

A quarterly publication of Wiles, Boyle, Burkholder & Bringardner, Attorneys at Law.



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Restaurant Operator Liability For Not Protecting Customer Credit Information From Computer Hackers.

The hard lesson of BJ Wholesale Club

When BJ's Wholesale Club, Inc. filed its 10-Q with the Securities and Exchange Commission for the quarter ending July 31, 2004, it reported in the Notes to the Consolidated Financial Statements that it had recorded a pre-tax charge of \$6,000,000.00 to establish a reserve relating to claims by credit card issuing banks seeking reimbursement for fraudulent credit card and debit charges and costs related to replacing cards and monitoring expenses. BJ's reported that earlier in the year the company was notified by credit card issuers that credit and debit card accounts used legitimately at BJ's were subsequently used fraudulently at non-BJ's locations. The allegations were not that BJ's employees had misappropriated credit card information, but rather that so-called "hackers" had breached BJ's computer security system and obtained the credit and debit card account information previously used legitimately by customers at its stores.

In response, the Company retained a leading computer security firm to conduct a forensic analysis of its information technology systems with the goal of determining whether a breach of security had in fact occurred. No conclusive evidence of a security breach was found, but that didn't stop the credit card data processing company from demanding reserves be established for potential future liability. And so began what appears to be the first highly publicized attempt by credit card issuers to push fraud charges and related expenses back to a retailer that utilized the credit and debit cards in the operation of its business, based on *alleged*, but unproven, security breaches of the retailer's computer system.

The players in this debacle include the credit card companies/organizations who, on a national basis, are represented by VISA, Master Card, Discover Card, American Express, etc. These organizations would typically have a direct contractual arrangement with numerous, so-called, Member Banks. The Member Banks in turn, have formed alliances, joint ventures or the like with credit card processing companies, which in turn, contract with the restaurant companies to provide credit card processing services. Restaurant clients, on the other hand, have their own relationships with their credit card "issuing" banks (such as Capital One), which, in turn, are likely also a Member Bank or are licensed through the credit card company.

When a "Fraud Alert" arises at a significant level, as in the case of BJ's, the credit card companies may require, through their agreement with the Member Bank, that the credit card data processing company, which has joint ventured with the Member Bank, set up a reserve to cover the anticipated costs for the fraudulent credit and debit charges and the cost of replacing cards and monitoring expenses. The credit card data processing company would in turn require the restaurant company to establish the same. Under most agreements entered into between the restaurant company and its credit card data processing company there are no "proof" requirements mandated prior to the credit card processing company requiring action against a restaurant company.

Thus, the quandary that the restaurant operator finds itself in is if a credit card company, were to determine, on its own, that a breach of security had occurred with respect to a given restaurant company (a determination that is based on mathematical calculations related to probabilities which are tied back to the stolen credit card information and where the credit card was



previously legitimately used by the card holder), then without any actual showing of a breach of security the credit card data processing company may require cash collateral accounts equal to the sum total of the projected fines, penalties, reissuing charges, monitoring charges, and projected fraud push back be established. As in the BJ case, the numbers may be significant.

The lesson to be learned from the BJ's story is do not assume that just because you purchased an "off the shelf" software package from a national retailer that you are in compliance with your credit card company's or Merchant Bank/credit card data processor's security requirements. Take the time now to make sure that you are in strict compliance or face the wrath of having your credit card accounts significantly discounted in the event a "hacker" was to breach your system. In short, make your software vendor or POS providers earn their money. Otherwise, the risk of credit card fraud may be shifted to the retail merchant who fails to protect its customer's credit card information.

By Bruce H. Burkholder

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Featured Attorneys



Michael L. Close

As a retired judge of the Court of Common Pleas for Franklin County and the Tenth District Court of Appeals of Ohio, Michael brings extensive experience to his appellate, mediation and public sector law practice.

He's a graduate of Ohio State with a law degree from Capital University. He also attained the rank of Captain in the United States Army with service in Vietnam. Michael is a member of the Columbus, Ohio State and Florida Bar Associations and is admitted to the Supreme Courts of Ohio, Florida and the United States.

He is a long time resident and former Mayor of the City of Dublin. He and his wife, Chris, have three children, Allison, Dan and Brian.



J. Corey Colombo

Corey recently joined the firm as a Municipal Law specialist with significant experience representing municipalities and school districts in a wide range of legal matters.

Corey is a Miami University graduate and earned his law degree from Capital University Law School. He is a member of the Columbus, Ohio State and American Bar Associations, and he has served as Assistant Prosecutor for the City of Dublin, Village of New Albany and Village of Marble Cliff.

Corey and his wife, Courtney, have a one-year-old daughter, Alexis.

Golfers Be 'Fore' Warned

According to the USGA's website, in the 18th century Scottish golfers adopted the word 'fore!' from the military, where it was used by artillery men as a warning to troops in forward positions. Although golf courses are much less dangerous than battlefields, they can nevertheless be hazardous. Therefore, it is important for golfers to understand and appreciate their possible liability for errant shots.

In 1990, the Ohio Supreme Court held that "a player who injures another player in the course of a sporting event by conduct that is a foreseeable, customary part of the sport cannot be held liable for

negligence because no duty is owed to protect the victim from that conduct." In that case, a golfer hit another member of her foursome with a golf ball who was twelve to fifteen yards away and at a ninety degree angle from the intended path of the ball. The Court held that the golfer could not be found liable for hitting the other golfer because "shanking the ball is a foreseeable and not uncommon occurrence in the game of golf. The same is true of hooking, slicing, pushing, or pulling a golf shot."

Insulation from liability is not absolute, however. The Court further held that injuries

caused by recklessness or intentional misconduct may give rise to a cause of action. The Court explained that the rules of a particular sport factor into the issue of liability. "If, for example, a golfer knows another is within the line of flight of his shot and fails to offer the customary warning of 'fore,' liability might accrue."

Therefore, the next time you hit an errant shot, make sure you yell 'fore!' Also, the next time you are behind a slow moving group, think twice about hitting a "warning" shot across their bow in an attempt to hurry them along.

By Mark Melko

Land Wars – The Process to Annex Land into a Municipality

The term "Land Wars" may be a bit overdramatic, but the annexation process does involve well-orchestrated diplomacy, negotiation, and sometimes even battles! An annexation is the process whereby a landowner files a petition to transfer their land from an unincorporated territory into a municipality. The process includes a maze of governmental involvement, as the landowner must follow state law to persuade the county commissioners to approve the transfer of township land into the city or village boundaries. There are many reasons why a landowner may choose to annex their land. This includes that the landowner obtains a variety of municipal services with central water and sewer services being the "trump card" for municipalities to entice landowners to annex.

In 2001, Governor Taft signed Senate Bill 5, which was the most major overhaul of the annexation laws since the 1960's.

Many Ohio cities and villages feared that the changes in the law would bring annexations to a screeching halt. Surprisingly, the law has had the opposite effect. In 2005, in Franklin County alone, the County Commissioners approved 37 annexations comprising approximately 1,540 acres of land. Part of the reason that annexations are still a viable option is that the new annexation law provides three additional attractive methods to annex land. These methods are called the "expedited" procedures and increase the likelihood of success of an annexation. County Commissioners must now approve the expedited annexation petition, without a hearing, if certain criteria have been established.

There are several key aspects of the legislation that are still being debated and litigated to this day. In fact, Michael Close of this law firm argued a procedural aspect of the law before the Ohio Supreme

Court in March 2006. It has become increasingly important to hire a knowledgeable attorney that is familiar with the changes in the annexation law to navigate landowners through the process. Landowners must negotiate, and in some instances enter into a pre-annexation agreement, to obtain favorable services, including police, fire, street maintenance, refuse collection, and of course, central water and sewer. Each annexation is unique depending on the size of parcel, whether applicable governmental entities and surrounding landowners support or oppose the annexation, and the county in which the annexation is filed. Half the battle in winning this "Land War" is choosing a good advocate and gaining a better understanding of the rules of engagement.

By J. Corey Colombo

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