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## *Unmasking the Consumer Privacy Ombudsman*

Laura N. Coordes

Associate Professor, Arizona State University Sandra Day O'Connor College of Law

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# ARTICLES

## UNMASKING THE CONSUMER PRIVACY OMBUDSMAN

Laura N. Coordes\*

### I. INTRODUCTION

In 2015, RadioShack, then in bankruptcy, sold its brand name and customer data to hedge fund affiliate General Wireless for approximately \$26 million.<sup>1</sup> Customer data was by far RadioShack’s most valuable asset; as one commentator put it, “RadioShack’s [customer] database is the company.”<sup>2</sup> A sale of the RadioShack name without the customer data would be vastly less valuable, because the purchaser would have to start afresh in ascertaining the identities of RadioShack’s customer base. Yet, a sale of customer data also violated RadioShack’s privacy policy.<sup>3</sup> In order to protect RadioShack’s customers, the bankruptcy court ordered the appointment of a “consumer privacy ombudsman” (“CPO”) to “provide . . . information to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale.”<sup>4</sup> Ultimately, with the CPO’s support, Radi-

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\* Associate Professor, Arizona State University Sandra Day O’Connor College of Law. I thank the Montana Law Review for the opportunity to present this Article at the Browning Symposium on Consumer Law. Thanks also to Chris Bradley for very helpful comments and Cole Cribari for excellent research assistance.

1. Reuters, *Bankruptcy Judge Approves Sale of RadioShack Name and Data*, N.Y. TIMES (May 21, 2015), <https://perma.cc/XH6G-XGFS>.

2. Larry Dignan, *FTC’s Take on the RadioShack Customer Data Appropriate (For Now)*, ZDNET (May 18, 2015), <https://perma.cc/6DVG-JLFN>.

3. See Zack Whittaker, *RadioShack Sale of Customers’ Personal Data May be Unlawful, Warns FTC*, ZDNET (May 18, 2015), <https://perma.cc/4VR8-YMYZ> (noting that RadioShack had promised “not to sell or rent” the consumer data it collected).

4. 11 U.S.C. § 332(b) (2018).

oShack was able to reach a resolution that limited the amount and type of data sold.<sup>5</sup>

A CPO can play an important role in a bankruptcy case such as Radioshack's by suggesting ways a sale of customer data can occur with minimal harm to consumers and in a way that accords with the debtor's own privacy policy and applicable non-bankruptcy laws.<sup>6</sup> Since a retail debtor's customers are typically not parties in the bankruptcy case, the CPO steps in to protect their privacy interests during a bankruptcy sale. In practice, bankruptcy courts look to the CPO to determine whether a sale of customer data can proceed, giving the CPO (and the report the CPO produces for the court) deference and sometimes even refusing to approve a sale until the CPO's conditions for that sale have been fulfilled.<sup>7</sup>

In spite of the important role the CPO is asked to play, the U.S. Bankruptcy Code devotes very little space to CPOs. The Code contains virtually no guidance as to how CPOs are to perform their roles and only one qualification for the CPO position: CPOs must be "disinterested,"<sup>8</sup> meaning, broadly speaking, that they must not have an interest adverse to a party in the bankruptcy by virtue of their relationship with or connection to the debtor.<sup>9</sup>

This Article takes a closer look at CPOs—who they are and who they should be. It contrasts the important role CPOs are asked to play in the protection of customer data with the relative lack of attention paid to the CPO's appointment in a bankruptcy case. And it suggests the appointment of a qualified CPO—someone who, among other things, is an expert in privacy law—is critical to the protection of consumer privacy interests.

The scholarly literature on CPOs is nearly as sparse as the Bankruptcy Code's treatment of them. Only a handful of articles discuss the CPO in depth,<sup>10</sup> and few have given much treatment to the CPO's qualifications for

5. Report of the Consumer Privacy Ombudsman, *In re Radioshack Corp.*, Case No. 15-10197 (May 16, 2015) at 23 ("The Ombudsman was supportive of [the mediation] process and believes the outcome appropriately balances the privacy rights of consumers with the economic interests of the Debtors' estates.").

6. Michael St. Patrick Baxter, *The Sale of Personally Identifiable Information in Bankruptcy*, 27 AM. BANKR. INST. L. REV. 1, 5–6 (2018).

7. See, e.g., *In re Borders*, discussed in Part III.A, *infra*; Report of the Consumer Privacy Ombudsman, *In re Sharper Image Corp.*, No. 08-10322 (KG), 2008 WL 2337300 (Bankr. D. Del. May 27, 2008) (stating debtor's proposed transfer of customer mailing lists was inconsistent with debtor's privacy policies and ordering debtor to destroy some PII).

8. 11 U.S.C. § 332(a).

9. 11 U.S.C. § 101(14).

10. Baxter, *supra* note 6 (discussing how the debtor and buyer may seek to avoid a CPO's appointment due to high administrative costs); Warren E. Agin, *Handling Customer Data in Bankruptcy Mergers and Acquisitions: Coping with the Consumer Privacy Ombudsman Provisions of BAPCPA*, 24-AUG AM. BANKR. INST. J. 1 (2005) (discussing guidelines for "personally identifiable information" and pointing out ambiguity in the CPO's role due to the statutory language); Warren E. Agin, *Reconciling the*

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the role.<sup>11</sup> In fact, many of the existing articles were written by CPOs themselves.<sup>12</sup> CPOs have and will continue to play important roles in protecting consumer privacy, yet there is minimal discussion of them in either the Bankruptcy Code or the academic literature. However, much of the literature discussing CPOs calls for them to play larger and more defined roles than they do now.<sup>13</sup>

In seeking to address these gaps in the literature, this Article proceeds as follows. Part II explains how and why companies sell customer data in bankruptcy, highlighting both the associated risks and the Bankruptcy Code's response to those risks. Part III examines the use of CPOs in bankruptcy cases and assesses the lack of scrutiny of their qualifications. It then proposes that explicit guidelines be issued for CPO qualifications. These guidelines could come from a number of potential sources and will help to minimize any potential for abuse inherent in the current statutory scheme. Part IV concludes by emphasizing why it will be increasingly important for

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*FTC Act with the Consumer Privacy Ombudsman's Role*, 29-OCT AM. BANKR. INST. J. 38 (2010) (arguing that the Bankruptcy Code provides insufficient guidance for CPOs); John R. Clemency & Kerriann M. Atencio, *Keeping Up with Technology: Section 332 and the Consumer Privacy Ombudsman*, 25-SEP AM. BANKR. INST. J. 28 (2006) (discussing § 332, its implications for the bankruptcy process, and its initial implementation in an Arizona bankruptcy court); Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C.L. REV. 423 (2018) (proposing that CPOs be appointed in all Article 9 transactions when the secured party seeks to enforce its rights against consumer data, in addition to bankruptcy proceedings involving the transfer of customer data); Cassandra M. Porter, *Confessions of a Consumer Privacy Ombudsman*, 9 NO. 6 LANDSLIDE 30 (2017) (arguing that CPOs have been beneficial to the bankruptcy sale process); Luis Salazar, *Don't Fear the Consumer Privacy Ombudsman*, 26-JAN AM. BANKR. INST. J. 42, 63 (2008) (pointing out that the CPO has been "easily integrated" into the § 363 quick sale process); Kayla Siam, *Coming to a Retailer Near You: Consumer Privacy Protection in Retail Bankruptcies*, 33 EMORY BANKR. DEV. J. 487 (2017) (arguing that the Bankruptcy Code should include stronger consumer privacy guidelines by giving CPOs more oversight and requiring the appointment of a CPO in any case where a business is likely to sell customer information); Lucy L. Thomson, *Personal Data for Sale in Bankruptcy: A Retrospective on the Consumer Privacy Ombudsman*, 34-JUN AM. BANKR. INST. J. 32 (2015) (exploring the impact of the CPO's creation and challenges moving forward).

11. The only articles that discuss the CPO's qualifications in any depth devote only a few paragraphs to them. Jessica D. Gabel, *CSI Las Vegas: Privacy, Policing, and Profiteering in Casino Structured Intelligence*, 3 UNLV GAMING L.J. 39, 51 (2012) (asserting that "it seems only logical that the court would prefer a candidate with a robust background in consumer privacy law" and that "[i]deally, the appointed ombudsman would have familiarity specific to the debtor's business and industry practices related to privacy"); Roland L. Trope & E. Michael Power, *Lessons in Data Governance: A Survey of Legal Developments in Data Management, Privacy and Security*, 61 BUS. LAW. 471, 503 (2005) (arguing that "a bankruptcy court would find it prudent, when ordering the appointment of a [CPO], to include in such order that the appointee meet specified criteria that could reasonably include expertise in privacy law").

12. See, e.g., Baxter, *supra* note 6 (identifying the author as the CPO in the Borders and BPS Holdings bankruptcy cases); Thomson, *supra* note 10 (identifying the author as the CPO in 16 federal bankruptcy cases); Porter, *supra* note 10, at 32 (identifying the author as the CPO in *In re Golfsmith International Holdings Inc.*).

13. See, e.g., Agin, *Handling*, *supra* note 10; Agin, *Reconciling*, *supra* note 10; Elvy, *supra* note 10; Siam, *supra* note 10.

CPOs to be privacy experts in light of the changing landscape of privacy law.

## II. CONSUMER DATA SALES IN BANKRUPTCY

Over the past forty years, advances in technology have made it increasingly easy for businesses to collect customer information.<sup>14</sup> Nearly every firm, from data giants (such as Facebook and Amazon), to large retailers (such as RadioShack), to small businesses, collects consumer data in the course of conducting business.<sup>15</sup> In doing so, these companies maintain that the collection of customer data allows them to improve customer experience, provide better services, and generate ad revenue through targeted advertising.<sup>16</sup> In the United States, companies spent almost \$20 billion in one year alone in their efforts to acquire and analyze customer data.<sup>17</sup>

In response to consumers' discomfort with the collection of their personal information, companies developed privacy policies, many of which assured customers that their data would never be shared with third parties.<sup>18</sup> These privacy policies made representations to customers, giving them a sense of how their data would be handled. However, recognition of the value of customer data has created an environment where firms may seek to ignore or circumvent those privacy policies in order to maximize value.<sup>19</sup> Because data tends to be a highly valuable asset for most companies, in the context of a bankruptcy sale, tensions between the desire to maximize the business's value for a potential buyer and compliance with privacy policies come to the fore.

There are many reasons a company might seek to sell customer data in bankruptcy. In some cases, the sale of such data is necessary or desirable so the purchasing company can continue to serve customers as part of the busi-

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14. Sarah Schmidt, *How Technology is Changing Market Research*, MARKETRESEARCH.COM (Mar. 17, 2016), <https://perma.cc/7T3D-D2HJ> ("Technology is increasingly enabling integration of data collection.") (quoting Steve August, Chief Innovation Officer of FocusVision Worldwide).

15. See William Goddard, *How Do Big Companies Collect Customer Data?*, ITCRONICLES, <https://perma.cc/TX4D-NYAW> ("[C]ollecting customer data has become a major priority for businesses.").

16. *Id.* ("With customer data, companies can improve customer experiences, refine marketing strategies, conduct hyper-targeted advertising, and even create new revenue streams by selling data (if they collect enough of it) to data companies.").

17. Carl Wedoff & David P. Saunders, *Big Data Meets Bankruptcy*, 39-JUL AM. BANKR. INST. J. 14, 14 (2020).

18. See, e.g., Press Release, Federal Trade Commission, FTC Announces Settlement with Bankrupt Website, Toysmart.com, Regarding Alleged Privacy Policy Violations (July 21, 2000), <https://perma.cc/QM38-HXB6> regarding (providing that Toysmart's privacy policy stated that customers' "personal information would *never* be shared with third parties") (emphasis in original).

19. *Id.* ("Customer data collected under a privacy agreement should not be auctioned off to the highest bidder.") (quoting Jodie Bernstein, Director of the FTC's Bureau of Consumer Protection).

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ness.<sup>20</sup> Warren Agin has used the example of an airline who is selling its assets to a competing carrier. The purchaser needs customer information in order to honor the airline tickets issued by the seller.<sup>21</sup> In addition, like anything else a company might sell, customer data is an asset. In some cases, customer data may be the most valuable asset the company has.<sup>22</sup>

As much as a company might want or need to sell customer data, there are risks involved as well. Companies must make sure the data they are selling was legally collected and held, and they cannot violate non-bankruptcy privacy laws, such as the Children’s Online Privacy Protection Act (“COPPA”) or the Gramm-Leach-Bliley Act (“GLB”).<sup>23</sup> If courts restrict the sale of data because of a party’s failure to comply with a privacy law or policy, the restriction can significantly decrease the value of the petitioning company’s remaining assets and jeopardize the sale.<sup>24</sup>

The risks of selling customer data are only likely to grow as jurisdictions adopt new privacy laws.<sup>25</sup> For example, the California Consumer Privacy Act (“CCPA”) allows consumers to hold corporations liable for violations of their privacy guidelines and takes a broad view of what information constitutes “private data.”<sup>26</sup> To some extent, some risks can be mitigated well in advance of any sale, through careful drafting of the privacy policy.<sup>27</sup> Still, firms cannot always predict changes in privacy laws or the identity of potential buyers, and therefore there is always some risk that a sale of customer data will violate the company’s privacy policy, another privacy law, or both.

### A. *The Toysmart Settlement*

The tensions described above were evident in 2000, when the Federal Trade Commission (“FTC”) sued now-defunct Toysmart.com, LLC (“Toys-

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20. See Marshall J. Hogan, *Customer Data Sale in Bankruptcy: Lessons From RadioShack*, FOLEY.COM (2015), <https://perma.cc/U3M6-KEM4>.

21. Agin, *Handling*, *supra* note 10, at 60.

22. Paula Rosenblum, *Bankrupt RadioShack’s Attempts To Sell Customer Data Meets [sic] Resistance*, FORBES (May 24, 2015), <https://perma.cc/LB5S-KY7R>.

23. Agin, *Handling*, *supra* note 10, at 60; see also Henry Lebowitz & Benjamin Sundholm, *Privacy Policies and the Value of Data in Bankruptcy Sales*, IPWATCHDOG.COM (Jan. 15, 2020), <https://perma.cc/7TTD-MWM2> (last visited Sept. 8, 2020) (citing the General Data Protection Regulation and California Consumer Privacy Act as two other laws that must be followed).

24. Lebowitz and Sundholm, *supra* note 23 (citing the RadioShack settlement as lessening the value of the data because it “reduced the data points available for purchasers’ business purposes”).

25. *Id.* (noting that it is difficult to predict courts’ willingness to permit data sales given more explicit requirements in recent European and California privacy laws regarding personal data transfers).

26. Maria Korolov, *California Consumer Privacy Act [CCPA]: What You Need to Know to be Compliant*, CSO (July 7, 2020), <https://perma.cc/T3L2-Z3NU>.

27. Lebowitz and Sundholm, *supra* note 23. (“[P]rivacy policies can be drafted to mitigate the risk of losing value in a sale of distressed data assets.”).

mart”), after the company attempted to sell its customer data in bankruptcy, in violation of its privacy policy.<sup>28</sup> Toysmart, a once-popular online retailer for children’s toys, had previously announced it was closing operations and would sell its assets.<sup>29</sup> Toysmart’s creditors subsequently put the company into bankruptcy proceedings.<sup>30</sup> The FTC alleged Toysmart was attempting to sell “personally identifiable information” (“PII”), including the names and birthdates of children, in violation of both COPPA and Toysmart’s own privacy policy.<sup>31</sup>

The FTC’s complaint alleged Toysmart had collected information from children under thirteen years of age without either notifying their parents or obtaining parental consent.<sup>32</sup> The FTC also took issue with Toysmart’s attempt to sell its customer data in direct violation of its own privacy policy, which stated the company would never share customer information with third parties.<sup>33</sup> Jodie Bernstein, then the director of the FTC’s Bureau of Consumer Protection, stated, “Customer data collected under a privacy agreement should not be auctioned off to the highest bidder.”<sup>34</sup>

Ultimately, the FTC and Toysmart settled their differences, with the FTC voting 3-2 to approve the settlement.<sup>35</sup> In approving the settlement, FTC Commissioner Mozelle Thompson issued a separate statement that expressed his reservations with the settlement.<sup>36</sup> Specifically, Commissioner Thompson believed “consumers would benefit from notice and choice before a company transfers their information to a corporate successor.”<sup>37</sup> However, the settlement did provide that any successor-in-interest would have to maintain the terms of Toysmart’s original privacy policy, and ultimately, Commissioner Thompson voted to approve the settlement.<sup>38</sup>

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28. Press Release, Federal Trade Commission, *FTC Announces Settlement with Bankrupt Website, Toysmart.com, Regarding Alleged Privacy Policy Violations* (July 21, 2000), <https://perma.cc/QS2Z-75Z4> [hereinafter *Settlement Announcement*].

29. Press Release, Federal Trade Commission, *FTC Sues Failed Website, Toysmart.com, for Deceptively Offering for Sale Personal Information of Website Visitors* (July 10, 2000), <https://perma.cc/2T85-6X6Z>.

30. *Id.*

31. *Settlement Announcement*, *supra* note 28.

32. *Id.*

33. Toysmart’s privacy policy stated, “Personal information voluntarily submitted by visitors to our site, such as name, address, billing information and shopping preferences, is never shared with a third party. . . . When you register with toysmart.com, you can rest assured that your information will never be shared with a third party.” Stipulation and Order Establishing Conditions on Sale of Customer Information, In re Toysmart.com, Case No. 00-13995-CJK (Bankr. D. Mass. 2000), <https://perma.cc/8DUS-MFMG>.

34. *Settlement Announcement*, *supra* note 28.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

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The *Toysmart* settlement articulated several guidelines for the sale of customer information in violation of a company's stated privacy policy. First, it provided Toysmart's data and customer lists could not be sold as a stand-alone asset.<sup>39</sup> Rather, they had to be sold as a package with other assets, including Toysmart's website.<sup>40</sup> The settlement further specified the data could be sold only to a "Qualified Buyer," defined by the FTC as "an entity that is in a related market and that expressly agrees to be Toysmart's successor-in-interest as to the customer information."<sup>41</sup> As stated, the Qualified Buyer had to keep the terms of Toysmart's privacy statement; if it sought to change those terms, it could not change the use of the customer information it had purchased from Toysmart unless it provided notice and obtained the relevant consumers' affirmative ("opt-in") consent to those new uses.<sup>42</sup> Additionally, though not an official part of the settlement, FTC Commissioner Thompson wrote separately to encourage "any successor to provide Toysmart customers with notice and an opportunity to 'opt out' as a matter of good will and business practice."<sup>43</sup>

The *Toysmart* settlement may have placated the FTC, but it did not end Toysmart's troubles. Several state attorneys general objected to the settlement in bankruptcy court, arguing Toysmart's proposed asset sale still constituted an unfair or deceptive business practice under state laws.<sup>44</sup> After the bankruptcy court refused to approve the settlement with the FTC, Toysmart withdrew its customer information from the auction.<sup>45</sup>

Although the FTC settlement did not result in Toysmart selling its customer lists, it lived on as a model for other companies seeking to sell customer information in bankruptcy. In the months and years following the *Toysmart* settlement, many debtors mimicked the settlement's terms, with some going further to include Commissioner Thompson's suggestion of an "opt out" policy in their sale agreements.<sup>46</sup> For example, in a 2000 settle-

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Randi Singer, Olivia Greer & Eliza Cotter, *Transferring Personally Identifiable Information in Bankruptcy M&A*, WEIL BANKR. BLOG (Aug. 12, 2020), <https://perma.cc/Q7W6-HJD3>.

45. *Id.*

46. CPO reports also commonly make the "opt out" recommendation today. *See, e.g.*, Report of Consumer Privacy Ombudsman, Alan Chapell at 27, In re General Motors Corp, et al., Case No. 09-50026 (2011), available at <https://perma.cc/DV8W-ZW96> ("Debtor and New GM agree to provide consumers with an opportunity to opt out of being contacted by New GM for marketing purposes and an opportunity to opt-out of having information transferred to another dealer.") (emphasis omitted); Report of Consumer Privacy Ombudsman, James P.S. Leshaw at 3, In re Adinath Corp. Simply Fashion Stores, Ltd., Case No. 15-16885 (2015), available at <https://perma.cc/MQ7L-B746> (recommending that, if the debtor does not sell to a qualified buyer, consumers be given the chance to opt out of communications from the buyer).



ment with the Texas Attorney General, online retailer Living.com was permitted to pursue a sale of its customer data, on the condition that it permitted customers to opt out of the transfer of their data to the buyer.<sup>47</sup>

The following year, eToys, Inc. went beyond an opt-out policy after multiple state attorneys general objected to its attempted sale in bankruptcy of customer data in express violation of its privacy policy.<sup>48</sup> The eventual settlement included a requirement that customers opt in to the use of their data by the purchaser, KB Consolidated, Inc.<sup>49</sup> By requiring affirmative consumer consent, this “opt-in” notice ensured more customer notice and consent than the opt-out policy favored in previous settlements. In addition, even those who opted in to use of their data by the purchaser could rest assured their credit card information would not be transferred.<sup>50</sup>

Not every company embraced opt-in and opt-out policies, however. Notably, in 2002, Egghead.com, Inc. sought to sell its assets to Fry’s Electronics, Inc. Fry’s proposed a sort of hybrid “opt-out” plan, under which Fry’s required that “no more than ten percent of active customers—anyone who bought something at Egghead in the last two years—can ‘opt out’ of a plan to transfer their information over to Fry’s Electronics.”<sup>51</sup> Critics of the proposal called it “wrong and on shaky legal ground,” because Egghead had previously stated it would not disclose customer information; therefore, privacy advocates argued customers needed to affirmatively opt in to any transfer.<sup>52</sup> The deal with Fry’s ultimately fell through, and Amazon, which agreed to honor Egghead’s privacy policy, purchased Egghead instead.<sup>53</sup>

As it became clear that an increasing number of companies were seeking to sell customer information in bankruptcy—thereby attracting the opposition of the FTC, state attorneys general, and other consumer advocates—Congress also took notice. In 2005, Congress revised the Bankruptcy Code and sought to better protect consumer privacy interests in bankruptcy sales.<sup>54</sup> The CPO was a key element of this increased protection.

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47. Robert Brady, Sean Beach & Karen B. Skomorucha, *Determining and Preserving the Assets of Dot-Coms*, 28 DEL. J. CORP. L. 185, 192 (2003).

48. Don Oldenburg, *A Question of Privacy*, WASH. POST (June 6, 2001), <https://perma.cc/P8CR-26EV>.

49. *Id.*

50. *Id.*

51. *Egghead Sale Could Crack on Privacy Issues*, CNET (Jan. 2, 2002, 4:43 PM), <https://perma.cc/8QUD-9M75>.

52. *Id.* (quoting privacy advocate Jason Catlett).

53. Alorie Gilbert, *Egghead.com Bounces Back Under Amazon*, CNET (Jan. 2, 2002, 4:43PM), <https://perma.cc/FW73-999R>.

54. Daniel Brian Tan, *Maximizing the Value of Privacy through Judicial Discretion* 34 EMORY BANKR. DEV. J. 681, 696 (2018).

*B. BAPCPA and the CPO*

In 2005, in response to a growing number of concerns about the accessibility and efficacy of the bankruptcy system, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).<sup>55</sup> BAPCPA represented an extensive set of amendments to the Bankruptcy Code. These amendments included two provisions relating to the sale of customer data in bankruptcy: 11 U.S.C. §§ 363(b)(1) and 332.

Section 363(b)(1) applies if the debtor has a privacy policy and the debtor-in-possession or trustee in bankruptcy wants to sell or lease PII during the bankruptcy case.<sup>56</sup> It provides that a sale or lease of PII cannot occur unless it is consistent with the debtor’s privacy policy or a CPO is appointed and the bankruptcy court, after notice and a hearing, approves the sale or lease.<sup>57</sup>

Importantly, the Bankruptcy Code has its own, somewhat narrow definition of PII. Broadly speaking, the Code defines PII as information provided by an individual to the debtor in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes.<sup>58</sup> Practically speaking, this definition excludes a wide swath of what may be considered PII by other law or in lay terms. For example, consumer information that the debtor obtains from another company does not constitute PII, because presumably, the other company did not obtain a product or service from the debtor primarily for personal, family, or household use in exchange for providing that information.

Section 332 provides for the appointment of a consumer privacy ombudsman.<sup>59</sup> Specifically, if a hearing is required per § 363(b)(1)(B), the bankruptcy court must order the United States Trustee (U.S. Trustee) to

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55. *Id.* (“BAPCPA amended the Code to address privacy concerns and system abuse.”).

56. 11 U.S.C. § 363(b)(1) (2018).

57. *Id.* The exact language of § 363(b)(1) is as follows: “The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless (A) such sale or such lease is consistent with such policy; or (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.”

58. 11 U.S.C. § 101(41A).

59. 11 U.S.C. § 332.

appoint a CPO.<sup>60</sup> The CPO must be appointed “not later than 7 days before the commencement of the hearing” and must be a “disinterested person.”<sup>61</sup> Section 332 further provides that the CPO may appear and be heard at the hearing contemplated by § 363(b)(1)(B) and must provide information to assist the court in its consideration of the “facts, circumstances, and conditions” of the proposed PII sale or lease.<sup>62</sup>

Thus, under these provisions, a debtor may not sell PII in violation of its privacy policy unless the court approves the sale after the U.S. Trustee has appointed a CPO to review the terms. The amendments thus contemplate the CPO taking on a role similar to that of the FTC and state attorneys general—the CPO assesses “potential losses or gains of privacy to consumers” as well as the potential costs or benefits to them.<sup>63</sup> In practice, PII sales occurring pursuant to these amendments follow very similar requirements as those the FTC imposed in the *Toysmart* settlement.<sup>64</sup>

Information-gathering is critical to the CPO’s role. In some cases, CPOs have considered not just the debtor’s current privacy policies, but other policies predating the current one that were disclosed to consumers at the time the debtor gathered their information.<sup>65</sup>

The Bankruptcy Code gives CPOs only a short time period in which to perform their role of gathering and assessing information and creating a report to the court. Initially, § 332 provided for the CPO’s appointment a mere five days prior to the hearing.<sup>66</sup> Now, the CPO must be appointed at least seven days before the hearing. Given the large amount of information a CPO must gather, review, and write about in order to make a recommendation to the court, seven days is a very short time period indeed.<sup>67</sup>

60. 11 U.S.C. § 332(a); *see also* Fed. R. Bankr. Proc. 6004(g)(1) (requiring a motion requesting an order directing the U.S. Trustee to appoint a CPO); Fed. R. Bankr. Proc. 6004(g)(2) (requiring the U.S. Trustee to file a notice of CPO appointment accompanied by a verified statement of disinterestedness).

61. 11 U.S.C. § 332(a).

62. 11 U.S.C. § 332(b).

63. 11 U.S.C. § 332(b)(2), (3); Tan, *supra* note 54, at 697 (“Just as the FTC advised the court in *Toysmart*, BAPCPA intended the consumer privacy ombudsman to serve a similar advisory role.”).

64. Tan, *supra* note 54, at 696–97 (comparing BAPCPA’s provisions with those the FTC required in the *Toysmart* case); Wedoff & Saunders, *supra* note 17, at 50.

65. *See* Report of Consumer Privacy Ombudsman, *In re Gen. Motors*, No. 09-50026 (Bankr. S.D.N.Y. Jul. 1, 2009) at 22–23 (considering GM’s current and historic policies).

66. Agin, *Handling*, *supra* note 10, at 59 (“The court must give the ombudsman at least five days to prepare his or her report.”).

67. *Id.* at 60 (noting the CPO “will have to know, in advance, what information he needs to do his job, where to find that information within a business entity and how to communicate his needs to the debtor and buyer”); Reply of Michael St. Patrick Baxter, Consumer Privacy Ombudsman, to Objection of the Official Committee of Unsecured Creditors to First Interim Fee Application and Second and Third Monthly Fee Statements at 5, *In re Borders Group, Inc.*, Case No. 11-10614 (Nov. 23, 2011) [hereinafter Baxter Reply] (“Upon my appointment as ombudsman. . . I was presented with a severely compressed timeframe. . .”).

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According to commentators, “[a] consumer privacy ombudsman should help the court understand the effect of the [proposed] sale on customers and help the parties restructure the sale if necessary so it is fair to customers.”<sup>68</sup> In essence, the goal of the CPO is to advise the court with respect to consumer data and privacy, and to provide protection for customer data in bankruptcy.<sup>69</sup> How, exactly, the CPO is to accomplish this goal is left largely up to the parties and the CPO. The language of the Bankruptcy Code does not define the CPO’s role in the sale process other than to provide some nonexclusive suggestions about information the CPO may present to the court.<sup>70</sup> Thus, whether and how the CPO adequately protects customer privacy is dependent, to a significant degree, on who the CPO is and whether they are equipped to take an active and thorough role in the bankruptcy case.

Importantly, the Bankruptcy Code does not require the court to appoint a CPO in every instance where a debtor seeks to sell PII. Instead, the “fact patterns requiring the ombudsman’s involvement seem to fall in between those where the sale is consistent with the privacy policy and those where the sale is illegal.”<sup>71</sup> Furthermore, if the customer information the debtor is seeking to sell is not “personally identifiable information” as defined in the Bankruptcy Code,<sup>72</sup> if the debtor does not have a policy with respect to PII in place, or if the court determines that the proposed sale or lease is consistent with the debtor’s policy, there is no statutory need for a CPO.<sup>73</sup>

Although the Bankruptcy Code now provides some protection for customers when their information is sold by a company to a third party, BAPCPA’s added provisions arguably did not go far enough in protecting consumer privacy, particularly given the pace at which data-collection technology has progressed.<sup>74</sup> As discussed, in practice, BAPCPA’s protections often end up looking very similar to those the FTC sought to impose in the *Toysmart* settlement—a settlement that received only lukewarm support within the FTC and that was ultimately deemed insufficiently protective by the bankruptcy court and state attorneys general. As indicated in the Introduction, scholars who have studied CPOs often conclude that consumers

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68. Agin, *Handling*, *supra* note 10, at 60.

69. Wedoff & Saunders, *supra* note 17, at 15.

70. See 11 U.S.C. § 332(b)(1)–(4) (2018); Agin, *Handling*, *supra* note 10, at 60 (“The ombudsman’s role in the sale process is far from clear given the statute’s language.”).

71. Agin, *Handling*, *supra* note 10, at 60.

72. The Bankruptcy Code’s definition for PII can be found in 11 U.S.C. § 101(41A) and is limited to, *inter alia*, information “provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes.” 11 U.S.C. § 101(41A)(A).

73. 11 U.S.C. § 363(b)(1).

74. Tan, *supra* note 54, at 697 (“Although BAPCPA contains measures to protect consumer privacy, technology has outpaced those protections.”).

could benefit from both more substantive CPO involvement and CPO involvement in a higher number of cases.

The Bankruptcy Code's limited protections for customer data transferred through an asset sale, combined with the Code's lack of guidance and specificity about the CPO's work, suggest that the efficacy of the CPO depends largely on who is inhabiting that role. And there is good reason to think that the CPO's work in assessing and protecting consumer privacy will become increasingly important. For example, courts must also consider a sale's compliance with other, non-bankruptcy privacy laws. A court may turn to a CPO to help it assess this compliance.<sup>75</sup>

As global concerns over the use of customer data increase, non-bankruptcy privacy laws are likely to become more ubiquitous. For example, in 2018, California passed the CCPA, which "allows any California consumer to demand to see all the information a company has saved on them, as well as a full list of all the third parties that data is shared with."<sup>76</sup> Under the CCPA, consumers can sue companies that violate privacy guidelines, even if there is no data breach.<sup>77</sup> The CCPA only came into effect in July of 2020, but it is expected to have significant repercussions for numerous companies.<sup>78</sup>

A CPO can help the bankruptcy court understand and address consumer privacy concerns arising in an asset sale, as well as the sale's compliance with both the debtor's own privacy policy and non-bankruptcy law. Part III discusses the CPO's role in some high-profile bankruptcy cases and critically assesses the process surrounding CPO appointments.

### III. CPOs: PRACTICE AND PROCESS

This Part examines CPOs in practice: who they are, what they do, and how they interact with the bankruptcy court. It posits that more attention should be paid to how CPOs are chosen and whether they are qualified for the tasks they must perform in a bankruptcy case, before concluding with some specific suggestions regarding CPO selection.

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75. Wedoff & Saunders, *supra* note 17, at 50 (concluding that "a bankruptcy court likely has authority to appoint a CPO to opine on a proposed sale's compliance with applicable nonbankruptcy law and its effect on consumer privacy" even if the sale does not involve PII as defined in the Bankruptcy Code).

76. Korolov, *supra* note 26.

77. *Id.*

78. *Id.*

### A. Case Law

As discussed in Part II, the Bankruptcy Code leaves something to be desired when it comes to describing the role of the CPO and the standards to which sales of customer data should be held. However, in practice, many CPOs have risen to the task of protecting customer data, producing substantial, detailed reports in a short amount of time and alerting the court if the sale parties risk running afoul of privacy laws and policies.<sup>79</sup> Sometimes, a CPO can stand between the debtor and a completed sale.<sup>80</sup> In addition, although a court may reject the CPO's recommendations,<sup>81</sup> in practice, bankruptcy courts appear to give deference to CPO reports.<sup>82</sup> All of this suggests that the identity of the CPO matters a great deal. The short time period in which the CPO must create a report means the CPO has little time to get up to speed on either privacy or bankruptcy law. And with multimillion-dollar asset sales on the line, parties will have little tolerance for CPOs that make mistakes.

As an example of the active and persuasive role CPOs can play in a bankruptcy case, consider the CPO in the *Borders* bankruptcy, Michael St. Patrick Baxter. From the time of his appointment, Baxter engaged in an ongoing dialogue with the purchaser of Borders's assets, Barnes & Noble ("B&N"), in order to structure the sale in a way that respected the privacy of Borders's former customers.<sup>83</sup> His initial court report outlined his concerns over possible privacy violations and suggested ways to address those concerns, including allowing consumers to opt out of the transfer of their data.<sup>84</sup> B&N did provide an opt-out notice to consumers; however, Baxter believed it deficient because it "failed to provide important information to enable Borders customers to make an informed decision about whether to opt out."<sup>85</sup> Baxter then filed a supplemental report expressing these con-

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79. See, e.g., Report of Consumer Privacy Ombudsman, *In re General Motors Corp.*, 409 B.R. 24 (Bankr. S.D.N.Y. 2009) (No. 09-50026) (83-page report, including analysis of debtors' privacy policies and practices and recommendations).

80. See, e.g., Baxter Reply *supra* note 67, at 6–7 (noting the court's refusal to approve sale based upon issues raised in CPO report).

81. Walter W. Miller, Jr. & Maureen A. O'Rourke, *Bankruptcy Law v. Privacy Rights: Which Holds the Trump Card?*, 38 Hous. L. Rev. 777, 845 (2001).

82. See Baxter Reply, *supra* note 67, at 6–7; see also Order (1) Authorizing Sale of Assets Free and Clear of Interests, (2) Authorizing the Assumption and Assignment of Contracts and Leases, (3) Waiving Any Temporary Stay of Relief, and (4) Granting Other Relief at 9, *In re Big Nevada, Inc.*, <https://perma.cc/794C-VXXD> (Bankr. W.D. Wash May 27, 2010) (No. 09-13569) [hereinafter Order Authorizing Sale of Big Nevada Assets] (adopting the CPO's report and recommendations).

83. See Supplemental Report of Michael St. Patrick Baxter Consumer Privacy Ombudsman 2–3, *In re Borders Group, Inc.*, (Bankr. S.D.N.Y. Oct. 3, 2011) (No. 11-10614) [hereinafter Baxter Supplemental Report].

84. See *id.* at 2 ("It was clear to the Ombudsman that a robust and meaningful opt-out was critical to reaching the negotiated privacy related terms of the Sale.").

85. *Id.* at 3.

cerns to the court.<sup>86</sup> Upon reading the supplemental report, the bankruptcy court refused to allow the sale to proceed until B&N satisfied Baxter's privacy concerns.<sup>87</sup> Ultimately, B&N agreed to send customers an "opt-out" email, giving customers a period of time to opt out of the transfer of their data.<sup>88</sup> The court in *Borders* gave great deference to the CPO's report, conditioning its own sale approval on the buyer's compliance with the CPO's recommendations. The *Borders* case shows how an active CPO can influence the conditions of a sale and can even stand in the way of a sale occurring.

In practice, CPOs can also serve as an intermediary of sorts for other consumer advocates to express concerns about a bankruptcy sale. For example, in 2015, the FTC and 37 state attorneys general became concerned after RadioShack proposed to sell the PII of its 117 million customers, representing nearly 37% of the entire U.S. population.<sup>89</sup> Jessica Rich, the director of the FTC's Bureau of Consumer Protection, sent a letter to the CPO, Elise Frejka, expressing the FTC's concerns about the sale and providing guidance on how to best protect customer data.<sup>90</sup> Rich's letter reiterated the *Toysmart* settlement guidelines and suggested that if RadioShack did not receive its customers' affirmative consent to sell their information, the sale would need to satisfy four conditions: (1) customer data could not be sold as a standalone asset; (2) the buyer would need to be involved in substantially the same lines of business as RadioShack; (3) the buyer would need to expressly agree to be bound by RadioShack's privacy policy; and (4) the buyer would need to obtain the affirmative consent of RadioShack's customers if making any material changes to the privacy policy.<sup>91</sup> In her report to the court, Frejka included these guidelines but went a step further, recommending that the parties provide an "opt-out notice" to customers, similar to what the *Borders* ombudsman requested, to allow customers to make an informed decision about the use of their data.<sup>92</sup> Ultimately, RadioShack ended up paring down the amount of customer data that it sold, providing

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86. *Id.*

87. Baxter Reply, *supra* note 67, at 6–7.

88. Baxter remained unhappy with the wording of Barnes & Noble's email, however, and vigorously sought to change it, despite having only a two-hour deadline to do so. *Barnes & Noble Email to Borders Customers Rattles Privacy Watchdog*, REUTERS, available at <https://perma.cc/YD56-DKU4> (last visited Sept. 19, 2020).

89. Gavriela A. Brotz, *RadioShacks Consumer Data: A Highly Scrutinized Asset*, TACHE, BRONIS, CHRISTIANSON & DESCALZO, P.A. (June 15, 2015), <https://perma.cc/P3NQ-P8WX>.

90. See Letter from Jessica L. Rich, Dir. of Bureau of Consumer Prot., Fed. Trade Comm'n, to Elise Frejka, Consumer Privacy Ombudsman, *In Re: RadioShack Corporation, et al.*, No. 15-10197 (BLS) (Bankr. D. Del.), <https://perma.cc/UYW7-84XD> [hereinafter Rich Letter].

91. *Id.* at 5.

92. Report of the Consumer Privacy Ombudsman, Elise Frejka at 2–4, *In re Radioshack Corp.*, (Bankr. D. Del. May 16, 2015) (No. 15-10197) available at <https://perma.cc/G6LN-9GY9Zxb8Fz> (last visited Sept. 19, 2020).

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only the email addresses of customers “who specifically requested information from RadioShack during the past two years.”<sup>93</sup> *RadioShack* illustrates how the CPO can work with other consumer advocates to protect customer data while allowing the sale to proceed.

On occasion, however, court deference to CPOs can result in fewer protections for consumer interests. For example, in *In re Big Nevada, Inc.*,<sup>94</sup> CPO Wesley Avery was appointed but determined that the customer data the debtor was selling likely did not fall within the Bankruptcy Code’s definition of PII.<sup>95</sup> The debtor had collected customer information in connection with a points program that rewarded customers for visiting the debtor’s casinos.<sup>96</sup> However, because customers were not required to provide the information in order to gamble, Avery determined that the information was not PII because it was not “provided. . .to the debtor in connection with obtaining a product or service.”<sup>97</sup> The CPO’s conclusion that the data did not constitute PII is consistent with a reasonable interpretation of the Bankruptcy Code’s definition of the term; however, because of the Bankruptcy Code’s arguably narrow definition of PII,<sup>98</sup> the debtor was able to complete the sale with comparatively little scrutiny of the overall privacy impact on customers. The *Big Nevada* court performed no independent analysis of the issue; instead, it took the CPO’s report at face value and adopted his recommendations without further comment or scrutiny.<sup>99</sup>

A review of some of the cases indicates that CPOs can play important roles in identifying risks to customer privacy, working with others to assess the severity of the risks, and finding ways to mitigate those risks. A diligent CPO can serve as a check on parties seeking to shortcut privacy interests in order to accomplish a sale, and CPO reports appear to be taken seriously by the courts. But who exactly are CPOs? What are their qualifications, and what process, if any, do they go through before becoming a CPO? The next section turns to these questions.

### B. *Unmasking the CPO*

As the proliferation of non-bankruptcy privacy regulations indicates,<sup>100</sup> it is becoming increasingly critical to safeguard consumer privacy

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93. Brotz, *supra* note 89.

94. No. 09-13569 (Bankr. W.D. Wash. May 26, 2010).

95. Report of Consumer Privacy Ombudsman at 4, *In re Big Nevada, Inc.*, <https://perma.cc/FND8-N6EU> (Bankr. W.D. Wash. May 26, 2010) (No. 09-13569) [hereinafter *Big Nevada Report*].

96. *Id.* at 2–3.

97. *Id.* at 4.

98. Wedoff & Saunders, *supra* note 17, at 49.

99. Order Authorizing Sale of Big Nevada Assets, *supra* note 82, at 9.

100. Venky Anant, et al., *The Consumer-Data Opportunity and the Privacy Imperative*, MCKINSEY & Co. (Apr. 27, 2020), <https://perma.cc/8S5V-BJ8Q> (“Proliferating breaches and the demand of con-



interests. A CPO may have no more than seven days from the time of appointment to scrutinize the debtor's privacy policy, assess the customer information the debtor has collected, and determine the privacy interests at stake in a potential data sale. As the entity designated to protect consumer privacy in a bankruptcy case, the CPO's qualifications should matter. Nevertheless, to date, no one has analyzed the qualifications or selection processes for CPOs.

This Article begins to fill that gap. An examination of some of the most significant bankruptcy cases with CPO appointments reveals the identities and qualifications of the CPOs chosen in those cases. Two themes emerge from the cases. First, CPOs tend to be repeat players. Many have been appointed in multiple bankruptcy cases, usually clustered around a particular geographic area. Second, although there appear to be no firm qualifications for a CPO, many CPOs have a privacy specialist certification.

### 1. Repeat Players

Many CPOs have experience serving as CPOs in multiple cases. For example, Michael St. Patrick Baxter, discussed above in connection with the *Borders* case, also served as the CPO in the Performance Sports Group bankruptcy,<sup>101</sup> a 2017 case where the debtor sold nearly all of its assets to an investor group.<sup>102</sup> Baxter also served as CPO for the bankruptcy sale of World Egg Bank's donor eggs and medical records.<sup>103</sup> Similarly, Elise Frejka, the *RadioShack* CPO, has been a CPO in at least nine high-profile bankruptcy cases, including Toys "R" Us, Inc. and Wet Seal.<sup>104</sup> Other prominent repeat players include Lucy Thomson, a CPO in 25 bankruptcy cases, including "Circuit City, Coach, True.com, Linens N Things, Mattress Discounters, and J.K. Harris,"<sup>105</sup> and Alan Chapell, a CPO in over 25 bankruptcy cases, "including General Motors, Chrysler, Eddie Bauer, Atari and St. Vincent's hospitals."<sup>106</sup> In the Pacific Northwest and California region, Wesley Avery has served as CPO in at least 12 bankruptcy cases, including

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sumers for privacy and control of their own data have led governments to adopt new regulations, such as the General Data Protection Regulation (GDPR) in Europe and the California Consumer Privacy Act (CCPA) in that US state. Many others are following suit." )

101. *Michael St. Patrick Baxter*, COVINGTON, <https://perma.cc/W2WQ-2VLY> [hereinafter Baxter Bio].

102. Press Release, *Performance Sports Group Completes Sale of Substantially All of its Assets to Investor Group Led by Sagard and Fairfax Financial*, PR NEWswire (Feb. 28, 2017), <https://perma.cc/F4C7-LWM5>.

103. Baxter Bio, *supra* note 101.

104. *Elise S. Frejka, CIPP/US*, FREJKA PLLC, <https://perma.cc/WY7A-97Z6> [hereinafter Frejka Bio].

105. *Lucy L. Thomson, Esq. CISSP*, LINKEDIN, <https://perma.cc/3H96-QFWP> [hereinafter Thomson Bio].

106. *Chapell & Associates*, CHAPPELLASSOCIATES.COM, <https://perma.cc/B7XP-CYD7>.

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*In re Big Nevada, In re Northwest Health Systems, In re X10 Wireless, and In re The Tulving Company.*<sup>107</sup>

Not all CPOs are repeat players, however. For example, Jim Leshaw, a commercial lawyer in Miami, appears to have been the CPO for only one case out of the Southern District of Florida.<sup>108</sup> Donald Gaffney, the first CPO ever appointed, was not subsequently appointed as a CPO in any other case.<sup>109</sup>

Still, it is clear that many CPOs are appointed in case after case. Undoubtedly, appointments in multiple cases allow the individuals appointed to gain experience and further develop their expertise. On the other hand, there is a risk that a CPO will be appointed repeatedly because of inertia and not because they are a particularly good fit for the case at hand. In some cases, it may be helpful for the CPO to understand the debtor's business or industry so that they can better understand how the debtor collects and uses customer information. CPOs appointed in a wide variety of cases may not have this desired industry-specific background.

Another concern can arise when a CPO is appointed simply because they can work quickly. In a bankruptcy, neither the debtor nor its creditors are likely to embrace the idea of a CPO appointment, "because it causes a delay in the sale process and accounts for the subtraction of a large administrative expense from the [ ] debtor's estate."<sup>110</sup> For these reasons, a CPO who can work quickly is likely to receive less resistance from the parties than a CPO who must take time to learn the ropes. Pressure or resistance from the debtor and other parties to the case, coupled with the short time window in between a CPO's appointment and production of their report,<sup>111</sup> has the potential to create pressure on the CPO to cut corners. Thus, working quickly may not always equate to working well.

In short, although there are advantages to appointing CPOs in case after case, those advantages should be taken in stride with other considerations, such as the desirability of a CPO with industry knowledge, even if that CPO has little to no experience as a CPO in other bankruptcy cases.

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107. *Consumer Privacy Ombudsman*, THEBANKRUPTCYLAWCENTERS.COM, <https://perma.cc/K6FG-SDME> [hereinafter Avery Bio].

108. Report of Consumer Privacy Ombudsman, *In re Adinath Corp.*, (Bankr. S.D. Fla. Jul. 29, 2015) (No. 15-16885-LMI), available at <https://perma.cc/XJ4Z-J9YE>.

109. *Keeping Up with Technology Section 332 and the Consumer Privacy Ombudsman*, AM. BANKR. INST. J. (Sept. 2006), available at <https://perma.cc/HR8V-Y27W> (last visited Sept. 19, 2020).

110. Siam, *supra* note 10, at 511.

111. See *Keeping Up with Technology*, *supra* note 109 (noting that Gaffney was appointed a mere 10 days before the scheduled sale hearing, although the hearing was later delayed, giving him 16 days from his appointment "to complete the investigation, analysis and drafting of the CPO's report").

## 2. *Privacy Specialist Designations*

In addition to being repeat players, some of the CPOs in the cases studied held industry certifications designating them as privacy specialists. For example, both Elise Frejka and Wesley Avery hold the title of Certified Information Privacy Professional (“CIPP”), which is a designation awarded by the International Association of Privacy Professionals, an organization accredited by the American Bar Association.<sup>112</sup> To earn this designation, candidates must pass a 90-question exam on privacy law.<sup>113</sup> Lucy Thomson is a Certified Information Systems Security Professional, a certification granted by the International System Security Certification Consortium.<sup>114</sup>

Overall, however, the experiences and certifications of the CPOs studied are mixed. For example, although Alan Chapell does not hold a privacy specialist designation, he is clearly experienced in the privacy realm. He has served as chief privacy officer and outside counsel for over 100 technology companies and regularly lectures on privacy issues.<sup>115</sup> Other CPOs, such as Michael St. Patrick Baxter and Jim Leshaw, are primarily bankruptcy lawyers that have served as CPOs on occasion.<sup>116</sup>

An examination of these CPOs indicates that there is no one route to becoming a CPO, and there is no particular baseline qualification, such as a certification of some kind. Some CPOs, such as Thomson, have little to no bankruptcy experience beyond their time in bankruptcy court as CPOs.<sup>117</sup> Others, such as Baxter and Leshaw, are known primarily for their bankruptcy expertise, rather than their privacy law experience.<sup>118</sup> Because the Bankruptcy Code provides no qualifications for a CPO other than that they be “disinterested,” a wide range of people may be qualified for a CPO appointment in any given case.

On the one hand, a lack of formal qualifications for a CPO opens the field to prospective candidates who may have unique experiences that qualify them to be CPOs even though they lack a formal privacy or bankruptcy designation. For example, CPOs may be familiar with the practice in a

112. Frejka Bio, *supra* note 104; Avery Bio, *supra* note 105; *CIPP Certification*, IAPP.ORG, <https://perma.cc/D8WX-VC7A>; *Privacy Law Specialist*, IAPP.ORG, <https://perma.cc/H28B-HP9D> (“The IAPP is accredited by the American Bar Association to certify lawyers in the specialty area of Privacy Law.”).

113. *IAPP Privacy Certification Candidate Handbook 2020* at 4, IAPP.ORG (2020), <https://perma.cc/79UB-EJQC>.

114. Thomson Bio, *supra* note 105.

115. Alan Chapell, LINKEDIN.COM, <https://perma.cc/2QYT-S3VT>.

116. Baxter Bio, *supra* note 101 (“Michael St. Patrick Baxter solves problems for clients involved in insolvency or bankruptcy situations.”); *Overview*, LESHAWLAW.COM, <https://perma.cc/9DGY-GE47> [hereinafter Leshaw Bio] (“Jim Leshaw has more than 30 years of experience as a commercial lawyer handling complex domestic and international business disputes and transactions . . .”).

117. Thomson Bio, *supra* note 105.

118. Baxter Bio, *supra* note 101; Leshaw Bio, *supra* note 115.

given court, or they may be knowledgeable about the business that is for sale. On the other hand, having virtually no standards for choosing a CPO creates the possibility that an individual with no privacy or bankruptcy expertise could fill the CPO's shoes. Whether or not this is likely to occur depends in part on the CPO selection process, of which little is known.

*C. Proposal: More Criteria and Transparency for CPO Appointments*

The bankruptcy system demands a great deal of CPOs: they must comprehensively assess the risks and benefits of the sale of customer data—frequently a company's most valuable asset—often in a very short window of time. Given the importance of the CPO's work, the background and qualifications of a potential CPO should matter a great deal, because a CPO with extensive knowledge of the relevant privacy and bankruptcy issues at stake will enter a case on a much stronger footing than an individual without such knowledge. However, little information exists about what, if any, substantive qualifications an individual must possess before being appointed as a CPO, and the Bankruptcy Code's sole requirement—that a CPO be “disinterested”—does not speak at all to the CPO's skill set. In addition, as discussed, although many CPOs appointed to date have shared characteristics, there is an unevenness in the people appointed to the position. Some are bankruptcy experts, some are privacy experts, and some are both. Some have substantial experience as a CPO, while others have comparatively little.

This Article suggests that further CPO qualifications, beyond disinterestedness, should be developed and made publicly available as guidelines for choosing a CPO in any bankruptcy case. Development and publication of these guidelines could occur in a number of ways. Congress could amend the Bankruptcy Code to add CPO qualifications or baseline standards directly to § 332. Alternatively, either the FTC or the Department of Justice could issue such guidelines.

Commentators have increasingly called for more changes to the Bankruptcy Code's provisions surrounding customer data, arguing that the current provisions do not go far enough.<sup>119</sup> If Congress heeds these calls and amends the Bankruptcy Code to broaden the scope of cases where a CPO is needed, it could include qualifications for the CPO as part of those amendments. Specifically, Congress could amend §332 directly to list qualifications for a CPO that go beyond disinterestedness.

Of course, it is far from clear that a Bankruptcy Code amendment of this type would be forthcoming. Congress has not substantially modified the Bankruptcy Code provisions surrounding customer data sales since they

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119. Wedoff & Saunders, *supra* note 17, at 49, 51.

have been enacted.<sup>120</sup> Further, including qualifications as part of the Bankruptcy Code's statutory scheme may impede flexibility, as well as the U.S. Trustee's discretion to select a CPO that is well-matched for a particular case.

As an alternative to a statutory amendment, the FTC could issue guidelines.<sup>121</sup> The FTC conducts 10-year reviews of each of its rules and guides, so standards for CPO qualifications could periodically be updated and adjusted as needed.<sup>122</sup> The FTC was initially heavily involved in creating guidelines for the sale of PII through cases such as *Toysmart*, and it continues to monitor PII sales in bankruptcy today.<sup>123</sup> Further, as discussed above, BAPCPA contemplated the CPO taking on a role similar to the FTC's role in bankruptcy data sales prior to 2005.<sup>124</sup> For all of these reasons, the FTC may be well-suited to issuing guidelines on a CPO's qualifications.

If the FTC is unable to or otherwise not interested in issuing guidelines, the Department of Justice ("DOJ") could do so through Title 28 of the CFR. The U.S. Trustee Program is part of the DOJ, and the U.S. Trustee ultimately appoints the CPO to a bankruptcy case.<sup>125</sup> The U.S. Trustee should therefore be well-acquainted with what is needed in a CPO.<sup>126</sup> In addition, the CFR already provides minimum qualifications for other entities appointed by the U.S. Trustee, such as panel trustees.<sup>127</sup>

Regardless of which entity or agency issues the qualifications, they should require any CPO to have significant privacy experience, which can be demonstrated either through a CIPP designation (or higher), or equivalent experience. Because the CPO's primary focus revolves around scrutiny of privacy laws and policies, a background in privacy law is essential to understanding how to protect customer data effectively. Indeed, as advances in technology allow more complex ways of collecting customer data, and as privacy laws themselves become both more ubiquitous and complex, it will be critical for anyone in a CPO role to have privacy exper-

120. Although Congress amended § 332 in 2009 to provide that ombudsmen may be appointed no later than 7 days before a hearing (as opposed to five days), it has not made any changes to § 332 since that time. See 11 U.S.C. § 332 (2018); Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. 111-16 (May 7, 2009).

121. See, e.g., Rules and Guides, FTC.GOV, <https://perma.cc/72UH-EV3U>.

122. Retrospective Review of FTC Rules and Guides, FTC.GOV, <https://perma.cc/L6SZ-64E5>.

123. Wedoff & Saunders, *supra* note 17, at 15 ("A number of PII sales have drawn strong opposition from the FTC, state attorneys general and other creditors.")

124. See Part II.B, *supra*.

125. 11 U.S.C. § 332; *United States Trustee Program Information*, JUSTICE.GOV (Dec. 31, 2020), <https://perma.cc/77TY-77JF>.

126. See Baxter, *supra* note 6, at 13, 15 (noting that the U.S. Trustee often safeguards consumer information when the FTC is not paying close attention to a case and pointing out that the U.S. Trustee will appoint a CPO if they believe one is needed).

127. 28 C.F.R. § 58.3 (Westlaw through Feb. 25, 2021).

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tise. Others involved in the case, such as the U.S. Trustee and the bankruptcy court, are unlikely to have the expertise necessary to accurately assess the privacy law interests inherent in the sale. This is particularly the case if the FTC does not get involved.

In addition to establishing minimum qualifications for a CPO, it will be important to make the process for choosing a CPO more transparent as well. In particular, the U.S. Trustee should consider multiple candidates for a CPO appointment in any case. This can be done by setting up panels of CPOs in the various circuits<sup>128</sup> and by advertising for interested candidates to apply for the panels, similar to the way that the U.S. Trustee posts applications for private trustees.<sup>129</sup> Indeed, the U.S. Trustee publishes extensive information about private trustees, including handbooks, advertisements, statistics, and qualifications.<sup>130</sup>

In a 2014 article, the U.S. Trustee's Office emphasized that the appointment of a chapter 11 trustee "requires great care."<sup>131</sup> In the case of chapter 11 trustees, the Bankruptcy Code requires the U.S. Trustee to consult "with parties in interest" prior to making an appointment.<sup>132</sup> When the U.S. Trustee consults with the interested parties, it asks them about the skills they believe a chapter 11 trustee should possess.<sup>133</sup> In seeking a candidate with the desired skill set, the U.S. Trustee does not limit itself to looking only in the district in which the case was filed.<sup>134</sup> When appointing a chapter 11 trustee, the U.S. Trustee looks carefully at candidates' experience and qualifications, including their "bankruptcy, financial and business expertise" and often conducts candidate interviews to ascertain the proper fit for a case.<sup>135</sup> As in the case of chapter 11 trustees, more discussion surrounding the need for CPOs in bankruptcy cases and more transparency surrounding the selection and appointment processes can arguably contribute to increased use of the CPO in a bankruptcy case.<sup>136</sup>

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128. There is some indication that some circuits may have established CPO panels. See Porter, *supra* note 9, at n. a1 (noting that the author "was appointed to the Consumer Privacy Ombudsman Panel for the Third Circuit"). However, little information is publicly available about these panels or the process for being appointed to a panel.

129. See, e.g., *Public Notice – Appointment to Panel of Chapter 7 Trustees*, JUSTICE.GOV (July 14, 2020), <https://perma.cc/8JR6-XFJ8> (advertising vacancies for private trustees).

130. See *generally Private Trustee Information*, JUSTICE.GOV (Apr. 20, 2020), <https://perma.cc/E6PT-HPPJ>. Private trustee panel qualifications are provided in 28 C.F.R. § 58.3.

131. Clifford J. White III & Walter W. Theus, Jr., *Taking the Mystery Out of the Ch. 11 Trustee Appointment Process*, 33-MAY AM. BANKR. INST. J. 26, 26 (2014).

132. 11 U.S.C. § 1104(d) (2018).

133. White & Theus, *supra*, note 131, at 26.

134. *Id.* at 27.

135. *Id.*

136. *Id.* at 110 ("Perhaps more discussion of the need for chapter 11 trustees and less mystery surrounding the selection process can lead to more diligent use of this important tool for sound corporate governance in bankruptcy cases.").

Of course, a CPO is not directly comparable to a private or chapter 11 trustee. Private trustees in particular are involved in vastly more cases, and their involvement is substantial, as they typically administer the bankruptcy estate.<sup>137</sup> At the same time, the role of a CPO in a bankruptcy case is important, particularly if customer data represents a business's most valuable asset. Furthermore, if Congress does amend the Bankruptcy Code to require the appointment of a CPO in more cases, CPO appointments could become much more ubiquitous. Finally, every bankruptcy case is different, and the U.S. Trustee should be able to match a CPO with the desired skill set to the appropriate case. In this manner, a CPO can be appointed who is familiar with the industry or type of business at issue.

Notably, in the context of asbestos bankruptcies, the U.S. Trustee has objected to the appointment of the same future claims representative in multiple cases. U.S. Trustees have argued that this practice creates an incentive for future claims representatives "to put future employment ahead of the interests of future claimants. The idea is that the future claimants' representative these lawyers choose will 'go along to get along' to the detriment of future claimants in order to be selected for the next case."<sup>138</sup>

The same argument could apply to CPOs: if the same individuals are appointed to all or even most of the cases in a given region, there may develop an incentive for them to behave so that they will be hired for the next case. The U.S. Trustee can address this concern in the CPO context by providing a transparent appointment process that involves consideration of multiple candidates, such that a CPO appointed in one case has no clear guarantee of being appointed in subsequent cases.

Indeed, the bankruptcy court's response to the U.S. Trustee's argument about future claims representatives supports exactly such a process. The court noted that "[e]xperience and expertise should not be discarded unless the facts of the case, *as developed in a thorough appointment process*, raise concerns about the capabilities of particular candidates."<sup>139</sup> In the CPO context, the extent to which there is a "thorough" appointment process is not clear. Engaging in such a process and having clear guidance on what minimum qualifications a CPO must possess, would go a long way toward mitigating the potential for abuse that the current system provides.

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137. *Private Trustee Information*, *supra* note 130 (describing the roles and responsibilities of private trustees).

138. *In re Fairbanks Company*, 601 B.R. 831, 835 (Bankr. N.D. Ga. 2019).

139. *Id.* at 841 (emphasis added).

#### IV. CONCLUSION

A CPO can alter or upend a bankruptcy sale. With this great power comes an equally great responsibility: CPOs must be able to parse through massive amounts of information, critically assess the terms of a proposed data transfer, and apply bankruptcy and privacy laws and policies to the transfer. This Article maintains that the identity and qualifications of the CPO matter and proposes that legislators or regulators provide more guidance on this front, in particular by ensuring that a CPO has privacy expertise.

Nothing in this Article is intended to disparage the work of the CPOs that have been appointed to date. The bulk of the CPOs studied in this paper were instrumental in protecting customer data transferred as part of a bankruptcy sale. At the same time, the lack of substantive standards for CPO appointments, as well as the lack of transparency in CPO selection, create the potential for abuse. And the impact of even one unscrupulous or under-qualified CPO could be substantial: imagine if the CPO in *RadioShack* had allowed customer data to be sold regardless of privacy interests. Over a third of the entire U.S. population would be affected.

This Article's proposals represent a portion of a multi-pronged effort to better protect customer privacy in bankruptcy sales. The suggestions in this Article, if taken in combination with other proposals, such as increasing the amount of CPO appointments and broadening the scope of CPO responsibilities, will help to provide more comprehensive protection of and attention to consumer privacy interests in bankruptcy.

As data privacy laws continue to proliferate, it will be increasingly important for CPOs to understand those laws and their application in bankruptcy asset sales. It is time to develop public processes and clear qualifications for CPOs so that they may continue to carry out the increasingly onerous tasks the bankruptcy system imposes on them.



