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Legal Issues With Mobile Payments

by ERIN FONTÉ

A short time ago, I stopped to pick up the family dry cleaning when an alert from a pharmaceutical retailer that noticed I was nearby popped up on my mobile phone. “Slide to activate your digital rewards card and come in for great savings,” it prompted.

I’m familiar with mobile payments/mobile commerce through my practice, so my first thought was “Cool—they just geo-fenced me!” and then my next thought was “Wait—creepy!”

TECHNOLOGY

The term “geo-fencing” refers to when a company recognizes a mobile device within a certain geographical area. Had the pharmacy geo-fenced me on the way into the store, that would have been fantastic science fiction come to life. But since they geo-fenced me from a significant distance (the store was 200 yards from my dry cleaner), I found it creepy that the pharmacy was tracking me from that far away.

The mobile device’s use for mobile payments is opening the door to a new world culminating in the “Internet of Things,” wherein billions of devices will interact and communicate with each other in the “background” while we go about our daily lives.

The payments system is an often-overlooked but crucial part of the economy and how it functions. For years, professionals have looked for ways to put payment systems on mobile phones, with limited success. Apple Pay may momentarily be the industry leader, but because the product is limited to iPhones, it may not maintain the lead for long. Other mobile wallet products are poised to serve both Apple and Android (and Windows?) devices, such as CurrentC (from the Merchant Customer Exchange—a large merchant consortium), Google Wallet, Softcard (formerly ISIS, major telecom consortium of AT&T, T-Mobile and Verizon), PayPal and Square.

A host of legal issues exist in and around payments, but enhanced protection and security hopefully will spur



broader use of mobile payments technology, giving people more confidence with smartphones and other mobile devices and helping to combat the “data breach of the week” from large retailers and financial institutions utilizing 60-year-old magstripe technology. The next step will be a consolidated “x commerce” service that will allow transactions from any device—mobile, laptop, desktop or set top.

To get to this state will require numerous agreements and cooperation among a lot of big players, and such

systems must be built out with adequate consumer disclosures and protections that comply with all applicable laws (and, trust me, regulators like the Consumer Financial Protection Bureau will be paying close attention).

Building the Rails

Enhanced security features such as biometrics encryption (like fingerprint recognition), and technology that lets devices talk to each other (such as near-field communication or Bluetooth low energy) will build the communication and security rails on which other products and services will run. Companies in this space want to change the way people shop, compare, receive ads or offers, and then buy.

Companies that seek to leverage mobile for loyalty/rewards, ads and offers and even Big Data analytics will need to carefully think through their products, particularly how they gather and use information and whether they have permission to do so. Despite pronouncements that “privacy is dead,” all companies in this space must comply with applicable privacy laws. If the product is mobile, then just like the Internet, the privacy laws of the state/country of residency of users or customers control. Many regulators, such as the California Attorney General, take regulation in the mobile app and mobile device space very seriously.

Heavily Regulated Industries

The combination of products and services addressing physical and financial health has introduced the age of the “Quantified Self”—organized and autho-

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riously self-monitoring and feedback. Any tech company working to make a mobile payments or mobile commerce product should have a lawyer or other professional that understands payments look at the company’s proposed product and “flow of funds” to determine whether the product is “money transmission.”

If a company is deemed to be a money transmitter by any state regulator, conducting business without the proper license can lead to fines, penalties and even criminal violations. And health and wellness apps and services have similar regulatory issues. Companies must understand the definition of “protected health information” under HIPAA and comply with those requirements. No venture capital investor or acquiring company wants to put money into a product that a regulator can shut down due to violations.

The Internet of Things

The interoperability of people and devices through multiple channels—mobile phones, smart watches, wearable devices, vehicles, medical devices, appliances and more will link billions

of objects together. Mobile payments is really the first step toward the Internet of Things. As we march in that direction, issues of contract law, automated agents, privacy issues, gathering, collecting and use of data will become more and more integral to the revenue streams of many companies, and will become more and more central to the lives of individuals. But even though the products and services may change, the legal issues of transparency, disclosures and consumer choice and protection must be addressed in a thoughtful and comprehensive manner. A brave new world is coming, and new and innovative legal challenges come with it. ■■■



Erin Fonté is a shareholder in Cox Smith in Austin. She advises financial institutions, retailers and tech vendors on new and innovative payments, loyalty/rewards and ads and offers for products and services. She also advises regulatory/legal issues regarding the same. Erin represents Merchant Customer Exchange mentioned in the article.