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Chip-Embedded Credit Cards: New Rules as of October 2015

by *Connie N. Heyer, TSSA Legal Counsel*

Effective October 1, 2015 most large credit card-issuing companies (Visa, MasterCard, American Express and Discover) have changed their policies to require merchants who accept in-store credit cards to either:

- upgrade their system to allow it to accept chip-enabled technology, or
- take on the risk associated with credit and debit card fraud.

The new policy is called “EMV.” EMV stands for “Europay Mastercard Visa” and is the standard for the new chip-embedded debit and credit cards. A chip is embedded in the card and transactions can be processed via the chip, as opposed to swiping the magnetic strip on a card as many merchants are used to.

What does this mean for my business? As of October 1, 2015, liability is shifted for credit card fraud—merchants may be responsible for fraud. Essentially, the liability for fraud will fall upon the entity with the lowest form of security. For example, if a customer presents a chip-embedded card at a store, but the store does not have

chip-reading technology, the store could be liable for fraud on that transaction. Alternatively, if a store has the chip-reading technology, but the bank has not yet issued chip-embedded cards, the bank could be held liable for fraud on the transaction.

Under the current system, if an in-store transaction is conducted using a counterfeit, stolen or otherwise compromised card, consumer losses from that transaction are absorbed by the payment processor or issuing bank (not the merchant), depending on the card’s terms and conditions.

After October 1, 2015 the liability for card-present (in-store) purchases will shift to whichever party is the least EMV-compliant in a fraudulent transaction. For example, if a chip card is used at a merchant without chip card technology, and the counterfeit card is successfully used, the cost of the fraud will fall back on the merchant. Liability for card-not-present transactions, such as Internet and phone sales, will not be affected.

This is a shift in liability in the credit card policies and not a change in the



law. There will be no laws broken or fines assessed on companies that have not yet converted to accepting EMV chip-embedded debit and credit cards by October 1, 2015. It is simply a change in your credit card merchant’s (VISA, Discover, etc.) policies.

In conclusion, companies that process sales through in-store and card-present transactions need to understand what the EMV chip technology is and how it will impact the company’s point of sale, and then decide whether or not to process transactions using the new technology. If companies decide to install EMV-compatible technology, all options for upgraded point-of-sale terminals should be explored, and employees should be trained in processing these transactions. ■

Technology Legal Pitfalls

by *Connie N. Heyer, TSSA General Counsel*

Technology can make running your business exponentially easier, but along with convenience technology can create potential liability concerns. Some liabilities can't be avoided—lightning will strike. But good planning and protocol can help you manage your liability exposure. This article will outline some of the pro-active steps you can take to lessen liability exposure created by technology.

MANAGEMENT SOFTWARE

Management software can be a real assistance, but can also create problems if the correct protocol is not in place. One of the biggest mistakes that can be avoided involving management software is changing information in your software, but not amending the lease. This happens most frequently in a change of unit or change of tenant situation. Here are some examples:

A tenant wants to upgrade to a larger unit. Great, so you change the tenant's unit number in your management software to reflect the new unit number. But you can't just leave it at that. You must also amend the lease. If you don't, you will have no written lease for the new unit (only the old unit the tenant vacated) so you lose the ability to legally use the lien /foreclosure auction process if the tenant doesn't pay.

The easiest way to amend the lease is to take a hard copy of the original lease, cross through the unit number in paragraph one, write the new unit number name on it, and then both you and the tenant initial and date this change, plus initial and date any change in rent amount, if applicable.

Another example is a change of tenant. Maybe a daughter came in and signed a lease but wants the lease changed to her mother as tenant instead. She says the mother is on board with it, so it shouldn't be a problem, right? Well, you cannot just change the tenant in your manage-

Management software can be a real assistance, but can also create problems if the correct protocol is not in place.

ment software; the lease itself must be amended. In this case you would need three parties to initial and date the change (your facility, the old tenant and the new tenant) and the new tenant would also need to sign the lease.

DATA SECURITY

Technology makes it a lot easier to store information efficiently. But all facilities need to keep in mind the legal exposure related to data storage.

Do you store tenants' Social Security numbers (SSNs)? If so, you must adopt a privacy policy and make it available to your tenants. If you have a website you are not required to put the policy on your website, but doing that would be a way to easily make it available to your tenants. If you obtain Social Security numbers, your privacy policy must address five items. There is a sample privacy policy in the *TSSA Goldbook*® along with a comprehensive article about privacy and data security.

Even if you don't store SSNs, all facilities must "take reasonable steps" to safeguard tenant information. This means different things at different facilities and is not legally defined. But it could mean storing files in a locked cabinet, storing them in an office away from easy access by tenants, or storing them electronically and requiring password protection.

Disposing of your records is also something to pay attention to. You have a legal duty to black out or otherwise make any sensitive personal information (SPI) un-readable in your records prior to disposing of them. The following items are considered SPI and must be properly disposed of: driver's license number, date of birth, SSN, mother's maiden name,

fingerprints, debit or credit card number and bank account numbers.

Some facilities keep hard files only as a back-up; all information is scanned or otherwise entered into the software. If you do this, you might consider redacting (cutting out) the sensitive information like SSNs before you file away the hard copy, that way when you go to purge old records you can just throw them away. Otherwise, you will need to shred or burn all files or otherwise make sure the sensitive information is not readable. The legal article in the *Goldbook*® regarding privacy laws provides further information on this topic.

ONLINE LEASING

Online leasing is becoming more and more common, whether kiosk based or Internet based. The TSSA forms software (Blue Moon) now offers purely electronic leasing—leasing from a tenant's own computer without the tenant ever setting foot at the facility.

Some of the potential benefits of online leasing are:

- It's easy for both you and the tenant.
- E-signatures are just as legally valid as hand-written signatures.
- Less administrative time for you.

Some of the potential drawbacks to online leasing are:

- Ability of the tenant to take advantage of their anonymity and store something or do something in violation of the lease or the law.
- It is easier for the tenant to lease under a false name.

Things to consider to help address some of the potential downsides of online leasing are:

- Adding a TSSA lease special provision requiring online-leasing ten-

ants to come to the facility within X days of leasing and present a valid driver's license (otherwise, per the lease, they are in default and you may overlock).

- Performing background checks on online-leasing tenants. This does no good if someone is using a false name, but if the tenant comes into the office to show an ID it may help weed out bad seeds.
- Making it known in your online leasing process that "for tenants' protection" you do random background checks on tenant's who lease via a website. Needless to say, if you advertise this, you do in fact need to perform random (or routine) background checks.

Several management software packages also integrate with the TSSA forms online leasing software. I have reviewed one of the popular management software packages and while it has many great aspects, there were glitches that needed work-arounds. In the software package I reviewed, the facility fills the lease information into the management software and the software uploads the information into the Blue Moon online lease. However, there are missing input fields in the management software-not all TSSA lease fields have corresponding entry fields in the management software. For example, there was no field for emergency contacts and there was no field to check "yes" or "no" as to whether the tenant is in the military. (Note: TSSA has been assured that these deficiencies will be corrected in a future release. In the meantime, managers need to manually fill in this information before saving the lease as a PDF.)

Whatever software package you use, do a test run with its online leasing platform. Make a checklist to address any software glitches. If you know the software doesn't have an emergency contact entry field, inputting the emergency contact information into the lease before you finalize the lease should be a part of your leasing checklist.

EMPLOYEE FRAUD

Technology creates "opportunities"



for employee problems that can be avoided through good protocol.

First and foremost, be an active owner or senior manager. Walk the facility. Are the blue-locked units (or whatever color lock you use to indicate vacant units) really vacant? Take the time to open them and confirm. Are all tenants shown as "moved out" in fact actually moved out? Are all units you show as occupied paying rent?

If possible, don't accept cash. If you need to accept cash, establish a clear protocol. A dated cash receipt should be created and signed by the tenant, and a copy kept for your files, every time. The TSSA lease does not require the facility to provide a receipt, but providing a receipt is a good idea to help avoid fraud, and also for dealing with tenant claims that more cash was given than the amount for which you credited the tenant's account.

Do you offer free or for-rent moving trucks? Keep track of the mileage and require all mileage to be logged by your manager after every trip. Routinely double check these logs. This can help managers resist the temptation to loan the trucks to friends, etc.

And as usual, the best tool for dealing with problem employees is to avoid hiring them to begin with. Easier said than done, but do what you can reasonably do. Use the TSSA employment application. Screen employees with a criminal background check (which is only

legal if the employee has given you written permission to do this, as they do in the TSSA employment application). Check references. In general, be slow to hire and quick to fire.

If you have an onsite apartment, use the TSSA dwelling lease. There are few scenarios more problematic than an employee you have fired but who refuses to leave the onsite apartment. If you don't have a good lease, that employee may have a month or more before you can legally require her to vacate. The TSSA lease requires the employee to immediately vacate if employment terminates for any reason. You can always voluntarily give a terminated employee more time to move out, but if it is a problem employee, this lease provision allows you to start the eviction process immediately.

In summary, technology has allowed the self-storage industry to increase professionalism and help the bottom line as well. It brings with it many benefits, but also some pitfalls. Just a little food for thought in instituting protocols to avoid the potential downsides of technology. ■

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Seven Deadly Sins of Self-Storage Operation

by *Connie N. Heyer, TSSA General Counsel*

Anthing can happen in the self-storage business, but certain types of problems seem to consistently rear their heads. Learn from these common mistakes and avoid these “deadly sins” for your self-storage business!

SIN ONE: Getting caught in the crossfire. Feuding exes, bickering heirs, frenemies—if you haven’t dealt with these at your facility it is likely only a matter of time. “Take my wife off as a tenant, we’re getting divorced and it’s all my stuff...” What to do?

First, have only one person listed as the tenant. Others can be listed as an emergency contact or as someone the tenant has authorized to have access. If there is only one tenant, that tenant and you can mutually agree to amend the lease. For example, if the tenant is the husband and the wife is a listed emergency contact, you and the tenant can agree (without the wife’s consent) to amend the TSSA lease to remove the wife from being an emergency contact.

Second, when in doubt, just say “no” to a non-tenant wanting access. The TSSA lease authorizes, *but does not require, a facility operator to allow access to people listed on the lease as having access. The lease also authorizes but again, does not require, the manager to provide access to the emergency contact in some instances such as death, jail, and other similar instances. If your radar tells you that you might be stepping into a minefield, just decline to get involved. Tell whoever wants access that he or she will need to take the issue of access up with the tenant on the lease.*

SIN TWO: Using the wrong forms, such as a Notice of Claim form without the required statutory language, or a lease form without the required statutory language. How to correct?

Use the TSSA lease forms. These forms are updated on a regular basis to keep up with all statutory requirements and industry best practices. Do not rely on forms that come with

management software—there is no such thing as a universal form. Texas self-storage statutes are very comprehensive, unlike statutes in most other states. If you want to use a form other than a TSSA form, have your attorney review and approve it.

SIN THREE: Inadequate or inappropriate insurance. Most standard commercial policies do not cover liability associated with wrongful sale of a tenant’s goods. Facilities need an insurance product specifically geared to the self-storage industry—one that covers what is commonly called “sale and disposal legal liability.” Make sure your policy covers this.

How much insurance do you need? Many facilities have a basic policy and an umbrella policy for the worst-case scenarios. Your insurance agent is the best person to help you determine what level of insurance is right for you. Holding your real estate in single-asset entities (the facility as the entity’s only asset) is also generally a good idea.

SIN FOUR: Lack of attention to your facility’s physical aspects. Does your facility meet ADA scoping and other requirements? Are you inspecting regularly to identify obvious problems like trip-and-fall hazards? Is your lighting adequate? Are you keeping vacant units locked? These are some of the more common items that can lead to big-ticket liability.

Consider installing cameras, especially near an access gate. Tenants tend to blame any gate incident on a malfunction. If you have the gate on a camera you can easily rebut false accusations of gate malfunction, which are usually code for “I forgot my code so I waited and tried to tailgate behind another tenant but didn’t make it through before the gate closed.”

If you do install cameras on the property, it is smart to have facility rules regarding cameras. The rules



can and should be an addendum to your lease. The rules can make clear that cameras may be dummies or non-operational, that they could potentially be non-functional at any time, may be unmonitored, and that copies of video footage will be provided only to law enforcement.

SIN FIVE: Employment issues. A bad employee can cause a major business disruption and considerable loss of income and good will. Screen your applicants. Use the TSSA employment application. This application obtains permission from the applicant to perform a background check. Perform a check either through a service or through your own online search using the Texas DPS website or a private website like publicdata.com.

If you have an onsite apartment, use the TSSA dwelling lease. Among other benefits, it will enable you to get a fired employee out of the apartment quickly.

If you encounter employment issues, consult with an attorney who specializes in employment law. This is a very specialized area of the law and a few minutes of attorney time can be a very wise investment in doing everything by the book.

SIN SIX: Lack of protocol. Institute checks and balances, such as using the TSSA Lien and Foreclosure Checklist with every lien sale. If you use the services of auctioneers, they normally also go over all of your lien paperwork to make sure all is in order

before every sale. Document your attempts to contact the tenant—even attempts not required by law—this shows you went the extra mile and makes the tenant look much less sympathetic if a dispute arises.

Use the TSSA property inspection checklist or one like it to keep a good record of walk-throughs of your property. Doing this can help rebut an accusation of negligence of maintenance of your property that allegedly caused injury to someone. It is not negligent to have a dangerous condition on your property. However, it is negligent for a dangerous condition that you knew or should have known about to exist and for you not to take

reasonable action to address it.

Walk the property regularly to make sure all vacant units are kept locked; this also helps quickly identify the cases where the tenant has moved out unannounced.

SIN SEVEN: Failure to trust your instincts. It is often tempting to take the most conservative approach to addressing day-to-day business scenarios. That may sometimes be the best course of action, but often it is not. It normally doesn't make sense, for example, to tell a newly-widowed woman that you will not give her access to her husband's storage unit without a court order (even though the TSSA lease allows you to do so

at your discretion). It is legal to take this position, but in many if not most such scenarios is not the best practice from the big picture perspective.

Similarly, if your instincts tell you that there is something odd about a tenant or would-be tenant, don't lease to him, or simply do not renew his lease. Is a prospective tenant looking around to see where the cameras are? Is he asking to pre-pay in cash? Is a tenant accessing the unit at odd hours or for hours at a time? Trust your instincts. As much as it pains you to lose a paying customer or to turn a prospect away, an ounce of prevention is always worth a pound of cure. ■

Self-Storage Legal Q&A

by *Connie N. Heyer, TSSA General Counsel*

Q: Is it OK for customers to change their email, mailing address, or other account information by logging onto our website and accessing their account with their password?

A: The answer will depend on a few things. First, if you're on a more current TSSA lease version (check your version) paragraph 33(d) says: "If Lessor provides an online form or similar option for updating Tenant's contact information, Tenant may update contact information in this manner."

If you're not on a current lease form but you have an addendum with rules in it, or a special provision in TSSA paragraph #6 or an addendum, saying that tenant may update contact info using your online system, then you may rely on any tenant updates they make through your software.

If you have neither an addendum or a current lease form, then per TSSA lease paragraph #2, "a change of mailing or email address will not be effective unless the new address is COMPLETE and the notice is mailed, faxed, or emailed to Lessor's address stated herein in WRITING and SIGNED and DATED by Tenant and

actually RECEIVED by Lessor."

As a practical matter, you can communicate informally to any email or mailing address. But if you are sending a formal legal notice like a Notice of Claim, then unless you have the new paragraph 33 language outlined above or you have a special provision or addendum, send any formal legal notice to both the original address and the address the tenant revised in the software, and then you are covered.

Q: I had a son lease a unit on behalf of his mother (in his mother's name) using a valid power of attorney. The mother has since revoked the power of attorney, refuses to pay rent and says that she will sue us if we foreclose the unit. What should we do?

A: The mother, who is the legal tenant, can always give notice of non-renewal of the lease. But, she is indeed responsible for all rent due, and you have the legal authority to carry out the Chapter 59 lien process just like with any other tenant. Part of the risk of giving someone a power of attorney is that person doing something you didn't want them to do, like incurring liabilities for which you are legally responsible.

Q: I have heard a rumor that if I know there is a gun in a unit, I can't sell the gun at a Chapter 59 lien sale without running the serial number to check to see if it is stolen or involved in a crime. Is this true?

A: In a word, "No." If you find the occasional weapon in a storage facility, it is lawful for you to sell it at auction without having a firearm dealer's license, and there is no duty to run its serial number. In the normal course of business, you do not qualify as a "dealer" who is "engaged in the business of selling firearms" and thus do not need a federal license to sell firearms. As long as you are not engaging in a regular course of trade or business of selling firearms, then you are exempted from licensure under federal law. Federal law allows you to make occasional sales of firearms without a license. However, there are additional requirements for machine guns and sawed off guns or illegal weapons. You should contact the Bureau of Alcohol, Tobacco, and Firearms before selling any machine guns, sawed off guns, or any illegal weapons such as brass knuckles. The Houston Field Division of ATF can be reached at (281) 716-8200; Dallas Field Division (469) 227-4300. ■