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MASSACHUSETTS RULES ON ZIP CODE COLLECTION IN CREDIT CARD TRANSACTIONS

The Supreme Judicial Court of Massachusetts recently held that (i) ZIP code numbers are "personal identification information" under a Massachusetts law that regulates the collection of information in connection with credit card transactions, (ii) identity fraud allegations are not required to bring an action under the statute and (iii) the term "credit card transaction form" refers equally to electronic and paper transaction forms. *Tyler v. Michaels Stores, Inc.*, 2013 WL 854097 (Mass. March 11, 2013).

The case involved a class action by Tyler, a credit card holder, against Michaels claiming that Michaels illegally requested customers' ZIP codes when processing their credit card transactions in violation of Section 105(a) of Massachusetts General Laws, Chapter 93A. Section 105(a) prohibits a person that accepts a credit card for a business transaction from writing, causing to be written or requiring that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction form. It also states that "personal identification information" includes, but is not limited to, a card holder's address or telephone number. Any violation of Section 105(a) constitutes an unfair or deceptive trade practice that is unlawful under Section 2 and may be the basis for a claim under Section 9 of the statute.

District Court Decision

The case originally was filed in federal court as a class action based on allegations by Tyler that the credit card issuer did not require Michaels to request its customers' ZIP codes to process their transactions, nor did Michaels request the ZIP code for verification of the card holder's identity. Rather, Michaels used Tyler's name and ZIP code in order to find her address and phone number and to send her unwanted marketing materials.

The United States District Court for the District of Massachusetts found that the main concern of the Massachusetts legislature was to prevent identity fraud. The court determined that ZIP code numbers are "personal identification information" (PII) under Section 105(a) because a ZIP code number may be necessary to the credit card issuer to identify the card holder in order to complete the transaction.

The court went on to determine that Michaels' electronic credit card terminal created a "credit card transaction form" because the plain meaning refers equally to electronic or paper transaction forms. Thus, the court concluded that Tyler sufficiently alleged facts in support of her claim under Section 105(a).

Despite this conclusion, in its January 6, 2012 decision, the court granted Michaels' motion to dismiss based on Tyler's failure to allege a causal connection between Michaels' actions and a cognizable injury under Massachusetts law. Tyler's claim of receiving unwanted advertising simply was not a cognizable injury, since Section 105(a) was enacted to prevent fraud, the court found. See DTS Alert dated February 6, 2012.

Questions Certified to Massachusetts Supreme Court

On February 6, 2012, the United States District Court for the District of Massachusetts determined that because the case rested on interpretations of Massachusetts law to which there were no controlling precedents, the court certified the following three questions to the Supreme Judicial Court of Massachusetts for resolution:

1. Under Section 105(a), may a ZIP code number be PII because a ZIP code number could be necessary to the credit card issuer to identify the card holder in order to complete the transaction?
2. Under Section 105(a), may a plaintiff bring an action for this privacy right violation absent identity fraud?
3. Under Section 105(a), may the words "credit card transaction form" refer equally to an electronic or a paper transaction form?

Massachusetts Supreme Judicial Court Decision

With respect to the statute in general, the Supreme Judicial Court of Massachusetts disagreed with the district court's conclusion that the primary purpose of Section 105(a) was to prevent identity fraud and found instead, that the statute was aimed at consumer privacy. It reached this conclusion based on the broad general terms used in the statute, the title and caption of the statute (both of which referred to "consumer privacy in commercial transactions") and the legislative history.

With respect to the legislative history, the court found strong support for a privacy-related purpose, noting that legislative

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documents indicate that the purpose of prohibiting recording of information in credit card transactions was to safeguard consumer privacy and more particularly to protect consumers using credit cards from becoming the recipients of unwanted commercial solicitations from merchants with access to their identifying information. While the court also found evidence that one goal of the legislation may have been fraud prevention, it did not find it to be the only, or even the primary, goal.

First Certified Question

As to the first certified question, the court did not address the specific reason assigned by the district court judge (*i.e.*, “because” a ZIP code could be necessary to complete the transaction), but instead, addressed the question of whether a ZIP code is PII generally. The court looked to the definition of PII, noting that it is explicitly non-exhaustive. The court concluded that the ZIP code was PII because, accepting the allegations of the complaint as true, the ZIP code, when combined with the consumer’s name, provides the merchant with enough information to identify the consumer’s address or telephone number, the exact information that Section 105(a) classifies as PII. To conclude otherwise, the court stated, would render hollow the statute’s explicit prohibition on the collection of customer addresses and telephone numbers and undermine the statutory purpose of consumer protection.

Second Certified Question

As to the second certified question, the court could find no reason to require that a plaintiff be a victim of identity fraud in order to assert a claim under the statute as there is no express limitation in the statute and the purpose of the statute is to address consumer privacy, not identity fraud. In considering what must be alleged in an action under Section 105(a) with respect to injury or loss, the court noted that a plaintiff bringing an action for damages under Section 9 must allege and ultimately prove that she has, as a result, suffered a distinct injury or harm that arises from the claimed unfair or deceptive act itself. For example, the court said, if Michaels obtained a customer’s ZIP code, placed that information in a file and never used the information for any purpose thereafter, a consumer would not have a cause of action for damages under Section 9, even though the request for and the saving of the ZIP code may have violated Section 105(a) and qualified as an unfair or deceptive practice.

In considering the types of injury or harm that might be caused by a violation of Section 105(a), the court noted two – the actual receipt by a consumer of unwanted marketing materials and the merchant’s sale of a customer’s PII (or the data obtained from that information) to a third party – that are the types of injuries the legislature apparently sought to prevent in enacting Section 105(a), although the court noted that there may be others. As the court stated, when a merchant acquires PII in violation of Section 105(a) and uses the information for its own purposes, the merchant has caused an injury that is distinct from the statutory violation itself and cognizable under Section 9.

As for damages, the court found that while the injuries mentioned likely do not result in a readily quantifiable loss of money or property or measurable emotional distress, the invasion of a consumer’s personal privacy through receipt of unwanted marketing materials, entitles the consumer to a minimum statutory damage award of \$25. In contrast, an appropriate measure of damages for the sale of a customer’s information to a third party might be disgorgement of the merchant’s profits for the sale. Such an award

also would remove any financial incentive to merchants to violate the statute.

Third Certified Question

Finally, as to the third certified question, the court agreed with the district court’s conclusion that “credit card transaction form” should not be limited to paper forms, as the statute applies to “all” credit card transactions and there is no language expressly limiting the form to paper. Any other conclusion, the court noted would render the statute essentially obsolete given the ever expanding use of electronic, rather than paper, transactions.

Implications

The findings of the Supreme Judicial Court of Massachusetts in *Tyler* represent a broader reading of statutes that regulate the collection of PII – specifically ZIP codes – by merchants in credit card transactions than we have seen thus far from federal courts. In light of *Tyler*, merchants and card issuers might wish to review and possibly revise point-of-sale policies related to the acceptance of credit cards to guard against the use of PII in violation of applicable law. □

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CFPB SEEKS COMMENT ON PROPOSED NONBANK STUDENT LOAN SERVICER RULE

The Bureau of Consumer Financial Protection recently issued a proposed rule that would define certain nonbank student loan servicers as “larger participants” and would allow the Bureau to oversee their activity for compliance with federal consumer financial laws. This would be the third market in which the Bureau has defined larger participants, after consumer reporting and debt collection.

Under the proposed rule, the Bureau would supervise any nonbank student loan servicer that handles more than one million borrower accounts. The proposal would cover servicing of both federal and private student loans. According to the Bureau’s press release, while many servicers currently perform their functions well, the Bureau’s 2012 report on student loan complaints found concerns among some borrowers, including confusion in determining amounts owed and hitting dead ends or experiencing the runaround in dealing with servicing personnel.

Comments will be accepted for 60 days after publication of the proposal in the Federal Register. □

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