**Overview of New Provisions on Sale of Personally Identifiable Information**

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A potentially valuable asset of any company that deals directly with consumers is the personal information that the company gathers and maintains about its individual customers. Historically, this "customer list" information has been considered to be a company asset, property of a bankruptcy estate and freely transferable either inside or outside of a bankruptcy proceeding. However, along with the development of Internet commerce have come privacy concerns regarding the potential transfer or release of personal information gathered and maintained by "dot.com" and e-commerce companies, especially given the ease with which substantial private information may be gathered. While these information gatherers frequently have privacy policies posted on their web sites that may state that personal information will not be transferred, privacy concerns and creditors' goals collide when a debtor-in-possession or trustee considers how to deal with this consumer information. In recent years, attempts to transfer this personal information have come under considerable attack on privacy grounds.

The recently signed Bankruptcy Abuse Prevention And Consumer Protection Act of 2005 (BAPCPA) contains provisions that regulate the ability to transfer customer personal information. As discussed below, the legislation leaves a number of significant open issues and will require interesting structural and procedural decisions by buyers and sellers.

**Personally Identifiable Information**

The BAPCPA adds a statutory framework to regulate the transfer of certain "personally identifiable information" (PII) relating to individuals that is in the possession of a debtor. Specifically, the BAPCPA amends the Code to include (a) a new §101(41A) that defines PII; (b) new provisions to existing §363(b)(1) that relate to the transfer of PII and mandate the appointment of a "consumer privacy ombudsman" (CPO) in certain circumstances; (c) a new §332 that sets forth the CPO appointment process and scope of the CPO's duties; and (d) the CPO among the persons entitled to recover reasonable compensation and expenses from the estate under §330.

As defined in the new §101(41A), PII generally includes individual consumer personal information held by a debtor and is broad enough so that it will generally encompass "any . . . information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically." 11 U.S.C. § 101(41A)(B)(ii), as amended. The definition specifically includes, among other information, an individual's name, address, e-mail address and phone number.

As amended, §363(b)(1) will expressly prohibit a sale or lease of PII where the transfer of PII is prohibited by the debtor's existing privacy policy unless (a) "such sale or lease is consistent with such policy," or (b) after appointment of a CPO, and after notice and hearing, such sale or lease is approved by the court. Thus, the CPO process must be employed unless a proposed transfer is "consistent with [an existing privacy] policy" (discussed below). The language of the amendment implies that a trustee may transfer PII without reference to §363(b)(1)(A) or (B) if the existing policy does not prohibit such transfer.

**Consumer Privacy Ombudsman**

New §332 sets forth the CPO appointment process and duties. Under §332(a), the court shall order the U. S. Trustee (UST) to appoint one disinterested person to serve as the CPO if a hearing is required under new §363(b)(1)(B), with the appointment to occur at least five days prior to the sale hearing. The section also requires that "timely" notice of the sale hearing be provided to the CPO. As set forth in new §332(b), the CPO shall provide the court with information to assist the court in its consideration of a proposed PII transfer. While the statute requires the CPO appointment a mere 5 days before the hearing, the statute also requires (i) "timely" notice to the CPO of the hearing, and (ii) that the CPO provide the court with information. It seems safe to assume that courts will allow sufficient time for a CPO to fulfill his or her duty to provide information, thus necessitating the appointment of a CPO well prior to the sale hearing. Additionally, the CPO process raises many other unanswered questions, all of which may considerably delay or complicate a sale, including the following: How will the UST identify an appropriate CPO? May parties object to a chosen CPO or such CPO's proposed fee? Must the CPO be retained under §§ 327 or 328? May the CPO engage others to assist in his or her duties? Is a motion, with an opportunity to object, required before a court will order the UST to appoint a CPO?

**Consistency with Existing Policy**

As drafted, new §363(b)(1) flatly prohibits a transfer of PII outside of the CPO process unless "such sale or lease is consistent with [the privacy] policy" per §363(b)(1)(A). In order to avoid the potential costs, delay and scrutiny of the CPO process, trustees and buyers may seek to structure a transfer to be consistent with an existing policy. One reading of the amended subsection could lead to the conclusion that PII is transferable under §363(b)(1)(A) only if the existing policy *permits* a sale or lease of the PII. However, by its terms §363(b)(1) only applies to an attempt to transfer PII where such transfer is generally *prohibited* under an existing policy.

So just what is meant by the provision of §363(b)(1)(A) that permits a transfer that is prohibited by an existing privacy policy so long as "such sale or lease is consistent with such policy?" It seems likely that debtors (or their trustees), creditors and potential buyers will seek an interpretation that would permit transfers as "consistent with" the debtor's existing PII usage policy so long as the transferee agreed to assume or otherwise comply with the policy. This interpretation could make it easier to effect bankruptcy transfers of PII. It remains to be seen if courts will accept such an interpretation in the face of likely opposition by consumer privacy advocates.

In conclusion, we believe that the BAPCPA revisions will force PII buyers and sellers to choose between two different approaches to PII transfers. First, the parties may seek to avoid the CPO process, and its inherent potential for increased sale scrutiny, costs and delay, by attempting to structure a transfer to be "consistent with" the existing policy. Such an approach comes with the risk that a court does not accept the proposed interpretation, thus jeopardizing a presumed PII transfer. Second, the parties may voluntarily seek to implement the CPO process from the outset in order to gain certainty in the process, albeit with added scrutiny, cost and potential delay. Time will tell how PII transfers are structured and litigated following the effectiveness of the BAPCPA.