cyberlaw: **the brave new e-world**

By Anne F. Downey

What's In Your Wallet?

In 2015, we will see America take a big step forward toward credit cards and debit cards that contain chips. Often referred to as "chip and PIN cards," they are also called chip cards, IC (integrated circuit) cards, or EMV cards. EMV is a global standard of card technology first launched by Europay, MasterCard and Visa. The global standard has continued to evolve and is now embraced by all the major card issuers, including Amex and Discover.

Chip card transactions are generally more secure than transactions with cards that have a magnetic stripe only. EMV technology enhances the security of payment transactions three ways. First, card authentication during the transaction authenticates that the card is genuine, i.e., the technology protects against counterfeit cards. Second, cardholder verification – such as the consumer's providing a signature or PIN – helps to verify that the shopper is the cardholder, i.e., the technology protects against stolen cards. Third, transaction authorization verifies that the specific transaction is permitted within the consumer's approved credit or account limit, the same as occurs today with non-chip cards when the supermarket clerk waits to see if the transaction "goes through" and is authorized because it comes within the shopper's credit or account limit.

Europeans have used chip cards for years, small wonder since European merchants faced a shift in card liability starting January 1, 2005. On that date, European merchants became responsible for counterfeit card fraud if they failed to upgrade their card terminals to the chip-based technology. Similar shifts in liability have also taken place over the past 10 years in Africa, Asia, Australia, Latin America and elsewhere. The U.S. is the last major nation to embrace chip card technology.

Change is coming to the U.S. this year. Liability is going to shift from companies like Visa and MasterCard to companies that process merchant payments. First, we need to understand how a credit card transaction works. If I use a Visa credit card to purchase groceries, the grocery store (merchant) electronically communicates with an "acquirer" (a bank that contracts with the merchant to accept the credit card transactions), which requests authorization from VisaNet, which passes on the request to the card "issuer," which sends a response to VisaNet, which passes the response to the acquirer, which passes the response to the merchant. As stated in a Visa brochure, starting October 1, 2015, the "party that is the cause of a chip transaction not occurring (i.e., either the issuer or the merchant's acquirer processor) will be held financially liable for any resulting card-present counterfeit fraud losses."

Issuers and processors will pass along to a merchant the liability for fraud losses when the merchant fails to upgrade the terminal. As stated at PNC Bank's website, "Starting in October 2015, financial liability for card-present counterfeit card losses will shift from issuing banks to merchants if merchants receive EMV-enabled cards but have not yet installed EMV-capable terminals. This liability shift will apply to all merchants, regardless of size." Thus, merchants accepting Amex, Discover, MasterCard and Visa must upgrade to the new chip card terminals or bear the loss in the event of a card-present counterfeit card transaction. There will be a similar liability shift for gas stations in the U.S. on October 1, 2017. Note that the liability shift only is for counterfeit cards and does not pertain to lost and stolen cards.

Since most U.S. cardholders do not yet hold chip cards, Americans have sometimes experienced hassles when traveling abroad and attempting to use their magstripe-only cards. While many hotels and stores in Europe accept the old-fashioned cards, there have been problems with places like ticket kiosks in train stations. The reason the non-chip cards worked in some locations is that different terminals allow different cardholder verification methods (CMVs). Some terminals – like an unattended train ticket kiosk – may require a PIN for every transaction, while other terminals have a hierarchy of CMV options, such as a retail store terminal where the preferred CMV might be the customer's signature, failing which the next CMV option might be a PIN, and possibly the fallback option is no CMV verification at all. Cards also come in various types, some being "chip and PIN" cards that call for entry of a PIN but allow a signature as a fallback, or "chip and signature" cards that call for a signature but allow a PIN as a fallback at unattended terminals.

The use of chip cards has cut card fraud in Europe by 65 percent during the past decade. In Canada, where chip cards launched in 2008, card-skimming losses dropped from $142 million to $38.5 million between 2009 and 2012. Chip cards are much more difficult to counterfeit because the microchip is almost impossible to duplicate.

Major U.S. retailers and banks are gearing up to roll out the new system by the October deadline. To fully implement EMV technology, new cards and new terminals are needed. Merchants may also need new software, and systems will need to be deployed and tested. In addition, staff must be trained.

Card issuers have offered incentives to merchants to tackle the cost and hassle of upgrading terminals. For example, Amex is offering small merchants a $100 reimbursement if they submit documentation of upgrading their terminals by April 30, 2015.

The new technology will also help facilitate additional changes down the road, such as contactless card transactions where a consumer simply waves a mobile phone or card in front of a terminal. (Contactless cards communicate via radio frequency and contain an antenna.)

Many merchants and consumers are not ready for the EMV technology. The PNC.com webpage states, "A lack of understanding among small and micro-business owners about exactly what EMV is and why it's important may be a hurdle the card industry will need to overcome. Another survey found that EMV awareness among consumers is low: Almost nine out of 10 U.S. consumers responding to a survey conducted by Phoenix Marketing International said they do not know very much about EMV. A second potential issue is confusion over what EMV standard will be used. EMV technical specifications do not require that a specific form of cardholder identity verification — for example, chip and pin or chip and signature — be used. Instead, the issuing bank will specify which cardholder verification services are required for a transaction by placing specific rules on the chip."

Merchants are reluctant to spend the money on the EMV terminals. The old magstripe terminals were durable and inexpensive, with used and refurbished models available. The chip card terminals must generally be purchased new and are seen by many as an unwelcome cost burden.

The price tag for the U.S. transition will be in the billions, with merchants shouldering at least $2.6 billion in costs, not including software, training and maintenance, according to Javelin Strategy & Research.

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EMV technology will reduce some of the problems associated with cards but will not eliminate problems where, for example, no card is required to be present during a transaction or in situations such as the Target data breach where the bad guys had access to the full card data in an unencrypted format.

Reminiscent of the "Spy vs. Spy" cartoons in Mad Magazine, the EMV technology will momentarily counter some of the current problems in payment transactions. Then new problems will arise, and technology will need to evolve to address the latest challenges. [B]

Death and Taxes continued from page 9

he died that he still owned the company and that Tom had made promises to allow all of the children to share in NYSFC.

The Fourth Department noted that "while the allegations of an express promise are lacking, even without an express promise,…courts of equity have imposed a constructive trust upon property transferred in reliance upon a confidential relationship. In such a situation, a promise may be implied or inferred from the very transaction itself. As Judge Cardozo so eloquently observed: "Though a promise in words was lacking, the whole transaction, it might be found, was 'instinct with an obligation imperfectly expressed'(*Sharp v. Kosmalski*, 40 NY2d at 122)."

The Appellate Division determined that based upon the circumstances of the relationship of between Tom and his parents and the nature of their multiple transactions, there were sufficient facts to conclude an implied promise by Tom to the decedents, and that the transfer of stock, if there was a transfer, was made in reliance upon that promise.

> " it is desirable and beneficial for persons with incapacities to have the least restrictive form of intervention."

To lend support to the allegations that Tom had made certain promises to the decedents relating to the real property and the stock, the petitioners had submitted statements allegedly made by their mother to her accountant, and to the father's sisters. Tom claimed that CPLR 4519 [the Dead Man's Statute] precluded consideration of those statements. But the Appellate Division pointed out that the CPLR 4519 only applies to parties interested in the proceeding testifying about statements made by the decedent, and that the accountant and the sisters were not parties interested in the event. Further, CPLR 4519 is a rule of evidence only operative at trial, not on a motion to dismiss a claim.

Matter of the Guardianship of Deborah A.L., 2015 NY Slip Op 00165 (4th Dept., 2015)

This case gets back to the basics of guardianships. In enacting Article 81 of the Mental Hygiene Law, the legislature found that it is desirable and beneficial for persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs. [Mental Hygiene Law §81.01]

Article 81 of the Mental Hygiene Law requires that in a proceeding for appointment of a guardian for an Alleged Incapacitated Person (AIP), the court must determine that the appointment is necessary to provide for the personal needs of the AIP, and consider the "sufficiency and reliability of available resources." [Id. §81.02] Further, the statute provides that "available resources" includes visiting nurses, homemakers, home health aides, powers of attorney and health care proxies, among other things. [Id. §81.03(e)].

At trial, the Supreme Court found that the AIP was an incapacitated person, and appointed a guardian for her.

The AIP appealed to the Fourth Department. The Appellate Division reversed and remanded to Supreme Court, noting: "It is undisputed that the AIP had 'available resources,' i.e., a power of attorney and healthcare proxy (see Mental Hygiene Law §81.03[e]), and the court should therefore have inquired whether those advance directives were adequate to protect the AIP's personal and property interests before determining that she is incapacitated and in need of a guardian."

In the Matter of the Estate of Searles, 2014 NY Slip Op 51713(U) (Surr. Ct., 2014)

The decedent in this matter died intestate. Frederick Searles, Jr., claiming to be a non-marital child of the decedent, filed an application to be appointed voluntary administrator of the estate under Article 13 of the Surrogate's Court Procedure Act. Surrogate Howe requested petitioner's attorney to supply proof, pursuant to EPTL 4-1.2, establishing that the decedent was in fact Frederick's father. EPTL 4-1.2, *inter alia*, sets out the requirements for a non-marital child seeking to establish paternity by his putative father.

Counsel submitted a letter, taking the position that EPTL 4-1.2 applies to the right to inherit, but does not restrict Frederick from becoming voluntary administrator of the estate under SCPA 1303.

In a written decision, Surrogate Howe rejected counsel's position:

SCPA 1303(a) provides in part "If the deceased dies intestate, the right to act as a voluntary administrator is hereby given first to the surviving adult spouse, if any, of the decedent and if there be none or if the spouse renounce, then in order to a competent adult who is a child…" While the statute does not say that the child must be established to be an intestate distributee of the decedent before he may become voluntary administrator, the section does say "if there are no known distributees within the categories listed above…," thereby giving the impression that one must be an intestate distributee of the decedent in order to serve.

In rejecting counsel's position and denying the application, the surrogate quoted the Warren's Heaton treatise on Surrogate's Court: "However, a careless reading of SCPA 1303(a) may mislead one into believing that one who is not a distributee may qualify as a voluntary administrator. This is not so. The voluntary administrator, except in certain limited situations, must be a distributee" (2 Warren's Heaton, Surrogate's Court Practice §37.05[2][a] at 37-17). [B]