

# Management Alert

## California Supreme Court Holds that Consumer Personal Contact Information can be Disclosed to Attorneys Without the Affirmative Consent of the Consumer

On January 25, 2007, the California Supreme Court in *Pioneer Electronics, Inc. v. Superior Court* held that plaintiffs bringing a putative class action can obtain the names and contact information of complaining consumers so long as the consumers receive reasonable notice and an opportunity to object to the release of such information.

### *The Lawsuit*

Plaintiff Patrick Olmstead purchased a DVD player from Pioneer Electronics. Olmstead claimed the DVD player was defective and sued Pioneer on behalf of himself and similarly situated consumers. In discovery, Pioneer produced letters it received from customers complaining about the allegedly defective DVD player, but redacted the names and contact information. Olmstead moved to compel Pioneer to produce unredacted copies of the documents, to permit plaintiff's counsel to contact these consumers to discuss their complaints before moving for class certification. Pioneer opposed the motion, arguing that these customers had a privacy right in their contact information and should receive a notice and opportunity to consent before their contact information was disclosed to opposing counsel.

### *Decision at the Trial Court*

Although the trial court agreed with Pioneer that the complaining consumers had a privacy interest in their contact information, it held that the privacy interest could be protected by simply providing a notice to the consumers about the lawsuit and an opportunity to object to the disclosure of their contact information. In order to object to the disclosure, the consumer would need to provide a written objection by a set deadline. If a consumer did not respond by the deadline, the contact information would automatically be disclosed.

### *The Court of Appeal Reverses, Finding Trial Court's Method Did Not Adequately Protect Consumer Privacy Interests*

The Court of Appeal reversed the trial court's order, holding that protecting disclosure of an individual's contact information is protected by the state Constitution's privacy provision, requiring actual notice to the consumer before any privacy interest is waived. Accordingly, the Court of Appeal rejected the trial court's approach that

consumers' contact information can be automatically disclosed if no objection is received in response to a notice of privacy rights, and held such information can only be disclosed if the consumer provides affirmative written consent.

### *The California Supreme Court's Decision*

The California Supreme Court rejected the Court of Appeal's approach, finding it failed to balance the nature of the privacy interest involved against the interest of class counsel in contacting these consumers. The Supreme Court determined that the trial court's approach was sufficient to protect the privacy interest of the consumers.

The court relied on its decision in *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1 (1994), which explained that the right to privacy protects an individual's reasonable expectation of privacy against a *serious* invasion and set out the framework for analysis:

- there must be a "legally protected privacy interest";
- there must be a reasonable expectation of privacy under the particular circumstances, including "customs, practices, and physical settings surrounding particular activities;" and
- the invasion of privacy must be "serious" in nature, scope, and actual or potential impact to constitute an "egregious" breach of social norms, as trivial invasions afford no cause of action.

If these criteria are met, then the privacy interest must be balanced against other competing interests.

Here, the court found the consumers had a *limited* privacy interest in their contact information since they had already

contacted Pioneer regarding their dissatisfaction with the DVD player and presumably would want to be contacted about any further developments, including any lawsuits involving similar complaints.

Further, the court held there was no serious invasion of privacy in providing this information to plaintiff's counsel without actual consent, since the information sought was not "particularly sensitive" and was "already voluntarily disclosed to Pioneer." The court noted that in a class action, names and contact information for putative class members are generally discoverable, "so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case." Accordingly, providing a written notice of the proposed disclosure to all complaining Pioneer customers and an opportunity to object was sufficient to protect their limited privacy interests.

Moreover, even if there were a greater expectation of privacy in the consumers' contact information against a *serious* invasion of privacy, the court held that the trial court "could reasonably conclude that, on balance, [Olmstead's] interest in obtaining contact information regarding complaining Pioneer customers outweighed the possibility that some of these customers might fail to receive their notice and thus lose the opportunity to object to disclosure." Holding otherwise could also adversely affect the ability of consumer rights litigation to redress social ills, since it would require affirmative consents to discovery of identifying information – something not currently required under many California laws.

*What Does Pioneer Electronics Mean For You?*

Pioneer Electronics is a victory for consumer rights attorneys who want to contact possible litigants and witnesses at an early stage of class litigation to strengthen and expand their claims. However, companies still must take steps to protect the information by insisting that consumers receive reasonable notice and a chance to object before their contact information is disclosed.

It is uncertain how this decision will be applied to requests for contact information regarding “non-complaining” putative class members or employees. There is language in the decision supporting greater protection when the plaintiffs seek employee contact information from personnel files. Unlike consumer records, personnel files are protected from disclosure by statute and have been recognized as information entitled to greater constitutional protection. Accordingly, companies should seek to protect employee contact information by insisting on obtaining affirmative consent from the employee prior to releasing this information to opposing counsel.

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