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COVER STORY

Defense scores major win in Song-Beverly lawsuit

By Justin Kloczko
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In a major defense win in a class action trial, a San Diego County judge has handed down a rare win for retailers Urban Outfitters Inc. and Anthropologie, Inc., which were accused of improperly collecting customer zip codes during transactions.

The case, which demanded \$288 million and exposed the companies to \$1 billion, alleged violation of the state's Song-Beverly Credit Card Act, which bars the request of personal information to be submitted as a condition of a sale.

Class members argued cashiers recorded zip codes at stores between February 2010 and February 2011 in order to enter them into a data system to use for marketing purposes.

The plaintiffs alleged that requests for their zip codes were requested before their transactions were completed and the information was a requirement for completing the sale.

Superior Court Judge Joel M. Pressman disagreed in a Tuesday ruling, stating plaintiffs did not show that the submission of zip codes was contingent upon a sale.

"The undisputed evidence at trial was that Urban's registers prompted the cashiers to request the customers' zip code after the card had been swiped, read, approved and signed for by the customer," Pressman wrote in his decision.

Miles D. Scully, a partner at Gordon Rees Scully Mansukhani

LLP who represented the retailers, called the outcome one of the largest defense verdicts of the year and possibly the decade.

"We're one of the larger companies to be sued under this statute," said Scully. He said the rarity of a class action going to trial coupled with the high standard for the Beverly Act made it a special verdict.

Scully said the verdict bucks the trend of businesses having to pay out multi-million dollar judgments in similar consumer credit card transaction cases. Of the 75 similar cases that have been filed in California this year, this is the first verdict for the defense at trial, Scully said.

"It's kind of like if everyone gets the answer to the test wrong and you get it right," Scully said.

Further, Pressman said there was undisputed evidence that none of the class representatives had a transaction at Anthropologie during the period when the zip was requested. *Andrew R. Dremak v. Urban Outfitters, Inc.* 37-2011-00085814-CU-BT-CTL (S.D. Super Ct., filed Feb. 15, 2011).

The companies did collect zip codes in a variety of lawful ways, including through their loyalty program, during online transactions, or at a cash register after the transaction was completed — requests which were all voluntary, Scully said.

Timothy Blood, a partner at Blood Hurst & O'Reardon LLP who represented the plaintiffs, said this interpretation of the act runs



Daily Journal photo

San Diego County Superior Court Judge Joel M. Pressman has ruled in favor of two retailers accused of improperly collecting customer zip codes during transactions in a major class action defense victory.

contrary to appellate precedent.

"We believe the Credit Card Act is violated if any reasonable consumer would believe the information is required, rather than requiring that every consumer must hold that belief," he said in an email. "The trial court here reaches a conclusion that is the opposite of what other trial courts have held after trial, so the issue appears ripe for further appellate review."

Similar cases in California resulted in Restoration Hardware Holdings Inc. paying an \$80 million judgment, while Kmart Holding Corp. paid \$21 million for similar allegations, Scully said. *Alexandra M. Alvarez v. Kmart Holding Corporation* 200800097746 (S.D. Super Ct., filed Dec. 10, 2008); *Mike Hernandez v. Restoration Hardware Inc.* 200800094395 (S.D. Super Ct., filed Oct. 21, 2008).

Brian Kabateck, a managing partner at Kabateck Brown Kellner LLP, who is not involved with the case, called the verdict an "odd result" that deserves further scrutiny.

"The fact that it is a huge win for the defense doesn't end the analysis; in fact, it sounds like it is just beginning because I am unaware of any case previously holding that the timing of the zip code information vis a vis the transaction matters," Kabateck said in an email.

"I am not saying it doesn't; just that sounds like a new area of law and a new issue for consideration of the high court," he added.

Scully worked with fellow partners Timothy Branson, William Rathbone, Richard Spirra and senior counsels James Danaher and Joseph Goodman.

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