing to do with the terms of purchase. Thus, while it is often convenient to make such requests while a customer is at the checkout counter – both to offer her future information about promotions and/or to learn more about where the customer base is coming from for purposes of expansion – the only way to ensure that the law is not being violated is to make the request *after* the customer has been handed her receipt, so that there is no confusion that the transaction is over. This can be done by changing the timing for when the customer capture screen on the point-of-sale system prompts the clerk to make the request, or by disabling that feature altogether. Employees should also be trained to explain to every customer why her information is being requested at the time the request is made. Signage posted in the checkout area and collecting customer information by asking customers to fill in their information by hand on a card containing a disclaimer regarding the practice (yet still after the transaction is completed) is also recommended. We advise all retailers to consult with legal counsel who specialize in this area to ensure that their practices are not putting them at risk for a class action lawsuit.

Subjective Value Placed on Product Label Sufficient to Confer Standing Against Manufacturer

Speaking more generally about class actions, the Supreme Court has recently handed down another opinion that will impact the landscape of class action litigation for retailers and manufacturers. The bottom line of this decision is that all labels on products matter. In its decision in *Kwikset Corp. v. Superior Court*, the Supreme Court held that the plaintiffs could state a claim for injunctive relief under California's Unfair Competition Law and False Advertising Law by alleging that they would not otherwise have purchased locks that were partly made in foreign countries had they not been

labeled as being "Made in the USA." These allegations were made despite the fact that the plaintiffs do not allege that they were dissatisfied with the actual function of the locks they purchased. Rejecting the lock manufacturer's argument that the plaintiffs did not suffer any economic loss because of this labeling discrepancy, the court looked to labels such as "organic" or "kosher" that may be material terms of purchase in the minds of consumers, and determined that when a consumer relies on a label to purchase a product, he is injured by paying more for a mislabeled product than he otherwise would have. The court further noted that manufacturers intentionally make representations on their products because they intend them to sway consumers into purchasing their products. The court rejected the argument that a consumer who purchased a product that is a functional equivalent of the advertised product does not provide the plaintiff with an economic injury.

From a defense perspective, it is important to note that this decision is at the demurrer stage of the litigation only. It remains to be seen how the subjective value approach, i.e., what the mislabeled product was worth to each individual, will be reconciled with class treatment because it will require individualized treatment for each class member. Such an analysis where individual issues predominate over class issues would defeat class certification. Counsel should be consulted by product manufacturers to determine how this decision may impact class action litigation that they currently face based on their labeling and advertising practices.

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