Contactless Currency During COVID-19: How the Pandemic's Business Disruptions Will Change Franchise System Payment Standards

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As the COVID-19 pandemic rages on, the economic toll of this global crisis continues to take shape with upward and downward spikes in activity, proving that the country's financial forecast remains very much in flux. As has been hashed out in seemingly countless articles since the pandemic firmly established itself by March 2020, small businesses—those without the resources of their bigger chain rivals—have suffered greatly with revenues falling and closures and layoffs continuing.[1] The future is anyone's guess. Many big picture economic questions linger, such as: Is this the end of physical malls and large department stores?[2] Will only chain restaurants survive?[3] What will experience-based businesses—birthday party venues, bowling alleys, and amusement parks—do to cope with the wariness that consumers have towards engaging in activities that

1. *See*, *e.g.*, Ben Brody, Alan Levin, Mary Schlangenstein & Roxana Tiron, *Bailout Pleas Renewed for Restaurants*, *Airlines as Cash Runs out*, Wash. Post (July 15, 2020), https://www.washingtonpost.com/business/on-small-business/bailout-pleas-renewed-for-restaurants-airlines-as-cash-runs-out/2020/07/15/2fe8226c-c6b0-11ea-a825-8722004e4150_story.html; Lauren Thomas, *The Coronavirus Pandemic Will Likely Leave a Lasting Legacy on Retail: Fewer Department Stores*, CNBC (Apr. 19, 2020), https://www.cnbc.com/2020/04/19/a-lasting-legacy-of-the-coronavirus-pandemic-fewer-department-stores.html.

2. Sapna Maheshwari, *With Department Stores Disappearing*, *Malls Could Be Next*, N.Y. Times (July 5, 2020), https://www.nytimes.com/2020/07/05/business/coronavirus-malls-department-stores-bankruptcy.html ("The standard American mall—with its vast parking lots, escalators and air conditioning, and an atmosphere heavy on perfume samples and the scent of Mrs. Fields cookies—was built around department stores. But the pandemic has been devastating for the retail industry and many of those stores are disappearing at a rapid clip.").

3. James Kwak, *The End of Small Business: Giant Corporations May Be the Only Survivors in the Post-Pandemic Economy*, Wash. Post (July 9, 2020), https://www.washingtonpost.com/outlook/2020/07/09/after-covid-19-giant-corporations-chains-may-be-only-ones-left/?arc404=true ("[T]he coronavirus will radically reshape Main Streets across the country, accelerating changes long in the making—chain stores will replace mom-and-pop businesses, some storefronts will remain vacant, and cash that once went into local hands will be redirected to Amazon and Walmart.").

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require proximity and contact? Will the travel industry ever fully recover?[4] Unlike previous recessions, most recently in 2007–2008, the nature of this economic recession (brought about by a deadly virus that makes social interaction difficult, if not dangerous) the usual consumer response—go out, spend—is often the exact opposite of the responsible thing to do. People cannot go out and spend when social distancing and quarantine measures remain the best way to flatten the curve and keep infections and deaths as low as possible until, and if, a vaccine ever comes to market.[5] The efforts by some to liken this recession to 2007–2008 are probably well-meaning, but they are seriously lacking in their failure to consider how different, and much more serious, this crisis is when compared with the Great Recession.[6]

This article will address how franchise systems—focusing primarily on the restaurant and food industry, but inclusive of any that sell products—might adjust to post-pandemic life, its social distancing realities, and other business disruptions as a result of COVID-19. Many businesses may begin to more widely embrace delivery services, contactless payment methods, and mobile ordering: changes that are both convenient and necessary. This examination will be broken into three parts: first, this article will discuss contactless payment methods, mobile ordering, and the infrastructure that makes them a reality; second, the data security risks of contactless payment methods and the latest security breaches; finally, the article will close with an examination of how future franchise agreements will change in light of the increase in contactless payments, including what franchisors might put into these future agreements in response to the risks and benefits associated with contactless payment methods.

I. The Electronic Economy: Understanding Contactless Payments and Mobile Apps

Just as it took what already existed in 2007—the smartphone—and made it accessible and "cool" to use by introducing the iPhone, Apple Computer, Inc. can probably also be credited with making mobile payments ubiquitous

4. Major airlines, such as Delta, are recognizing the dire threat to their industry that the COVID-19 pandemic presents. *See generally* Delta Coronavirus Travel Requirements, Delta, https://www.delta.com/us/en/travel-update-center/flying-what-you-need-to-know/coronavirus-regional-restrictions (last visited Aug. 10, 2020).

5. *See* Jacqueline Howard & John Bonifield, *Moderna Coronavirus Vaccine Shows 'Promising' Safety and Immune Response Results in Published Phase 1 Study, but More Research Is Needed*, CNN (July 15, 2020), https://www.cnn.com/2020/07/14/health/moderna-coronavirus-vaccine-phase-1-study/index.html.

6. For example, before this year, the record for weekly seasonally adjusted unemployment benefits claims was 695,000, from 1982. In March of this year, that record was shattered when 3.28 million people filed for benefits in the week that ended March 21. Jim Zarroli & Avie Schneider, *3.3 Million File Unemployment Claims, Shattering Records*, NPR (Mar. 26, 2020), https://www.npr.org/2020/03/26/821580191/unemployment-claims-expected-to-shatter-records. From personal experience, it is extremely difficult to, as has been discussed in various firm panels, go out and "get work" when work is being conducted from home and the informal office interactions that often led to work are impossible.

and easy to use. Apple introduced its Apple Pay mobile payment system in 2014, and it ushered in the era of widely accepted and widely used mobile payments.[7] With the introduction of Apple Pay, Apple provided a means by which the billions of iPhones that it had sold up until that point could be used in two important ways: (1) for contactless payment at stores; and (2) for easy mobile app ordering of food and other products. Apple has heavily advertised the capabilities of its mobile payment system, and news organizations heralded it at its introduction as ushering in a new age of payment and perhaps signaling the end of cash payments forever.[8] Indeed, in the wake of the adoption of mobile payments since Apple Pay's introduction, companies have more fully embraced mobile payments and contactless methods, especially in the wake of the pandemic. For example, Starbucks touts its app by saying:

> As Starbucks responds to the impacts of coronavirus (COVID-19), the company is welcoming customers back to stores with modified store operations and pausing on seating in cafes to help create social distance. Service offerings vary by store, including drive-thru, grab-and-go café service, and order-ahead entryway pickup. Delivery continues to be another option through Starbucks Delivers in markets across the United States and Canada through the Uber Eats App. *The Starbucks app is accessible, and the easiest place to find a store, check hours, order ahead and have contactless payment.*[9]

But what are the nuts and bolts of these systems—how do mobile apps get developed, and what makes contactless payment work? This section will proceed in two parts. First, the technical aspects of these technologies will be explored. Second, an argument will be made that the ubiquity of this technology and the increasing ease-of-use associated with it will allow for use beyond companies like Starbucks and Apple and into the realm of smaller businesses—namely, franchisees—who, in an effort to avoid the percentage that they must pay to third-party apps, will begin developing their own mobile ordering apps.

A. *The Technical Aspects of Mobile and Contactless Payments*

In the United States, the method by which consumers pay via credit card had changed very little until a few years ago when the credit card industry made the switch from payment using the familiar magnetic strip on the back of the card to an embedded computer chip in the card, which was read

7. Greg Bensinger & Robin Sidel, *Can Apple Solve Riddle of Mobile Payments with Apple Pay Service?*, Wall St. J. (Sept. 9, 2014), https://www.wsj.com/articles/apple-introduces-payment-service-called-apple-pay-1410286677.

8. *See* Nilay Patel, *Apple Pay Hands-on: Is This the Future of Payments?*, Verge (Sept. 9, 2014), https://www.theverge.com/2014/9/9/6128371/apple-pay-hands-on ("I just spent some quick time using Apple Pay . . . and it's remarkably smooth.").

9. Heidi Peiper, *A How-To Guide for Digital Ordering at Starbucks*, Starbucks (May 20, 2020), https://stories.starbucks.com/stories/2020/a-how-to-guide-for-digital-ordering-at-starbucks (emphasis added).

by the credit card terminal and made transactions more secure.[10] Now, the industry has transitioned to a more convenient, and faster, method of credit card payment: cards with what are called "Near Field Communication," or "NFC," chips.[11] These cards can communicate with a credit card terminal and authenticate a purchase as long as the embedded card is a few inches from the terminal's reader; there is no need to insert the card, and the entire process is quick.[12] This NFC technology is the same technology that makes mobile payment from a smartphone possible.[13] When you load a credit card into your phone for use with Apple Pay or other contactless payment providers, you are essentially making a contactless payment.

The ease by which consumers can make contactless payments or tap to pay transactions has made them a popular choice for mobile app developers, who allow for mobile wallets, such as Apple Pay, to be integrated into their apps so consumers can easily pay. For example, shortly after it introduced Apple Pay in 2014, "Apple . . . announced a slew of partners for Apple Pay, including Subway, McDonalds, Disney, Walgreens, Macy's, Sephora, and of course, Apple's 258 retail stores. Partners like Groupon, Uber, and Pandora have also integrated Apple Pay to allow customers to pay from their apps without having to enter any payment information."[14] But now it is not just the biggest players—Uber, Groupon, Pandora, etc.—who use mobile apps that allow for payment using a stored card. Many smaller companies, namely restaurants, have opted into using mobile apps, usually third-party food ordering apps such as Uber Eats and DoorDash, in order to deliver their food and maintain a customer base.[15] However, using these third-party apps has a downside: the apps often take a percentage of the payment. For example, the fees that such third-party apps charge their restaurant clients were discussed in a recent article in the *Washington Post*, which noted a somewhat shocking example of the amount of money these apps take from restaurants:

> Diners and restaurant owners from across the country have become more aware of the issue during the [COVID-19] crisis. Giuseppe Badalamenti, owner of Chicago Pizza Boss and a restaurant consultant, posted a receipt from another

10. Bob Musinski, *How Do Contactless Credit Cards and Payments Work?*, U.S. News & World Rep. (June 13, 2019), https://creditcards.usnews.com/articles/how-do-contactless-credit-cards-and-payments-work ("EMV chip cards, which became widespread only a few years ago in the U.S., have dramatically cut down on the amount of counterfeit credit card fraud.").

11. *Id.*

12. *Id.*

13. *Id.* ("Contactless credit cards and mobile wallets use the same near-field communication technology to interact with the EMV point-of-sale terminal.").

14. Adrianne Jeffries, *Apple Pay Allows You to Pay at the Counter with Your iPhone 6*, Verge (Sept. 9, 2014), https://www.theverge.com/2014/9/9/6084211/apple-pay-iphone-6-nfc-mobile-payment.

15. *See* Heather Kelly, *To Save Their Neighborhood Small Businesses, People Are Rebelling Against Delivery Apps*, Wash. Post (May 13, 2020), https://www.washingtonpost.com/technology/2020/05/13/small-business-third-party-apps ("These apps have proved hugely useful to many restaurants suddenly unable to host diners and switching to delivery models, as well as laid-off workers desperate for work. For companies, the apps make it easier to reach a wide audience and conduct online sales despite the pandemic, and put a staff of delivery workers at their fingertips instantly.").

> restaurant he was working with that showed seemingly exorbitant fees from Chicago-based Grubhub. What started as a $1,042.63 in food sales was reduced to $376.54 after Grubhub fees for delivery, commission, processing, and promotions.[16]

What these high fees mean for small businesses like restaurants is this: as more and more restaurant and franchise operators begin to push back on the high fees collected by third-party delivery apps, the more that these operations will see value in trying to develop and be responsible for their own apps. These third-party fees also complicate the franchisor-franchisee relationship, which typically requires the franchisee to pay royalties on gross sales to its franchisor. Franchisees have argued that these third-party apps (and associated fees) are necessary for them to survive, but they reduce the gross sales on which they must remit royalties. Franchisors, however, have argued that these fees are no different than other expenses such as credit card fees, and therefore the royalty calculation is unaffected.

B. *Digital Development: Small Business Owners Will Begin to Go Their Own Way*

The cut of the profit that third-party mobile ordering apps like Grubhub take from small business owners has started the push towards these small businesses taking matters into their own hands and creating their own apps. The COVID-19 pandemic has only expedited this transition. For example, the New *York Times* reported recently on the transition to contactless payment, and the fact that cash is no longer as convenient as it once was—especially as people fear its germ-spreading potential.[17] As the article notes, "Cash was already being edged out in many countries as urban consumers paid increasingly with apps and cards for even the smallest purchases. But the coronavirus is accelerating a shift toward a cashless future, raising new calculations for merchants and enriching the digital payments industry."[18] And, as Visa itself has noted:

> While the full impact of COVID-19 on tap to pay adoption across the world is yet to be fully seen, early indications highlight a shift in consumer spend toward every day, essential segments where contactless usage is high such as grocery and pharmacy. In the U.S., this is leading to increasing awareness and usage among consumers who are looking to limit interaction during checkout time. *Tap to pay transactions in everyday segments in the U.S. including grocery and pharmacy has grown more than 100% year over year.* 31 million Americans tapped a Visa contactless card or digital wallet in March 2020, up from 25 million in November, with overall contactless usage in the U.S. growing 150% since March 2019. The U.S. now has the most contactless cards of any market globally . . . .[19]

16. *Id.*
17. Liz Alderman, *Our Cash-Free Future Is Getting Closer*, N.Y. Times (July 6, 2020), https://www.nytimes.com/2020/07/06/business/cashless-transactions.html.
18. *Id.*
19. *Merchants and Consumers Turn to Tap to Pay as Part of New Daily Routines*, Visa (Apr. 30, 2020), https://usa.visa.com/visa-everywhere/blog/bdp/2020/04/30/merchants-and-consumers-1588276426783.html (emphasis added).

Industry publications have also commented on the mobile payment trends in light of the COVID-19 pandemic.[20] These trends follow from the fact that physical money itself has literally become scarce during the pandemic, with some banks even providing incentives for people to bring in coins to help local businesses that need them.[21]

Although these articles recognize that the pandemic has hastened the shift to contactless and mobile payments, they do not account for the fact that the pandemic, coupled with the increasing third-party app fees, has created the perfect opportunity for smaller companies to begin venturing out on their own and creating company-specific apps with their own payment systems. What this means is that small businesses—attempting to stay financially viable during the pandemic when people are hesitant to shop indoors—are going to begin creating their own apps, which will allow them to manage orders and payments without having to pay a third-party company. In the franchise realm, franchisees will begin pushing for these types of apps, and franchisors will be pressured to develop them, or let the franchise owners work on the apps themselves. With these changes, there will be an increase in apps and all that comes with them: more and more companies and franchises will offer customer accounts, rewards programs, and loyalty benefits.[22] For example, McDonald's offers mobile ordering through its app, which detects when the customer is close to a restaurant and suggests the nearest location for pickup.[23] Outside of the food industry, companies are coping in similar ways; for example, Molly Maid, a residential cleaning service, is offering virtual scheduling and estimation.[24]

QR-code-based ordering systems have also been gaining steam amidst the pandemic. These systems allow customers to scan a QR code with their

20. *See* Jessica Shelcusky, *How the Pandemic Solidified Contactless Payment*, Fast Casual (May 4, 2020), https://www.fastcasual.com/blogs/how-the-pandemic-solidfied-contactless-payment/ ("Here in the U.S., mobile payments are on the rise with 47% of consumers expected to be using mobile payment and digital wallets this year. Approximately half of American stores—about five million locations—accepted Apple Pay in 2018, while about four million locations took Google Pay. The number of stores accepting Apple Pay was up 50% from the year before, and up considerably from the 3% that accepted Apple Pay just five years ago.").

21. Alaa Elassar, *A Bank is Paying People to Bring in Their Spare Change to Help Local Businesses Amid the Coin Shortage*, CNN (July 22, 2020), https://www.cnn.com/2020/07/19/us/coin-shortage-banks-paying-trnd/index.html ("The coin shortage is one of the many consequences of the partial closure of the economy, which halted the flow of coins. As banks and businesses shuttered or changed the way they operate, there are now fewer coins reaching the public. Some national retailers—including Wawa and CVS—are asking customers to pay with exact change or offering programs through which customers can donate their change to charity.").

22. Such perks are very common in mobile payment apps. *See id.* ("When tightly integrated with a loyalty program, mobile payments help restaurants and retailers capture information about consumer buying habits and, consequently, develop closer digital relationships with customers. In fact, mobile payments and loyalty go hand-in-hand.").

23. McDonald's Mobile Order & Pay, https://www.mcdonalds.com/us/en-us/mobile-order-and-pay.html (last visited Aug. 10, 2020).

24. Molly Maid, *Molly Maid Pivots Amidst COVID-19 Concerns and Introduces New Contactless Services*, Franchising.com (June 30, 2020), https://www.franchising.com/news/20200701_molly_maidreg_pivots_amidst_covid19_concerns_and_i.html.

phone in order to see a menu[25] or pull up drink buttons on their phones that mimic the physical self-serve beverage stations and allow the customer to "pour" his or her own drink.[26] The developers behind the mobile app Glyde, which allows customers to look at menus on their phones and order from them as well, have lofty ambitions that demonstrate the increasing significance of these technologies and this mobile ordering and mobile payment model. According to Glyde, the app is its "vision to automate the ordering and payment process within various food establishments. In time, we want to make our app the only one you use to order food no matter where you go."[27]

This model seems like a viable way for franchisees to survive during and after the pandemic, as fears over close interactions continue. With mobile apps and mobile payments, consumers will be able to buy and interact with their favorite brands and stores while maintaining distance and limiting their exposure to the coronavirus; and they will enjoy the perks of earning points and other loyalty incentives. However, new added responsibilities will come with franchisees and other small business owners maintaining their own apps, and these responsibilities will change the way franchise agreements are structured. The next two sections of this article highlight those responsibilities, and the risks that accompany them, and discuss the coming changes to franchise agreements as a result in the future uptick in mobile payment demand.

II. The Data Security Risks of Mobile Apps and Contactless Payment Systems

In March 2020, Marriott International experienced a significant data breach of one of its internal systems, a system that kept track of guest data and that had information on guest loyalty accounts.[28] As the company noted in its release acknowledging the breach: "Hotels operated and franchised under Marriott's brands use an application to help provide services to guests

25. *See FAQ: What Is Glyde?* Glyde, https://glyde.app/faq.html (last visited Aug. 10, 2020).

26. Micah Robinson, *How Drive-Thru Restaurants Can Thrive in the Age of Social Distancing*, QSR (July 2020), https://www.qsrmagazine.com/outside-insights/how-drive-thru-restaurants-can-thrive-age-social-distancing, ("One cherished feature of quick-serves—the self-service beverage dispenser—is quickly evolving to the no-touch paradigm as well. Leading soft-drink manufacturers have enabled QR-based technology on their flagship dispensers in order to allow customers to order their favorite drinks on-demand without physically interacting with the equipment in any way. They can hold their personal smartphone camera to the dispenser's display to scan the QR code. Once scanned, it replicates the dispenser's user interface on their screen. That makes it intuitive, safe, and seamless for them to choose from the full menu of brands and flavors on offer. The dispenser does the rest, then offers a full cup of the customer's choice beverage for them to pickup.").

27. *FAQ: What Is Glyde*, *supra* note 25.

28. Taylor Lyles, *Marriott Discloses Another Security Breach That May Impact Over 5 Million Guests*, Verge (Apr. 1, 2020), https://www.theverge.com/2020/4/1/21203313/marriott-database-security-breach-5-million-guests ("Personal information such as names, birthdates, and phone numbers may have been taken in the breach, along with language preferences and loyalty account numbers.").

at hotels. At the end of February 2020, the company identified that an unexpected amount of guest information may have been accessed using the login credentials of two employees at a franchise property." This data breach of customer data is just the latest in a string of high-profile breaches in the past two decades. For example, after its massive data breach nearly two years ago, which affected the sensitive credit-related data of 143 million Americans, Equifax agreed to a large settlement with the Federal Trade Commission that saw them dedicate approximately $425 million to assist those whose data had been compromised in the breach.[29] In 2018, Minnesota-based coffee chain Caribou Coffee experienced a data breach, which did not affect its customer loyalty accounts, but did nonetheless potentially expose customer names and credit card information from 265 of its stores.[30] In 2012, Barnes & Noble experienced a similar data breach of customer data at a number of its stores.[31] And, in 2016, the restaurant chain Wendy's experienced a similar breach.[32] These breaches reveal the dangers that accompany the benefits of having easy payment methods and account information at the fingertips of consumers. When all of that data is out there, it can be easily accessed for good reasons—when it is used for the purchases that it was intended to facilitate. But it can also be accessed for bad reasons—when hackers and others get it to extract money or other reward from unwitting consumers.[33]

When franchisees and other small business owners adapt to the business disruptions brought about by COVID-19, these dangers become magnified.

29. Tara Siegel Bernard, Tiffany Hsu, Nicole Perlroth & Ron Lieber, *Equifax Says Cyberattack May Have Affected 143 Million in the U.S.*, N.Y. Times (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/business/equifax-cyberattack.html ("The attack on the company represents one of the largest risks to personally sensitive information in recent years, and is the third major cybersecurity threat for the agency since 2015."); Tara Siegel Bernard, *Equifax Breach Affected 147 Million, but Most Sit out Settlement*, N.Y. Times (Jan. 22, 2020), https://www.nytimes.com/2020/01/22/business/equifax-breach-settlement.html ("Roughly two years ago, nearly half the American population had their personal information compromised by hackers in Equifax's enormous database."); *Equifax Data Breach Settlement*, Fed. Trade Comm'n (Jan. 2020), https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement.

30. Martin Moylan, *Caribou Coffee Says Data Breach Exposed Customer Info*, MPR News (Dec. 20, 2018), https://www.mprnews.org/story/2018/12/20/caribou-coffee-says-data-breach-exposed-customer-info.

31. Michael S. Schmidt & Nicole Perlroth, *Credit Card Data Breach at Barnes & Noble Stores*, N.Y. Times (Oct. 23, 2012), https://www.nytimes.com/2012/10/24/business/hackers-get-credit-data-at-barnes-noble.html, ("Hackers have stolen credit card information for customers who shopped as recently as last month at 63 Barnes & Noble stores across the country . . . .").

32. Dave Lee, *Food Chain Wendy's Hit by Massive Hack*, BBC (July 8, 2016), https://www.bbc.com/news/technology-36742599.

33. *See* David B. Ramsey, *Data Security: Evolving Legal Duties and Challenges for Franchise Systems*, 20 J. Internet L. 3, 7 (2016) ("In today's networked world, a signature aspect of contemporary franchising is that the franchisor often will impose certain requirements for types of computer systems or software that franchisees must use for certain purposes in their businesses. The purpose of imposing uniformity of such systems or software is to protect the brand and achieve efficiency and uniformity throughout the franchise system. Uniformity is something that franchise systems strive for, naturally, as part of having a strong, identifiable brand. However, with the uniformity in franchise systems comes the danger of responsibility on the part of the franchisor should a problem arise with regard to those computer systems, software programs or practices that it mandates.").

Franchisees and other business owners will, now and in the future, turn to these mobile payment platforms—mobile apps, rewards and loyalty programs, contactless payment, etc.—to keep business alive as consumers will be wary about in-store and in-person interactions for years to come since the pandemic, and the fear that accompanies it, show little signs of abating.[34] As the *Wall Street Journal* noted recently, "Executives who were bracing for a months-long disruption are now thinking in terms of years. Their job has changed from riding it out to reinventing. Roles once thought core are now an extravagance. [35] Strategies set in the spring are obsolete."[36] As these business owners and franchisees turn towards these mobile ordering and payment systems, they will have an increasing amount of customer data to handle and protect. In their haste to survive the pandemic, these companies could potentially overlook the serious risks that are associated with handling so much data—risks that are evident in the myriad of data breaches over the last two decades, only a few of which were mentioned above.

Recent articles and scholarship on data security risks summarize the dangers well. For instance, since the entire franchise system is, in its simplest form, a party (the franchisor) allowing other parties (franchisees) to use its trademarked and proprietary methods and material, if a franchisee were to suffer a security breach, the franchisor—and the brand as a whole—could be negatively impacted, even if the security breach had nothing to do with the franchisor and was entirely the doing of one franchisee in the system.[37]

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34. *See*, *e.g.*, Chip Cutter & Doug Cameron, *U.S. Companies Lose Hope for Quick Rebound from Covid-19*, Wall St. J. (July 19, 2020), https://www.wsj.com/articles/u-s-companies-lose-hope-for-quick-rebound-from-covid-19-11595151000?mod=hp_lead_pos1 ("The fierce resurgence of Covid-19 cases and related business shutdowns are dashing hopes of a quick recovery, prompting businesses from airlines to restaurant chains to again shift their strategies and staffing or ramp up previous plans to do so. They are turning furloughs into permanent layoff, de-emphasizing their core businesses and downsizing production indefinitely."); Jan Hoffman, *Mistrust of a Coronavirus Vaccine Could Imperil Widespread Immunity*, N.Y. Times (July 18, 2020), https://www.nytimes.com/2020/07/18/health/coronavirus-anti-vaccine.html, ("A growing number of polls find so many people saying they would not get a coronavirus vaccine that its potential to shut down the pandemic could be in jeopardy.").

35. Cutter & Cameron, *supra* note 34.

36. *Id*.

37. Ramsey, *supra* note 33 ("For franchisors, the cost to reputation can be particularly grave. That is because franchisors' most essential assets are their brands, and the goodwill engendered thereby . . . a breach at the franchisee level, having little or nothing to do with actions by the franchisor, may cause immense harm to the reputation of the entire brand in the eyes of the public, and can have an immediate and drastic impact on the entire franchise system."); Morgan Ben-David, *Managing Catastrophic Risks in Franchise Systems*, 38 Franchise L.J. 207, 212–13 (2018) ("Franchises, specifically, remain an appealing target for hackers, due to customer data being collected from multiple entry points, including at each company-owned and franchised unit, as well as at each point of sale or computer terminal at each unit. Information collected also includes private data on franchisees and employees. Therefore, when a franchise falls victim to a cyber-attack or data security breach, the consequences can quickly have a domino effect throughout the system. To make matters worse, once hackers attack a merchant's point of sale system, it can often take months for a company to discover that its network (along with their customers' private information) has been compromised. The damage from these malicious cyber-attacks can have devastating effects on a franchise system's reputation and sales.").

These risks are particularly prone to happen in franchise systems that have smaller, less financially stable franchisees:

> Especially vulnerable are small- and mid-sized franchised businesses. Many of these small- and mid-sized businesses are not large enough on their own, or knowledgeable enough about basic data security practices, to have and to implement sophisticated data security defenses. The technology networks that franchisors use to collect and transmit business data (e.g., sales tracking, royalty payments, customer credit card information) are only as secure as their "weakest link," and the computer systems of franchisors often are linked to the systems of their franchisees. Thus, a single franchisee that has not invested the time or money necessary to ensure its computer systems are protected, can compromise a whole franchise system.[38]

And these smaller franchisees are the ones most likely to quickly adopt mobile apps, contactless payment systems, and other measures to survive the pandemic.[39] In other words, the parties who were already the most vulnerable to data and security breaches prior to the pandemic are the ones who are likely to be even more at risk as the need to survive financially necessitates rapid development of tools that allow for remote customer and consumer interaction. So how will franchisors and franchisees respond to this inevitable shift towards mobile payments and mobile ordering systems? The next section of this article will provide some guidance on what franchisors can expect in the future as the business disruptions from COVID-19 continue.

III. How the Franchise System Will Respond to the Increase in Mobile Ordering, Mobile Payment, and Other Mobile-Based Infrastructure

As previously stated, the heart of the franchise system is the licensing of intellectual property by the franchisor to the franchisee. The franchisee is licensed to use the franchise trademarks, branding, merchandise, advertisements, and other products to open a franchise location. This license allows the franchise business to grow quickly and with little financial involvement by the franchisor because the franchisee remains, essentially, its own small business. In this regard, the franchise agreement has always been the fundamental contract that protects the intellectual property of the franchise. Since the franchise agreement is so fundamental to the franchise system, it is a fitting place to include added protections for both the franchisor and the franchisee as the disruptions from COVID-19 force many franchisees to wrestle with the lack of in-person contact that used to be so essential for business.

Franchise agreements may utilize three key ways to address the risks associated with mobile payment systems and apps and their increased use during and after the pandemic. First, the franchise agreement can demand

38. Ramsey, *supra* note 33.

39. *See* Amy Haimerl, *Staying Nimble: How Small Business Can, and Do, Shift Gears*, N.Y. Times (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/business/coronavirus-small-businesses-adapt.html.

cybersecurity insurance and put forth who, the franchisor or the franchisee, owns the customer data generated by all of the digital interaction of apps and online ordering. Second, the agreement can require that the infrastructure that makes mobile payments and ordering possible be up-to-date. This requirement could, importantly, mean that franchisors might need to raise, or require for the first time, a franchise-technology fee owed by the franchisee to update and maintain this infrastructure. Finally, the agreement should include an "invention" clause, so the franchisor can benefit from the innovations that its franchisees might develop in response to the pandemic.[40]

A. *Mandating Cybersecurity Insurance in the Franchise Agreement*

Cybersecurity insurance protects against various risks associated with maintaining a digital presence in the business world, and, as indicated earlier, those risks are significant. Succinctly, this type of insurance can be described in this manner:

> Cybersecurity insurance is designed to mitigate losses from a variety of cyber incidents, including data breaches, business interruption, and network damage. A robust cybersecurity market could help reduce the number of successful cyberattacks by: (1) promoting the adoption of preventative measures in return for more coverage; and (2) encouraging the implementation of best practices by basing premiums on an insured's level of self-protection.[41]

Franchisors should consider two important aspects in mandating cybersecurity insurance in their franchise agreements. First, and perhaps most importantly, the insurance should include coverage for business-continuity issues that might arise by a network outage. As more and more systems go online amidst the pandemic, having insurance for when one of these online systems goes down is important to maintaining revenue. No business wants to have to shut down and lose money because of a system outage. But it does happen, and having insurance can relieve some of those losses. Second, as businesses move to more electronic business models, cybersecurity insurance policies should address the crime and fraud risks of an all-digital environment. Closely related to this point is the necessity for any cybersecurity insurance policy to protect against the loss of personal or financial information stored in these digital systems.

The key benefit to mandating cybersecurity insurance in the franchise agreement is the possibility, reflected in the definition above, that requiring it would lead to franchisees adopting preventative measures on their

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40. *See* Michael Gray, *Revisiting Franchise Agreements in Light of Covid-19*, Law360 (Apr. 2, 2020), https://www.law360.com/articles/1258162/revisiting-franchise-agreements-in-light-of-covid-19, ("Creative franchisees find a way to be successful in difficult times. Many develop unique processes, procedures, products and methods to overcome adversity and stay in business. No doubt, countless franchisees are developing ways to keep their businesses operating despite the challenges presented by COVID-19. Some of these methods of operation could become the 'new norm' in the future.").

41. *Cybersecurity Insurance*, Cybersecurity & Infrastructure Sec. Agency (June 22, 2015), https://www.cisa.gov/cybersecurity-insurance.

own to reduce premiums. Just as car insurance companies offer discounts for safe driving—and often can directly monitor one's driving—cybersecurity insurance companies could encourage lower rates by helping franchisees implement greater safety measures. These measures may include keeping employees knowledgeable about keeping their passwords private and making sure that the software is up to date.[42] By mandating cybersecurity insurance in the franchise agreement, franchisors would not only be helping limit their out-of-pocket costs, they would also be raising awareness of preventative measures that can be taken to reduce risks (and premiums). This awareness is especially important for franchisees and other businesses that are new to the mobile app and mobile ordering ecosystem—those franchisees and businesses that have had to adopt these new programs in order to survive the pandemic and the post-pandemic future.[43] Exploring and discussing these options during the franchise agreement negotiations will be a step in the right direction as franchisees and other small business owners continue to adapt their business to meet customer needs during the pandemic.[44]

B. *Insisting That Infrastructure Be Up-to-Date*

Closely related to having security measures in place to keep cybersecurity premiums as low as possible is the need to keep essential infrastructure—the physical components that keep mobile systems operating—up-to-date. This is the hardware equivalent of keeping system software on the latest version. Larger business and franchisees are probably more financially well-equipped to keep their infrastructure up to date, and any requirement can easily be supplemented by the franchisor requiring that the franchisee pay

42. *See* Dennis Nishi, *The Ins and Outs of Cybersecurity Insurance*, Wall St. J. (June 4, 2019), https://www.wsj.com/articles/the-ins-and-outs-of-cybersecurity-insurance-11559700180 ("How much network security a company has can also influence premiums. Insurance companies will often ask companies to detail what kind of security they have during the application process, such as whether employees have been trained to recognize cyber fraud or if company software is routinely updated. Insurers also want to know how frequently companies change their passwords and how much network access third-party vendors and service providers have.").

43. The pandemic has amplified the need for small businesses owners, including franchisees, to expand on their knowledge in order to keep their businesses afloat in these uncertain times. *See* Steve Nicastro, *25 Best Small-Business Apps*, Nerd Wallet (Apr. 21, 2020), https://www.nerdwallet.com/article/small-business/20-apps-small-business-owners ("Problem solver. Communicator. Financial whiz. Running a small business involves wearing a lot of hats. If you're looking to increase productivity and organization—or just make your life as an entrepreneur a little easier—a good business app might be just what you need.").

44. *See* David J. Baldwin, Jennifer Penberthy Buckley & D. Ryan Slaugh, *Insuring Against Privacy Claims Following a Data Breach*, 122 Penn. St. L. Rev. 683, 706 (2018) ("[T]here are myriad risks confronting companies relating to privacy claims that are asserted following a cybersecurity event. As with most risk, prudent businesses should seek, and in some cases may be required, to hedge against those risks through insurance coverage. These risks, however, are relatively new and are rapidly developing as a result of new technology and responsive legislation that has given rise to new liabilities. These developments have made potential damages extremely difficult to predict. Because the policies underwriting these risks are similarly new and developing, it can be difficult for companies to know what type of coverage they should employ to cover their bases.").

additional technology fees.[45] It might not be possible for a smaller franchisee to maintain infrastructure to the degree needed to keep data safe, especially if, as will probably most often be the case, that franchisee is using third-party systems to host its mobile capability (think GrubHub or the use of third-party payment terminals such as Square). However, this requirement can still be useful to have in the franchise agreement. By the franchisor insisting that system infrastructure be up-to-date, the franchisee will have reason to inquire about the security measures of the third-party systems that it uses. In other words, each party holds the other accountable in some way, even if indirectly.

C. *Future Franchise Agreements Should Include an Invention Clause*

This concept is not new: franchisors should put into their franchise agreements a clause that at least puts forth who owns what in terms of innovations or inventions that the franchisee puts in place down the road to maintain business during the pandemic.[46] Doing so would not only allow franchisors to have access to valuable customer data that is a byproduct of mobile information systems, but it would also ensure that franchisors benefit from any future innovations franchisees develop.[47] At the very least, having contract language that spells out who owns what would be beneficial, even if the financial windfall does not go to the franchisor. The clarity that such a clause would bring would limit fights and litigation in the future. The future of the pandemic is unknown—having clarity is always beneficial.

Invention clauses are not necessarily new, but, in light of COVID-19 and the increase in small businesses and franchisees having to adapt to the new normal, their presence will become more prevalent, and their wording all the more important. For example, see the following invention clause from the Rocky Mountain Chocolate Factory:

> All copyrightable works created by the Franchisee or any of its owners, officers or employees in connection with the Store shall be the sole property of the Franchisor. The Franchisee assigns all proprietary rights, including copyrights, in these works to the Franchisor without additional consideration. The Franchisee hereby assigns and will execute such additional assignments or documentation to effectuate the assignment of all intellectual property, inventions, copyrights and trade secrets developed in part or in whole in relation to the Store, during the term of this Agreement, as the Franchisor may deem necessary in order to enable it, at its expense, to apply for, prosecute and obtain copyrights, patents or other proprietary rights in the United States and in foreign countries or in order to transfer to the Franchisor all right, title, and interest in said property. *The Franchisee shall promptly disclose to the Franchisor all inventions, discoveries, improvements,*

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45. *See generally* Keith Gerson, *Tech Fees by the Numbers*, Int'l Franchise Ass'n (July 18, 2019), https://www.franchise.org/franchise-information/technology/tech-fees-by-the-numbers.

46. Gray, *supra* note 40.

47. *Id.* ("If the franchise agreement does not have a provision whereby the franchisee automatically assigns these new 'inventions' to the franchisor, it may be difficult for the franchisor to adopt them and roll them out to the entire franchise system. Adding such a provision could eliminate disputes about who owns the 'invention' in the future.").

> *recipes, creations, patents, copyrights, trademarks and confidential information relating to the Store which it or any of its owners, officers or employees has made or may make solely, jointly or commonly with others and shall promptly create a written record of the same. In addition to the foregoing, the Franchisee acknowledges and agrees that any improvements or modifications, whether or not copyrightable, directly or indirectly related to the Store, shall be deemed to be a part of the Licensed Methods and shall inure to the benefit of the Franchisor.*[48]

The italicized language of this example provides a good starting point for how franchisors might phrase invention clauses in light of innovations developed by franchisees to respond to COVID-19. The increased use of mobile technologies by franchisees is likely just the beginning; expect more innovations from franchisees in the future as businesses are forced to confront the lingering presence of the pandemic.

IV. Conclusion

The COVID-19 pandemic has created shockwaves that have spread throughout the entire U.S. economy. No one, and no business, have been spared from the devastating consequences of the pandemic. People are rightly wary of in-person and in-store interaction and are looking for ways to limit contact so as not to contract, or spread, the virus. Even if a vaccine becomes available, these fears will undoubtedly remain. These economic trends have forced mobile apps and mobile payments to proliferate. These technologies were already on the rise, but the pandemic has only hastened their arrival, driving the economy towards a truly cashless future—and a future where every business has a stake in the mobile app game and the loyalty points, customer accounts, and consumer data collection that comes with it. Franchise systems will have to adapt to these changes because the risks that accompany such technologies are significant. By keeping cybersecurity insurance, updating infrastructure regularly, and putting an invention clause into franchise agreements, franchisors should be well protected from the pandemic's significant business disruptions.

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48. *Rocky Mountain Chocolate Factory, Inc. Franchise Agreement*, SEC, https://www.sec.gov/Archives/edgar/data/785815/000095013405013229/d26962exv10w4.htm (last visited Aug. 10, 2020).