

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court
FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC DOCKET No. 11145

MELISSA TYLER,
PLAINTIFF-APPELLANT,

v.

MICHAEL STORES, INC.,
DEFENDANT-APPELLEE.

***AMICUS CURIAE* BRIEF ON BEHALF OF
RETAIL LITIGATION CENTER**

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STATEMENT OF INTEREST

The Retail Litigation Center ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

RLC's member entities routinely collect ZIP codes from consumers—in Massachusetts and elsewhere—in ways that do not heighten the risk of consumer fraud and for purposes that are beneficial to consumers. For example, this and similar information is requested and collected for reasons designed to serve consumer demands and preferences, such as (i) verifying the person holding the credit card at the point of purchase is the person authorized to use the card, and (ii) making decisions about store locations,

advertising, and product mix. The interpretation of G.L. c. 93, §105(a) ("Section 105(a)" or "§105(a)") advocated by Plaintiff-Appellant, Melissa Tyler ("Tyler") would significantly hamper retailers' ability to meet their customers' demands and preferences, and operate efficient, profitable businesses that serve their communities, provide jobs and pay taxes.

RLC is therefore filing this brief to address the purposes it believes §105(a) was intended to serve, the actions it was intended to prohibit, and to show the harm that would result to the retail industry if Massachusetts defeated the settled expectations of the industry in this regard. The RLC has an interest in ensuring that its members have clear guidance as to what they must do to comply with Massachusetts law.

ARGUMENT

I. SECTION 105(a) DOES NOT GENERALLY PROHIBIT REQUESTING OR COLLECTING ZIP CODES IN CONNECTION WITH CREDIT CARD TRANSACTIONS.

Based on its plain language and the Legislature's intent, Section 105(a) imposes a narrow proscription on retailers: personal identification information may not be *written or caused to be written* on a credit card transaction form. The law does not broadly

prohibit collecting or requesting ZIP codes, nor does it explicitly or implicitly classify a "ZIP code" as personal identification information. The law does not specifically address nor does it contemplate the electronic capturing of ZIP code information in an electronic database for otherwise permissible purposes.

Thus, for example, a Massachusetts retailer should not be prohibited under Section 105(a) from asking a customer to voluntarily provide his or her ZIP code to be electronically entered into the retailer's marketing database in connection with the transaction (even if at the end of the transaction the customer tenders a credit card for payment).

A. Section 105(a)'s Plain Language and Legislative History Confirm That It Was Not Intended To Create A General Privacy Right.

When construing a statute, a court should start with the statute's plain and ordinary meaning. Town of Boylston v. Commissioner of Revenue, 434 Mass. 398, 405 (1994). (citation omitted) Section 105(a) states in relevant part:

No person, firm, partnership, corporation or other business entity that accepts a credit card for a business transaction shall write, cause

to be written or require that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction form. Personal identification information shall include, but shall not be limited to, a credit card holder's address or telephone number.

Nothing in the plain language of the law references, express or otherwise, a broad privacy right or interest held by consumers, or an attempt by the General Court of Massachusetts to limit the purposes for which retailers might request or collect personal identification information.

The legislative history of Section 105(a) demonstrates that the statute was intended to prevent fraud against consumers, not to create a broad privacy right or to limit the purposes for which retailers might otherwise permissibly collect information from consumers.

In particular, when the Legislature's Commerce and Labor Committee heard testimony in connection with Section 105(a), the testimony included that from a representative of the Massachusetts Public Interest Group, which "noted that most retailers still require personal information, including home phone and address,

to process credit card purchases." Defendant's Brief at 15. That representative further noted that "[o]n personal checks, [merchants] often record drivers license and credit card numbers - both of which, she noted, can be used to defraud the purchaser." Id. Additional testimony, from a consumer, remarked on "how drivers license information written on his Master Card receipt was used to fraudulently purchase over \$12,000 worth of goods in his name." Id. And a representative of the Retailer's Association of Massachusetts "defended the collection of some information on consumers." Id. He noted that "merchants need to protect themselves from credit card and check fraud" and "emphasized the use of drivers' licenses to verify signatures." Id.

The U.S. District Court of Massachusetts in this case agreed with this more narrow reading of Section 105(a), holding that the General Court of Massachusetts intended Section 105(a) to have a much narrower scope than the California statute at issue in Pineda v. Williams-Sonoma Stores, Inc., 246 P.3d 612 (Cal. 2011). Specifically, the District Court found that while the goal of the California statute was to prevent retailers from directly or indirectly obtaining personal

identification information for marketing purposes, the main concern of the Massachusetts Legislature was to prevent exposing the customer to an unnecessary risk of identity fraud by writing personal identification information on the credit card transaction form when it was not otherwise required for the credit card transaction. District Court Opinion ("Opinion"), pp. 8-9, citing Pineda at 617-18.

Moreover, unlike California Civil Code §1747.08(a) at issue in Pineda, which provides more expansive proscriptions on what can be *requested*, *required* or *utilized* in connection with a credit card transaction, Section 105(a) was more narrowly tailored to what is written on a credit card transaction form. This is because Section 105(a) was not intended to broadly prohibit the collection of personal identification information or other information for marketing and other purposes in order to serve a general privacy right of consumers. Rather, its purpose was to limit the **writing** of this information on a document-- the credit card transaction form -- an act perceived by the Legislature at that time to

present a risk of fraud.¹ This more narrow scope of Section 105(a) also may explain why fewer exceptions to the general prohibition were needed under Section 105(a), than are contained in California Civil Code §1747.08(a).²

That risk associated with paper credit card transaction forms has largely subsided with the advent of electronic means to process credit card transactions. And, while new risks have emerged

¹ As noted above, the legislative history of Section 105(a) discusses the testimony of a consumer who explained "how drivers license information written on his Master Card receipt was used to fraudulently purchase over \$12,000 worth of goods in his name." Defendant's Brief at 15. It is also important to note that, in 1991 when Section 105(a) was enacted, merchants commonly used carbon copies of a customer's credit card to record a sale. Merchants would then write personally identifiable information on the carbon copy and that copy could be lost, discarded, or stolen, increasing the risks of fraud and the need for a measure like Section 105(a). See also Defendant's Brief at 34-36 concerning laws in New York and New Jersey. Technological advancements have since largely mitigated the need for carbon copies.

² Section 105(a) does not prohibit the requesting of personal identification information that is necessary for shipping, delivery or installation of purchased merchandise or services or for a warranty when such information is provided voluntarily by a credit card holder. However, examples of lawful uses of personal identification information under the California statute are more numerous. See California Civil Code §§1747.08(c)(1) through (4) and (d).

specific to this electronic medium, new measures have been advanced to address those risks.³

B. The Term "Personal Identification Information" In Section 105(a) Does Not Include ZIP Codes.

Plain language. The plain language of Section 105(a) does not include ZIP code within the scope of "personal identification information". Section 105(a) provides only two examples of "personal identification information": "a credit card holder's address or telephone number." G.L. c. 93, § 105(a). This information is specific to the individual. Only the individual or perhaps close family members will have the same address or phone number.

In contrast, ZIP codes by definition are *general* in nature and not *personal*. The United States Postal Service assigns ZIP codes to facilitate the delivery of mail and the code is designed to refer to geographic areas associated with United States Post Offices, not specific people. See 39 C.F.R. 2001, sub.

³ See, e.g., The Payment Card Industry Data Security Standards adopted by credit card issuers to ensure the security of credit card transaction (https://www.pcisecuritystandards.org/security_standards/index.php); 201 CMR 17.00 et seq. (Massachusetts "Standards for the Protection of Personal Information" under G.L. c. 93H); G.L. c. 93H, Section 1 (Massachusetts data breach notification mandate).

(c), appendix A, § 1008; Defendant's Brief at 22. Nowhere in the Act is a ZIP code classified as "personal identification information," and a ZIP code cannot be analogized in any respect to the personally identifying quality of a consumer's name and address or home telephone number.

Comparison of Definitions of Personal Identification Information and Similar Terms. The District Court correctly held that the Massachusetts Legislature did not intend §105 to sweep so broadly as to include any component of the address simply because the ZIP code could later be used (in conjunction with other data) to obtain the individual's full address. Opinion, pp. 8-9.

However, the Court looked to a Massachusetts law criminalizing identity theft and identity fraud, G.L. c. 266, §37E(a), to support its holding that personal identification information includes ZIP codes. Specifically, the Court noted that the definition of "personal identifying information" under the criminal statute included "[a]ny name or number that may be used, alone or in conjunction with any other information, to assume the identity..." and concluded

that "any" should include ZIP code. Opinion, pp. 12-13.

The District Court's reliance on G.L. c. 266, §37E(a) is misplaced. This criminal law statute contains an extremely broad and all-encompassing definition of personal identifying information. To facilitate the successful prosecution of the relevant crimes, the Legislature adopted a sweeping definition of the operative term because it plainly wanted the statute to capture any names or numbers that could be used to assume someone else's identity. Otherwise, creative identity thieves might be able to commit identity theft and easily avoid prosecution by successfully using data not listed or referred to in the statute.

The language adopted in c. 266, §37E(a) bears no resemblance to the definition contained in Section 105(a). Moreover, in attempting to ascertain the Legislative intent here, it is reasonable to examine civil statutes (like Section 105(a)) that have been enacted to address the issue of identity fraud and theft. The overwhelming majority of generally applicable state laws, in Massachusetts and around the country, that have been enacted in the past five to

ten years to protect individuals from fraud and identity theft apply to a much narrower set of elements of personal information critical to achieving the statutes' purpose than related criminal statutes.

For example:

(1) The regulations issued under G.L. c. 93H, known as the "Standards for the Protection of Personal Information," at 201 CMR 17.00 et seq., define personal information as: a Massachusetts resident's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such resident: (a) Social Security number; (b) driver's license number or state-issued identification card number; or (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account...⁴

⁴ See also, e.g., Ca. Civ. Code § 1798.81.5; Conn. Gen. Stat. § 42-471(c); ORS §§ 646A.602 and 622. We could find no state law of general application that imposes requirements to safeguard personal information for the purpose of preventing identity fraud to specifically include a ZIP code standing alone in the definition of "personal information," "personal identification information," or similar term.

(2) G.L. c. 93H, Section 1, defines "personal information" for purposes of Massachusetts' data breach notification statute nearly identical to the definition in (i) above.⁵

(3) G.L. c. 93I, Section 1, defines "personal information" for purposes of Massachusetts' disposition and destruction of records law, another law designed to limit identity fraud, nearly identical to the definition in (i) and (ii) above, except it adds "biometric identifier".⁶

The criminal laws in other states that are comparable to the Massachusetts statute cited by the

⁵ See also, e.g., Cal. Civ. Code § 1798.82(h); 815 ILCS 530/5; NJSA 56:8-161; ORC Ann. 1347.12. Of the 41 other state breach notification statutes, we could find none that included ZIP code in the definition of "personal information," "personal identification information," or any similar term to trigger notification in the event of a data breach, and thereby help to prevent identity fraud.

⁶ See also, e.g., Alaska Stat. § 45.48.590(4); C.R.S. § 6-1-713(2); O.C.G.A. § 10-15-1(9); HRS § 487R-1; Tex. Bus. & Com. Code § 72.004; Rev. Code Wash. § 19.215.010. We could find no state law of general application that included ZIP code in its requirements to destroy "personal information," "personal identification information," or similar information when no longer needed.

District Court define personal identifying information much more broadly.⁷

⁷ See, e.g., Cal. Penal Code § 530.55. ("For purposes of this chapter, "personal identifying information" means any name, address, telephone number, health insurance number, taxpayer identification number, school identification number, state or federal driver's license, or identification number, social security number, place of employment, employee identification number, professional or occupational number, mother's maiden name, demand deposit account number, savings account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card number of an individual person, or an equivalent form of identification.); Conn. Gen. Stat. §53a-129a ("personal identifying information" means any name, number or other information that may be used, alone or in conjunction with any other information, to identify a specific individual including, but not limited to, such individual's name, date of birth, mother's maiden name, motor vehicle operator's license number, Social Security number, employee identification number, employer or taxpayer identification number, alien registration number, government passport number, health insurance identification number, demand deposit account number, savings account number, credit card number, debit card number or unique biometric data such as fingerprint, voice print, retina or iris image, or other unique physical representation.); and Fla. Stat. §817.568 1(f) ("Personal identification information" means any name or number that may be used, alone or in conjunction with any other

Consumer protection laws similar to Section 105(a) seek to strike a balance between the interests of the consumer and the interest of merchants. To achieve this balance, and unlike the considerations that need to be addressed when crafting criminal statutes, state legislatures across the country have considered only certain elements of data to be personally identifiable information, those elements

information, to identify a specific individual, including any:

1. Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;

2. Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

3. Unique electronic identification number, address, or routing code;

4. Medical records;

5. Telecommunication identifying information or access device; or

6. Other number or information that can be used to access a person's financial resources.

likely to result in identity fraud, and not just any data or component of data that could conceivably be used for the same purpose. Otherwise, achieving the goal of reducing identity fraud would place too great a burden on the permissible and appropriate use of such data by retailers and others. For these reasons, it is more appropriate to compare consumer protection schemes, such as Section 105(a), with other consumer protection schemes for parallels in the meanings of similar terms, rather than to look to criminal laws.

Additionally, the Massachusetts Legislature is aware of the need to provide protections to certain types of information, and yet, it has deliberately not included address, and/or ZIP code, in its definitions of personal information in statutes with similar purposes. See, e.g., G.L. c. 93H. Where the Legislature wanted to make specific mention of ZIP codes, it did so. For example G.L. c. 23K, §71 provides specific carve outs for ZIP codes in the context of gaming research. It is respectfully submitted that it is not the role of the Court to construe enactments to provide broader protections than those the Legislature has already codified.

C. The Term "Credit Card Transaction Form" As Used In Section 105(a) Applies To Hardcopy Forms And Not Electronic Databases.

Section 105(a) and similar laws in other states seem to have come about at the same time,⁸ generally in the early 1990s, at a time when the credit card processing industry was in transition. In the mid-1980s, credit card transactions were primarily processed by way of manual imprint machines, imprinting the image of credit cards onto credit card transaction forms.⁹ It was the additional personal information written on these forms that was believed to increase the risk of identity fraud and the likely impetus behind the number of laws contemporaneously enacted to address this risk. See n.3 *supra*. As early as 1983, however, electronic terminals began to be introduced to process credit card transaction. *Id.* Yet, the laws referenced above made no mention of this technology. Instead, in most cases, they prohibited "writing" personal identification information on a form. See also, Defendant's Brief at 34-36.

⁸ See, e.g., Kan. Stat. Ann. § 50-669a (1992); Md. Stat. Ann § 13-317 (1990); M.G.L. c. 93, § 105(a) (1991); RI. Stat. Ann. 6-13-16 (1993); Wis. Stat. Ann. § 23.401 (1991).

⁹ <http://blog.nabancard.com/uncategorized/how-processing-credit-cards-got-to-where-it-is-today/>

As discussed above, the shifting of risks from those associated with paper credit card transaction forms to those associated with electronic processing, and the enactment of new laws to address the changing landscape, support the view that Section 105(a) had at its core the goal of prohibiting paper credit card transaction forms from becoming vehicles of identity fraud when personal identification information was written on them.

II. A RULING THAT ZIP CODES CONSTITUTE PERSONAL IDENTIFICATION INFORMATION WOULD HAVE A HARMFUL IMPACT ON THE RETAIL INDUSTRY IN MASSACHUSETTS.

A decision concluding that under Section 105(a) ZIP codes constitute "personal identification information" or that ZIP codes could not be collected in connection with a credit card transaction or on a credit card transaction form would have significant negative and unintended public policy consequences, including harm to the broader retail community in Massachusetts.

Penalties. Retailers that have recorded ZIP codes could be subject to civil penalties notwithstanding that Section 105(a) does not expressly state that ZIP codes are personal identification information. If the Court were to hold that a ZIP code constitutes

"personal identification information" under Section 105(a), such a result would be unfair and prejudicial.

The current law in Massachusetts is that recording a ZIP code does not violate Section 105(a), regardless of the retailer's purpose for doing so, because a ZIP code does not constitute "personal identification information" under the statute. Accordingly, unless and until the Court rules that Section 105(a) prohibits the collection of ZIP codes in this manner (writing them on credit card transaction forms), retailers that collected ZIP codes are not exposed to civil penalties under Section 105(a) because they have not violated the statute.

If, however, the Court were to hold that ZIP codes constitute personal identification information under Section 105(a), retailers that recorded ZIP codes could be exposed to mandatory civil penalties for past conduct under a statute that had been in place for over 20 years without such an interpretation.

Litigation Costs. Similarly, because suits filed under Section 105(a), like this instant suit, would likely be filed as putative class actions, the

potential exposure for retailers could be substantial, and in some cases, even devastating.¹⁰

Business Costs and Reduction in Service to Consumers and Communities. Retailers request and record ZIP codes for important business purposes. For example, retailers may collect and use ZIP codes for (i) minimizing fraud by verifying that the person holding the credit card at the point of purchase is the person authorized to use the card, (ii) analyzing demographics and facilitating bulk marketing efforts (sending promotional mailers to every address in a ZIP code), (iii) making decisions about store locations, advertising, and product mix, to serve consumer demands and preferences; and (iv) developing strategic real estate analyses to assist in making significant business decisions regarding location of stores, store size, and the opening of new stores or closing of

¹⁰ To avoid the unfairness and prejudice to retailers that would result if the Court endorses Tyler's position regarding the reach of Section 105(a), RLC respectfully submits that any such decision should apply prospectively only. The adverse impact on retailers is not a theoretical harm. In California, hundreds of class action suits were filed against retailers in the immediate aftermath of the California Supreme Court's decision in Pineda. <http://www.insidecounsel.com/2011/06/01/zip-code-ruling-leads-to-billion-dollar-lawsuits>.

existing stores. These efforts and decisions require considerable analysis because they are long-lasting (typical store lease periods are for numerous years) and involve significant expenditures of time, resources, and money. Retailers' use of ZIP codes to identify where there is demand for their products benefits not only the retailers, but also its customers and communities by enabling the retailers to open stores where they are needed and wanted.

The interpretation of Section 105(a) sought by Tyler would deprive retailers of the ability to take these steps and use ZIP codes to serve their business needs, their customers and the larger communities retailers serve. In addition, as many retailers utilize ZIP codes for the purposes noted above, such a ruling would require retailers to make substantial investments in time and money to modify existing systems, retrain employees, and develop alternative measures to continue to provide the same level of service to consumers and communities, at a time when the economic environment has been difficult for all businesses, including the retail industry. These costs would be increased for national retailers who

employ this and similar permissible practices in a large majority of other states.

As set forth above, Section 105(a) was enacted in 1991 in response to the Legislature's concerns regarding identity fraud when personal identification information was written on paper credit card transaction forms or checks. The legislative history is silent on requesting and recording ZIP codes. Recording ZIP codes and using them in ways that do not personally identify customers, or raise concerns of fraud or identity theft, is consistent with Section 105(a)'s purpose and intent. It is well settled that "[a] court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose." Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 454-455 (2007), citing Milford v. Boyd, 434 Mass. 754, 757 (2001). A decision concluding that under Section 105(a), ZIP codes constitute "personal identification information" or that ZIP codes could not be collected in connection with credit card transaction forms, would do just that.

CONCLUSION

For the foregoing reasons, the RLC respectfully requests that this Court respond to the U.S. District Court's certified questions (1) and (3) by providing the following guidance: (1) Under G.L. c.93, §105(a), a ZIP code is not "personal identification information"; and (3) G.L. c.93, §105(a), the words 'credit card transaction form' refer only to paper transaction forms.

Respectfully submitted,

RETAIL LITIGATION CENTER

By its attorneys,

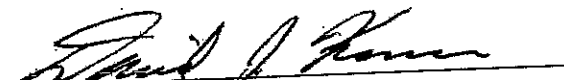


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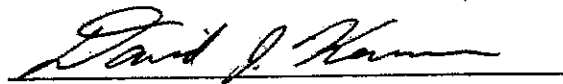
CERTIFICATE OF SERVICE

Two copies of the above document was served this 22nd day of October, 2012, by overnight mail on counsel for Plaintiff/Appellant, Douglas Gregory Blankinship, 1311 Mamaroneck Avenue, White Plains, New York 10605, and by hand delivery on counsel for Defendant/Appellee, Jonathan W. Lent, Seyfarth Shaw LLP, 2 Seaport Lane, World Trade Center East, Boston, MA 02210.


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CERTIFICATION UNDER RULE 16 OF MASS. R.A.P.

Now comes David J. Kerman, counsel for the RLC, who hereby certifies that the RLC's brief submitted herewith complies with the rules of Court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16 (a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of brief); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices and other papers).



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