



THE ONLINE CONNECTION TO AMERICA'S HIGHEST-VOLUME RETAILERS

OPINION

by Scott Pearson and Dan Rozansky

(Mar. 30) The economy poses challenges for retailers, but decreased sales don't mean a reprieve from lawsuits.

The latest problem? A seemingly reasonable method of collecting data from customers is illegal in many states. As a result, class action lawsuits have been filed against stores that ask for zip codes and other types of customer information during checkout. Like the recent wave of lawsuits about printing full credit card numbers on customer receipts, this trend threatens to engulf the entire industry.

Retailers obviously have legitimate reasons for asking for information about their customers. Asking for customer zip codes allows one to understand where a store's customers live so retailers can target and evaluate advertising, for example. Asking for mail or e-mail addresses allow stores to build mailing lists to expand sales. There is nothing inherently wrong with these activities -- it's just good, old-fashioned marketing!

So why are courts allowing these class actions? The statutes under which the cases are being filed are not intended to stop merchants from obtaining information about their customers. Their purpose is to protect customers' freedom to use credit cards. So it is critical to understand how and when merchants can ask shoppers for information.

At least 16 states, including New York and California, prohibit businesses from requesting or recording personal customer information in connection with credit card purchases. While most of these statutes have yet to be interpreted by the courts, there are three basic schemes:

- 1) those that completely prohibit merchants from gathering customer information during a credit card transaction,
- 2) those that prohibit information gathering as a "condition of accepting a credit card as a payment,"
- 3) and those that simply prohibit writing the information on the credit card transaction form. Some of the statutes also apply to debit card transactions.

Many states have exceptions, such as for gathering customer information when needed for shipping, delivery, installation, warranties or other such purposes. The numerous class action complaints recently filed in California and other states take the position that gathering any customer information at the point of sale, even a simple request for a customer's zip code, is prohibited.

However, it is far from clear that these statutes will be interpreted this broadly. A California court, for example, recently concluded that information gathering is permitted as long as it is done in a manner that won't deter the customer from using his or her credit card. For example, merchants in California are free to ask for customer information after the purchase has been completed or during the transaction if payment is being made in cash. This is why it is critically important for retailers to know what kind of information they can ask for in each state, and how and when they are allowed to ask for it. Retailers also should review their point of sale systems to ensure that they do not prompt the cashier to ask customers for information in a manner that would violate state law.

But are customers really harmed? These statutes have serious teeth even when customers can't prove they actual damage. Many states require merchants to pay significant civil penalties to customers for each violation. California, New York, and New Jersey, for example, all provide for fines up to \$250 for the first violation and up to \$1,000 for subsequent violations. In the context of a class action brought on behalf of thousands or even millions of customers, these penalties can be enormous. Some states also provide for criminal penalties. And, of course, the mere filing of a class action can pose serious public relations and image problems for retailers and force significant expenditures of legal fees regardless of the ultimate outcome of the case.

At the end of the day, it really isn't that difficult to comply with the law and still obtain the information merchants need to conduct business. Retailers need to know the rules and train employees to follow them. But given the serious consequences that can result from class actions, it is essential to know the rules in each state where merchants operate, and to ensure employees know what they can and cannot do. Even in this economy, investing in compliance will be money well spent.

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