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In This Issue

Court Refuses to Certify Class in Zip Code Suit

A U.S. District Court judge in California denied class certification in a suit alleging that salespeople at General Nutrition Corp. asked for customers' zip codes when they conducted credit card transactions.

The suit was one of hundreds filed in the wake of *Pineda v. Williams-Sonoma*, where the California Supreme Court ruled that zip codes are "personal identification information" under the state's Song-Beverly Credit Card Act. Requesting and recording the zip codes of customers can therefore result in a statutory fine of $250 for the first violation and $1,000 for each subsequent violation, the court in the *Pineda* case held.

In the *GNC* case, a plaintiff alleged that she used her credit card to purchase items at the store and that her zip code was "requested and/or required" in connection with the transaction. She sought to certify a class of similar consumers, citing GNC's estimate that it engaged in 798,000 credit card transactions during the class period.

But the court said the plaintiff failed to present evidence regarding the number of individuals who had their personal information requested when they attempted to consummate a credit card transaction at a GNC store.

"Based on plaintiff's evidence alone, there is nothing to suggest that the class contains anyone besides plaintiff," U.S. District Court Judge S. James Otero wrote. "Not once does plaintiff cite a fact or item of any evidentiary weight to support her contention that defendant had a uniform policy of requesting zip code information (or other personal information) from its customers."

Further, Judge Otero said a violation of the Song-Beverly Act "would depend upon whether the individual consumer reasonably believed that providing his personal information was a condition of consummating the credit card transaction," an analysis that will vary with every customer.

Given the plaintiff's failure to establish commonality, typicality, or adequacy of representation for the class, the court denied certification.

To read the court's denial of class certification in *Rothman v. General Nutrition Corp.*, click here.

Why it matters: The decision is a blow to plaintiffs, who filed hundreds of similar suits in the wake of the *Pineda* case. Judge Otero's

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emphasis on an individual consumer's "reasonable belief" that he or she had to provide a zip code to complete a credit card transaction provides a strong defense to class action certification.

back to top

Facebook, Zynga Score Court Victory

Days before Facebook's settlement with the Federal Trade Commission over privacy violations, a federal judge dismissed a class action suit against the social network, in which plaintiffs claimed that Facebook shared users' personal information with advertisers. A similar suit filed against game company Zynga met the same fate.

The plaintiffs in both cases alleged that the companies violated California state law and the federal Stored Communications Act (SCA) when they transmitted users' names through referrer headers (the URL transmitted by publishers when users click on ads).

But U.S. District Court Judge James Ware determined that the advertisers were the actual addressees or intended recipients of the communications, so Facebook and Zynga were permitted under the SCA to divulge users' information. Further, the court said that the plaintiffs failed to show any actual harm or that they had suffered any appreciable damages. "Nominal damages and speculative harm do not suffice to show legally cognizable damage," Judge Ware wrote.

The plaintiffs relied upon *Claridge v. RockYou*, where a different California federal judge denied a motion to dismiss a suit brought by a data breach plaintiff whose personal information was exposed online. The defendant had argued that the plaintiffs had not suffered any concrete, tangible, non-speculative loss or harm from the breach, but the court let some of the claims in the suit continue despite "doubts about the plaintiff's ultimate ability to prove his damages theory in this case."

Judge Ware said the *Claridge* decision did not embrace the plaintiffs' damages theory, and that "In light of the continuing absence of controlling authority, or even clear persuasive authority," the suits against both Facebook and Zynga should be dismissed with prejudice.

To read the court's order in *In re Facebook Privacy Litigation*, click here.

To read the court's order in *In re Zynga Privacy Litigation*, click here.

Why it matters: Privacy suits have been filed against dozens of companies over the last year, including Facebook, Zynga and LinkedIn. With the exception of the *Claridge* case (which recently settled), companies have successfully argued that plaintiffs failed to establish any actual injury even if they were victims of a data breach or had their personal information compromised. Companies, however, should evaluate their privacy policies to ensure compliance and minimize the likelihood of regulatory and class action litigation.

back to top

TCPA is "Weird," Says Supreme Court Justice

The U.S. Supreme Court recently heard oral argument in a case that will decide whether plaintiffs can file suit under the Telephone Consumer Protection Act in federal, rather than state, court.

The TCPA empowers individual plaintiffs to bring a private right of action "in an appropriate court of that state."

In *Mims v. Arrow Financial Services*, a plaintiff filed his TCPA suit in federal court. He alleged that he received repeated calls from a debt collection agency. A federal court judge dismissed the suit, holding that Congress intended that TCPA lawsuits be exclusively filed in state courts. The Eleventh Circuit affirmed in an unpublished decision.

At oral argument, Scott L. Nelson, an attorney with the Public Citizen Litigation Group in Washington, D.C., argued on behalf of the plaintiff. He contended that suits involving federal laws such as the TCPA can be heard in federal courts unless Congress explicitly provides otherwise. The law "says nothing one way or another about whether the action may also be filed in federal court," Nelson argued.

But Gregory G. Garre, representing the defendant, said that there "is no constitutional foundation for that presumption."

Throughout the argument, the Justices repeatedly expressed frustration over the statute's wording. Even if TCPA cases were allowed in federal court, state law statutes of limitation would still apply, Garre said. "[That] is so weird. I can't understand that," Justice Antonin Scalia replied.

Justice Samuel Alito called it "the oddest creature that's ever been seen, a cause of action created by Congress that is not a claim arising under federal law."

Acknowledging that it is an "odd statutory provision," Garre nonetheless asked the Court "to give effect to its language."

Chief Justice John Roberts agreed with his fellow Justices, calling the TCPA "the strangest statute I have ever seen."

"Is there any [other law] where you have Congress creating a cause of action that can be brought in state courts unless the state court says it can't, saying nothing at all [about] whether there is a federal cause of action?" he asked.

Garre, a partner at Latham & Watkins in Washington, D.C., again requested that the Court "give effect to what [Congress] said."

A decision from the Court is expected later this term.

To read the transcript of the oral argument, click here.

Why it matters: The Court's decision will end a split among the lower courts about the availably of federal jurisdiction for TCPA claims, although the outcome of the case is uncertain. While the Justices repeatedly expressed their dislike for the "odd" and "strange" statute, Chief Justice Roberts noted that the text of the statute seems to indicate that Congress did not create a federal cause of action.

back to top

FDA to Appeal Injunction of Cigarette Labeling Rules

By filing notice of its plan to appeal the preliminary injunction halting the law's effect, the Food and Drug Administration made clear it intends to fight for enforcement of the new cigarette package labeling requirements.

In November, U.S. District Court Judge Richard J. Leon ruled for the tobacco companies, finding that the defendants had demonstrated that their First Amendment challenge to the new rules was likely to prevail.

The new rules were promulgated by the FDA under the Family Smoking Prevention and Tobacco Control Act.

Under the new rules, which were slated to take effect in September 2012, at least 50 percent of all cigarette packaging must be covered by a warning label that includes a color image and a written message, such as "Smoking can kill you" or "Cigarettes are addictive." The images selected by the FDA include graphic pictures of a post-autopsy body and a man blowing smoke out of a tracheotomy hole. The warnings must also cover at least 20 percent of cigarette advertisements.

R.J. Reynolds, Lorillard, Commonwealth Brands, Liggett Group, and Santa Fe Natural Tobacco Co. sought an injunction against the enforcement of the new requirements. Judge Leon agreed that the "mandatory graphic images unconstitutionally compel speech" and that the tobacco companies "will suffer irreparable harm absent injunctive relief pending a judicial review of the constitutionality of the FDA's rules."

The government's primary purpose behind using the images combined with the textual warnings is not merely to inform consumers, the court said, but rather to advocate a change in consumer behavior. "It is abundantly clear from viewing these images that the emotional response they were crafted to induce is calculated to provoke the viewer to quit, or never to start, smoking: an objective wholly apart from disseminating purely factual and uncontroversial information. Thus, while the line between the constitutionally permissible dissemination of factual information and the impermissible expropriation of a company's advertising space for government advocacy can be frustratingly blurry, here – where these emotion-provoking images are coupled with text extolling consumers to call the phone number '1-800-QUIT' - the line seems quite clear."

The injunction pushes enforcement of the new rules to 15 months from the date the court issues a final ruling on the case.

To read the court's order granting a preliminary injunction, click here.

To read the FDA's notice of appeal, click here.

Why it matters: By contesting the images alone and in combination with the textual warnings, and by filing a separate lawsuit challenging the Family Smoking Prevention and Tobacco Control Act, the tobacco companies have taken a multifaceted approach to challenging the FDA's new requirements. In that suit, a federal court judge ruled that the labeling requirements were constitutional, a decision the tobacco

companies have appealed to the Sixth Circuit.

back to top

In San Francisco, It Costs 10 Cents More to be "Happy"

Since December 1, McDonald's stores in the San Francisco area no longer give away free toys with Happy Meals. Under an ordinance passed by the San Francisco Board of Supervisors last year, restaurants may not provide toys with meals unless the meal (with food and drink combined) has fewer than 600 calories, the fat content is less than 35 percent of the calories, and other requirements for sodium, trans fats, and saturated fats are met. Fruits and vegetables must also be included if an incentive item – defined as a toy, game, trading card, or other consumer product – is included.

Now that the "Healthy Food Incentives Ordinance" has taken effect, McDonald's is offering the option to purchase a toy for 10 cents with a Happy Meal, with proceeds going to the Ronald McDonald House of San Francisco. "While we will fully comply with this law, we also have a responsibility to give our customers what they want," Danya Proud, a spokeswoman for McDonald's, said in a statement to *The New York Times*. "Parents have told us they'd still like the option of purchasing a toy separately for their child when they buy them a Happy Meal."

Eric Mar, a member of the San Francisco Board of Supervisors and the sponsor of the ordinance, told *The Washington Post* that McDonald's decision to sell toys was a "marketing ploy," but he doesn't have plans to update the ordinance accordingly.

To read the Healthy Food Incentives Ordinance, click here.

Why it matters: As the ordinance applies only to the 19 McDonald's outlets (as well as other fast-food restaurants) within the city limits, it has limited effect. But the buzz surrounding the ordinance – and a similar law in Santa Clara County, California – could lead other cities or jurisdictions to consider similar action. Comparable legislation is currently pending in Michigan and New York.

back to top