



## **Pokestop And Think: Risks Of Augmented Reality For Retailers**

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Law360, New York (August 8, 2016, 3:54 PM ET) -- "Pokemon Go," a game available on Apple and Android mobile devices, has taken the world by storm since its July 6 release. "Pokemon Go" is an "augmented reality" game: it integrates with a mobile device's geolocation and camera functionalities to superimpose Pokemon characters and points of interest, such as "Pokemon Gyms" and "Pokestops" (more on those later), onto real-world surroundings. This groundbreaking technology, coupled with its availability for download free of charge, has made the mobile application wildly popular.

"Pokemon Go" has set download records for both Apple and Android, and, within one month of its release, was downloaded over 100 million times worldwide. "Pokemon Go" and other augmented reality games offer opportunities for shopping center owners to attract more retail customers, but they also raise the possibility of security problems and increased liability risk.



at a Pokestop to "buy"

"Pokemon Go" users roam their communities in an effort to collect Pokemon characters scattered through the virtual landscape and visit "Pokemon Gyms" (virtual locations where users can "train" the characters they have collected and cause their characters to "battle" other users' characters in real time) and "Pokestops" (virtual stores where users can acquire items needed to play the game). Pokemon Gyms and Pokestops are real world locations that have been designated as virtual landmarks by the game's developer, and users must be physically present at a Pokemon Gym to "engage in battle" or

virtual supplies for catching Pokemon characters. As examples, the fast food restaurant down

the street from your house may be a Pokemon Gym, and the water fountain outside your office building may be a Pokestop.

Noting the app's widespread popularity and its potential to generate significant foot traffic through the search for Pokemon characters, Pokemon Gyms and Pokestops, retailers have begun exploring ways to attract potential customers to their stores, both by using "Pokemon Go's" in-game features and creating various promotions and discounts centered around the game. Some retailers and shopping centers may already be designated as Pokemon Gyms and Pokestops by chance, in which event such retailers or shopping centers have likely seen increased visitors as a result of such designations (whether they know it or not). In addition, the game's developer has also begun selling Pokemon Gym and Pokestop designations to retailers as part of sponsorship packages, with McDonald's Corp. being the first sponsor to ink such a deal. Under the McDonald's sponsorship deal, 3,000 McDonald's locations in Japan were designated as Pokemon Gyms in exchange for the purchase by McDonald's of advertising on the "Pokemon Go" app. In the future, shopping center owners and/or other retailers may consider entering into similar sponsorships with the game's developer (or other developers of augmented reality games) in order to attract users. Retailers and/or shopping centers that are not designated as Pokemon Gyms or Pokestops and do not wish to purchase a sponsorship can still attract users by purchasing "lure modules" within the game; lure modules allow a retailer or shopping center owner (or any other user) to cause a high concentration of Pokemon characters to populate at a retail establishment or shopping center (or any location of the user's choice), attracting "Pokemon Go" users (i.e., potential customers).

Based on the success of "Pokemon Go," augmented reality games seem to be here to stay and will probably be incorporated into the marketing strategies of both retailers and shopping center owners in the future. Shopping center owners that acquire Pokemon Gym or Pokestop status as part of a sponsorship may not only reap the benefits resulting from increased foot traffic, such as increases in percentage rent and in the overall success of retailers located at the shopping center, but such a designation may actually be a selling point for shopping center owners in attracting new tenants. Shopping center owners may even be able to pass through some or all of the sponsorship costs as part of marketing or promotional charges (to the extent permitted under applicable lease provisions).

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However, although the potential advantages of "Pokemon Go" for retailers and shopping center owners may prove significant, shopping center owners should also be aware of the enhanced risks and novel legal implications associated with "Pokemon Go" use in their shopping centers. For example, shopping center owners may be exposed to growing numbers of personal injury claims by inattentive gamers and additional instances of loitering and crime.

With respect to personal injury claims, "Pokemon Go" by its nature requires users to focus their attention on the screens of their mobile devices while exploring often busy areas open to the public, including shopping centers. As a result, users may be less likely to notice a crack in the sidewalk, a car reversing in a parking lot or even other shopping center patrons. The fact that two San Diego users recently fell down a cliff while playing "Pokemon Go" is illustrative of the inherently distracting nature of the app.

While the increased foot traffic generated by the hunt for Pokemon characters at retail establishments and the designation of such establishments as Pokemon Gyms and Pokestops may indeed increase sales for retailers, it is also likely to result in loitering by users who have no intention of shopping. Among other things, such users may utilize valuable parking spaces that would otherwise be available to paying shoppers and, as some major tenant leases may contain provisions requiring the shopping center owner to reasonably prevent or police loitering activity, nonshopping users may cause shopping center owners to expend additional resources or incur additional costs in regulating such activity.

Although the link between "Pokemon Go" play and increased criminal activity may seem remote, there have been some alleged instances of criminals luring users to particular locations using the game's features in order to commit crimes against them (e.g., theft and even assault). In some instances, a shopping center owner may wish to consider implementing enhanced safety measures to protect against criminal activity.

In order to protect themselves with respect to the foregoing risks, shopping center owners should take several precautions. First, with respect to personal injuries that might occur in the shopping center common areas as a result of "Pokemon Go," shopping center owners should confirm that they have adequate policy limits under their commercial general liability policies

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covering such common areas. In addition, shopping center owners should also confirm that the insurance provisions of their leases require their tenants to maintain commercial general liability insurance with sufficient policy limits and adequate coverage in connection with the operation of such tenants' leased premises, and that their tenants are in fact maintaining the required insurance per the terms of their leases.

In negotiating leases with prospective tenants, shopping center owners should try to eliminate (or at least limit) indemnity obligations in favor of tenants for injuries occurring in the common areas of the shopping center so as to avoid becoming potentially liable to tenants for "Pokemon Go"-related injuries that may occur in the common areas. Shopping center owners should also confirm that their leases include appropriate landlord liability waivers for activities within tenants' premises and that tenants' indemnity obligations to the landlord are broad enough to cover any potential "Pokemon Go"-related injuries that may occur at the leased premises. Additionally, shopping center owners wishing to regulate "Pokemon Go"-related promotions at their properties should attempt to include a provision in their tenants' leases that requires such tenants to obtain the shopping center owner's prior approval before engaging in any such promotions.

In some instances where shopping center owners actively attract "Pokemon Go" users (either through Pokemon Gym or Pokestop sponsorships or the use of lure modules), such shopping center owners may increase their obligations to provide security measures and prevent other dangerous conditions. Such shopping center owners should ensure that they implement reasonable security measures to meet any increased risks posed by "Pokemon Go" traffic and should attempt to remove dangerous conditions which would seem to be particularly likely to injure a user focusing on his or her phone screen as opposed to his or her surroundings.

Shopping center owners may also consider posting signage and/or enlisting security personnel to remind patrons to be mindful of their surroundings, or limiting "Pokemon Go" use to certain safer areas of the shopping center. In addition, shopping center owners may require, through shopping center rules and regulations, that tenants that actively attract "Pokemon Go" users (whether through sponsorships, special promotions or otherwise) impose similar safety and security measures.

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"Pokemon Go" and other augmented reality games appear to be here to stay, and retailers have already employed, and will continue to find new ways to use, "Pokemon Go" as a tool to attract potential customers. While increased shopping center foot traffic resulting from "Pokemon Go" and retailer promotional efforts around the game can certainly have positive impacts on a shopping center, shopping center owners should be mindful of the potential risks posed by "Pokemon Go" use on their properties. Shopping center owners should also keep in mind that as augmented reality games continue to grow in popularity and become fixtures of modern society, legal issues surrounding such games will continue to develop and arise in new and often unforeseen ways. As a result, legal approaches and solutions to such novel issues will continue to evolve.

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