

Client advisory

The evolving concept of what constitutes personally identifiable information

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Personally identifiable information (PII) typically entails information that can be easily used to identify an individual, such as a driver's license number, Social Security number or unpublished phone number. Plaintiffs in consumer privacy litigation across the country have been forcing courts to address what can constitute PII.

In the seminal case of *Pineda v. Williams-Sonoma Stores*, 51 Cal. 4th 524 (2011), plaintiffs brought a consumer protection lawsuit against the retailer for collecting a customer's ZIP code at the point of sale. The information was not necessary for the credit card sale, as it was not used for shipping a product. In *Pineda*, the California Supreme Court ruled that a consumer's ZIP code constitutes a PII, and that collecting such data was in breach of the Song-Beverly Act of 1971¹ (Song-Beverly Act), and thus infringed on consumer privacy.

Recently, the Massachusetts top court joined California by holding that the Massachusetts consumer protection statute equally reflected the state's interest in protecting consumer privacy by finding that ZIP codes were PII. In *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492 (2013), the plaintiffs alleged that Michaels unlawfully wrote customers' ZIP codes on credit card transaction forms in violation of the Massachusetts unfair trade practices act.

The court agreed with the plaintiffs' position and found that ZIP codes were PII. In addition, the court held that the plaintiffs' alleged damages of receipt of unwanted marketing materials and sale of their PII was sufficient injury under the state statute to move forward with their case.

What about internet commerce? Obviously, internet retailers need a consumer's ZIP code to be able to ship products purchased. But what about items that do not need to be shipped? In *Apple v. Superior Court*, 56 Cal. 4th 128 (2013), the California Supreme Court, in a narrowly tailored decision, held that the Song-Beverly Act does not apply to online transactions relating to electronically downloaded products (that is, songs or books).

Most recently, plaintiffs sought to claim that personal email addresses are PII. In *Capp v. Nordstrom, Inc.*, 2013 WL 5739102 (E.D.C.A. Oct. 22, 2013), the plaintiff brought a consumer class action alleging that Nordstrom had collected personal email addresses to send electronic receipts for in-store purchases, then used the email address for marketing purposes in violation of the Song-Beverly Act. In a case of first impression, the federal court held that an email address constitutes PII for purposes of the Song-Beverly Act.

¹ The Act prohibits retailers from collecting and recording a customer's personal identifying information as a condition of accepting payment by credit card.

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Risk management implications

These cases demonstrate that the concept of PII is still evolving, and as technology changes and increases the ability to identify consumers using a collection of different types of information, the legal definition of what encompasses PII will also continue to expand. Companies should review their marketing and data collection practices and policies, as well as the statutes in effect in the jurisdictions in which they do business.

From an E&O and privacy insurance perspective, a coverage review of your policies should consider whether various types of legally identified PII will fit within the coverage definitions.

How can we help?

For more information regarding this topic, please contact your Wells Fargo Insurance sales executive, or:

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