Legal Updates & News

Legal Updates

Pioneer Electronics (USA), Inc. v. Superior Court (Olmstead); California Supreme Court Addresses Consumer Privacy Rights When Plaintiffs Seek Contact Information Of Consumers Who Have Complained To The Company

January 2007

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In consumer class action litigation, plaintiffs often seek to learn the identity of other consumers who have complained to the company about the same alleged problem. Today, the California Supreme Court held that the names and phone numbers of such complaining customers can be disclosed to the plaintiffs — so long as the complaining customers are given reasonable notice and an opportunity to object and opt out of the disclosure. In doing so, the Supreme Court reversed the Court of Appeal, which had held that complaining consumers must affirmatively consent and opt in to such a disclosure. As a practical matter, if you are a defendant in a consumer class action, you now may be forced to disclose the names of more complaining customers.

The issue was presented in a putative consumer class action in which Mr. Olmstead alleged that Pioneer Electronics sold defective DVD players. In the course of discovery, Pioneer produced documents relating to complaints that it received from consumers — but none from which the complaining consumers' identities could be determined. When the plaintiff sought the names and addresses of the complaining consumers, Pioneer objected on the basis of the consumers' rights to privacy under the California Constitution. Cal. Const., art. 1, § 1.

The trial court, Judge Wendell Mortimer, Jr., of the Los Angeles County Superior Court, resolved the issue by requiring Pioneer to send a notification letter to the 700-800 complaining consumers. The trial court's order required that the letter inform the consumers about the lawsuit and the plaintiff's request for identifying information. In addition, the letter informed the consumers that they could object to disclosure of their identifying information, but that a failure to object would be treated as consent to the release of the information. In other words, under the trial court's order, Pioneer would need to disclose the consumer-identifying information unless the consumer affirmatively took steps to opt out of the disclosure.

Pioneer appealed the trial court's order. The Court of Appeal held that having taken adequate steps to insure actual notice is a prerequisite to an assumed waiver of a consumer's right to privacy, and that the measures the trial court had taken were inadequate. *Pioneer Electronics (USA), Inc. v. Superior Court (Olmstead),* 128 Cal. App. 4th 246, 250 (2005). The Court of Appeal focused on the requirement that a waiver of a right, such as the right to privacy, must be shown by clear and convincing evidence. *Id.* at 256. The court concluded that waiver of the fundamental right to privacy could not depend on a "conclusive presumption" that Pioneer's notification letter was received, opened, and read. *Id.* at 259. The Court of Appeal held that "requiring an express consent from the consumer, rather than inferring waiver from passive conduct alone is appropriate in this case." *Id.* at 259-60.

In reaching its contrary conclusion, the Supreme Court looked to the invasion of privacy balancing test that it set forth in *Hill v. National Collegiate Athletic Assn.,* 7 Cal. 4th 1 (1994). That test balances the nature of the privacy interest, the holder's reasonable expectation of privacy under the particular circumstances, the seriousness of the subject breach, the countervailing interests in disclosure, and safeguards and other alternatives that may minimize the invasion. The Court agreed

with the plaintiff that "consumers who initially contacted Pioneer to express dissatisfaction with its product have a reduced expectation of privacy or confidentiality in the contact information they freely offered to Pioneer for the purpose, presumably, of allowing further communication regarding their complaints." The Court further found that the proposed disclosure was not particularly sensitive (contrasting personal medical or financial information), and that the identity of potential class members was appropriately discoverable. The Court also rejected the Court of Appeal's concern that the notification letter might be discarded and unread "assuming the notice clearly and conspicuously explains how each customer might register an objection to disclosure." As a result, the Court concluded that the trial court's "notice and opt-out" approach adequately safeguarded the privacy rights at issue.

In doing so, the Supreme Court reaffirmed the approach that it took in *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652 (1975). In that case, the defendants, who were sued for defaulting on a promissory note held by the plaintiff bank, sought discovery of bank records relating to seven of the bank's customers — in support of a defense that the bank had engaged in misconduct to protect the interests of those seven bank customers. In striking a balance between the need for discovery of relevant information and the right to privacy in financial affairs, the Supreme Court concluded that "before confidential customer information may be disclosed in the course of civil discovery proceedings, the bank must take reasonable steps to notify its customer of the pendency of the proceedings and to afford the customer a fair opportunity to assert his interests by objecting to the disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered." *Id.* at 658.

Although the *Pioneer Electronics* decision reaffirms a trial court's broad discretion to weigh and balance the competing interests in the cases before them, the case likely will present the starting point from which they will perform their analysis.