No. _____

In the

SUPREME COURT OF THE UNITED STATES

_____

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON Subscribing to Insurance Policy Numbers SS0002114/2730 and SS0002115/2566, Unknown Persons or Business Entities of Unknown Residence,

Petitioners,

v.

BRIGHTON COLLECTIBLES, LLC, a Delaware Limited Liability Company,

Respondent.

_____

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court's supervisory power is called upon as to:

1. Whether the Ninth Circuit violated federalism, abstention, and comity by creating new law when it refused to follow California's precedence establishing there can be no actionable claim with recoverable civil damages for invasion of privacy under the *Song-Beverly* Credit Card Act (*Civil Code* §1747.08)?

2. Whether the Ninth Circuit violated insurers/Petitioners' substantive due process rights when it refused to follow its own intra-circuit precedence--and California's--in finding the *Song-Beverly* Credit Card Act (*Civil Code* §1747.08) can provide for actionable invasion of privacy when it reversed the lower court's order regarding no duty to defend by insurers/Petitioners?

3. Whether the Ninth Circuit's refusal to certify questions to determine if California's *Song-Beverly* Credit Card Act proscribes against "publication" of customer data and provides for "civil damages" violated Petitioners' substantive due process rights in light of **suggestion in footnote** of its memorandum answers *could have* impacted its decision in reversing the lower court's order establishing Petitioners have no duty to defend under their insurance policy?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceedings are listed in the caption.

Pursuant to Rule 29.6 of this Court's Rules, petitioner CERTAIN INTERESTED UNDERWRITERS subscribing to insurance policy numbers SS0002114/2730 and SS0002115/2566 state that the following listed parties may have a pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

PARTY	CONNECTION/INTEREST
Certain Underwriters --	
MS Amblin PLC	MS&AD Insurance Group Holdings,
Syndicate 2001 at	Inc. (100%)
Lloyd's London	
XL Catlin Syndicate	XL Group Limited (100%)
2003 at Lloyd's, London	
Chaucer Syndicates Ltd.	China Reinsurance Corporation
1084 at Lloyd's London	(China Re) (100%)
Liberty Syndicate 4472	Liberty Mutual Holdings Company
at Lloyd's, London	(100%)

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Certain Underwriters at Lloyd's, London Subscribing To Insurance Policy Numbers SS0002114/2730 and SS0002115/2566 ("Underwriters") respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Certain Underwriters at Lloyd's, London's timely petition for Ninth Circuit and *en banc* rehearing was denied by the Ninth Circuit on April 24, 2020. Appendix A [Dkt. 43].

Certain Underwriters at Lloyd's, London's motion to certify state law questions involving California's *Song-Beverly* Credit Card Act, *Civil Code* §1747.08 was denied on April 24, 2020. Appendix B, [Dkt. 44].

The Ninth Circuit court of appeals Memorandum on reversal, remand, and entry of Judgment in favor of Brighton Collectibles, LLC was issued on March 16, 2020 and reported at 798 Fed.Appx. 144 (2020). Appendix C [Dkt 38-1].

The Fed. Rules of Civil Procedure, Rule 56 disposition of the Central District Court, California granting Certain Underwriters' at

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JURISDICTION

The United States Court of Appeals for the Ninth Circuit's Order denying Certain Underwriters at Lloyd's, London's Petition for Ninth Circuit and *en banc* rehearing was denied on April 24, 2020. This petition for writ of certiorari is timely filed within 150 days of that date pursuant to this Court's March 19, 2020 order involving ongoing concerns as to restrictions imposed by the COVID-19 pandemic, Order List: 589 U.S.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V provides, in relevant part:

> "No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS AND CALIFORNIA CASES INVOLVED

This petition involves statutes, cases, and rules reprinted at App. E through L as follows:

15 U.S.C. §1012(a).

28 U.S.C. §§ 1254(1), 1652.

FRCP, Rule 56(c), (e).

Big 5 Sporting Goods Corporation v. Zurich American Insurance Co. 635 Fed.Appx.351 (9th Cir. 2015).

Pineda v. Williams-Sonoma Stores, Inc., 51 Cal.4th 524 (2011).

Folgelstrom v. Lamps Plus, Inc., 195 Cal.App.4th 986 (2011).

Cal. Civil Code §1747.08.

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INTRODUCTION

The Ninth Circuit failed to follow established California law and therefore made new law in violation of federalism, abstention, and comity when it reversed Petitioners Certain Underwriters at Lloyd's, London's ("Underwriters") summary judgment as to retailer Brighton Collectibles, Inc. involving Underwriters' defense obligations of otherwise unrecognized invasion of privacy claims arising out of mere statutory violation of the *Song–Beverly* Credit Card Act under California *Civil Code* §1747.08 ("*Song-Beverly*"; "The Credit Card Act"; "The Act").

In evaluating whether Underwriters have a duty to defend within the terms and conditions provided under their policy, the Ninth Circuit inquired whether a customer could pursue "no harm" civil claims for invasion of privacy under California's *Song-Beverly* Credit Card Act based on the merchant's mere collection and recording of a customer's personal identifying information during a credit card

transaction and simply because the intended purpose of the Credit Card Act is to protect consumer privacy. If California has never recognized an actionable claim for invasion of privacy, there can be no defense obligation owed within the terms of Underwriters' policy for Brighton's statutory violation of the Credit Card Act arising out of Brighton's collection practices of customer data.

Rather than certifying questions to California involving whether the *Song-Beverly* Credit Card Act can provide for recoverable civil damages in order to support actionable invasion of privacy claims, the Ninth Circuit chose to create new law in contravention of California's highest court, including the Ninth Circuit's own prior decision in *Big 5 Sporting Goods Corporation v. Zurich American Insurance Co.* 635 Fed.Appx. 351 (9th Cir. 2015), establishing there can be no actionable claims for invasion of privacy based on the merchant's mere collection of the customer's identifying information.

As a consequence of the Ninth's Circuit's dereliction from California law and its intra-circuit decision in *Big 5*, floodgates of "no harm" litigation for invasion of privacy involving California's Credit Card Act will rapidly widen in diversity cases and financially impact all merchants alike, including and most notably Respondent Brighton Collectibles.

Petitioners' due process rights were also violated when the Ninth Circuit refused to follow its own precedence in *Big 5* and when it chose to ignore California law regarding no actionable statutory invasion of privacy can exist under the Credit Card act. Petitioners' due process rights were further violated when the Ninth Circuit refused to certify questions to California involving whether the Credit Card act could provide for civil damages and whether the Act proscribes against "publication" of the customer's personal information --- both of which the Ninth Circuit suggested in footnote of its memorandum may very be indispensible elements in Underwriters' policy wording and its decision in finding whether Petitioners have a defense obligation to Brighton Collectibles.

The Ninth Circuit was required to certify state law questions relating to concerns it raised in footnote 1 of its memorandum (App. C, fn 1) which demonstrated it questioned the merits of its decision in finding actionable invasion of privacy under the California Credit Card Act in the absence of express statutory language also providing for recovery of civil damages, and whether the statute included proscribing against publication of the customer's information as part of the prohibited act involving collection of the customer's data. The Ninth Circuit's refusal supports this Court's review under this Court's supervisory power whether violation of federalism, abstention, and

comity including Underwriters' due process rights has occurred.

STATEMENT OF THE CASE

A. *Background*

On October 19, 2018, Respondent Brighton Collectibles, LLC, ("Brighton") appealed the California Central District Court's order granting Petitioners, Certain Underwriters at Lloyd's, London's ("Underwriters") summary judgment on the grounds that the underlying Lida Yeheskel class action lawsuit, which presented a **single** cause of action for violation of the *Song-Beverly* Credit Card Act under California Civil Code §1747.08 ("the Credit Card Act" or "Act"), sufficiently alleged an "[o]ral or written publication of material that violates a person's right of privacy" within the meaning of Underwriters' insuring clauses for advertising and/or personal injury cover.

If no actionable claim can exist for "violation" of a person's right of privacy concurrent with a mere infraction of the *Song-Beverly* Credit Card Act, then Petitioners' insuring clause has not been met as a threshold matter for "personal or advertising injury" cover because the insuring clause requires "[o]ral or written **publication** of material ***that*** **violates** a person's right of privacy". Moreover, if the Credit Card Act was intended to proscribe only the merchant's conduct involving

"collection" of the information and not the later "publication", then the Ninth Circuit misapprehended Petitioner's duty to defend an alleged offense that simply does not exist under the wording of the subject insuring clause for personal or advertising injury cover ("collection" is not referenced in the insuring agreement, but rather "publication" is).

In *Big 5 Sporting Goods v. Zurich,* 635 Fed.Appx. 351, 353 (2015), the Ninth Circuit stated "the duty to defend groundless actions applies *only* to claims covered by the policy", citing *Venoco v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750, 765 (2009).

Further, the Ninth Circuit stated in *Big 5*:

> "We conclude that in garden variety ZIP Code cases like these, such extra Song-Beverly Act privacy claims **simply do not exist**. We have scoured the legal landscape searching for precedents supporting Big 5's assertions, but we have come up empty. To the contrary, the authority shedding light on this issue points conclusively in the other direction: California **does not recognize** any common law or constitutional privacy right causes of action for requesting, sending, transmitting, communicating, distributing, or commercially using ZIP Codes. The only possible claim is for statutory penalties, not damages."
>
> *Big 5 Sporting Goods* at 354. [Emphasis added].

If California's common law **refuses to recognize** any actionable claim for invasion of privacy arising out of **mere** violation of The *Song-Beverly* Credit Card Act, how can the Ninth Circuit create such recognition statutorily? And particularly when the Act contains no

language providing for recovery of actual damages?

The Ninth Circuit in *Big 5 Sporting Goods v. Zurich,* 635 Fed.Appx. 351 (2015) primarily relied on *Folgelstrom v. Lamps Plus, Inc.,* 195 Cal.App.4th 986 (2d Dist.2011) stating:

> "*Folgelstrom*...a ZIP Code marketing case, illuminates our conclusion that the **privacy rights asserted by Big 5 do not exist**. In that case, the plaintiff alleged an invasion of his common law and constitutional rights to privacy. The Court of Appeal held that "the conduct of which plaintiff complains does not constitute a 'serious' invasion of privacy." *Id.* at 992.. The court reasoned that "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Id.* (quoting *Hill v. National Collegiate Athletic Ass'n,* 7 Cal.4th, 1, 37 (1994)…). The court said that "[Lamps Plus'] conduct is not an egregious breach of social norms, but routine commercial behavior." *Id.* As the Supreme Court of California observed in *Hill,* "[n]o community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy."

Big 5 Sporting Goods at 354.

If California confirms that invasion of privacy claims do not exist from a mere infraction of the Credit Card Act, then Petitioners' duty to defend cannot be triggered for an unrecognized and non-existent risk involved in the Act since a claim for infraction by itself would not also mean conduct "**that violates** a person's right of privacy", wording that must be met in the subject insuring clause for personal injury cover. "An insurer has no duty to defend when 'the underlying claim cannot come within the policy coverage by virtue of the scope of the insuring

clause'…" *Big 5 Sporting Goods v. Zurich,* 635 Fed.Appx. 351, 353 (9th cir. 2015) citing *Montrose Chem. Corp. v. Sup.Ct.,* 6 Cal.4th 287, 301 (1993).

B. *Ninth Circuit's Memorandum of Decision*

The Ninth Circuit issued its Memorandum reversing the lower court's order stating:

> "Because the California Supreme Court has made clear that the Credit Card Act's 'overriding purpose' is likewise to 'protect the personal privacy of consumers', *Pineda v. Williams-Sonoma Stores, Inc.,* 246 P.3d 612, 619 (Cal. 2011) (quotation marks and citation omitted), we conclude that Yeheskel's Credit Card Act claim alleges an **invasion of privacy** sufficient to trigger Lloyd's duty to defend."
>
> P.1, Memorandum, attached to Appendix C. [Emphasis added].

The Ninth Circuit pointed out in footnote 1 of its Memorandum that it need not decide whether the underlying Yeheskel action also alleges an "advertising injury" because the Ninth Circuit already determined "personal injury" cover was sufficiently alleged based on an invasion of privacy claim imputed in the Credit Card Act itself since the purpose behind the Credit Card Act was to "protect privacy" interests in customer information. Without this imputed assertion of actionable invasion of privacy under the Credit Card Act (contrary to California law and inconsistent with this Court's prior decision), as noted, Brighton's demand for cover would not be within the insuring

clause for "[o]ral or written publication of material **that violates** a person's right of privacy".

The Ninth Circuit further suggested in footnote 1 of its Memorandum the problematic issue of whether recovery of enumerated civil penalties allowed under the Act also meant the same as recovery of "damages" involved in an invasion of privacy claim. Also in footnote 1, the Ninth Circuit suggested the added concern about whether the Credit Card Act proscribes only the collection of customer information, and not the subsequent **"publication"** which if it does ***not***, a claim for violation of the *Song-Beverly* Credit Card Act could not be covered offense under the subject insuring clause for personal injury due to absence of a prohibited act involving publication.

The Ninth Circuit's overbroad conclusion regarding the Credit Card Act's goal to proscribe against invasion of privacy and therefore recognize actionable claims therefrom based on collection of a customer's personal identifying information (which is inconsistent with California law and its own prior decision in *Big 5*) was relied on one cited inapposite case, *L.A. Lakers, Inc. v. Federal Insurance Co.*, 869 F.3d 795 (9th Cir. 2017). The Ninth Circuit broadly concluded because the Telephone Consumer Protection Act ("TCPA") involved in

L.A. Lakers provided protection from invasion of privacy, a claim under the TCPA "is inherently an invasion of privacy claim" and, therefore, so is a claim for violation of the *Song-Beverly* Credit Card Act because *Song-Beverly* also sought to protect privacy interests. However, the TCPA is an entirely different statute than *Song-Beverly* because the TCPA protects a different species of privacy interest in the sense of "seclusion" **and** contains a provision allowing a private right of action for invasion of privacy with recovery of statutory penalties or actual damages which, in sharp contrast, *Song-Beverly* Credit Card Act does not have. *See,* TCPA *47 U.S.C. §227(b)(3)(B)* contrast with *Civil Code §1747.08*.

Unless the Ninth Circuit can predict whether California will uphold a claim for statutory invasion of personal privacy under the *Song-Beverly* Credit Card Act in light of numerous California cases finding it **absurd** to do so at common law, the Ninth Circuit must seek answers from the California Supreme Court as to whether the Credit Card Act can provide for civil damages but the Ninth Circuit refused and, therefore, violated federalism, abstention, comity, and notably Petitioners' substantive due process rights. Claims for statutory invasion of personal privacy under the Credit Card Act , if found actionable, will open floodgates for unreasonable "no harm" litigation involving information a customer may freely provide in the first

instance with no evidence of the merchant's later misuse (such as Ms. Yeheskel's lawsuit against Brighton).

REASONS FOR GRANTING THE PETITION

This Court should intervene with its supervisory power to prohibit the practice endorsed by the court below in the creation of new law not expressly identified in California's *Song-Beverly* Credit Card Act nor provided by California law because the substantive due process violation is clearly presented, recurring, and of great importance to all insurers alike including (ironically) the merchant/ Respondent, Brighton Collectibles, Inc. Merchants like Brighton will face meritless "no harm" claims for invasion of privacy under California's *Song-Beverly* Credit Card Act based on mere collection practices or information that was voluntarily provided to begin with.

Further, the Ninth Circuit, by rejecting certification of state law questions involving whether California's Credit Card Act prohibits publication of customer data and provides for civil damages beyond penalties, has crafted new statutory law for a previously unrecognized cause of action for invasion of privacy and improperly predicted availability of civil remedies which have far departed from the spirit of comity and federalism calling for an exercise of this Court's supervisory powers. Moreover, Petitioners' substantive due process rights were further deprived when the Ninth Circuit refused to certify

these questions to California which resulted in the Ninth Circuit's creation of new actionable rights for credit card customers that did not previously exist and for which Petitioners would not have otherwise been required to provide a defense under their insurance policy.

A. Review is Needed to Determine whether the Ninth Circuit Violated Federalism, Abstention, and Comity When it Created New Law Recognizing Actionable Statutory Invasion of Privacy Under California's Credit Card Act in the Absence of Recoverable Civil Damages under the Act.

This Court's precedents against a federal court's interference with state substantive law are well established. "No clause in the Constitution" purports to confer power upon the federal courts "to declare substantive rules of common law applicable in a state." *Erie R. Co. v. Tompkins*, 58 S. Ct. 817, at 822 (1938). Under this rule, federal courts may apply but not declare state law which is what occurred here with new substantive rights created by the Ninth Circuit involving actionable "no harm" claims for invasion of privacy under California's *Song-Beverly* Credit Card Act.

In order to animate this fundamental tenet of federalism, the federal courts, when faced with an important and unsettled question of state law, are encouraged to certify that issue to the implicated state's supreme court. *Arizonans for Official English v. Arizona,* 520 U.S. 43,

48, 62, 76-79 (1997) ("Federal courts lack competence to rule definitively on the meaning of state legislation"); *Lehman Brothers v. Schein,* 416 U.S. 386, 391 (1974) (noting certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism").

For its part, the California Supreme Court has noted the certification procedure (i) allows federal courts to avoid mischaracterizations of state law, which might result in misleading other state and federal courts until the state supreme court "finally" in other litigation corrects the error; (ii) strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to conclusively decide an issue; (iii) avoids conflicts between federal and state courts; and (iv) protects the sovereignty of state courts. *Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal. 4th 352, 360-61 (2000).

After *Arizonans*, the Ninth Circuit acknowledged that it had "an obligation to consider whether novel state-law questions should be certified - and we have been admonished in the past for failing to do so.' " *Kremen v. Cohen,* 325 F.3d 1035, 1037-38 (9th Cir. 2003), *citing Parents Involved in Community Schools v. Seattle Sch. Dist.,* 294 F.3d 1085, 1086 (9th Cir. 2002). The Ninth Circuit accordingly certifies state-law questions "that present significant issues, including those

with important public policy ramifications, and that have not yet been resolved by state courts." *Kremen*, 325 F.3d at 1038 (noting that when a case "raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause us to seek certification"). Moreover, following this Court's ruling in *Lehman Brothers*, 416 U.S. at 391, that certification is appropriate when state law is unclear, even where no constitutional issue is raised, the Ninth Circuit has specifically found that certification is appropriate whether or not the issue was of constitutional significance.

Here, the Ninth Circuit's newly fashioned substantive right for actionable invasion of privacy under the Credit Card Act will significantly affect litigation in California by promoting forum shopping---much to Respondent Brighton's detriment---because the Ninth Circuit's memorandum of decision will have at least persuasive effect for district courts in California while the state courts must follow existing California law which does not recognize statutory invasion of privacy claims under *Song-Beverly*. *See Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th 352, 360 (2000) (noting concern that a lenient Ninth Circuit ruling on California law would cause cases to be filed in federal rather than state court, thereby depriving state courts of a case in which they could address the issue). This is exactly the kind of result that this Court sought to prevent in

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). This Court's guidance is needed to confirm the extent to which the Ninth Circuit is free to disregard existing state-law authorities as in *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524 (2011) or *Folgelstrom v. Lamps Plus, Inc.,* 195 Cal.App.4th 986 (2011) both of which refused to recognize claims for invasion of privacy even though the acknowledged purpose behind the Credit Card Act is to "protect privacy rights" of consumers.

Because California does not recognize actionable invasion of privacy claims based on mere violation of its Credit Card Act, there would be no legal basis that Petitioners might eventually be obligated to indemnify Respondent Brighton Collectibles. It is hornbook law that an insurer's duty to defend its policyholder is broader than its duty to indemnify, and "that an insurer has a duty to defend a claim against its insured unless it can establish 'as a matter of law, that there is no possible factual or legal basis on which [the insurer] **might eventually be obligated to indemnify** [the] insured under any policy provision.' " 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 5.02, at 204 (12th ed. 2004) ("*Handbook on Insurance Coverage*") (citation omitted). [Emphasis added].

Indeed, federalism, abstention, and comity have been cast aside to find coverage where none exists as an initial matter involving the

Petitioners' subject insuring clause based on the underlying lead class plaintiff Lida Yeheskel's **sole cause of action** for violation of the *Song-Beverly* Credit Card Act which, on its face, only proscribes against a merchant's collection practices and only provides for civil penalties and does not make any reference to the act of publication, or as providing for recovery of civil damages, but which the Ninth Circuit improperly and **very likely incorrectly** predicted without California's guidance.

B. Petitioners' Due Process Rights were Violated When the Ninth Circuit Refused to Certify Questions to California About Whether the Credit Card Act Provides for Civil Damages and Proscribes Against Publication of Customer Data.

Certification today covers territory once dominated by a deferral device called "Pullman abstention" and can be raised at any time before the state's highest court answers the certified question. *Arizonans*, at 75-76; *see also, City of Houston v. Hill,* 482 U.S. 451, (1987).

During oral argument, the Ninth Circuit panel repeatedly wrestled with itself and questioned whether the *Song-Beverly* Credit Card Act could possibly intend to provide for recoverable civil damages involving statutory "invasion of privacy" claims which California's highest courts, as noted, in *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524 (2011) and *Folgelstrom v. Lamps Plus, Inc.,* 195

Cal.App.4th 986 (2011) have already rejected including, as noted, the Ninth Circuit's own prior decision in *Big 5* because "such extra Song-Beverly Act privacy claims **simply do not exist**." *Big 5* at APP-29; App. H.

The California Supreme Court in *Pineda v. Williams-Sonoma Stores* **refused** to recognize a private right of action in relation to a claim of violation of the Song-Beverly Act by the mere collection of personal identifying data or subsequent distribution of the information in a customer list even though the Supreme Court expressly stated (in dicta) that it recognized the overriding purpose of the Act was to "protect the personal privacy of consumers who pay for transactions with credit cards." *Id* at 534. This was demonstrated when the Supreme Court in *Pineda* expressly disclaimed review of the lower court's order sustaining the merchant's demurrer to the customer's claim for invasion of privacy thereby tacitly reaffirming its view that violation of the Song-Beverly Act did not also create an actionable invasion of privacy claim when "nothing more" exists to suggest a serious invasion. *Id* at 528. It is unclear how the Ninth Circuit was able to interpret *Pineda's* refusal to review the lower court's order sustaining the merchant's demurrer on the common law invasion of privacy claim to also mean *Pineda* defined the Act to confer statutory rights to sue for invasion of privacy.

Therefore, the Ninth Circuit panel should have sought approval from California to deem the Act provides for actionable invasion of privacy and to interpret the Act includes conduct involving publication and recoverable damages beyond civil penalties. Refusal to do so violated Petitioners' substantive due process rights.

Moreover, just because the stated purpose of the *Song-Beverly* Credit Card Act was to "protect the personal privacy of consumers", this does not mean an infraction of the Credit Card Act also means an ***invasion*** of the person's privacy rights since California (and the Ninth Circuit in its own prior decision in *Big 5*) already loudly and clearly spoke about this issue. Looking past these cases and in violation of federalism, abstention, and comity the Ninth Circuit viewed differently and created new state law by concluding that: "Yeheskel's Credit Card claim alleges an invasion of privacy sufficient to trigger Lloyd's duty to defend." APP-8 of Memorandum App.C.

As affirmed in footnote 1 of the Memorandum, the Ninth Circuit panel wondered ---and stated was disinclined to find because the issues were not before it but went ahead and took a position in any event without seeking approval from California--- whether the Credit Card Act has the element of publication in order for there to be a violation to meet the distinct elements of Petitioners' insuring clause for "personal

injury" cover requiring "[o]ral or written **publication** of material **that violates** a person's **right of privacy**". [Emphasis added].

If statutory invasion of privacy can be a recognized claim under the Act (by incorporating a claim of "publication" where none exists in the Act) what can possibly be recoverable damages when the Act clearly provides for civil penalties only? The Ninth Circuit panel also expressed deep concerns about this during oral argument but disregarded an obligation to seek answers from California and, rather, made statutory findings contrary to California common law (i.e., new statutory law) by failing to certify questions to California and in order to support its conclusions of a duty to defend within the meaning of Petitioners/Underwriters' insuring clause.

The Ninth Circuit panel's decision to reject certification of state law questions was inconsistent with another panel's decision in *Kremen v. Cohen,* 325 F.3d 1035 (9th Cir. 2003). There appears to be no uniformity within the Ninth Circuit as to when to certify state law questions. The inquiry when to certify state law questions involves exceptional importance as it relates to the spirit of comity and federalism. Resolution of this issue has nationwide application as it may affect every diversity case.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate and reverse the memorandum decision below in favor of Underwriters' or, alternatively, order certification to the California Supreme Court the questions whether the Credit Card Act includes proscribing publication of customer data and provides for civil damages for invasion of privacy which are indispensable elements in determining Petitioners' duty to defend the underlying sole claim for violation of the Credit Card Act by Ms. Yeheskel against Brighton.

September 21, 2020

Respectfully submitted,

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Attorneys for Petitioners

APPENDICES

APPENDIX A

FILED

APR 24 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIGHTON COLLECTIBLES, LLC, a Delaware Limited Liability Company, Plaintiff-Appellant, v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, Subscribing To Insurance Policy Numbers SS0002114/2730 AND SS0002115/2566 unknown persons or business entities of unknown residence, Defendant-Appellee.	No. 18-56403 D.C. No. 2:18-cv-01107-JFW-GJS Central District of California, Los Angeles ORDER

Before: HURWITZ and FRIEDLAND, Circuit Judges, and KORMAN,* District Judge.

The panel has unanimously voted to deny Defendant-Appellee's petition for panel rehearing. Judges Hurwitz and Friedland have voted to deny the petition for rehearing en banc, and Judge Korman so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc are **DENIED**.

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX B

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 18-56403 **Docketed:** 10/22/2018
Nature of Suit: 4190 Other Contract Actions **Termed:** 03/16/2020
Brighton Collectibles, LLC v. Certain Underwriters at Lloyds
Appeal From: U.S. District Court for Central California, Los Angeles
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0973-2 : 2:18-cv-01107-JFW-GJS
Trial Judge: John F. Walter, District Judge
Date Filed: 02/08/2018

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
10/04/2018	10/04/2018	10/19/2018	10/19/2018

Prior Cases:
15-56867 **Date Filed:** 12/04/2015 **Date Disposed:** 01/08/2018 **Disposition:** Reversed, Vacated, Remanded - Memorandum

Current Cases:
None

BRIGHTON COLLECTIBLES, LLC, a Delaware Limited Liability Company Plaintiff - Appellant,	Charles Avrith, Esquire, Senior Litigation Counsel Direct: 310-274-7100 [COR NTC Retained] Browne George Ross LLP 2121 Avenue of the Stars Suite 2800 Los Angeles, CA 90067 Eric M. George, Esquire, Attorney [COR NTC Retained] Browne George Ross LLP 2121 Avenue of the Stars Suite 2800 Los Angeles, CA 90067 Peter Wayne Ross, Esquire, Attorney Direct: 310-274-7100 [COR NTC Retained] Browne George Ross LLP 2121 Avenue of the Stars Suite 2800 Los Angeles, CA 90067
v.	
CERTAIN UNDERWRITERS AT LLOYD'S LONDON, Subscribing To Insurance Policy Numbers SS0002114/2730 AND SS0002115/2566 unknown persons or business entities of unknown residence Defendant - Appellee,	Tami Kay Lee, Attorney Direct: 626-373-2444 [COR NTC Retained] P.K. Schrieffer LLP 100 N. Baranca Avenue Suite 1100 West Covina, CA 91791

BRIGHTON COLLECTIBLES, LLC, a Delaware Limited Liability Company,

Plaintiff - Appellant,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, Subscribing To Insurance Policy Numbers SS0002114/2730 AND SS0002115/2566 unknown persons or business entities of unknown residence,

Defendant - Appellee.

10/22/2018	1 (15 pg, 573.25 KB)	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 10/29/2018. Appellant Brighton Collectibles, LLC opening brief due 12/18/2018. Appellee Certain Underwriters at Lloyd's London answering brief due 01/17/2019. Appellant's optional reply brief is due 21 days after service of the answering brief. [11056005] (JBS) [Entered: 10/22/2018 04:01 PM]
10/29/2018	2 (3 pg, 127.66 KB)	Filed (ECF) Appellee Certain Underwriters at Lloyd's London Mediation Questionnaire. Date of service: 10/29/2018. [11065074] [18-56403] (Lee, Tami Kay) [Entered: 10/29/2018 05:05 PM]
10/29/2018	3 (3 pg, 129.75 KB)	Filed (ECF) Appellant Brighton Collectibles, LLC Mediation Questionnaire. Date of service: 10/29/2018. [11065121] [18-56403] (Ross, Peter) [Entered: 10/29/2018 06:14 PM]
11/01/2018	4 (2 pg, 203.52 KB)	MEDIATION ORDER FILED: The Mediation Program of the 9th Circuit Court of Appeals facilitates settlement while appeals are pending. By 11/16/2018, counsel for all parties intending to file briefs in this matter are requested to inform the Circuit Mediator by email of their clients' views on whether the issues on appeal or the underlying dispute might be amenable to settlement presently or in the foreseeable future. This communication will be kept confidential, if requested... This communication should not be filed with the court... The existing briefing schedule remains in effect... [11068864] (VS) [Entered: 11/01/2018 01:55 PM]
11/27/2018	5 (1 pg, 185.62 KB)	MEDIATION ORDER FILED: This case is RELEASED from the Mediation Program. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further settlement discussions. [11099891] (VS) [Entered: 11/27/2018 09:35 AM]
12/06/2018	6	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellant Brighton Collectibles, LLC. New requested due date is 01/17/2019. [11111939] [18-56403] (Ross, Peter) [Entered: 12/06/2018 10:01 AM]
12/06/2018	7	**Streamlined request [6] by Appellant Brighton Collectibles, LLC to extend time to file the brief is approved. Amended briefing schedule: Appellant Brighton Collectibles, LLC opening brief due 01/17/2019. Appellee Certain Underwriters at Lloyd's London answering brief due 02/19/2019. The optional reply brief is due 21 days from the date of service of the answering brief.** [11112141] (JN) [Entered: 12/06/2018 11:11 AM]
01/17/2019	8 (48 pg, 284.84 KB)	Submitted (ECF) Opening Brief for review. Submitted by Appellant Brighton Collectibles, LLC. Date of service: 01/17/2019. [11158111] [18-56403] (Ross, Peter) [Entered: 01/17/2019 09:26 PM]
01/17/2019	9 (799 pg, 54.15 MB)	Submitted (ECF) excerpts of record. Submitted by Appellant Brighton Collectibles, LLC. Date of service: 01/17/2019. [11158112] [18-56403] (Ross, Peter) [Entered: 01/17/2019 09:31 PM]
01/18/2019	10 (2 pg, 187.2 KB)	Filed clerk order: The opening brief [8] submitted by Brighton Collectibles, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: blue. The Court has reviewed the excerpts of record [9] submitted by Brighton Collectibles, LLC. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [11158712] (GV) [Entered: 01/18/2019 10:27 AM]
01/24/2019	11	Received 7 paper copies of Opening Brief [8] filed by Brighton Collectibles, LLC. [11165335] (SD) [Entered: 01/24/2019 01:29 PM]
01/24/2019	12	Filed 4 paper copies of excerpts of record [9] in 4 volume(s) filed by Appellant Brighton Collectibles, LLC. [11167227] (LA) [Entered: 01/25/2019 02:14 PM]
02/01/2019	13	Filed (ECF) notice of appearance of Charles Avrith for Appellant Brighton Collectibles, LLC. Date of service: 02/01/2019. (Party previously proceeding without counsel: No) [11175424] [18-56403] (Ross, Peter) [Entered: 02/01/2019 09:02 AM]
02/01/2019	14	**Notice of Appearance (ECF Filing) [13] is rejected. Filer is not permitted to file on behalf of another attorney. Each attorney must file their own notice of appearance.** [11175492] (CW) [Entered: 02/01/2019 09:27 AM]
02/01/2019	15	Filed (ECF) notice of appearance of Charles Avrith for Appellant Brighton Collectibles, LLC. Date of service: 02/01/2019. (Party previously proceeding without counsel: No) [11175543] [18-56403] (Avrith, Charles) [Entered: 02/01/2019 09:41 AM]
02/01/2019	16	Added attorney Charles Avrith for Brighton Collectibles, LLC, in case 18-56403. [11175574] (CW) [Entered: 02/01/2019 09:55 AM]
02/07/2019	17	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee Certain Underwriters at Lloyd's London. New requested due date is 03/21/2019. [11182613] [18-56403] (Lee, Tami Kay) [Entered: 02/07/2019 12:36 PM]
02/07/2019	18	**Streamlined request [17] by Appellee Certain Underwriters at Lloyd's London to extend time to file the brief is approved. Amended briefing schedule: Appellee Certain Underwriters at Lloyd's London answering brief due 03/21/2019. The optional reply brief is due 21 days from the date of service of the answering brief.** [11182638] (JN) [Entered: 02/07/2019 12:51 PM]
03/21/2019	19 (51 pg, 194.21 KB)	Submitted (ECF) Answering Brief for review. Submitted by Appellee Certain Underwriters at Lloyd's London. Date of service: 03/21/2019. [11238376] [18-56403] (Lee, Tami Kay) [Entered: 03/21/2019 05:53 PM]
03/22/2019	20 (2 pg, 94.9 KB)	Filed clerk order: The answering brief [19] submitted by Certain Underwriters at Lloyd's London is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be submitted to the principal office of the Clerk. [11239272] (LA) [Entered: 03/22/2019 01:51 PM]
03/28/2019	21	Received 7 paper copies of Answering Brief [19] filed by Certain Underwriters at Lloyd's London. [11245330] (DB) [Entered: 03/28/2019 12:38 PM]
03/29/2019	22	Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellant Brighton Collectibles, LLC. New requested due date is 05/10/2019. [11247008] [18-56403] (Avrith, Charles) [Entered: 03/29/2019 03:00 PM]
03/29/2019	23	**Streamlined request [22] by Appellant Brighton Collectibles, LLC to extend time to file the brief is approved. Amended briefing schedule: the optional reply brief is due 05/13/2019.** [11247092] (DLM) [Entered: 03/29/2019 03:32 PM]
05/13/2019	24 (23 pg, 585.71 KB)	Submitted (ECF) Reply Brief for review. Submitted by Appellant Brighton Collectibles, LLC. Date of service: 05/13/2019. [11296059] [18-56403] (Ross, Peter) [Entered: 05/13/2019 11:03 PM]
05/14/2019	25 (2 pg, 94.88 KB)	Filed clerk order: The reply brief [24] submitted by Brighton Collectibles, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [11296539] (LA) [Entered: 05/14/2019 11:08 AM]
05/16/2019	26	Received 7 paper copies of Reply Brief [24] filed by Brighton Collectibles, LLC. [11299856] (SD) [Entered: 05/16/2019 10:55 AM]
10/02/2019	27	This case is being considered for an upcoming oral argument calendar in Pasadena

		Please review the Pasadena sitting dates for February 2020 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: request for mediation).[11451972][18-56403] (AW) [Entered: 10/02/2019 03:32 PM]
10/03/2019	☐ 28 1 pg, 58.27 KB	Filed (ECF) Attorney Peter Wayne Ross, Esquire for Appellant Brighton Collectibles, LLC response to notice for case being considered for oral argument. Date of service: 10/03/2019. [11453259] [18-56403] (Ross, Peter) [Entered: 10/03/2019 02:20 PM]
10/08/2019	☐ 29 1 pg, 103.07 KB	Filed (ECF) Attorney Ms. Tami Kay Lee for Appellee Certain Underwriters at Lloyd's London response to notice for case being considered for oral argument. Date of service: 10/08/2019. [11458114] [18-56403] (Lee, Tami Kay) [Entered: 10/08/2019 01:55 PM]
10/31/2019	☐ 30	This case is being considered for an upcoming oral argument calendar in Pasadena Please review the Pasadena sitting dates for March 2020 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: request for mediation).[11485112][18-56403] (AW) [Entered: 10/31/2019 02:31 PM]
11/04/2019	☐ 31 1 pg, 52.83 KB	Filed (ECF) Acknowledgment of hearing notice by Attorney Peter Wayne Ross, Esquire for Appellant Brighton Collectibles, LLC. Hearing in Pasadena on 03/02/2020 at 09:00 A.M. (Courtroom: N/A). Filer sharing argument time: No. (Argument minutes: 15.) Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 11/04/2019. [11488799] [18-56403] (Ross, Peter) [Entered: 11/04/2019 06:16 PM]
11/05/2019	☐ 32 1 pg, 102.62 KB	Filed (ECF) Attorney Ms. Tami Kay Lee for Appellee Certain Underwriters at Lloyd's London response to notice for case being considered for oral argument. Date of service: 11/05/2019. [11490356] [18-56403] (Lee, Tami Kay) [Entered: 11/05/2019 05:43 PM]
12/22/2019	☐ 33	Notice of Oral Argument on Monday, March 2, 2020 - 09:00 A.M. - Courtroom 3 - Pasadena CA. View the Oral Argument Calendar for your case **here**. Be sure to review the GUIDELINES for important information about your hearing, including when to arrive (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). If you are the specific attorney or self-represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 21 days before Monday, March 2, 2020. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[11541118]. [Array, 18-56403] (AW) [Entered: 12/22/2019 06:08 AM]
02/03/2020	☐ 34	Filed (ECF) Acknowledgment of hearing notice by Attorney Ms. Tami Kay Lee for Appellee Certain Underwriters at Lloyd's London. Hearing in Pasadena on 03/02/2020 at 09:00 A.M. (Courtroom: Courtroom 3). Filer sharing argument time: No. (Argument minutes: 20.) Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 02/03/2020. [11583609] [18-56403] (Lee, Tami Kay) [Entered: 02/03/2020 04:52 PM]
02/05/2020	☐ 35	Filed (ECF) Acknowledgment of hearing notice by Attorney Peter Wayne Ross, Esquire for Appellant Brighton Collectibles, LLC. Hearing in Pasadena on 03/02/2020 at 09:00 A.M. (Courtroom: Courtroom 3). Filer sharing argument time: No. (Argument minutes: 15.) Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 02/05/2020. [11587137] [18-56403] (Ross, Peter) [Entered: 02/05/2020 04:53 PM]
03/02/2020	☐ 36	ARGUED AND SUBMITTED TO ANDREW D. HURWITZ, MICHELLE T. FRIEDLAND and EDWARD R. KORMAN. [11615064] (DLM) [Entered: 03/02/2020 02:34 PM]
03/06/2020	☐ 37 1 pg, 31.04 MB	Filed Audio recording of oral argument. **Note:** Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [11620966] (DLM) [Entered: 03/06/2020 12:47 PM]
03/16/2020	☐ 38 8 pg, 307.14 KB	FILED MEMORANDUM DISPOSITION (ANDREW D. HURWITZ, MICHELLE T. FRIEDLAND and EDWARD R. KORMAN) REVERSED and REMANDED for further proceedings. FILED AND ENTERED JUDGMENT. [11630472] (MM) [Entered: 03/16/2020 08:52 AM]
03/27/2020	☐ 39 1 pg, 84.55 KB	Filed (ECF) Appellant Brighton Collectibles, LLC bill of costs (Form 10) in the amount of $456.30 USD. Date of service: 03/27/2020 [11644276] [18-56403] (Avrith, Charles) [Entered: 03/27/2020 02:30 PM]
03/30/2020	☐ 40 34 pg, 401.68 KB	Filed (ECF) Appellee Certain Underwriters at Lloyd's London petition for rehearing en banc (from 03/16/2020 memorandum). Date of service: 03/30/2020. [11646428] [18-56403] (Lee, Tami Kay) [Entered: 03/30/2020 07:40 PM]
04/09/2020	☐ 41 17 pg, 85.27 KB	Filed (ECF) Appellant Brighton Collectibles, LLC response to motion (motion for certification to the california supreme court). Date of service: 04/09/2020. [11656869]. [18-56403] --[COURT UPDATE: Updated docket text to reflect correct ECF filing type. 4/10/2020 by TYL] (Avrith, Charles) [Entered: 04/09/2020 04:59 PM]
04/17/2020	☐ 42 17 pg, 497.51 KB	Filed (ECF) Appellee Certain Underwriters at Lloyd's London reply to response (). Date of service: 04/17/2020. [11665017] [18-56403] (Lee, Tami Kay) [Entered: 04/17/2020 04:59 PM]
04/24/2020	☐ 43 1 pg, 122.3 KB	Filed order (ANDREW D. HURWITZ, MICHELLE T. FRIEDLAND and EDWARD R. KORMAN): The panel has unanimously voted to deny Defendant-Appellee's petition for panel rehearing. Judges Hurwitz and Friedland have voted to deny the petition for rehearing en banc, and Judge Korman so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for panel rehearing and rehearing en banc are DENIED. [11670650] (AF) [Entered: 04/24/2020 09:41 AM]
04/24/2020	☐ 44	Filed text clerk order (Deputy Clerk: AF): The motion (Dkt. [40]) for certification to the California Supreme Court (included in the petitions), is denied. [11670677] (AF) [Entered: 04/24/2020 09:54 AM]
05/04/2020	☐ 45	MANDATE ISSUED.(ADH, MTF and ERK) Costs taxed against Appellee in the amount of $456.30.

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798 Fed.Appx. 144 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

BRIGHTON COLLECTIBLES, LLC, a Delaware Limited Liability Company, Plaintiff-Appellant,
v.
CERTAIN UNDERWRITERS AT LLOYD'S LONDON, Subscribing To Insurance Policy Numbers SS0002114/2730 and SS0002115/2566 unknown persons or business entities of unknown residence, Defendant-Appellee.

No. 18-56403
|
Argued and Submitted March 2, 2020 Pasadena, California
|
FILED March 16, 2020

Attorneys and Law Firms

Charles Avrith, Esquire, Senior Litigation Counsel, Eric M. George, Esquire, Attorney, Peter Wayne Ross, Esquire, Attorney, Browne George Ross LLP, Los Angeles, CA, for Plaintiff - Appellant

Tami Kay Lee, Attorney, P.K. Schrieffer LLP, West Covina, CA, for Defendant - Appellee

Appeal from the United States District Court for the Central District of California, John F. Walter, District Judge, Presiding, D.C. No. 2:18-cv-01107-JFW-GJS

Before: HURWITZ and FRIEDLAND, Circuit Judges, and KORMAN,[*] District Judge.

***145** MEMORANDUM[**]

In this insurance dispute, Brighton Collectibles, LLC ("Brighton") appeals the district court's grant of summary judgment to Certain Underwriters at Lloyd's London ("Lloyd's"). The district court held that Lloyd's does not have a duty to defend Brighton against a putative class action by Lida Yeheskel (the "Yeheskel Action"), which alleges that Brighton collected and sold Yeheskel's and other customers' personal information in violation of California's Song-Beverly Credit Card Act (the "Credit Card Act"), Cal. Civ. Code § 1747.08. We have jurisdiction under 28 U.S.C. § 1291 and reverse.

Under California law, an insurer has a duty to defend its insured unless "there is *no* potential for coverage." *Montrose Chem. Corp. v. Superior Court*, 6 Cal.4th 287, 24 Cal.Rptr.2d 467, 861 P.2d 1153, 1157 (1993). To trigger this duty, "the insured need only show that the underlying claim *may* fall within policy coverage." *Id.*, 24 Cal.Rptr.2d 467, 861 P.2d at 1161. "The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy." *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal.4th 1076, 17 Cal.Rptr.2d 210, 846 P.2d 792, 795 (1993).

As relevant here, Brighton's policies with Lloyd's cover " '[p]ersonal injury' caused by an offense arising out of [Brighton's] business," defined to include the "[o]ral or written publication of material that violates a person's right of privacy." The district court held that the Yeheskel Action is not covered by this personal injury provision. We disagree. The Yeheskel Action alleges the violation of "a person's right of privacy" within the meaning of Brighton's policies. In *Los Angeles Lakers, Inc. v. Federal Insurance Co.*, 869 F.3d 795 (9th Cir. 2017), we held that a claim under the Telephone Consumer Protection Act "is inherently an invasion of privacy claim" because Congress stated in that Act that "privacy rights" are the interests "this section is intended to protect." *Id.* at 803, 806 (quoting 47 U.S.C. § 227(b)(2)(B)(ii)(I), (C)). Because the California Supreme Court has made clear that the Credit Card Act's "overriding purpose" is likewise to "protect the personal privacy of consumers," *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524, 120 Cal.Rptr.3d 531, 246 P.3d 612, 619 (2011) (quotation marks and citation omitted), we conclude that Yeheskel's Credit Card Act claim alleges an invasion of privacy sufficient to trigger Lloyd's duty to defend.

Lloyd's obligation to defend is not eliminated by the policies' exclusion of coverage for "advertising, publishing, broadcasting or telecasting done by or for [Brighton]." The word "publishing" in this coverage exclusion cannot be read to have the same meaning as the word "publication" in the personal injury provision. Such a reading would exclude

coverage for virtually any ***146** publication over which Brighton might realistically be sued, rendering the policies' express coverage for publications that violate privacy rights "practically meaningless." *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal.4th 758, 110 Cal.Rptr.2d 844, 28 P.3d 889, 894-95 (2001) (rejecting a broad construction of an exclusion that would have rendered coverage "illusory" and violated the insured's reasonable expectations).

Moreover, the grouping of "publishing" with "advertising ..., broadcasting or telecasting" in the coverage exclusion suggests that the exclusion applies only to broad, public-facing marketing activities. *See Hameid v. Nat'l Fire Ins. of Hartford*, 31 Cal.4th 16, 1 Cal.Rptr.3d 401, 71 P.3d 761, 766 (2003) (interpreting the term "advertising" in liability policies to mean "widespread promotional activities usually directed to the public at large"). Yeheskel's allegations that Brighton sold customer information to select third-party marketers, if true, would constitute "publication" of the information, *see State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 181 Cal.App.4th 429, 104 Cal. Rptr. 3d 573, 587 (2010), but would not rise to the level of widespread, public-facing "publishing." [1]

REVERSED and REMANDED for further proceedings.

All Citations

798 Fed.Appx. 144 (Mem)

Footnotes

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 In light of our determination that the Yeheskel Action alleges a personal injury based on a privacy violation, we need not decide whether it also alleges an "advertising injury" within the meaning of the insurance policies. We also decline to reach two issues the parties did not raise in their briefing: (1) whether "civil penalt[ies]" under the Credit Card Act are "damages" within the meaning of Brighton's policies, *see* Cal. Civ. Code § 1747.08(e); and (2) whether the fact that the Credit Card Act proscribes only the collection of customer information, and not its subsequent publication, *see* Cal. Civ. Code § 1747.08(a)(1)-(2), means the Yeheskel Action does not implicate the "publication of material" covered by Brighton's policies.

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United States District Court, C.D. California.

BRIGHTON COLLECTIBLES, LLC, et al.
v.
CERTAIN UNDERWRITERS AT LLOYDS LONDON

Case No. CV 18-1107-JFW(GJSx)
|
Filed 09/27/2018

Attorneys and Law Firms

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David Theodore Hayek, Paul K. Schrieffer, Tami Kay Lee, PK Schrieffer LLP, West Covina, CA, for Certain Underwriters At Lloyds London.

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANT UNDERWRITERS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S ENTIRE COMPLAINT OR, *ALTERNATIVELY*, PARTIAL SUMMARY JUDGMENT ON THE 3 RD CAUSE OF ACTION FOR "BAD FAITH" [filed 8/24/18; Docket No. 50]

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

***1** On August 24, 2018, Defendant Certain Underwriters at Lloyds London ("Lloyds") filed a Motion for Summary Judgment on Plaintiff's Entire Complaint or, *Alternatively*, Partial Summary Judgment on the 3 rd Cause of Action for "Bad Faith" ("Motion"). On August 31, 2018, Plaintiff Brighton Collectibles, LLC ("Brighton") filed its Opposition. On September 10, 2018, Lloyds filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's September 24, 2018 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background [1]

This is an insurance coverage dispute arising out of Brighton's claim that Lloyds has a duty to indemnify and defend Brighton in the class action lawsuit entitled *Lida Yeheskel v. Brighton Collectibles, LLC*, pending in the Superior Court of the State of California, County of Ventura, Case No. 56-2016-00489019-CU-BT-VTA" (the *"Yeheskel* Action"), which was filed on November 14, 2016 and alleges a single cause of action for violation of California Civil Code § 1747.08, *et seq.*, also known as the Song-Beverly Credit Card Act. Complaint, ¶ 1.

A. The Underlying *Yeheskel* Action

In the *Yeheskel* Action, Plaintiff Lida Yeheskel ("Yeheskel") alleges that she visited a Brighton retail store in Thousand Oaks, California on September 15, 2016, and purchased a Brighton product with a credit card. As part of Brighton's alleged Information Capture Policy, a Brighton employee asked Yeheskel to provide her full name, e-mail address, residence address, and telephone number during the credit card sale. Yeheskel provided the requested personal identifying information to the Brighton employee who then recorded the information into Brighton's electronic database. After the credit card transaction was completed, Yeheskel left the store. At no time did Yeheskel object to or question Brighton's request for her personal identifying information.

In her Complaint, Yeheskel does not allege that Brighton collected any information other than her "personal identifying information," which included her full name, e-mail address, residence address, and telephone number, along with the credit card information necessary to complete the sale. In addition, Yeheskel does not allege that Brighton collected any other information, such as Yeheskel's driver's license number, her age, or her social security number. In fact, Yeheskel admitted in deposition testimony that the store clerk never asked about her age. Therefore, the information that Brighton collected and immediately recorded at the point-of-sale was merely neutral, personal identifying data.

***2** Yeheskel also alleges that Brighton sold her personal identifying information (and that of other customers) to third parties engaged in direct marketing and that Brighton used the personal identifying information it collected from her and other customers to solicit existing customers to buy its products. There are no allegations that Brighton used Yeheskel's personal identifying information for any purpose

other than in furtherance of Brighton's routine commercial activities. Moreover, there are no allegations that Brighton's collection of the data was accomplished by anyone other than by Brighton via its employees. Finally, there are no allegations that the third parties that purchased Yeheskel's personal identifying information subsequently sold that information to other third parties.

B. The Relevant Policy Language

Brighton made a demand for coverage for the *Yeheskel* Action under the two policies issued by Lloyds, Business Owner's Liability Insurance Policy No. SS0002114/2730, in effect June 21, 2015 to June 21, 2016, and Business Owner's Liability Insurance Policy No. SS0002115/2566, in effect June 21, 2016 to June 21, 2017 (collectively, the "Policies"), which Lloyds denied because it concluded that there was no duty to defend and/or no coverage under the Policies.

Section III(A)(1)(a)[2] of the Policies provides coverage as follows: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'[,] 'property damage', 'personal injury' or 'advertising injury' to which this insurance applies. We will have the right and duty to defend any 'suit' seeking those damages." Section III(A)(1)(b)(2)(a) and (b) provided that the insurance applies to " 'personal injury' caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you" and " '[a]dvertising injury' caused by an offense committed in the course of advertising your goods, products or services."

Section III(F)(1)(b) defines "advertising injury" as "injury arising out of" "[o]ral or written publication of material that violates a person's right of privacy." Section III(F)(3) defines "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Section III(F)(1)(e) defines "personal injury" as "injury, other than 'bodily injury', arising out of ... [o]ral or written publication of material that violates a person's right of privacy."

C. Procedural History

On November 28, 2017, Brighton filed a Complaint in Ventura County Superior Court, which Lloyds removed to this Court on February 8, 2018, and which alleges causes of action for: (1) breach of contract; (2) declaratory relief; and (3) bad faith.[3] Brighton alleges that Lloyds wrongful denied coverage and that Brighton is entitled to coverage under the "personal injury" and/or "advertising injury" insuring clauses based on Yeheskel's allegations that Brighton collected her personal identifying data and sold it, along with the personal identifying information of other customers, to third party direct marketers and also used it to market its products to its existing customers. Brighton alleges that the conduct alleged by Yeheskel – creating lists of its customers' personal identifying information it has collected and then selling those customer lists to third parties – satisfies the definition of a "publication" that "violates a person's privacy right" under the Policies.

II. Legal Standard

***3** Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at

249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.' " *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. Discussion

A. Standard for Interpreting an Insurance Policy

"Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation." *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 647 (Cal. 2003).[4] "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636. "Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (Cal. 1990) (internal citations omitted).

"The determination of ambiguity is a question of law" for the Court to decide. *City of Chino v. Jackson*, 97 Cal. App. 4th 377, 385 (2002). "When interpreting a contract, even when the document is unambiguous on its face, a judge is required to give 'at least a preliminary consideration [to] all credible evidence offered to prove the intention of the parties.' " *Jones-Hamilton Co v. Beazer Materials & Services, Inc.*, 973 F.2d 688, 692 (9th Cir. 1992) (quoting *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 40-41 (1968)). "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. Courts will not strain to create an ambiguity where none exists." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 18-19 (Cal. 1995) (internal citations omitted).

B. There Is No Coverage Under the Policies.

***4** In this case, the Court has reviewed the Policies and concludes that, as a matter of law, the provisions at issue are unambiguous, and there is no coverage under the Policies. In addition, although the duty to defend may be broad, it is limited and defined by the "nature and kinds of risks covered by the policy." *Hartford Casulaty Insurance Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 288 (2014). Where, as in this case, there is no potential for coverage, there is no duty to defend. *Quan v. Truck Insurance Exchange*, 67 Cal. App. 4th 583, 592 (1998). Accordingly, Lloyds is entitled to summary judgment.

1. There Was No "Publication of Material that Violates a Person's Right of Privacy" by Brighton.

Brighton argues that it is entitled to coverage under the "personal injury" or "advertising injury" insuring clauses in the Policies because Brighton's alleged conduct involved an "[o]ral or written publication of material that violates a person's right of privacy." *See* Section III(F)(1)(b) and (3) of the Policies. Lloyds argues that there is no coverage under the Policies because there was no invasion of Yeheskel's right to privacy. The Court agrees with Lloyds.

Yeheskel's claim that Brighton's request for her personal identifying information invaded her right to privacy has been rejected by California courts that have decided the issue in the context of actions under the Song-Beverly Act. For example, the court in *Folgelstrom v. Lamps Plus, Inc.* 195 Cal. App. 4th 986, 992 (2011), held as follows:

> Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or

> an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.

In order for there to be coverage for Brighton's conduct involving the alleged "publication of material that violates a person's right of privacy," Brighton must first demonstrate that the personal identifying data it collected from Yeheskel was private. *Folgelstrom*, 195 Cal. App. 4th at 992.

In this case, Brighton has failed to demonstrate that it collected anything other than routine personal identifying information which Yeheskel voluntarily provided to Brighton's cashier at the point of sale and which Yeheskel had already freely provided to other merchants, such as Ralph's Supermarket and CVS Pharmacy. Therefore, the Court concludes that the information that Yeheskel provided to Brighton was not private. *Diaz v. Oakland Tribune*, 139 Cal. App. 3d 118, 131 (1985).

In addition, there is no claim that Brighton used the personal identifying information for an improper or offensive purpose. Indeed, Yeheskel merely alleges that Brighton used the personal identifying information it collected to market its products to existing customers and that it sold the information to direct marketers. Thus, even if Yeheskel's personal identifying information could be considered "private," there still would not be an invasion of Yeheskel's privacy because her information was not used for an improper or offensive purpose. As the *Fogelstrom* court held:

> Indeed, we have found no case which imposes liability based on the defendant obtaining unwanted access to the plaintiff's private information which did not also allege that the use of plaintiff's information was highly offensive. However questionable the means employed to obtain plaintiff's address, there is no allegation that Lamps Plus used the address once obtained for an offensive or improper purpose.
>
> ***5** Finally, we note that plaintiff seeks to add gravity to his privacy claims by suggesting that Lamps Plus's conduct increased the risk that he would be victimized in an identity theft scam. This is a speculative conclusion of fact which we may disregard on review of a demurrer.

Id. at 992-93.

Similarly, Yeheskel testified at her deposition that her damage claim was based solely on her fear that she might be a victim of identity theft from the collected data. As in *Fogelstrom*, this fear is, at best, a speculative conclusion of fact.

Accordingly, the Court concludes that there is no potential for coverage under the Policies because Brighton's request for personal identifying information and Yeheskel's voluntary compliance with the request as alleged by Yeheskel did not constitute an invasion of her privacy.

2. Brighton's Alleged Offense Was Not Committed in the Course of "Advertising Activities."

It is undisputed that Yeheskel's claim arises out of Brighton's collection of her personal identifying information during an ordinary credit card transaction and not during Brighton's traditional advertising activities. However, the parties disagree on whether the manner in which Brighton collected and subsequently used Yeheskel's personal identifying information constitutes "advertising activities," which would give rise to coverage under the Policies. The Court concludes that Brighton's collection and use of Yeheskel's personal identifying information as alleged by Yeheskel does not qualify as an "advertising injury" under the Policies.

In analyzing the insuring clause for "advertising injury" in a commercial general liability ("CGL") policy, which was similar to the Policies at issue in the case, the California Supreme Court in *Hameid v. National Fire Ins. Of Hartford*, 31 Cal. 4th 16, 28-29 (2003), rejected the argument that "advertising" included activity involving personal solicitation of customers, such as sending mailers to customers on a mailing list or making personal phone calls to the customer from a customer list. Instead, the California Supreme Court concluded that the term "advertising" as used in a CGL policy means "widespread promotional activities usually directed to the public at large." *Id.* at 28-29. Thus, Brighton's collection of Yeheskel's personal identifying information, which was used to solicit existing customers does not constitute "advertising injury" under the Policies because there are no allegations that the information was ever used for "widespread promotional activities directed to the public at large."

Accordingly, the Court concludes that there is no potential for coverage under the "advertising injury" clause in the Policies because the collection of Yeheskel's personal identifying

information and Brighton's subsequent use of that information does not constitute advertising activity.

3. "Personal Injury" Coverage in the Policies Does Not Include Conduct Arising Out of the Publication or Publishing of Yeheskel's Personal Identifying Information.

Section III(F)(1)(e) of the Policies defines "personal injury" as "injury, other than 'bodily injury', arising out of ... [o]ral or written publication of material that violates a person's right of privacy." Section III(A)(1)(b)(2)(a) limits coverage for "personal injury" to "an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you." Brighton argues that its sale of Yeheskel's personal identifying information to third party direct marketers constitutes a "publication," and, thus, Brighton is entitled to coverage under the "personal injury" clause of the Policies. Lloyds argues that there is no coverage under the "personal injury" clause of the Policies because that coverage expressly excludes conduct "arising out of" publishing "done by or for you" and Brighton's conduct falls within that exclusion. In response, Brighton argues that giving the same meaning to the terms "publishing" and "publication" as Lloyds suggests would eviscerate coverage for an injury caused by "oral or written publication of material that violates a person's right of privacy" because that coverage would be completely swallowed by the exclusion for "publishing" activity. The Court agrees with Lloyds.

***6** The Court concludes that Brighton's act of selling Yeheskel's personal identifying information to third party direct marketers constitutes a "publication" as that term is used in the "personal injury" clause of the Policies. *State Farm General Ins. Co. v. JT's Frames, Inc.*, 181 Cal. App.4th 429, 447-49 (2010) (holding that where "personal injury" coverage in an insurance policy requires "publication," the term means "making known to any person or organization"). However, despite the fact that Brighton's act constitutes a "publication," Brighton is still not entitled to coverage. The "personal injury" insuring clause includes an exception for "publishing" activities "arising out of" publishing done "by or for" Brighton. *See Los Angeles Lakers v. Federal Insurance Co.*, 869 F.3d 795, 800 (2017) (holding that the phrase "arising out of" should be broadly construed in exclusionary clauses); *see also Palmer v. Truck Ins. Exchange*, 21 Cal. 4th 1109, 1116-17 (1999) (holding that the rule of contract interpretation requires that the same word used in an instrument is generally given the same meaning unless the policy indicates otherwise). In this case, it is undisputed that the sale of Yeheskel's personal identifying information to third party direct marketers was done "by and for" Brighton. [5]

Accordingly, the Court concludes that based on the exception provided in Section III(A)(1)(b)(2)(a), there is no potential for coverage under the "personal injury" clause in the Policies.

IV. Conclusion

For all the foregoing reasons, Lloyds' Motion is **GRANTED**. The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with the Court's Order. The parties shall lodge the joint proposed Judgment with the Court on or before October 3, 2018. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a declaration outlining their objections to the opposing party's version no later than October 3, 2018.

IT IS SO ORDERED.

All Citations

Slip Copy, 2018 WL 9782167

Footnotes

1 To the extent any of these facts are disputed, they are not material to the disposition of this motion. In addition, to the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

2 Lloyds issued two Policies, which contain identical coverage clauses under Section III, Business Owners' Liability.

3 Brighton filed a prior Complaint against Lloyds in this Court on August 9, 2017, Case No. CV 17-5925-JFW (GSX), which alleged only breach of contract and declaratory relief claims. On October 24, 2017, the Court dismissed the action without prejudice due to Brighton's failure to file a Joint Rule 26(f) Report as required by the Court's September 12, 2017 Order.

4 The parties agree that California law governs the interpretation of the Policies.

5 As Lloyds points out, the exception is limited to “publishing” activity “by or for” Brighton. However, the exception does not foreclose the possibility of coverage based on an allegation that an unknown third party improperly “published” or made a “publication” of information that violates a person's right to privacy without Brighton's consent or knowledge and, thus, would not be conduct done “by or for” Brighton. In addition, although Brighton argues that the terms “publishing” and “publication” should be given different meanings, there is nothing in the Policies that supports this argument. Moreover, the Court notes that Brighton's expert, Paul Amoruso, used the terms “publishing” and “publication” interchangeably and without any attempt to distinguish the meaning of these two terms multiple times in his report. Therefore, the Court finds Brighton's argument unpersuasive.

End of Document

United States Code Annotated
Title 15. Commerce and Trade
Chapter 20. Regulation of Insurance (Refs & Annos)

15 U.S.C.A. § 1012

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

Currentness

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

CREDIT(S)

(Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.)

Notes of Decisions (492)

15 U.S.C.A. § 1012, 15 USCA § 1012
Current through P.L. 116-158.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 81. Supreme Court (Refs & Annos)

28 U.S.C.A. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Currentness

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 928; Pub.L. 100-352, § 2(a), (b), June 27, 1988, 102 Stat. 662.)

Notes of Decisions (518)

28 U.S.C.A. § 1254, 28 USCA § 1254
Current through P.L. 116-158.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 111. General Provisions (Refs & Annos)

28 U.S.C.A. § 1652

§ 1652. State laws as rules of decision

Currentness

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 944.)

Notes of Decisions (353)

28 U.S.C.A. § 1652, 28 USCA § 1652
Current through P.L. 116-158.

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 56

Rule 56. Summary Judgment

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in multiple documents.>

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 28, 2010, effective December 1, 2010.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also *Third Annual Report of the Judicial Council of the State of New York* (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Smith-Hurd Ill.Stats. c. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

1946 Amendment

Note to Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco,* N.D.Cal.1944, 58 F.Supp. 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.,* C.C.A.2, 1939, 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.,* 1944, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.,* C.C.A.2d, 1945, 147 F.2d 399, certiorari denied 1945, 65 S.Ct. 1201, 325 U.S. 861, 89 L.Ed. 1982. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.,* C.C.A.7, 1942, 130 F.2d 535; *Biggins v. Oltmer Iron Works,* C.C.A.7, 1946, 154 F.2d 214; 3 *Moore's Federal Practice,* 1938, 3190-3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co.,* supra. See also *Audi Vision Inc. v. RCA Mfg. Co.,* C.C.A.2, 1943, 136 F.2d 621; *Toomey v. Toomey,* 1945, 149 F.2d 19, 80 U.S.App.D.C. 77; *Biggins v. Oltmer Iron Works,* supra; *Catlin v. United States,* 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911.

1963 Amendment

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, *Federal Practice & Procedure* 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.,* 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern,* 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.,* 191 F.Supp. 383 (D.Del.1961); *Jamison v. Pennsylvania Salt Mfg. Co.,* 22 F.R.D. 238 (W.D.Pa.1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries,* 139 F.Supp. 542 (E.D.Pa.1956); *Levy v. Equitable Life Assur. Society,* 18 F.R.D. 164 (E.D.Pa.1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment--that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

2009 Amendment

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses,

are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages--including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

2010 Amendment

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word--genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. As explained below, "shall" also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

"Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions--"must" or "should"--is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948)"), with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record--including materials referred to in an affidavit or declaration--must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials--including the facts considered undisputed under subdivision (e)(2)--show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts--both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply--it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See* Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2,

2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Notes of Decisions (5151)

Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A., FRCP Rule 56
Including Amendments Received Through 9-1-20

End of Document

635 Fed.Appx. 351
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals,
Ninth Circuit.

BIG 5 SPORTING GOODS CORPORATION, a Delaware corporation, Plaintiff–Appellant,
v.
ZURICH AMERICAN INSURANCE COMPANY, a New York corporation; Hartford Fire Insurance Company, a Connecticut corporation, Defendants–Appellees.

No. 13–56249.
|
Argued and Submitted Oct. 21, 2015.
|
Filed Dec. 7, 2015.

Synopsis

Background: Insured corporation brought action against its commercial general liability (CGL) insurers, asserting claims under state law arising from insurers' refusal to defend corporation from class action lawsuits. The parties filed cross-motions for summary judgment. The United States District Court for the Central District of California, Dolly M. Gee, J., 957 F.Supp.2d 1135, granted summary judgment to insurers. Insured appealed.

The Court of Appeals held that under California law, CGL policies' statutory violation exclusions barred coverage for claims against insured for violation of state privacy statute by requesting, recording, and publishing customer zip codes during credit card transactions.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, Dolly M. Gee, District Judge, Presiding. D.C. No. 2:12–cv–03699–DMG–MAN.

Before: TROTT, KLEINFELD, and CALLAHAN, Circuit Judges.

MEMORANDUM [*]

Because the parties are aware of the facts, circumstances, and policy language controlling this case, we repeat them only as necessary to explain our decision.

***353** This lawsuit boils down to (1) whether or not Hartford had a duty to defend Big 5 against the underlying actions, and (2) whether or not Zurich had a similar duty. Focusing on exclusions of coverage in the relevant policies, the district court concluded that no such duty existed as to either company. In a thorough order carefully addressing Big 5's claims and arguments, the court said,

> [B]ecause all of the Underlying Actions in this case arise out of the alleged violation of the statutory right to privacy, specifically the Song–Beverly Act, coverage is barred by the Statutory Violations Exclusions under the Policies. Defendants have established, as a matter of law, that there is no conceivable theory under which the claims in the Underlying Actions warrant coverage. Viewing the facts in the light most favorable to Plaintiff does not change this outcome. Accordingly, Defendants are entitled

> to summary judgment. Conversely, Plaintiff is not.

We agree.

We begin with Big 5's argument that the insurers had a duty to defend even if the underlying actions were bound to fail. Not so. Big 5 ignores that the "duty to defend groundless actions applies *only* to claims covered by the policy." *Venoco, Inc. v. Gulf Underwriters Ins. Co.,* 175 Cal.App.4th 750, 765, 96 Cal.Rptr.3d 409 (2009) (emphasis added). An insurer may have a duty to defend against a *claim* that is meritless or frivolous, i.e. "a loser," but not against a claim that is plainly *not covered* because of an exclusion. *Scottsdale Ins. Co. v. MV Transp.,* 36 Cal.4th 643, 655, 31 Cal.Rptr.3d 147, 115 P.3d 460 (2005) ("[I]f, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance."). An insurer has no duty to defend when "the underlying claim cannot come within the policy coverage by virtue of the scope of the insuring clause *or* the breadth of an exclusion." *Montrose Chem. Corp. v. Sup. Ct.,* 6 Cal.4th 287, 301, 24 Cal.Rptr.2d 467, 861 P.2d 1153 (1993) (emphasis added).

Zurich's 2007–2009 "Statutory Violation Exclusion" language bars coverage for personal and advertising injury *arising directly or indirectly* out of *any* action or omission that violates or is alleged to violate any statute, ordinance or regulation that prohibits or limits the sending, transmitting, communicating, or distribution of material or information. Zurich's 2009–2010 policy exclusions slightly modify and expand this language, but not in a material way that might benefit Big 5.

Hartford's policy creates similar exclusions. The first exclusion, entitled "Right Of Privacy Created By Statute," covers personal and advertising injury arising out of the violation of a person's right of privacy created by any state or federal act. The second exclusion, entitled "Distribution Of Material In Violation of Statutes," covers personal and advertising injury arising directly or indirectly out of any action or omission that violates or is alleged to violate any statute that prohibits or limits the sending, transmitting, communicating, or distribution of material or information.

We agree with the district court that Zurich's and Hartford's exclusionary language encompasses violations of the Song–Beverly Act—undeniably a statute—as well as *any* act or omission that arises *directly or indirectly* from an alleged violation of that law.

Big 5 argues, however, that the lawsuits it was forced to defend contained common law and California constitutional right to privacy claims separate and apart from ***354** any Song–Beverly Act ZIP Code violations. We disagree. As did the district court, we conclude that in garden variety ZIP Code cases like these, such extra Song–Beverly Act privacy claims simply do not exist. We have scoured the legal landscape searching for precedents supporting Big 5 assertions, but we have come up empty. To the contrary, the authority shedding light on this issue points conclusively in the other direction: California does not recognize any common law or constitutional privacy right causes of action for requesting, sending, transmitting, communicating, distributing, or commercially using ZIP Codes. The only possible claim is for statutory penalties, not damages.

In 1991, the Song–Beverly Act created by statute a new right of privacy. As the district court noted, the legislative history of the Act states, "Existing law does not prohibit persons who accept credit cards in business transactions from requiring a cardholder to write or provide personal identification information for notation on the credit card transaction form. This bill would enact such a prohibition." Nothing has changed since the enactment of that Act.

Folgelstrom v. Lamps Plus, Inc., 195 Cal.App.4th 986, 125 Cal.Rptr.3d 260 (2d Dist.2011), a ZIP Code marketing case, illuminates our conclusion that the privacy rights asserted by Big 5 do not exist. In that case, the plaintiff alleged an invasion of his common law and constitutional rights to privacy. The Court of Appeal held that "the conduct of which plaintiff complains does not constitute a 'serious' invasion of privacy." *Id.* at 992, 125 Cal.Rptr.3d 260. The court reasoned that "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Id.* (quoting *Hill v. National Collegiate Athletic Ass'n,* 7 Cal.4th, 1, 37, 26 Cal.Rptr.2d 834, 865 P.2d 633 (1994)). The court said that "[Lamps Plus'] conduct is not an egregious breach of social norms, but routine commercial behavior." *Id.* As the Supreme Court of California observed in *Hill,* "[n]o community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy." 7 Cal.4th at 37, 26 Cal.Rptr.2d 834, 865 P.2d 633.

Big 5's "claims" are not just lacking in merit. Under settled California law, they are not even recognized as cognizable causes of action, a status one step below "unmeritorious." Allowing Big 5's fact pattern to rise to the level of a claim would require an insurance company to insure and defend against non-existent risks.

Folgelstrom also disposes of the plaintiff's increased-risk-of-identity-theft argument, calling it "a speculative conclusion of fact." 195 Cal.App.4th at 993, 125 Cal.Rptr.3d 260.

Big 5's negligence theory fares no better. Just as a rose by any other name is still a rose, so a ZIP Code case under any other label remains a ZIP Code case. *See Swain v. Cal. Cas. Ins. Co.,* 99 Cal.App.4th 1, 8–9, 120 Cal.Rptr.2d 808 (2002) ("A general boilerplate pleading of 'negligence' adds nothing to a complaint otherwise devoid of *facts* giving rise to a potential for covered liability."). As the district court recognized, the California Court of Appeal has discouraged the "artful drafting" of alleging superfluous negligence claims, saying that to allow such a practice would inappropriately "erase exclusions in any policy." *Fire Ins. Exch. v. Jiminez,* 184 Cal.App.3d 437, 443 n. 2, 229 Cal.Rptr. 83 (1986).

***355** Accordingly, the district court's Amended Judgment in favor of Zurich and Hartford is AFFIRMED.

All Citations

635 Fed.Appx. 351

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

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REPORTS OF CASES

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[No. S178241. Feb. 10, 2011.]

JESSICA PINEDA, Plaintiff and Appellant, v.
WILLIAMS-SONOMA STORES, INC., Defendant and Respondent.

SUMMARY

A customer sued a retailer, asserting a violation of the Song-Beverly Credit Card Act of 1971 (Civ. Code, § 1747 et seq.). The customer alleged that while she was paying for a purchase with her credit card in one of the retailer's stores, the cashier asked the customer for her ZIP Code. Believing it necessary to complete the transaction, the customer provided the requested information and the cashier recorded it. The customer further alleged that the retailer subsequently used her name and ZIP Code to locate her home address. The trial court sustained the retailer's demurrer to the customer's complaint. (Superior Court of San Diego County, No. 37-2008-00086061-CU-BT-CTL, Ronald S. Prager, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D054355, affirmed the trial court's judgment, concluding that a ZIP Code, without more, does not constitute "personal identification information" as that term is defined in Civ. Code, § 1747.08.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the case for further proceedings. The court held that personal identification information, as that term is used in Civ. Code, § 1747.08, includes a cardholder's ZIP Code. Requesting and recording a cardholder's ZIP Code, without more, violates the act. A ZIP Code is readily understood to be part of an address. The Legislature, by providing that "personal identification information" includes the cardholder's address, intended to include components of the address. Otherwise, a business could ask not just for a cardholder's ZIP Code, but also for the cardholder's street and city in addition to the ZIP Code, so long as it did not also ask for the house number. Such a construction would render the statute's protections hollow. Thus, the word "address" in the statute should be construed as encompassing not only a complete address, but also its components. That a cardholder's ZIP Code is shared by other individuals in addition to the cardholder does not render it dissimilar to an address or telephone number. (Opinion by Moreno, J., expressing the unanimous view of the court.)

HEADNOTES

(1) **Credit Cards § 9—Duties and Liabilities of Retailer—Personal Identification Information—ZIP Code.**—A ZIP Code constitutes "personal identification information" as that phrase is used in Civ. Code, § 1747.08, part of the Song-Beverly Credit Card Act of 1971 (Civ. Code, § 1747 et seq.). Requesting and recording a cardholder's ZIP Code, without more, violates the act. Therefore, a contrary judgment of the Court of Appeal was subject to reversal.

[Cal. Forms of Pleading and Practice (2010) ch. 127, Consumer Contracts and Loans, § 127.28; 4 Witkin, Summary of Cal. Law (10th ed. 2005) Negotiable Instruments, § 150.]

(2) **Statutes § 29—Construction—Language—Legislative Intent—Ambiguity—Extrinsic Aids.**—In construing a statute, a court looks first to the words of a statute, because they generally provide the most reliable indicator of legislative intent. The court gives the words their usual and ordinary meaning while construing them in light of the statute as a whole and the statute's purpose. In other words, the court does not construe statutes in isolation, but rather reads every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. Generally, civil statutes for the protection of the public are broadly construed in favor of that protective purpose. If there is no ambiguity in the language, the court presumes the Legislature meant what it said and the plain meaning of the statute governs. Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation.

(3) **Credit Cards § 2—Definitions—Personal Identification Information—Address and Telephone Number.**—Civ. Code, § 1747.08, subd. (b), defines personal identification information as information concerning a cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number.

(4) **Credit Cards § 9—Duties and Liabilities of Retailer—Personal Identification Information—Address.**—The word "address" in Civ. Code, § 1747.08, subd. (b), should be construed as encompassing not only a complete address, but also its components.

(5) **Credit Cards § 9—Duties and Liabilities of Retailer—Positive Identification—Driver's License—Address—ZIP Code.**—Civ. Code, § 1747.08, subd. (d), permits businesses to require the cardholder, as a

condition to accepting the credit card, to provide reasonable forms of positive identification, which may include a driver's license or a California state identification card, provided that none of the information contained thereon is written or recorded. Driver's licenses and state identification cards contain individuals' addresses, including ZIP Codes. Thus, under § 1747.08, subd. (d), a business may require a cardholder to provide a driver's license, but it may not record any of the information on the license, including the cardholder's ZIP Code.

(6) **Credit Cards § 9—Duties and Liabilities of Retailer—Personal Identification Information—ZIP Code.**—The only reasonable interpretation of Civ. Code, § 1747.08, is that personal identification information includes a cardholder's ZIP Code. (Disapproving to the extent inconsistent: *Party City Corp. v. Superior Court* (2008) 169 Cal.App.4th 497 [86 Cal.Rptr.3d 721].)

(7) **Credit Cards § 9—Duties and Liabilities of Retailer—Personal Identification information—ZIP Code—Penalties.**—Civ. Code, § 1747.08, which is violated when a business requests and records a customer's ZIP Code during a credit card transaction, does not mandate fixed penalties; rather, it sets maximum penalties of $250 for the first violation and $1,000 for each subsequent violation. Presumably this could span between a penny to the maximum amounts authorized by the statute. Thus, the amount of the penalties awarded rests within the sound discretion of the trial court.

COUNSEL

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OPINION

MORENO, J.—The Song-Beverly Credit Card Act of 1971 (Credit Card Act) (Civ. Code, § 1747 et seq.) is "designed to promote consumer protection." (*Florez v. Linens 'N Things, Inc.* (2003) 108 Cal.App.4th 447, 450 [133 Cal.Rptr.2d 465] (*Florez*).) One of its provisions, section 1747.08, prohibits businesses from requesting that cardholders provide "personal identification information" during credit card transactions, and then recording that information. (Civ. Code, § 1747.08, subd. (a)(2).)[1]

Plaintiff sued defendant retailer, asserting a violation of the Credit Card Act. Plaintiff alleges that while she was paying for a purchase with her credit card in one of defendant's stores, the cashier asked plaintiff for her ZIP Code. Believing it necessary to complete the transaction, plaintiff provided the requested information and the cashier recorded it. Plaintiff further alleges that defendant subsequently used her name and ZIP Code to locate her home address.[2]

(1) We are now asked to resolve whether section 1747.08 is violated when a business requests and records a customer's ZIP Code during a credit card transaction. In light of the statute's plain language, protective purpose, and legislative history, we conclude a ZIP Code constitutes "personal identification information" as that phrase is used in section 1747.08. Thus, requesting and recording a cardholder's ZIP Code, without more, violates the Credit

[1] All unlabeled statutory references are to the Civil Code.

[2] ZIP is an acronym that stands for "Zone Improvement Plan." (U.S. Postal Service, Mailing Standards of the United States Postal Service: Domestic Mail Manual, ch. 602, subtopic 1.8.1 <http://pe.usps.com/text/dmm300/602.htm> [as of Feb. 10, 2011] (DMM).)

Card Act. We therefore reverse the contrary judgment of the Court of Appeal and remand for further proceedings consistent with our decision.

FACTS AND PROCEDURAL HISTORY

Because we are reviewing the sustaining of a demurrer, we assume as true all facts alleged in the complaint. (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 996 [89 Cal.Rptr.3d 594, 201 P.3d 472].)

In June 2008, plaintiff Jessica Pineda filed a complaint against defendant Williams-Sonoma Stores, Inc.[3] The complaint alleged the following:

Plaintiff visited one of defendant's California stores and selected an item for purchase. She then went to the cashier to pay for the item with her credit card. The cashier asked plaintiff for her ZIP Code and, believing she was required to provide the requested information to complete the transaction, plaintiff provided it. The cashier entered plaintiff's ZIP Code into the electronic cash register and then completed the transaction. At the end of the transaction, defendant had plaintiff's credit card number, name, and ZIP Code recorded in its database.

Defendant subsequently used customized computer software to perform reverse searches from databases that contain millions of names, e-mail addresses, telephone numbers, and street addresses, and that are indexed in a manner resembling a reverse telephone book. The software matched plaintiff's name and ZIP Code with plaintiff's previously undisclosed address, giving defendant the information, which it now maintains in its own database. Defendant uses its database to market products to customers and may also sell the information it has compiled to other businesses.

Plaintiff filed the matter as a putative class action, alleging defendant had violated section 1747.08 and the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). She also asserted an invasion of privacy claim. Defendant demurred, arguing a ZIP Code is not "personal identification information" as that phrase is used in section 1747.08, that plaintiff lacked standing to bring her UCL claim, and that the invasion of privacy claim failed for, among other reasons, failure to allege all necessary elements. Plaintiff

[3] According to its Web site, Williams-Sonoma is "the premier specialty retailer of home furnishings and gourmet cookware in the United States." (Williams-Sonoma, About Us <http://www.williams-sonoma.com/customer-service/about-us.html> [as of Feb. 10, 2011].) The company operates "more than 250 stores nationwide, a direct-mail business that distributes millions of catalogs a year, and a highly successful e-commerce site." (*Ibid.*)

conceded the demurrer as to the UCL claim, and the trial court subsequently sustained the demurrer as to the remaining causes of action without leave to amend. As for the Credit Card Act claim, the trial court agreed with defendant and concluded a ZIP Code does not constitute "personal identification information" as that term is defined in section 1747.08.

The Court of Appeal affirmed in all respects. With respect to the Credit Card Act claim, the Court of Appeal relied upon *Party City Corp. v. Superior Court* (2008) 169 Cal.App.4th 497 [86 Cal.Rptr.3d 721] (*Party City*), which similarly concluded a ZIP Code, without more, does not constitute personal identification information.[4]

Plaintiff sought our review regarding both her Credit Card Act claim and her invasion of privacy cause of action. We granted review, but only of plaintiff's Credit Card Act claim.[5]

DISCUSSION

(2) We independently review questions of statutory construction. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387 [97 Cal.Rptr.3d 464, 212 P.3d 736].) In doing so, we look first to the words of a statute, "because they generally provide the most reliable indicator of legislative intent." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 [39 Cal.Rptr.2d 824, 891 P.2d 804].) We give the words their usual and ordinary meaning (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299]), while construing them in light of the statute as a whole and

[4] Both opinions were issued by Division One of the Fourth District Court of Appeal.

[5] In its answer brief, defendant argues our jurisdiction to grant review lapsed under California Rules of Court, rule 8.512(b). Under the rule, we may order review within 60 days after a petition for review is filed. (*Ibid.*) Before the 60 days have expired, we may extend the time in which to consider review, to a date not later than 90 days after a petition was filed. (*Ibid.*) If we have not ruled on the petition within the time allowed, it is deemed denied. (*Ibid.*)

The docket shows plaintiff's petition for review was filed on November 25, 2009. On February 4, 2010, after 60 days had already run, an order was entered extending time for review to February 23, 2010, 90 days after the petition was filed. The order was entered nunc pro tunc as of January 22, 2010, a date before the original 60-day window had expired. Defendant contends such a nunc pro tunc order was invalid. We disagree.

The petition was originally due to be considered prior to the expiration of the 60 days. Concluding we needed more time, we put the matter over to a later petitions conference. The act of putting the matter over necessarily included our extending time for review. However, the clerk inadvertently failed to enter an order reflecting that act. Under the circumstances, the nunc pro tunc order merely caused the record to show something that was actually done but that was mistakenly not entered in the record at the time the act was done. Thus, the use of a nunc pro tunc order was appropriate and our subsequent grant of review on February 10, 2010, was within this court's jurisdiction. (See *Cowdery v. London & San Francisco Bank* (1903) 139 Cal. 298, 306 [73 P. 196].)

the statute's purpose (*Walker v. Superior Court* (1998) 47 Cal.3d 112, 124 [253 Cal.Rptr. 1, 763 P.2d 852]). "In other words, ' "we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' " ' " (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 [45 Cal.Rptr.3d 394, 137 P.3d 218].) We are also mindful of "the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313 [58 Cal.Rptr.2d 855, 926 P.2d 1042] (*Lungren*); see *Florez, supra*, 108 Cal.App.4th at p. 450 [liberally construing former § 1747.8, now § 1747.08].) "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." (*People v. Snook* (1997) 16 Cal.4th 1210, 1215 [69 Cal.Rptr.2d 615, 947 P.2d 808].) "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 [56 Cal.Rptr.3d 880, 155 P.3d 284].) Our discussion thus begins with the words of section 1747.08.

(3) Section 1747.08, subdivision (a) provides, in pertinent part, "[N]o person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business shall . . . : [¶] . . . [¶] (2) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide *personal identification information*, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise." (§ 1747.08, subd. (a)(2), italics added.)[6] Subdivision (b) defines personal identification information as "information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number." (§ 1747.08, subd. (b).) Because we must accept as true plaintiff's allegation that defendant requested and then recorded her ZIP Code, the outcome of this case hinges on whether a cardholder's ZIP Code, without more, constitutes personal identification information within the meaning of section 1747.08. We hold that it does.

[6] Section 1747.08 contains some exceptions, including when a credit card is being used as a deposit or for cash advances, when the entity accepting the card is contractually required to provide the information to complete the transaction or is obligated to record the information under federal law or regulation, or when the information is required for a purpose incidental to but related to the transaction, such as for shipping, delivery, servicing, or installation. (*Id.*, subd. (c).)

Subdivision (b) defines personal identification information as "information *concerning* the cardholder . . . including, but not limited to, the cardholder's address and telephone number." (§ 1747.08, subd. (b), italics added.) "Concerning" is a broad term meaning "pertaining to; regarding; having relation to; [or] respecting . . . ." (Webster's New Internat. Dict. (2d ed. 1941) p. 552.) A cardholder's ZIP Code, which refers to the area where a cardholder works or lives (see DMM, *supra*, ch. 602, subtopic 1.8.1 <http://pe.usps.com/text/dmm300/602.htm> [as of Feb. 10, 2011] [each U.S. post office is assigned at least one unique five-digit ZIP Code]), is certainly information that pertains to or regards the cardholder.

In nonetheless concluding the Legislature did not intend for a ZIP Code, without more, to constitute personal identification information, the Court of Appeal pointed to the enumerated examples of such information in subdivision (b), i.e., "the cardholder's address and telephone number." (§ 1747.08, subd. (b).) Invoking the doctrine *ejusdem generis*, whereby a "general term ordinarily is understood as being ' "restricted to those things that are similar to those which are enumerated specifically" ' " (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 743 [101 Cal.Rptr.3d 758, 219 P.3d 736] (conc. opn. of George, C. J.)), the Court of Appeal reasoned that an address and telephone number are "specific in nature regarding an individual." By contrast, the court continued, a ZIP Code pertains to the *group* of individuals who live within the ZIP Code. Thus, the Court of Appeal concluded, a ZIP Code, without more, is unlike the other terms specifically identified in subdivision (b).

(4) There are several problems with this reasoning. First, a ZIP Code is readily understood to be part of an address; when one addresses a letter to another person, a ZIP Code is always included. The question then is whether the Legislature, by providing that "personal identification information" includes "the cardholder's address" (§ 1747.08, subd. (b)), intended to include components of the address. The answer must be yes. Otherwise, a business could ask not just for a cardholder's ZIP Code, but also for the cardholder's street and city in addition to the ZIP Code, so long as it did not also ask for the house number. Such a construction would render the statute's protections hollow. Thus, the word "address" in the statute should be construed as encompassing not only a complete address, but also its components.

Second, the court's conclusion rests upon the assumption that a complete address and telephone number, unlike a ZIP Code, are specific to an individual. That this assumption holds true in all, or even most, instances is doubtful. In the case of a cardholder's home address, for example, the

information may pertain to a group of individuals living in the same household. Similarly, a home telephone number might well refer to more than one individual. The problem is even more evident in the case of a cardholder's *work* address or telephone number—such information could easily pertain to tens, hundreds, or even thousands of individuals.[7] Of course, section 1747.08 explicitly provides that a cardholder's address and telephone number constitute personal identification information (*id.*, subd. (b)); that such information *might also* pertain to individuals other than the cardholder is immaterial. Similarly, that a cardholder's ZIP Code pertains to individuals in addition to the cardholder does not render it dissimilar to an address or telephone number.

More significantly, the Court of Appeal ignores another reasonable interpretation of what the enumerated terms in section 1747.08, subdivision (b) have in common, that is, they both constitute information unnecessary to the sales transaction that, alone or together with other data such as a cardholder's name or credit card number, can be used for the retailer's business purposes. Under this reading, a cardholder's ZIP Code is similar to his or her address or telephone number, in that a ZIP Code is both unnecessary to the transaction and can be used, together with the cardholder's name, to locate his or her full address. (Levitt & Rosch, *Putting Internet Search Engines to New Uses* (May 2006) 29 L.A. Law. 55, 55; see Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy* (2001) 53 Stan. L.Rev. 1393, 1406–1408.) The retailer can then, as plaintiff alleges defendant has done here, use the accumulated information for its own purposes or sell the information to other businesses.

There are several reasons to prefer this latter, broader interpretation over the one adopted by the Court of Appeal. First, the interpretation is more consistent with the rule that courts should liberally construe remedial statutes in favor of their protective purpose (*Lungren*, *supra*, 14 Cal.4th at p. 313), which, in the case of section 1747.08, includes addressing "the misuse of personal identification information for, inter alia, marketing purposes." (*Absher v. AutoZone, Inc.* (2008) 164 Cal.App.4th 332, 345 [78 Cal.Rptr.3d 817] (*Absher*).)[8] The Court of Appeal's interpretation, by contrast, would

[7] *Party City*, upon which the Court of Appeal opinion heavily relies, assumes that a cardholder's work address or telephone number constitutes personal identification information. (*Party City*, *supra*, 169 Cal.App.4th at p. 518.) While we express no opinion on this point, we acknowledge that nothing in section 1747.08, subdivision (b), explicitly limits its scope to a cardholder's *home* address or telephone number.

[8] *Party City*, *supra*, 169 Cal.App.4th at pages 510–511, by contrast, concludes that section 1747.08, subdivision (b), should be strictly construed under the rule for construing penal statutes because violations of section 1747.08 are subject to a "mandatory civil penalty." We disagree. First, as we held in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 448 [97 Cal.Rptr.2d 179, 2 P.3d 27], section 1747.08, subdivision (c), "does not mandate fixed

permit retailers to obtain indirectly what they are clearly prohibited from obtaining directly, "end-running" the statute's clear purpose. This is so because information that can be permissibly obtained under the Court of Appeal's construction could easily be used to locate the cardholder's complete address or telephone number. Such an interpretation would vitiate the statute's effectiveness. Moreover, that the Legislature intended a broad reading of section 1747.08 can be inferred from the expansive language it employed, e.g., "concerning" in subdivision (b) and "*any* personal identification information" in subdivision (a)(1). (Italics added.) The use of the broad word "any" suggests the Legislature did not want the category of information protected under the statute to be narrowly construed.

(5) Second, only the broader interpretation is consistent with section 1747.08, subdivision (d). Subdivision (d) permits businesses to "requir[e] the cardholder, as a condition to accepting the credit card . . . , to provide reasonable forms of positive identification, which may include a driver's license or a California state identification card, . . . *provided that none of the information contained thereon is written or recorded* . . . ." (§ 1747.08, subd. (d), italics added.) Of course, driver's licenses and state identification cards contain individuals' addresses, including ZIP Codes. (Veh. Code, §§ 12811, subd. (a)(1)(A), 13005, subd. (a); *People v. McKay* (2002) 27 Cal.4th 601, 620 [117 Cal.Rptr.2d 236, 41 P.3d 59].) Thus, under Civil Code section 1747.08, subdivision (d), a business may require a cardholder to provide a driver's license, but it may not record any of the information on the license, *including the cardholder's ZIP Code*. Under the Court of Appeal's interpretation, the Legislature inexplicably permitted in section 1747.08, subdivision (a)(2), what it explicitly forbade in subdivision (d)—the requesting and recording of a ZIP Code.[9] We decline to conclude such an inconsonant result was intended. (*Absher*, *supra*, 164 Cal.App.4th at p. 343 ["A statute open to more than one interpretation should be interpreted so as to ' "avoid anomalous or absurd results." ' [Citations.]"].)[10]

penalties; rather, it sets *maximum* penalties of $250 for the first violation and $1,000 for each subsequent violation." Second, "the rule of strict construction of penal statutes has generally been applied in this state to criminal statutes, rather than statutes which prescribe only civil monetary penalties." (*Lungren*, *supra*, 14 Cal.4th at p. 312.)

[9] Defendant points out that a cardholder's name, which all parties agree can permissibly be obtained by the retailer, also appears on a driver's license. This is true, albeit irrelevant, as subdivision (b) explicitly excludes information appearing on the credit card, such as a cardholder's name, from the definition of personal identification information. (§ 1747.08, subd. (b).)

[10] The Court of Appeal did not discuss subdivision (d) of section 1747.08. While *Party City*, *supra*, 169 Cal.App.4th at page 518, did briefly mention the issue, the court dismissed it without explanation.

(6) In light of the foregoing, and particularly given the internal inconsistency that would arise under the Court of Appeal's alternate construction, we conclude that the only reasonable interpretation of section 1747.08 is that personal identification information includes a cardholder's ZIP Code. We disapprove *Party City Corp. v. Superior Court*, *supra*, 169 Cal.App.4th 497, to the extent it is inconsistent with our opinion.

Even were we to conclude that the alternative interpretation urged by defendant and adopted by the Court of Appeal was reasonable, the legislative history of section 1747.08 offers additional evidence that plaintiff's construction is the correct one.[11] The Credit Card Act was enacted in 1971 to "impose[] fair business practices for the protection of the consumers." (*Young v. Bank of America* (1983) 141 Cal.App.3d 108, 114 [190 Cal.Rptr. 122].) It made "major changes in the law dealing with credit card practices by prescribing procedures for billing, billing errors, dissemination of false credit information, issuance and unauthorized use of credit cards." (Sen. Song, sponsor of Sen. Bill No. 97 (1971 Reg. Sess.) enrolled bill mem. to Governor Reagan (Oct. 12, 1971) p. 1.) As originally enacted, however, the Credit Card Act did not contain section 1747.08 or any analogous provision.

In 1990, the Legislature enacted former section 1747.8[12] (Assem. Bill No. 2920 (1989–1990 Reg. Sess.) § 1), seeking "to address the misuse of personal identification information for, inter alia, marketing purposes, and [finding] that there would be no legitimate need to obtain such information from credit card customers if it was not necessary to the completion of the credit card transaction." (*Absher*, *supra*, 164 Cal.App.4th at p. 345.) The statute's overriding purpose was to "protect the personal privacy of consumers who pay for transactions with credit cards." (Assem. Com. on Finance and Ins., Analysis of Assem. Bill No. 2920 (1989–1990 Reg. Sess.) as amended Mar. 19, 1990, p. 2.)

The Senate Committee on Judiciary's analysis highlighted the motivating concerns: "The Problem [¶] . . . [¶] Retailers acquire this additional personal information for their own business purposes—for example, to build mailing and telephone lists which they can subsequently use for their own in-house marketing efforts, or sell to direct-mail or tele-marketing specialists, or to

[11] The Court of Appeal did not discuss the legislative history of section 1747.08. And, while the opinion in *Party City*, *supra*, 169 Cal.App.4th at pages 514–516, has a section titled "Legislative History Arguments," the court did not actually cite or discuss any of the statute's legislative history.

[12] The statute was later amended and renumbered as section 1747.08. (Stats. 2004, ch. 183, § 29, p. 981.)

others." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2920 (1989–1990 Reg. Sess.) as amended June 27, 1990, pp. 3–4.) To protect consumers, the Legislature sought to prohibit businesses from "requiring information that merchants, banks or credit card companies do not require or need." (Assem. Com. on Finance and Ins., Analysis of Assem. Bill No. 2920 (1989–1990 Reg. Sess.) as amended Mar. 19, 1990, p. 2.)

A year later, in 1991, the Legislature amended former section 1747.8. (Assem. Bill No. 1477 (1991–1992 Reg. Sess.) § 2.) Two of the changes shed further light on the Legislature's intent regarding former section 1747.8's scope. First, the Legislature added a provision (former § 1747.8, subd. (d)) (former subdivision (d)) substantially similar to the subdivision (d) now in section 1747.08, permitting businesses to require cardholders to provide identification so long as none of the information contained thereon was recorded. (Stats. 1991, ch. 1089, § 2, p. 5042.) The adoption of former subdivision (d) was described as "a clarifying, nonsubstantive change." (State and Consumer Services Agency, Enrolled Bill Rep. on Assem. Bill No. 1477 (1991–1992 Reg. Sess.) Sept. 9, 1991, p. 3.) Defendant argues that, because the adoption of former subdivision (d) was intended to be nonsubstantive, it is irrelevant to our inquiry here. We draw the opposite conclusion. That former subdivision (d) was considered merely clarifying and nonsubstantive suggests the Legislature understood former section 1747.8 to *already* prohibit the requesting and recording of any of the information, including ZIP Codes, contained on driver's licenses and state identification cards.

Second, the 1990 version of former section 1747.8 forbade businesses from "requir[ing] the cardholder, as a condition to accepting the credit card, to provide personal identification information . . . ." (Stats. 1990, ch. 999, § 1, p. 4191.) In 1991, the provision was broadened, forbidding businesses from "[*r*]*equest*[*ing*], *or* requir[ing] as a condition to accepting the credit card . . . , the cardholder to provide personal identification information . . . ." (Stats. 1991, ch. 1089, § 2, p. 5042, italics added.) "The obvious purpose of the 1991 amendment was to prevent retailers from 'requesting' personal identification information and then matching it with the consumer's credit card number." (*Florez*, *supra*, 108 Cal.App.4th at p. 453.) "[T]he 1991 amendment prevents a retailer from making an end-run around the law by claiming the customer furnished personal identification data 'voluntarily.' " (*Ibid.*) That the Legislature so expanded the scope of former section 1747.8 is further evidence it intended a broad consumer protection statute.

To be sure, the legislative history does not specifically address the scope of section 1747.08, subdivision (b) or whether the Legislature intended a ZIP Code, without more, to constitute personal identification information. However, the legislative history of the Credit Card Act in general, and section

1747.08 in particular, demonstrates the Legislature intended to provide robust consumer protections by prohibiting retailers from soliciting and recording information about the cardholder that is unnecessary to the credit card transaction. Plaintiff's interpretation of section 1747.08 is the one that is most consistent with that legislative purpose.

Thus, in light of the statutory language, as well as the legislative history and evident purpose of the statute, we hold that personal identification information, as that term is used in section 1747.08, includes a cardholder's ZIP Code.

(7) We briefly address defendant's contention that this construction violates due process. First, defendant argues such an interpretation is unconstitutionally oppressive because it would result in penalties "approach[ing] confiscation of [defendant's] entire business . . . ." Not so. As we have previously noted (fn. 8, *ante* at p. 532), the statute "does not mandate fixed penalties; rather, it sets *maximum* penalties of $250 for the first violation and $1,000 for each subsequent violation." (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 448.) "Presumably this could span between a penny (or even the proverbial peppercorn we all encountered in law school) to the maximum amounts authorized by the statute." (*The TJX Companies, Inc. v. Superior Court* (2008) 163 Cal.App.4th 80, 86 [77 Cal.Rptr.3d 114].) Thus, the amount of the penalties awarded rests within the sound discretion of the trial court. (*Ibid.*)

Second, defendant contends that plaintiff's interpretation renders the statute unconstitutionally vague and, thus, our adoption of that interpretation should be prospectively applied only. We are not persuaded. In our view, the statute provides constitutionally adequate notice of proscribed conduct, including its reference to a cardholder's address as an example of personal identification information (§ 1747.08, subd. (b)) as well as its prohibition against retailers recording any of the information contained on identification cards (*id.*, subd. (d)). Moreover, while *Party City*, *supra*, 169 Cal.App.4th 497, reached a contrary conclusion, both defendant's conduct and the filing of plaintiff's complaint predate that decision; it therefore cannot be convincingly argued that the practice of asking customers for their ZIP Codes was adopted in reliance on *Party City*. Indeed, it is difficult to see how a single decision by an inferior court could provide a basis to depart from the assumption of retrospective operation. (See *People v. Guerra* (1984) 37 Cal.3d 385, 401 [208 Cal.Rptr. 162, 690 P.2d 635], disapproved on another ground in *People v. Hedgecock* (1990) 51 Cal.3d 395, 409–410 [272 Cal.Rptr. 803, 795 P.2d 1260].) In sum, defendant identifies no reason that would justify a departure from the usual rule of retrospective application. (See *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 967 [32 Cal.Rptr.3d 5, 116 P.3d 479].)

DISPOSITION

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this decision.

Cantil-Sakauye, C. J., Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Corrigan, J., concurred.

REPORTS OF CASES

DETERMINED IN

THE COURTS OF APPEAL

OF THE

STATE OF CALIFORNIA

May 5, 2011, to June 1, 2011

EDWARD W. JESSEN

Reporter of Decisions

VOLUME 195 - 4th

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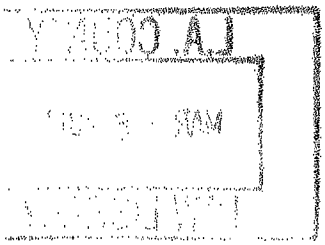

[No. B221376. Second Dist., Div. Five. Apr. 29, 2011.]

JAMES C. FOLGELSTROM, Plaintiff and Appellant, v.
LAMPS PLUS, INC., Defendant and Respondent.

SUMMARY

The trial court entered judgment in favor of a retailer following its demurrer to a customer's complaint that alleged causes of action for violation of the Song-Beverly Credit Card Act of 1971 (Civ. Code, § 1747 et seq.), invasion of the customer's common law and constitutional rights to privacy, and violation of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200). The customer alleged that the retailer routinely asked its customers for their ZIP codes during credit card transactions so that it can obtain their home addresses for the purpose of mailing marketing materials to them. (Superior Court of Los Angeles County, JCCP No. 4532, Anthony J. Mohr, Judge.)

The Court of Appeal reversed the judgment and remanded the case for further proceedings. The court observed that requesting and recording a cardholder's ZIP code, without more, violates the Song-Beverly Credit Card Act. Accordingly, the trial court erred in sustaining the retailer's demurrer to the customer's cause of action under the Song-Beverly Credit Card Act. However, the trial court properly sustained the demurrers addressed to the additional causes of action alleged by the customer. Even if the court assumed that the customer had a protected privacy interest in his home address, the conduct of which he complained did not constitute a serious invasion of privacy. The supposed invasion of privacy essentially consisted of the retailer obtaining the customer's address without his knowledge or permission, and using it to mail him coupons and other advertisements. That conduct is not an egregious breach of social norms, but routine commercial behavior. As to the customer's common law tort of invasion of privacy, there was no allegation that the retailer used the address once obtained for an offensive or improper purpose. Finally, as to the customer's UCL claim, he did not allege that he suffered an economic injury as a result of the retailer's challenged business practice. (Opinion by Armstrong, J., with Turner, P. J., and Mosk, J., concurring.)

HEADNOTES

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DISCUSSION

(1) Following *Party City, supra*, 169 Cal.App.4th 497 a second case concerning the same issue was heard by the same District Court of Appeal; it adopted the reasoning of *Party City* to rule that a ZIP code is not "personal identification information" within the meaning of the Credit Card Act. The California Supreme Court granted review in the latter case and, on February 11, 2011, issued its opinion holding that "requesting and recording a cardholder's ZIP code, without more, violates the Credit Card Act." (*Pineda, supra*, 51 Cal.4th at pp. 527–528.) Both parties agree, as do we, that based on *Pineda*, this court must reverse the judgment in this case and order the trial court to overrule Lamps Plus's demurrer to plaintiff's Credit Card Act claim. We are thus left to decide the propriety of the trial court's order sustaining Lamps Plus's demurrer to the remaining three causes of action.

1. *Violation of the state constitutional right to privacy*

(2) The elements of a cause of action for violation of the California Constitution's guaranteed right to privacy are "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39–40 [26 Cal.Rptr.2d 834, 865 P.2d 633].) "Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. [Citations.] Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Id.* at p. 40.)

Residential privacy interests have been recognized in a number of cases. (*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 359 [99 Cal.Rptr.2d 627] and cases cited therein.) "Courts have frequently recognized that individuals have a substantial interest in the privacy of their home." (*Ibid.*) As the United States Supreme Court has observed, "The unwilling listener's interest in avoiding unwanted communication . . . is an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.' *Olmstead* v. *United States*, 277 U.S. 438,

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(2010) 181 Cal.App.4th 8
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Cal.App.3d 1128 [277 Cal.
mental health records (*Susc*
Cal.Rptr.2d 42]). Plaintiff d

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[19 L.Ed.2d 576, 88 S.Ct. 507] (1

the legal analysis of the privacy interests at stake in them weighs in favor of a finding of a legally protected privacy interest in this case.

(3) In any event, even if we assume that plaintiff has a protected privacy interest in his home address, we conclude that the conduct of which plaintiff complains does not constitute a "serious" invasion of privacy.

"Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill v. National Collegiate Athletic Assn., supra*, 7 Cal.4th at p. 37.) Here, the supposed invasion of privacy essentially consisted of Lamps Plus obtaining plaintiff's address without his knowledge or permission, and using it to mail him coupons and other advertisements. This conduct is not an egregious breach of social norms, but routine commercial behavior.

2. *Common law tort of invasion of privacy*

Plaintiff alleged that Lamps Plus's conduct of obtaining his ZIP code under false pretenses and using it for its own marketing purposes constituted an intrusion subjecting it to liability for invasion of his common law right to privacy.

(4) As our Supreme Court explained in *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231 [74 Cal.Rptr.2d 843, 955 P.2d 469], California has adopted the Restatement Second of Torts formulation of the intrusion-into-private-matters tort: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." (Rest.2d Torts, § 652B, boldface omitted.) "[T]he action for intrusion has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." (*Shulman, supra*, at p. 231.) "To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, *or obtained unwanted access to data about*, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." (*Shulman v. Group W Productions, Inc., supra*, at p. 232, italics added.)

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3. *Unfair competition*

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(5) The UCL prohibits "
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rights in his home address." Although he acknowledges that he did not suffer an out-of-pocket monetary loss, he claims that he is entitled to "restitution of the fair compensation for his personal information" measured by the license fee Lamps Plus paid to Experian to obtain the address. The argument lacks merit.

Plaintiff cites no authority in support of his novel argument that his address is his intellectual property. Plaintiff did not create his address; rather, the address was assigned by a governmental authority to identify a particular parcel of property and its location for purposes of, among others, public safety, recordkeeping, tax collection and mail delivery. None of the usual incidents of property ownership, such as the right to sell, mortgage, or transfer one's interest in property, adheres in an address. In short, plaintiff's intellectual property rights are not implicated in this case.

Moreover, even if plaintiff had an intellectual property interest in his address, he does not explain how that interest has been economically diminished by Lamps Plus. That is to say, the Supreme Court has made clear that the injury-in-fact element of a UCL claim refers to an *economic* injury; " 'a UCL plaintiff's "injury in fact" [must] specifically involve "lost money or property." ' " (*Kwikset Corp. v. Superior Court, supra*, 51 Cal.4th at p. 324, quoting *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1348, fn. 31 [90 Cal.Rptr.3d 589].) The fact that the address had value to Lamps Plus, such that the retailer paid Experian a license fee for its use, does not mean that its value to plaintiff was diminished in any way.

Finally, we note that any claim that plaintiff is entitled to restitution on account of the "sale" of his address would presumably be directed to Experian, the entity which sold the information, not to Lamps Plus, which paid for it.

In sum, plaintiff does not allege that he suffered an economic injury as a result of Lamps Plus's challenged business practice. Consequently, the trial court properly sustained the demurrer to plaintiff's UCL claim.

Lamps Plus moved to strike the portions of plaintiff's supplemental brief which discuss *Kwikset Corp. v. Superior Court, supra*, 51 Cal.4th 310, and the injury-in-fact requirement of a UCL claim, an issue outside the scope of our January 20, 2011 request for additional briefing, which was limited to the issue of the effect of *Pineda* on resolution of this appeal. We deny the motion. In the alternative, Lamps Plus requested an opportunity to file an additional brief to address the Supreme Court's opinion in *Kwikset*. Given our resolution of this appeal, we deny this request as well.

The judgment is reversed
consistent with this opinion.

Turner, P. J., and Mosk, J

On June 7, 2011, the opi

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 4. Obligations Arising from Particular Transactions (Refs & Annos)
Title 1.3. Credit Cards (Refs & Annos)

West's Ann.Cal.Civ.Code § 1747.08

§ 1747.08. Personal identification information; prohibition upon collection of data upon credit card transaction form; exemptions; civil penalties and injunctive relief

Effective: October 9, 2011
Currentness

(a) Except as provided in subdivision (c), no person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business shall do any of the following:

(1) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information upon the credit card transaction form or otherwise.

(2) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.

(3) Utilize, in any credit card transaction, a credit card form which contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder.

(b) For purposes of this section "personal identification information," means information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number.

(c) Subdivision (a) does not apply in the following instances:

(1) If the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence.

(2) Cash advance transactions.

(3) If any of the following applies:

(A) The person, firm, partnership, association, or corporation accepting the credit card is contractually obligated to provide personal identification information in order to complete the credit card transaction.

(B) The person, firm, partnership, association, or corporation accepting the credit card in a sales transaction at a retail motor fuel dispenser or retail motor fuel payment island automated cashier uses the Zip Code information solely for prevention of fraud, theft, or identity theft.

(C) The person, firm, partnership, association, or corporation accepting the credit card is obligated to collect and record the personal identification information by federal or state law or regulation.

(4) If personal identification information is required for a special purpose incidental but related to the individual credit card transaction, including, but not limited to, information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders.

(d) This section does not prohibit any person, firm, partnership, association, or corporation from requiring the cardholder, as a condition to accepting the credit card as payment in full or in part for goods or services, to provide reasonable forms of positive identification, which may include a driver's license or a California state identification card, or where one of these is not available, another form of photo identification, provided that none of the information contained thereon is written or recorded on the credit card transaction form or otherwise. If the cardholder pays for the transaction with a credit card number and does not make the credit card available upon request to verify the number, the cardholder's driver's license number or identification card number may be recorded on the credit card transaction form or otherwise.

(e) Any person who violates this section shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation and one thousand dollars ($1,000) for each subsequent violation, to be assessed and collected in a civil action brought by the person paying with a credit card, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred. However, no civil penalty shall be assessed for a violation of this section if the defendant shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error made notwithstanding the defendant's maintenance of procedures reasonably adopted to avoid that error. When collected, the civil penalty shall be payable, as appropriate, to the person paying with a credit card who brought the action, or to the general fund of whichever governmental entity brought the action to assess the civil penalty.

(f) The Attorney General, or any district attorney or city attorney within his or her respective jurisdiction, may bring an action in the superior court in the name of the people of the State of California to enjoin violation of subdivision (a) and, upon notice to the defendant of not less than five days, to temporarily restrain and enjoin the violation. If it appears to the satisfaction of the court that the defendant has, in fact, violated subdivision (a), the court may issue an injunction restraining further violations, without requiring proof that any person has been damaged by the violation. In these proceedings, if the court finds that the defendant has violated subdivision (a), the court may direct the defendant to pay any or all costs incurred by the Attorney General, district attorney, or city attorney in seeking or obtaining injunctive relief pursuant to this subdivision.

(g) Actions for collection of civil penalties under subdivision (e) and for injunctive relief under subdivision (f) may be consolidated.

(h) The changes made to this section by Chapter 458 of the Statutes of 1995 apply only to credit card transactions entered into on and after January 1, 1996. Nothing in those changes shall be construed to affect any civil action which was filed before January 1, 1996.

Credits

(Formerly § 1747.8, added by Stats.1990, c. 999 (A.B.2920), § 1. Amended by Stats.1991, c. 1089 (A.B.1477), § 2, eff. Oct. 14, 1991; Stats.1995, c. 458 (A.B.1316), § 2. Renumbered § 1747.08 and amended by Stats.2004, c. 183 (A.B.3082), § 29. Amended by Stats.2005, c. 22 (S.B.1108), § 14; Stats.2011, c. 690 (A.B.1219), § 2, eff. Oct. 9, 2011.)

Notes of Decisions (87)

West's Ann. Cal. Civ. Code § 1747.08, CA CIVIL § 1747.08
Current with urgency legislation through Ch. 78 of 2020 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
California Rules of Court (Refs & Annos)
Title 8. Appellate Rules (Refs & Annos)
Division 1. Rules Relating to the Supreme Court and Courts of Appeal (Refs & Annos)
Chapter 9. Proceedings in the Supreme Court (Refs & Annos)

Cal.Rules of Court, Rule 8.536
Formerly cited as CA ST A Rule 29.5

Rule 8.536. Rehearing

Currentness

(a) Power to order rehearing

The Supreme Court may order rehearing as provided in rule 8.268(a).

(b) Petition and answer

A petition for rehearing and any answer must comply with rule 8.268(b)(1) and (3). Any answer to the petition must be served and filed within eight days after the petition is filed. Before the Supreme Court decision is final and for good cause, the Chief Justice may relieve a party from a failure to file a timely petition or answer.

(c) Extension of time

The time for granting or denying a petition for rehearing in the Supreme Court may be extended under rule 8.532(b)(1)(B). If the court does not rule on the petition before the decision is final, the petition is deemed denied.

(d) Determination of petition

An order granting a rehearing must be signed by at least four justices; an order denying rehearing may be signed by the Chief Justice alone.

(e) Effect of granting rehearing

An order granting a rehearing vacates the decision and any opinion filed in the case and sets the cause at large in the Supreme Court.

Credits
(Formerly Rule 29.5, adopted, eff. Jan. 1, 2003. As amended, eff. Jan. 1, 2004. Renumbered Rule 8.536 and amended, eff. Jan. 1, 2007.)

Notes of Decisions (51)

Cal. Rules of Court, Rule 8.536, CA ST APPELLATE Rule 8.536
California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through June 15, 2020. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through June 15, 2020.

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