

Chapter 6

E–Business Goes Mobile: A Fiduciary Framework for Regulating Mobile Location Based Services

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ABSTRACT

Where others have remarked on the possible fiduciary regulation of e-commerce in general, this chapter makes a more specific and demanding normative claim; notably, that we in fact ought to regulate Mobile Location Based Services (MLBS) along fiduciary lines. Part I describes the limited-access nature of fiduciary relationships and the conditions of peculiar vulnerability and dependence that attract fiduciary obligations. Part II explains the dynamics of user-provider relationships in MLBS environments and argues that the conditions present therein generate fiduciary obligations. Part III describes and addresses a likely criticism; in particular, that the imposition of fiduciary obligations on MLBS providers is morally incompatible with the special fiduciary status rightly and already afforded to equity holders. In response, I argue that those who argue along these lines tend to confuse a manager's nominate function with their strict fiduciary duty to refrain from the opportunistic exploitation of those they serve.

INTRODUCTION

The growth and power of mobile technologies has moved well beyond the realm of simple telecommunication. Current mobile devices are vast storehouses and organizers of information, holding our calendars, to-do lists, photos and music collections, as well as important documents, and databases. Additionally, mobile social network applications

and Global Positioning System (GPS) enabled devices have spurred the growth of robust mobile communities where users create complex digital identities, make friends, tweet and blog, and collect and share various forms of digital media. Indeed, because of such applications, mobile phones are now the largest technology platform on the planet; and, this is just the beginning. Hardware advances promise “smart” phones that will have the same power as desk top computers. Access to broadband third and fourth-generation networks and the advent

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of ubiquitous and cloud computing and Mobile 2.0 technologies are among the drivers of significant and rapid technological innovations. With prevailing market conditions driving down costs and promises of over 5 billion worldwide mobile subscribers expected by 2011, the implications for e-business and the opportunities for a variety of mobile location based services (MLBS) are profound (Infonetics Research, 2008). Some of the hotly anticipated services include location-based advertising, mobile social networking platforms, and the development and use of mobile social mapping technologies.

As profound, however, are the concerns about user privacy and, in particular, the potential for the opportunistic exploitation of sensitive user information in MLBS networks (Ardagna, Cremonini, Damiani, De Capitani di Vimercate, and Samarati, 2008). Where others have remarked on the possible fiduciary regulation of e-commerce in general, this chapter makes a more specific and demanding normative claim; notably, that we *ought to* regulate MLBS along fiduciary lines. The first section describes the limited-access nature of fiduciary relationships and the conditions of peculiar vulnerability and dependence that attract fiduciary obligations. The second section explains the dynamics of user-provider relationships in MLBS environments and argues that the conditions present therein generate fiduciary obligations. Finally, the third section of the paper describes and addresses a likely criticism; in particular, that the imposition of fiduciary obligations on MLBS providers is morally incompatible with the special fiduciary status rightly and already afforded to equity holders.

PECULIAR VULNERABILITY AND DEPENDENCE

Given our limitations (e.g., limited time, resources, knowledge or cognitive capacities), we often must rely on others to act on our behalf. Decisions regarding proper medical treatment, legal ques-

tions, and retirement investments, for example, are typically best handled by soliciting and following the respective opinions of doctors, lawyers, and mutual fund managers. Yet, benefiting by these sorts of dependencies also requires that we entrust others with limited-access to sensitive information (e.g., our medical history, details of potentially incriminating events, and financial assets and liabilities) and grant limited control over something that we value (e.g., our health, legal status, and capital) for a limited purpose (e.g., medical care, legal defense, or retirement investing). While we certainly hope that those who are granted this limited-access and control will in fact act in our best interests, the fear of opportunistic exploitation looms. We find that just as doctors, lawyers, and money managers are certainly in privileged positions to offer helpful or even quite necessary services, they are likewise in positions where they can take advantage of beneficiary trust.

With this in mind, the conventional imposition of fiduciary obligations has a clear purpose: to control opportunism in limited-access arrangements, under which the professional relationships mentioned above and other similarly structured relationships (e.g., between legal guardians and wards) necessarily fall (Flannigan, 2004). Contracts, legislation, or professional codes can thus recognize the fiduciary status of those entrusted with limited-access to another's property or assets, in which the other party is recognized as the beneficiary of the fiduciary's service. The designation of fiduciary status will then carry the highest expectations for fiduciary honesty, care, and loyalty and stand in sharp contrast with typical market relationships in which all parties are assumed to act out of their own self-interest (*Meinhard v. Salmon*, 1928). Although the bounds of fiduciary obligations and the proper utilization of fiduciary metaphors are highly contested, it is generally expected that fiduciaries are obliged to forgo opportunistic behavior, to obtain no material gain without consent, and to avoid or otherwise disclose potentially conflicting interests with third-parties. Fiduciary obligations are therefore quite

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