Articles

Privacy Theater in the Bankruptcy Courts

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The intersection between privacy law and the big business of consumer data has become a major focus of policymakers, scholars, the business community, and consumer advocates, yet the legal regime governing the commercial use of data remains contested and often unclear. The difficulty becomes particularly acute when a company is financially distressed. A healthy firm might hesitate to exploit private data out of concern that doing so would cause reputational harm or liability, but these scruples matter less to financially distressed firms.

Bankruptcy law provides for the appointment of a "consumer privacy ombudsman" to make a recommendation on whether debtors in bankruptcy should be allowed to sell consumers' private information. But the law applies only to a subset of bankruptcy cases, and while the work of the ombuds may affect the sale of consumer data in those cases, legal protection is less than most would assume. This Article presents the only comprehensive empirical study of the consumer privacy ombudsman's role in the bankruptcy system, and of ombuds' qualifications, activities, and fees.

Ultimately, the regime is best understood as a form of "privacy theater," intended to reassure the public that consumer data is protected in bankruptcy proceedings. By mobilizing the public's trust in expertise, coupled with an ignorance of the nuances of bankruptcy, the consumer privacy ombudsman regime projects what scholars have called "a myth of oversight." While there are good rationales for heightening consumer protections when companies are in financial stress, the current system does not fulfill its promise of protecting consumer data from misuse by distressed businesses. This Article presents a series of proposals for reforming the law and for institutions governing commerce in consumers' private data by entities both in and out of bankruptcy.

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INTRODUCTION

The sharply resource-constrained environment of bankruptcy breeds fierce competition for the value that remains in a bankrupt firm.[1] Managers are tasked with maximizing the overall value of the firm, while those with individual rights in the firm's assets or claims against the firm fight to protect their interests.[2] Businesses may seek to restructure or escape contractual obligations and other burdensome relationships in order to maximize their assets' value—a process that can seem inequitable to those who dealt with the debtor prebankruptcy.[3] The determinations made in bankruptcy proceedings often go beyond business and financial issues and implicate public policy.[4] For example, in recent years, debtors have sought relief from liabilities to victims of asbestosis, sexual assault, or opioid addiction.[5]

The general bankruptcy goal of value maximization is often in tension with the interests of consumers. As a matter of policy, consumer interests may be worth protecting, but usually consumers lack individual incentive to involve themselves in the bankruptcy process. As a result, consumers can see gift card values wiped out; warranties, leases, and loans abandoned or dramatically restructured; or private data sold to the highest bidder.[6]

The efforts of bankrupt firms to monetize consumers' private data is a prime example of how unresolved policy conflicts can end up in the bankruptcy system. Although the intersection between privacy law and the big business of consumer data has become a major focus of policymakers, scholars, the business community, and consumer advocates, the legal regime governing the commercial use of data in bankruptcy proceedings remains contested and often unclear.[7] To the stakeholders in a financially distressed firm, consumers' private

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1. *See, e.g.*, LYNN M. LOPUCKI, CHRISTOPHER R. MIRICK & CHRISTOPHER G. BRADLEY, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS 3 (7th ed. 2021).

2. *See, e.g.*, Joshua Macey & Vincent Buccola, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. ON REGUL. 766, 768–69 (2021); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 866 (2014).

3. *See, e.g.*, Macey & Buccola, *supra* note 2, at 769 ("Scholars have long understood that bankruptcy can prevent companies from bearing many of the social costs of their behavior."); Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEVS. J. (forthcoming 2023).

4. *See, e.g.*, Jay Lawrence Westbrook, *Commercial Law and the Public Interest*, 4 PENN ST. J.L. & INT'L AFFS. 445, 450–51, 458 (2015).

5. *See generally* William Organek, *"A Bitter Result": Purdue Pharma, a Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies*, 96 AM. BANKR. L.J. 361 (2022); Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960 (2022); Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53 (2022); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079 (2022); Lindsey Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1062 (2021); Macey & Buccola, *supra* note 2; Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PENN. L. REV. 1715 (2018).

6. *See infra* notes 258, 262.

7. *See generally* John D. McKinnon, *Congress To Take Another Swing at Privacy Legislation*, WALL ST. J. (Mar. 25, 2022, 4:38 PM), https://www.wsj.com/articles/congress-to-take-another-swing-at-privacy-legislation-11648239269 (describing "comprehensive privacy legislation" as "a goal that has long eluded

data is a resource that can be monetized. While a healthy firm might hesitate to exploit private data out of concern over reputational risk or liability, these scruples matter less to financially distressed firms.

The pressure to capitalize on data has been acute in quickly transforming industries such as retail and healthcare. Thousands of companies in these fields have experienced financial distress, closed offices and stores, and sought bankruptcy relief.[8] Meanwhile, the value of consumer data has continued to rise, tempting cash-strapped companies to sell this data regardless of any risk to their reputation or harm to consumers.[9]

Recognizing this issue, Congress passed legislation to protect consumer privacy in bankruptcy proceedings in the sweeping Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[10] Congress did so in reaction to a high-profile case in which a failing dot-com e-retailer, Toysmart, sought to sell its consumer data—including data collected from and about children—to the highest bidder, despite the company's promises never to do so.[11] Regulators opposed the sale, the national media covered the battle, and the sale was scuttled.[12] In response to public outcry, Congress created the regime that Senator Patrick Leahy, the law's primary legislative sponsor, pronounced would prevent future breaches of such privacy promises.[13]

Congressional resolution"); Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C. L. REV. 423 (2018); Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573 (2021); Anupam Chander, Margot E. Kaminski & William McGeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733 (2021); William J. Magnuson, *A Unified Theory of Data*, 58 HARV. J. ON LEGIS. 23 (2021); Ari Ezra Waldman, *Privacy Law's False Promise*, 97 WASH. U. L. REV. 773 (2020); Lauren E. Willis, *Deception by Design*, 35 HARV. J.L. & TECH. 115 (2020); Lindsey Barrett, *Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries*, 42 SEATTLE L. REV. 1057 (2021); CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY (2016); Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247 (2011); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

8. Aisha Al-Muslim, *U.S. Retail Store Closures Hit Record in First Half*, WALL ST. J. (Sept. 29, 2020, 4:12 PM), https://www.wsj.com/articles/u-s-retail-bankruptcies-store-closures-hit-record-in-first-half-1160137 1800; Joe Skorupa, *Store Closures 2019: Another Record Year for Mass Extinction*, RETAIL INSIGHT (Mar. 20, 2019), https://risnews.com/store-closures-2019-another-record-year-mass-extinction; *Healthcare Organizations and Bankruptcy: Is Telemedicine the Savior?*, EPIQ ANGLE, https://www.epiqglobal.com/en-us/resource-center/articles/healthcare-organizations-bankruptcy-telemedicine (last visited Feb. 23, 2023); Jennifer Meyerowitz, *Privacy Protection and Data Security in Health Care-Related Bankruptcies*, 37 AM. BANKR. INST. J., June 2018, at 20.

9. David A. Hoffman, *Intel Executive: Rein In Data Brokers*, N.Y. TIMES (July 15, 2019), https://www.nytimes.com/2019/07/15/opinion/intel-data-brokers.html (noting that the data broking industry "generates more than $200 billion in economic activity per year").

10. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of the U.S. Code). The consumer privacy ombudsman regime was initially proposed as part of the Privacy Policy Enforcement in Bankruptcy Reform Act of 2001, S. 420, 107th Cong. § 232 (2001) (enacted).

11. *See generally* Complaint, FTC v. Toysmart.com, No. 00-11341, 2000 WL 34016434 (D. Mass. July 10, 2000) [hereinafter *Toysmart* Complaint].

12. *See infra* notes 42–46 and accompanying text.

13. S. REP. NO. 109-20, at 1781 (2005) ("Once somebody tells you we are going to keep your kids' information confidential, it will be.").

This law created a new institution and procedural rules to address the tension between bankruptcy value maximization and the protection of consumer data.[14] When certain conditions are met, the law provides for the appointment of a "consumer privacy ombudsman" (an "ombud"[15]) to investigate a sale of consumers' private information, and to advise the court on whether the sale should be allowed.[16] The rationale underlying this law is that by forcing the retention of an outside expert to report to the court, the process will ensure consideration of the impact of the sale on the privacy interests of consumers.[17]

In a companion article,[18] I summarize the contributions that ombuds have made to the law of privacy. There, I show that privacy law, as applied by ombuds, imposes some guardrails on companies' sale of consumer data, but that these restrictions leave businesses with considerable latitude to collect, use, and transact in data.[19] In addition, privacy law in this area relies heavily on the assumption that companies will continue to uphold the privacy promises that they made to their consumers after the sale of data is complete.[20] While the companion article deals with ombuds' impact on privacy law in general, this Article addresses the operation of the regime in actual bankruptcy proceedings. This Article provides an empirically grounded analysis of the regime that Congress established. Drawing primarily from a hand-collected dataset of every case from 2005 to 2020 where private data was offered for sale, an ombud was appointed, and a written report was submitted to a bankruptcy court, this Article presents the first comprehensive empirical study of who ombuds are, what they charge, and what they do.[21] This Article also presents evidence of the lengths to which parties in dozens of cases have gone to avoid the appointment of ombuds.[22]

The Article shows that the consumer privacy ombudsman regime falls far short of its promise of protecting consumers from the misuse of their data by distressed entities. Most ombuds are capable and accomplished privacy

14. 11 U.S.C. §§ 332, 363(b)(1).

15. On this terminology, see generally Christopher Bradley, *Privacy for Sale: The Law of Transactions in Consumers' Private Data*, 40 YALE J. ON REGUL. 127 (2023).

16. § 363(b)(1)(B).

17. *Id.* § 332(a).

18. *See generally* Bradley, *supra* note 15.

19. *Id.* at pt. III.B.

20. *Id.* at 140–42.

21. For helpful prior work on the consumer privacy ombudsman regime, see generally Laura N. Coordes, *Unmasking the Consumer Privacy Ombudsman*, 82 MONT. L. REV. 17 (2021); Diane Lourdes Dick, *The Bankruptcy Playbook for Dealing with Valuable Data Assets*, 42 BANKR. L. LETTER, Jan. 2022; Kayla Siam, *Coming to a Retailer Near You: Consumer Privacy Protection in Retail Bankruptcies*, 33 EMORY BANKR. DEVS. J. 487 (2017); Edward J. Janger, *Muddy Property: Generating and Protecting Information Privacy Norms in Bankruptcy*, 44 WM. & MARY L. REV. 1801 (2003) (discussing the regime before Congress enacted it); Lucy L. Thomson, *Personal Data for Sale in Bankruptcy: A Retrospective on the Consumer Privacy Ombudsman*, 34 AM. BANKR. INST. J., June 2015, at 32.

22. *See infra* Part II.A.

experts,[23] and undoubtedly their work sometimes helps consumers. In the RadioShack bankruptcy, for instance, the personal information of more than 117 million individuals was put up for sale.[24] Together with regulators, the ombud crafted a regime that protected much of the most sensitive consumer information that RadioShack was seeking to monetize.[25] But regulators and the media are rarely as active as they were in the RadioShack case, and absent such pressure, ombuds operate within a legal and institutional system that does not equip them to energetically protect consumers' private data.

The law applies in a narrow subset of cases where consumers' private information is sold, and while the work of the ombuds has some impact in those cases, it is less than most would assume. Ombuds routinely follow a set framework derived from a prominent FTC settlement. Ombuds' analyses typically rely on neither technical knowledge nor legal expertise beyond that which most lawyers could attain with a few hours of research—particularly if, as this Article recommends, prior reports are collected and published so that future ombuds, future debtors in bankruptcy, and the public can better understand what ombuds do.

Ultimately, the consumer privacy ombudsman regime is best understood as a form of "privacy theater," intended to reassure the public that their data is safe by giving an exaggerated sense of protection. As privacy law scholar Paul Schwartz articulates, "privacy theater . . . seeks to heighten a feeling of privacy protection without actually accomplishing anything substantive in this regard."[26] A legal regime that functions as privacy theater is "largely ritualistic," used to "create a myth of oversight," and used to sustain that myth while obscuring the darker realities.[27] The consumer privacy ombudsman regime mobilizes public

23. *See infra* Part II.B.1 (discussing ombud characteristics and qualifications). For some thoughtful reflections by ombuds, see Randi Singer & Olivia Greer, *Transferring Personally Identifiable Information in Bankruptcy M&A – Part 3*, WEIL RESTRUCTURING BLOG (June 22, 2021), https://restructuring.weil.com/pre-filing-considerations/transferring-personally-identifiable-information-in-bankruptcy-ma-part-3/ (providing a lengthy interview with frequently serving ombud Elise Frejka); Thomson, *supra* note 21, at 32.

24. Letter from Jessica L. Rich, FTC, to Elise Frejka, Frejka PLLC (May 16, 2015), https://www.ftc.gov/system/files/documents/public_statements/643291/150518radioshackletter.pdf [hereinafter Rich Letter].

25. Chris Isidore, *RadioShack Sale Protects Most Customer Data*, CNN BUS. (June 10, 2015, 4:16 PM), https://money.cnn.com/2015/06/10/news/companies/radioshack-customer-data-sale/index.html.

26. Paul M. Schwartz, *Reviving Telecommunications Surveillance Law*, 75 U. CHI. L. REV. 287, 310 (2008). Schwartz derived this concept from Bruce Schneier's work on "security theater." *See* BRUCE SCHNEIER, BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD 38 (2003); *see also* Ari Ezra Waldman, *How Big Tech Turns Privacy Laws into Privacy Theater*, SLATE (Dec. 2, 2021, 1:28 PM), https://slate.com/technology/2021/12/facebook-twitter-big-tech-privacy-sham.html; Rob Shavell, *Real Win vs. Privacy Theater: Google's New Personal Information Removal Policy*, VENTURE BEAT (May 11, 2022, 2:07 PM), https://venturebeat.com/datadecisionmakers/real-win-vs-privacy-theater-googles-new-personal-information-removal-policy/; Gilad Edelman, *Google and the Age of Privacy Theater*, WIRED (Mar. 18, 2021), https://www.wired.com/story/google-floc-age-privacy-theater/; Rohit Khare, *Privacy Theater: Why Social Networks Only Pretend To Protect You*, TECH CRUNCH (Dec. 27, 2009), https://techcrunch.com/2009/12/27/privacy-theater/.

27. Schwartz, *supra* note 26, at 288.

trust in experts and courts to "create a myth of oversight" while adding little "substantive" protection.

While there are good reasons to enhance consumer privacy protections when companies are financially stressed, the current system does not do the job. Instead, appointments are rarely made, and when they are, these appointments provide relatively minimal protection. This Article presents a series of proposals to reform the law and the institutions governing commerce in consumers' private data. It further suggests that ombuds' role could be played by U.S. Trustees' lawyers, or could be shaped into a more traditional form where the proponents of a sale present necessary proofs to the judge to decide on the sale's compliance with the law.

In addition, the Bankruptcy Code could be changed to make its privacy protections more meaningful. Most obviously, the many gaps in the current law could be fixed so that all sales of private information comply with governing law, and that the burden of demonstrating compliance with the law lies more clearly with the proponents of the sale. In addition, lawmakers could shift ombuds from the relatively neutral role they have generally played and instruct them to serve as protectors of consumers' interests, investigate proposed sales more actively, and advocate more directly for consumers.

Changes beyond the bankruptcy system should also be considered. Because financially distressed businesses present special risks regardless of whether they are in bankruptcy, and because there is no workable way to identify and target distressed businesses for additional privacy scrutiny, commercial privacy law reforms arguably should apply to all business transactions involving consumers' private information. Distress should be merely one factor for regulators or courts to consider as they weigh the propriety of a transfer of private data or the need for data protection. Some potential reforms involve requiring regulatory preclearance of transactions in data, or requiring advance notification of such transactions so that consumers, regulators, and others can act if necessary to protect consumer privacy.

Part I summarizes the existing consumer privacy ombudsman regime and the broader context of the law of privacy the regime operates in. This Part discusses the public concern over the protection of data from misuse by distressed entities, which led to the creation of the ombudsman regime, and surveys the significant limitations of that regime. Part II explores how this regime is implemented in practice. It shows that many sales of private data take place without the appointment of an ombud, and that even when ombuds are appointed, they show keen awareness of the limits of their statutory responsibilities. Part III surveys possible reforms to the consumer privacy ombudsman regime. It begins with potential changes to the bankruptcy system, and then suggests more sweeping changes to transactions in private data by businesses outside of bankruptcy as well.

I. THE PROTECTION OF CONSUMER INFORMATION IN BANKRUPTCY

A. THE LAW OF CONSUMER DATA PRIVACY

There is no comprehensive U.S. law governing the use of consumers' private information. Rather, there are some sector-specific federal laws governing data in healthcare businesses and financial institutions as well as information gathered from or about children.[28] Some states have passed privacy regulations that broadly (if not comprehensively) govern privacy within their jurisdictions.[29] Generally, though, regulation of privacy emerges from the broad prohibitions against "unfair or deceptive acts or practices" contained in the Federal Trade Commission Act and in similar "little FTC Acts" passed by the states.[30] The Federal Trade Commission (FTC) has developed the law of privacy in a number of ways, such as by producing guidance documents, as well as by pursuing investigations, enforcement actions, and settlements in which an alleged violator often agrees to pay fines, submit to monitoring, and reform allegedly unlawful practices.[31] Over time, these regulatory actions have come to form a "common law of privacy": a body of quasi-regulatory norms to guide the behavior of companies as they develop practices in the constantly evolving and increasingly economically important area of data privacy.[32]

The linchpin of the common law of privacy has been the "notice and choice" framework, which requires the disclosure of practices to consumers and the procurement of their consent.[33] Consumer consent sometimes takes the form of "opting in" to a practice—for instance, by clicking "accept" when prompted. At other times, consent is obtained when consumers do not "opt out"—for instance, by choosing to unsubscribe or to cease using a website or service after disclosure of unfavorable terms.[34] The nature and degree of sufficient disclosure and consent depends on the particular acts or practices at issue.[35] The standards for sufficient consent are higher when the practices would be particularly detrimental to consumers' interests or surprising to reasonable consumers.[36]

The notice and choice approach has been sharply and extensively criticized as an unrealistic, unworkable, and unfair framework for regulating the privacy

28. *See* 15 U.S.C. §§ 6501–6505, 6801–6802; COPPA Rules, 16 C.F.R. § 312 (2013); HIPAA Rules, 45 C.F.R. §§ 160.101–.105, 160.500–.552.

29. *See, e.g.*, Kaminski & McGeveran, *supra* note 7, at 1734; STEPHEN P. MULLIGAN & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., R45631, DATA PROTECTION LAW: AN OVERVIEW 38–40 (2019).

30. MULLIGAN & LINEBAUGH, *supra* note 29, at 36–37.

31. *See* HOOFNAGLE, *supra* note 7, at 98–107.

32. *See generally* Solove & Hartzog, *supra* note 7.

33. Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1882–83 (2013).

34. HOOFNAGLE, *supra* note 7, at 236–40.

35. *Id.* at 164–65.

36. *See, e.g.*, Complaint at 5, *In re* Sears Holdings Mgmt. Co., No. C-4264 (F.T.C. Aug. 31, 2009).

practices of data-driven companies.[37] As a result, the model has been modified and to some degree abandoned. Rather than focusing solely on a company's particular privacy-related disclosures, regulators have looked to the entirety of the company's relationship with consumers to weigh whether, in light of all of the relevant circumstances, a practice comports with the reasonable expectations that consumers have formed regarding data privacy.[38] In addition to their ongoing refinements to the consent-based model, regulators have increasingly imposed substantive regulations on companies, on the theory that consumers reasonably expect certain data protection standards, and that no amount of disclosure could successfully dispel such expectations.[39] Lax information security practices, for instance, have been held to be inherently unfair or deceptive, as have privacy policies that permit companies to change practices retroactively and without seeking further consent from consumers.[40]

With respect to the sale of consumers' private information, the law remains sparse.[41] The legal framework governing the sale of consumer data derives from *In re Toysmart.com, LLC*. In *Toysmart*, a failed dot-com was seeking to sell its remaining assets, including private customer information, some of which had been gathered from children, to the highest bidder.[42] The FTC and state regulators fought the sale.[43] The FTC ultimately agreed to withdraw its opposition subject to conditions that the buyer would use (and protect) the information in a way similar to how Toysmart did.[44] The FTC decided that even

37. *See generally* Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461 (2019); Bradley, *supra* note 15, at 142–45 (summarizing criticism).

38. *See* Solove & Hartzog, *supra* note 7, at 628, 638–40, 667–69; Bamberger & Mulligan, *supra* note 7, at 295.

39. HOOFNAGLE, *supra* note 7, at 163.

40. *See, e.g.*, Consent Order, *In re* Gateway Learning Corp., 138 F.T.C. 443, 449 (2004) [hereinafter *Gateway* Consent Order] (arguing that retroactive modification was unfair or a deceptive practice); Solove & Hartzog, *supra* note 7, at 640–41 (describing *Gateway*); HOOFNAGLE, *supra* note 7, at 216–35 (describing security requirements).

41. *Cf.* Solove & Hartzog, *supra* note 7, at 643–48 (describing FTC actions under some "sectoral" regimes).

42. *See Toysmart* Complaint, *supra* note 11.

43. *Id.*; Matt Richtel, *F.T.C. Moves To Halt Sale of Database at Toysmart*, N.Y. TIMES (July 11, 2000), https://www.nytimes.com/2000/07/11/business/ftc-moves-to-halt-sale-of-database-at-toysmart.html.

44. Stipulation and Order Establishing Conditions on Sale of Customer Information, attached as Ex. A to Motion To Approve Stipulation with Federal Trade Commission and for Authority To Enter Into Consent Agreement, *In re* Toysmart.com, No. 00-13995 (Bankr. D. Mass. July 20, 2000), ECF No. 113, https://www.ftc.gov/sites/default/files/documents/cases/toysmarttbankruptcy.1.htm [hereinafter *Toysmart* Stipulation]. The sale was nonetheless opposed by state attorneys general, and ultimately the data was destroyed. *See* Michael Brick, *Judge Overturns Deal on Sale of Online Customer Database*, N.Y. TIMES (Aug. 18, 2000), www.nytimes.com/library/tech/00/08/biztech/articles/18toys.html; *Bankruptcy Judge Passes on Toysmart*, N.Y. TIMES (Aug. 17, 2000), https://www.nytimes.com/2000/08/17/continuous/bankruptcy-judge-passes-on-toysmartcom.html; Motion by Debtor To Destroy Customer Information, ¶¶ 12–13, *In re* Toysmart.com, LLC, No. 00-13995 (Bankr. D. Mass. Jan. 1, 2001), ECF No. 313; Victoria Shannon, *Tech Brief: Toysmart Paid Off*, INT'L HERALD TRIB., Jan. 11, 2001, at 11; Objection of the Commonwealth of Massachusetts and Forty-Six States to the Debtor's Motion to Approve Settlement with Federal Trade Commission and for Authority To Enter Into Consent Agreement at 6–7, *In re* Toysmart.com, LLC, No. 00-13995 (Bankr. D. Mass. Aug. 3, 2000), ECF No. 180.

if there was a privacy policy stating that consumer information would not be transferred, the company could break that promise and sell the information, so long as the recipient was a "qualified buyer."[45] A buyer is qualified if it intends to use the information to continue the seller's business or to engage in a similar business, and it agrees to abide by the seller's privacy policy.[46] The *Toysmart* framework is commonly supplemented by the requirements of notice to consumers and an opportunity for consumers to opt out of the proposed transfer.[47] If a privacy policy is more permissive than that in *Toysmart*, then a proposed transfer is likely to be allowed with fewer restrictions, although the exact scope of appropriate restriction is unclear.[48] Courts or regulators might hold that unfettered transfers are not permitted even with a clear warning, but the assessment would likely depend on the particular circumstances under which the information was gathered.

Because privacy rules in the United States tend to be broad and indeterminate, leaving considerable room for interpretation in different circumstances, companies tend to view privacy through the lens of risk management and assess the likelihood of a given business practice being a violation of the law, offending public sentiment, or driving away customers.[49] Expert consensus appears to be that the legal sanctions for breaches of privacy laws are inadequate, but that they provide at least some deterrence.[50] Companies wish to avoid the expense of regulatory investigations and the resulting sanctions, which often include lengthy monitoring and large auditing costs.[51]

In addition, the existing consumer protection regime in the area of privacy relies, to some degree, on reputational constraints—the notion that companies won't betray consumers because they want to maintain good relationships with their customers.[52] But reputational protections are weakened under some conditions. First, there is reason to doubt the power of reputational constraints when, as is often the case, a company can violate consumers' privacy without the breach ever being attributed back to the company. Private information can be transferred with a few keystrokes, or through the exchange of an encrypted message or thumb drive, and the transfer is often untraceable.[53] Thus, there is little risk of discovery, and abuses can be perpetrated with impunity.

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45. *See Toysmart* Stipulation, *supra* note 44.

46. *See id.*

47. *See, e.g.*, Bradley, *supra* note 15, at 140–42.

48. *Id.* at 161–62.

49. Bamberger & Mulligan, *supra* note 7, at 272 ("[P]rivacy is increasingly framed as part of the evolving practice of risk management.").

50. *See generally* Lauren H. Scholz, *Privacy Remedies*, 94 IND. L.J. 653 (2019); Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737 (2018).

51. *See, e.g.*, HOOFNAGLE, *supra* note 7, at 98–99; Solove & Hartzog, *supra* note 7, at 606 (noting that auditing frequently lasts more than twenty years).

52. *See, e.g.*, Bamberger & Mulligan, *supra* note 7, at 280 (quoting a privacy officer as commenting, "the biggest value to privacy is it's a part of brand" (alteration in original)); HOOFNAGLE, *supra* note 7, at 166 (noting the "tremendous public relations cost of FTC enforcement actions").

53. Magnuson, *supra* note 7, at 40–41.

Second, some parties, such as data brokers,[54] may have no interest in maintaining good customer relations and thus may not be constrained by reputational constraints. This is part of what is known as the "third-party problem."[55] The third-party problem sparked public concern about the proposed auction of data in *Toysmart*,[56] which, as mentioned, ultimately led to the establishment of the consumer privacy ombudsman regime. The FTC explained its adoption of the "qualified buyer" framework in the *Toysmart* case by opining that the framework

> protect[s] consumer interests by ensuring that the data would be used consistent with Toysmart's promises by an entity that was essentially operating as a new owner of the business, as opposed to a "third party" who was merely the highest bidder in a winner-take-all auction that may not have a reputational interest in handling the information in the same manner.[57]

In other words, all buyers are not created equal in the FTC's view. Consumers are more protected when a buyer is likely to desire an ongoing relationship with consumers and is accordingly willing to take steps to protect consumer information to protect its own reputation. Ombuds have found this conceptualization of asset purchasers appealing. One stated that "[b]ecause the buyer of a company can be viewed as stepping into the shoes of the purchased company, it is arguably not a 'third party' but instead a new 'first party.'"[58]

Third, as discussed in the following Subpart, a privacy protection regime based on reputational constraints may falter because financial distress may lead companies to disregard reputational concerns as they focus more on short-term monetization of assets rather than on good customer relations.

B. FINANCIAL DISTRESS AND CONSUMERS' PRIVATE DATA

Companies in financial distress may respond less to the reputational considerations and other constraints that U.S. privacy regulation relies on, and thus heightened regulatory attention to companies in financial distress (in or out of bankruptcy) may be warranted.

Companies' risk-management perspectives often change when they experience financial distress and are forced to make corporate life-or-death

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54. Data brokers are businesses that are dedicated to collecting, analyzing, and transacting in vast amounts of personal information about individuals. *See* FTC, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY i–ii (2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

55. HOOFNAGLE, *supra* note 7, at 146–47.

56. *See, e.g.*, Richtel, *supra* note 43 (noting FTC official stating that sale with "appropriate protections"—specifically those that address the concerns underlying the third-party problem—could potentially be approved).

57. Rich Letter, *supra* note 24, at 5.

58. Consumer Privacy Ombudsman's Interim Report to the Court at 17, *In re* Gottschalks Inc., No. 09-10157 (Bankr. D. Del. May 24, 2019), ECF No. 515. In that case, the ombud contrasted this reading of "third parties" with that of the term "outside parties," which he believed was more restrictive, to the extent of precluding access by a "qualified buyer." *Id.* at 17, 24.

decisions.[59] Companies in financial distress often abandon a reputationally aware posture and begin to act more like a "third party" who was the highest bidder in a winner-take-all action.[60] Customer loyalty and retention are, of course, necessary building blocks of long-term, sustainable success for most businesses. But as businesses approach a financial endgame, their decisionmakers tend to look to shorter time horizons.[61] A company—and its managers and employees, who risk losing employment, often together with some equity stake—becomes more likely to choose survival over consumer relations and short-term value maximization over its long-term health. Some owners or managers may even conceive of that prioritization as part of their duty to the stakeholders in the insolvent entity.[62]

A similar dynamic undermines the deterrent effect provided by risk of legal liability for data misuse. Ordinarily, due to the costs and risks associated with insolvency, decisionmakers at a company will take precautions to avoid incurring liability, which in the privacy context often includes the cost of lengthy regulatory investigations and monitoring regimes.[63] But a financially distressed company has "shallow pockets" due to the shield of limited liability.[64] Accordingly, legal liability for data misuse serves as less of a deterrent because there is a low likelihood that any judgment will be collectible. In essence, a distressed company can gamble with money that is not its own.[65]

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59. Edward J. Janger, *Privacy Property, Information Costs, and the Anticommons*, 54 HASTINGS L.J. 899, 910 (2003) (noting that "[l]egal economists have long recognized that the officers of companies that are insolvent (or nearly so) are faced with a number of morally problematic choices" and collecting citations).

60. *See supra* note 58 and accompanying text.

61. This phenomenon has also been remarked in startup businesses, which are willing to sacrifice long-term prospects for the sake of shorter-term success. *See* WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES 75 (2018) ("Companies have widely divergent incentives to self-regulate. Large companies plan far into the future and are reliant upon consumer goodwill for long-term sustainability. But small start-ups may be incentivized to collect as much data as possible by . . . a kind of digital strip mining.").

62. Cassandra M. Porter, *Confessions of a Consumer Privacy Ombudsman*, 9 LANDSLIDE, July/Aug. 2017, at 30 ("For a solvent company, the priority is upholding applicable privacy law and maintaining good customer relations by keeping security breaches to a minimum. However, for an insolvent company, *creditor repayment becomes the company's focus by statute, and all other tasks are prioritized accordingly*. Critically, customer data is often among a debtor's most valuable assets." (emphasis added)).

63. *See, e.g.*, Bamberger & Mulligan, *supra* note 7, at 274 ("One [corporate privacy offer] described the threat of FTC oversight as a motivating 'Three-Mile Island' scenario.").

64. Janger, *supra* note 21, at 1829 (discussing the "judgment proof" problem and explaining that "[l]iability-based entitlements are not particularly useful for enforcing duties against people or entities without assets").

65. This may be more likely in small businesses that are managed by their owners, who are less dependent on the firm for employment and more focused on positive return on their investment. While small business owners often provide personal guarantees to lenders such as banks, *see, e.g.*, Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AM. BANKR. INST. L. REV. 251, 282–83 (2020), limited liability ensures that involuntary tort creditors do not benefit from such guarantees. Employees and managers of larger companies, who often lack significant ownership stakes, may be more risk-averse, interested in prolonging their employment rather than in taking value-maximizing risks.

Limited liability is not a perfect shield; there is always a possibility that the "corporate veil" can be pierced, such that liability will be imposed on the owners of the company.[66] But veil-piercing is an exceedingly rare remedy, requiring allegations of fraud, deception, or serious inequity.[67] It is not available for breaches of contract or violation of most regulations.[68] And veil-piercing litigation is fact-driven and costly.[69] Some statutory regimes curtail limited liability as a matter of course—for instance, in the context of environmental, employment, or tax-related violations[70]—but there is no such regime in the privacy context.

Financial distress also presents particular risks because distressed companies' capacity for data protection is significantly lower. Distressed companies are unlikely to invest in the technology or personnel required to maintain data security. In fact, they frequently shed employees, including those with information technology expertise.[71] They may also lose or let go of employees with knowledge of the privacy policies and promises of the company.[72]

Several ombuds have acknowledged this link between distress and lax security practices. These ombuds often do so in order to emphasize the lack of consumer harm from the sale. As one report puts it, "[personally identifiable information] may be better protected under the stewardship of a solvent Buyer than in the hands of a bankrupt Debtor that may lack the financial and personnel resources to protect PII appropriately."[73] Of course, there is another, even more

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66. *See, e.g.*, Macey & Buccola, *supra* note 2, at 774–75; Douglas C. Michael, *To Know a Veil*, 26 J. CORP. L. 41, 41 (2000).

67. Verdantus Advisors, LLC v. Parker Infrastructure Partners, LLC, No. CV 2020-0194, 2022 WL 611274, at *2 (Del. Ch. Mar. 2, 2022); Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 854, 886 (2010).

68. Allen Sparkman, *Will Your Veil Be Pierced? How Strong Is Your Entity's Liability Shield? Piercing the Veil, Alter Ego, and Other Bases for Holding an Owner Liable for Debts of an Entity*, 12 HASTINGS BUS. L.J. 349, 365, 476 (2016).

69. *See generally* Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89 (2013).

70. *See* Sparkman, *supra* note 68, at 481; United States v. Bestfoods, 524 U.S. 51, 55 (1998) (noting that under CERCLA, parent companies may be held directly liable even when state law standards for veil-piercing are not met).

71. John G. Loughnane, *Mediating Cybersecurity Disputes in Distressed Circumstances*, 36 AM. BANKR. INST. J., July 2017, at 26 (noting the particular challenges of preserving information security when companies encounter distress and providing examples).

72. *See, e.g.*, Singer & Greer, *supra* note 23 ("Compare . . . [a company in a reorganization planned well in advance] to a company in Chapter 7 where there's no one there to talk to, or a company not willing to make people available to discuss the nuts and bolts of how the company operates and what they do with their information. Then it's much harder . . . . The really bad situations are where everyone has left a company, because IT professionals are employable and they're the first to go. When you have a homegrown data set that only the people who work there know how to deal with and those people are gone, and then the state Attorney General wants to take a deposition . . . .").

73. Declaration and Report of Consumer Privacy Ombudsman Fred H. Cate at 1, *In re* Bakers Footwear Grp., Inc., No. 12-49558 (Bankr. D. Mo. Feb. 20, 2013), ECF No. 650; *see also* Consumer Privacy Ombudsman Report to the Court at 7–8, *In re* JS Mktg. & Commc'ns, Inc., No. 05-65426 (Bankr. D. Mont. Dec. 20, 2006),

consumer-protective option, which is simply to destroy the data—an option that, perhaps for reasons explored below, ombuds are generally reluctant to propose.[74]

In sum, reputational constraints and the threat of liability have less deterrence in the context of distressed businesses, and the lack of resources to retain personnel and maintain technological security also threaten consumer interests. For these reasons, there may be justification for imposing additional regulation of privacy when businesses are in financial distress.

C. THE ORIGINS AND LIMITS OF THE OMBUDSMAN REGIME

As mentioned, *Toysmart* drew the attention of the public and lawmakers. In an age in which the monetary value of customer data was beginning to come into focus, and the potential growth of online, data-centric business models was becoming clear, there was concern that Toysmart's efforts to hawk consumer information to the highest bidder would presage a wave of such sales.[75]

Congress responded to these concerns by imposing new rules and procedures for the sale of private information in bankruptcy. The new provisions were included in the sweeping amendments to the Bankruptcy Code initially proposed in 2000 and 2001, which ultimately passed into law in 2005.[76] A bipartisan amendment, sponsored by Senators Hatch and Leahy, imposed a new procedure for how bankruptcy courts should address the "next *Toysmart*."[77] Shortly before the law's passage, Senator Leahy explained the amendment:

> [T]he Leahy-Hatch amendment is needed because the customer lists and databases of failed firms now can be put up for sale in bankruptcy without any privacy considerations, even in violation of the failed firm's own public privacy policy against sale of personal customer information to third parties.
>
> Let me just tell you what happened in this case, and it is not untypical. We had an online toy store called Toysmart.com. Toysmart.com wanted to encourage parents to allow their children to go online and, in doing so, they promised on their Web site that personal information voluntarily submitted by visitors to the site—such as name, address, billing information, childhood preferences—would never be shared with a third party . . . They filed for bankruptcy in 2000. Even though they had made this promise to parents and children, the personal customer information was put on the auction block . . . .
>
> *We wanted to prevent future cases like Toysmart.com. Once somebody tells you we are going to keep your kids' information confidential, it will be.*[78]

ECF No. 137 (noting violations of federal and state data privacy and security laws and suggesting that consumers' information is safer with the buyer than with the seller); Consumer Privacy Ombudsman Report to the Court at 5, 8, *In re* W. Med., Inc., No. 06-bk-01784 (Bankr. D. Ariz. Aug. 1, 2006), ECF No. 169 (same).

74. *See infra* Part III.B.3.b (noting pro-transactional stance of most ombuds).

75. *See supra* notes 42–44.

76. *See supra* note 10 and accompanying text.

77. *Id.*; Privacy Policy Enforcement in Bankruptcy Reform Act of 2001, S. 420, 107th Cong. § 232 (2001) (enacted).

78. 151 CONG. REC. 2899, 2957–58 (2005) (emphasis added); *see also* 147 CONG. REC. 2749, 2751 (2001) (statement of Sen. Patrick Leahy); 147 CONG. REC. 2749, 2749 (2001) (statement of Sen. Orrin Hatch).

Even granting some leeway for politician-speak, this is an overly generous characterization of the protection provided by the consumer privacy ombudsman regime. Reflecting the influence of this overexpansive view, many ombuds' reports quote Senator Leahy's statement as if it accurately conveys the substance of the law.[79] The most frequently appointed ombud wrote in one of her reports that "Section 332 of the Bankruptcy Code makes the protection of consumer privacy an important focus of all bankruptcy proceedings in which personally identifiable consumer records are to be sold."[80] Another ombud wrote in an American Bar Association publication that she is not "overly concerned" about her own privacy, because "I am confident that my fellow CPOs (and their counsel) are working just as diligently to protect consumer interests. After all, we're all consumers first."[81]

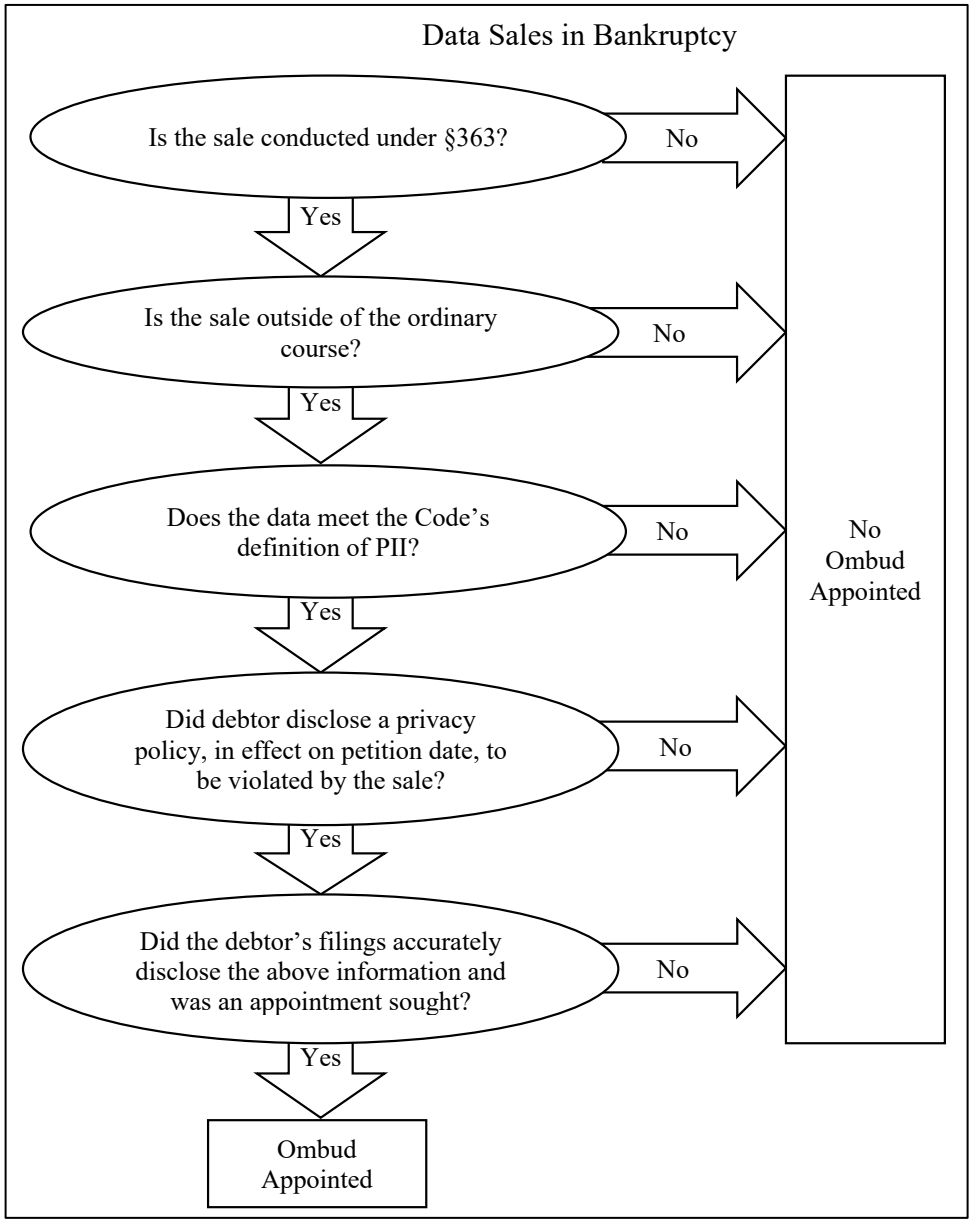
In fact, the scope of the consumer privacy ombudsmen regime is much more limited than these broad assurances suggest. While it is strictly true that the regime might prevent the exact situation in *Toysmart*, Senator Leahy oversold the actual impact of the law. The Bankruptcy Code only mandates the appointment of ombuds in a narrow range of situations. The limitations can be represented by the flow chart in Figure 1 below.

79. *See, e.g.*, Consumer Privacy Ombudsman's Report at 22, *In re* Mich. Sporting Goods Distribs., Inc., No. 17-00612 (Bankr. W.D. Mich. July 19, 2017), ECF No. 498 [hereinafter *Michigan Sporting Goods* Report].

80. Consumer Privacy Ombudsman Report to the Court at 11, *In re* Activecare, Inc., No. 18-11659 (Bankr. D. Del. Sept. 27, 2018) [hereinafter *Activecare* Report]. On the frequency of ombuds' appointments, see *infra* Figure 1.

81. Porter, *supra* note 62.

FIGURE 1: DATA SALES IN BANKRUPTCY (FLOW CHART)



First, the law applies only to sales undertaken pursuant to § 363(b) of the Bankruptcy Code, and not those undertaken pursuant to plans of reorganization.[82] While plans of reorganization are classically thought of as restructuring a debtor's balance sheet and operations to continue the debtor's business,[83] many plans do not fit this model. Some plans, often known as "liquidating" or "liquidation" plans, involve auctioning off the company as a whole or on a piecemeal basis.[84] They typically provide for the orderly sale of the debtor's assets, the prosecution of any valuable causes of action, and ultimately, the distribution of all proceeds to creditors.[85] Thus, reorganization plans can provide for the disposition of some or all of a debtor's assets, including intangible assets such as customer data. If information is to be disposed of under a plan, there is nothing like the automatic requirement of an appointment of an ombud in the § 363 sale context. This is at least one reason why an ombud was not appointed in the *In re Caesars Entertainment Operating Co.* bankruptcy case, in which millions of customers' information was sold.[86] In performing research for this Article, I found no case in which an ombud was appointed to evaluate a sale pursuant to a plan of reorganization.

This does not necessarily mean that plans can liquidate consumer information without regard to consumer privacy. The Code requires that every Chapter 11 plan be "proposed in good faith and not by any means forbidden by law."[87] Faced with an objection on this basis, a bankruptcy court might well refuse to confirm a plan that would violate overriding rules of consumer privacy law, just as it would a plan whose business model violated other applicable laws, such as drug or employment laws.[88] In addition, limiting the involvement of ombuds to the § 363 sale context could perhaps be justified, because the plan process differs from the sale process. Sales are often accomplished on an

82. Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 603, 627 (2005) ("[The Code] requires appointment of a consumer privacy ombudsman only in the context of sales or leases under § 363(b)(1), not in the context of a sale under a Chapter 11 plan, and § 1123(a) of the Bankruptcy Code continues to allow a plan to provide for a transfer or sale of the debtor's property '[n]otwithstanding any otherwise applicable nonbankruptcy law.'"); Luis Salazar, *Privacy and Bankruptcy Law Part II: Specific Code Provisions*, 25 AM. BANKR. INST. J., Dec./Jan. 2007, at 10 (frequently appointed ombud who identifies himself as drafter of provisions confirming that plans of reorganization are not covered).

83. DOUGLAS J. WHALEY & CHRISTOPHER G. BRADLEY, PROBLEMS AND MATERIALS ON DEBTOR AND CREDITOR LAW 387–88 (7th ed. 2022); *Chapter 11 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Feb. 23, 2023).

84. WHALEY & BRADLEY, *supra* note 83; *Chapter 11 – Bankruptcy Basics*, *supra* note 83.

85. *See, e.g.*, Bankruptcy Servs., Inc. v. Ernst & Young, LLP (*In re* CBI Holdings Co., Inc.), 529 F.3d 432, 441 (2d Cir. 2008).

86. *See* Dick, *supra* note 21, at 3–4 (describing *Caesars* bankruptcy case).

87. 11 U.S.C. § 1129(a)(3); *see In re* Madison Hotel Assocs., 749 F.2d 410, 425 (7th Cir. 1984) (noting that courts must consider the totality of circumstances to determine whether the plan "achieve[s] a result consistent with the objectives and purposes of the Bankruptcy Code"); *cf.* 11 U.S.C. § 1123(a) (permitting a plan to provide for sale of property "[n]otwithstanding any otherwise applicable nonbankruptcy law").

88. *See, e.g.*, Clifford J. White III & John Sheahan, *Why Marijuana Assets May Not Be Administered in Bankruptcy*, 36 AM. BANKR. INST. J., Dec. 2017, at 12.

abbreviated timeframe shortly after the bankruptcy petition is filed, whereas plans involve a lengthier process, extensive disclosures, court approval, and the participation of affected parties, which includes voting.[89]

But these facets of the Bankruptcy Code's requirements for confirmation of Chapter 11 plans do not provide much protection to consumer privacy. Consumer interests are unlikely to be represented in the plan confirmation process. There is no requirement that consumers or regulators, such as the FTC, receive notice in advance of any transfer. Individual consumers are also unlikely to have much motivation to step forward because the individual harm is small, even if the collective harm across potentially millions of affected consumers might be large. None of the parties in a bankruptcy proceeding are likely to care a whit about the interests of the consumers whose information is to be transferred, so objections from them are unlikely. The lawyers representing the U.S. Trustee have the authority to step in,[90] but with numerous other responsibilities, they may not realize that consumer interests are being compromised or may not think it worth their while to urge an objection. Thus, the exemption of sales pursuant to plans from the ombudsman regime is a significant one.

Second, because the ombudsman provisions are in § 363(b) of the Code, the regime also only applies to sales of consumer data that are outside of the "ordinary course of business" for the debtor.[91] Although probably less common than sales through plans, this exception might be meaningful for debtors who have regularly sought to monetize consumer data as part of their business.

Third, an ombud's appointment is only merited if what is to be sold qualifies as "personally identifiable information"[92] under the Bankruptcy Code, which excludes large categories of consumer data.[93] Specifically, the definition only includes information "provided by an individual to the debtor in connection with obtaining a product or a service from the debtor."[94] Unpacking this, the definition leaves unprotected information received by the debtor from some other source—potentially from a data broker or even from a debtor in a prior

89. *See In re* Smurfit-Stone Container Corp., No. 09-10235, 2010 WL 2403793, at *10 (Bankr. D. Del. June 11, 2010) ("A sale pursuant to a plan of reorganization frankly provides greater protections for affected parties than a sale pursuant to section 363 of the Bankruptcy Code.").

90. 11 U.S.C. § 307.

91. *See id.* § 363(b) ("The trustee . . . may use, sell, or lease, other than in the ordinary course of business, property of the [bankruptcy] estate . . . .").

92. *Id.* §§ 332(a), 363(b)(1).

93. Coordes, *supra* note 21, at 25 ("Practically speaking, this definition excludes a wide swath of what may be considered PII by other law or in lay terms."); *see* Warren E. Agin, *Handling Customer Data in Bankruptcy Mergers and Acquisitions*, 24 AM. BANKR. INST. J., July/Aug. 2005, at 1 (confirming narrow interpretation); Salazar, *supra* note 82, at 58–59 (same). This also leaves consumers completely exposed to the "third-party problem"—that is, the problem that third parties such as data brokers have neither a legal duty nor consumer relationship to motivate them to take consumer-protective steps with respect to private information. *See* HOOFNAGLE, *supra* note 7, at 299–300.

94. 11 U.S.C. § 101(41A).

bankruptcy sale.[95] The definition excludes information given by an individual to a debtor to receive marketing information and not in connection with an actual purchase.[96]

The statute also excludes any information that is not either on a short list of identifiable characteristics—names, addresses, phone numbers, credit card numbers—or "identified in connection with" one of those characteristics.[97] Thus, it omits information that should in fact be considered personal and identifiable, such as usernames, IP addresses, non–credit card account numbers, location, browsing data, and so on. All of these relatively "anonymized" types of data can be used to identify individuals, even if not initially linked to their names.[98]

Fourth, the law only applies if the debtor has "disclose[d] to an individual a policy prohibiting the transfer of personally identifiable information," if the policy is "in effect on the date of the commencement of the case," and if the sale would violate it.[99] One expert who has served as an ombud suggests that the disclosure requirement is more meaningful than might first appear. He notes that "[i]n most industries, the business only discloses the privacy policy in connection with transactions conducted over the Internet," not in brick-and-mortar locations.[100] He adds that "[e]ven then, the debtor may not be the entity disclosing the privacy policy," giving the example of an airplane ticket purchased through an intermediary such as Travelocity or Orbitz.[101]

The requirements that the relevant policy be in effect on the date of the commencement of the case may also be an invitation for mischief. Under a strict reading of this provision, no ombud should be appointed if a company enacts a more permissive privacy policy on the eve of bankruptcy, even if at the time the information was gathered, a much more protective policy was in place. This

95. Coordes, *supra* note 21, at 25 ("[C]onsumer information that the debtor obtains from another company does not constitute PII . . . ."); Elvy, *supra* note 7, at 477 (explaining limitations of definition).

96. § 101(41A).

97. *Id.*

98. *See, e.g.*, Natasha Singer, *F.T.C. Sues over Tracking Data That Could Expose Visits to Abortion Clinics*, N.Y. TIMES (Aug. 30, 2022), https://www.nytimes.com/2022/08/29/business/ftc-lawsuit-tracking-data-abortion.html ("[T]he [location] data set [for sale] made it possible to identify a mobile device that had visited a reproductive health center and trace that device to a single-family home. . . . The sample data also made it possible to track mobile devices to Christian, Islamic and Jewish houses of worship . . . ."); Will Greenberg, *Fog Revealed: A Guided Tour of How Cops Can Browse Your Location Data*, ELEC. FRONTIER FOUND. (Aug. 30, 2022), https://www.eff.org/deeplinks/2022/08/fog-revealed-guided-tour-how-cops-can-browse-your-location-data (providing examples); Susan Landau, *FTC Lawsuit Spotlights a Major Phone Data Privacy Risk*, GOVERNING (Sept. 6, 2022), https://www.governing.com/security/ftc-lawsuit-spotlights-a-major-phone-data-privacy-risk (describing how much identification can be accomplished by metadata and telemetry information generated even by a "burner" phone not registered with an individual); Latanya Sweeney, *Simple Demographics Often Identify People Uniquely* 2 (Carnegie Mellon Univ., Data Privacy Working Paper 3, 2000), https://dataprivacylab.org/projects/identifiability/index.html (demonstrating, among other things, that it is likely identification of 87% of individual Americans was based only on zip code, gender, and date of birth).

99. 11 U.S.C. § 363(b)(1).

100. Agin, *supra* note 93.

101. *Id.*

gambit may succeed, even if such changes in privacy policies are often themselves unfair or deceptive acts or practices, as the FTC has alleged in several cases.[102] Some commentators, and some ombuds, have taken a more nuanced approach, concluding that the language should be interpreted to mean not simply the last posted policy, but also the policy that nonbankruptcy law would consider to govern the particular data at issue—often, the policy in effect when the information was gathered, or a policy that entered into force after a reasonable time has passed.[103] But this appears to be a minority position.[104]

The requirement that the transfer violate the privacy policy—rather than undermining the broader expectations established by the debtor in its relationships with consumers—also exists in tension with current privacy law. As mentioned above, privacy law's heavy reliance on a contractual model of consumer consent to businesses' privacy policies has been widely criticized[105] and has lost favor with regulators, who have developed a more contextualized understanding of what practices should be understood as unfair or deceptive.[106] As I have explained in other work, ombuds have intermittently recognized this reality,[107] but the Bankruptcy Code appears out of sync with it.

Fifth, even where the consumer privacy ombudsman provisions should apply, they must be initiated by someone.[108] In theory, the potential for the sale of private information should be recognized from the beginning of the case. The Statement of Financial Affairs, which every debtor must file, requires the debtor to disclose if it "collect[s] and retain[s] personally identifiable information of customers" within the definition in the Bankruptcy Code, and if the debtor "ha[s] a privacy policy about that information."[109] The debtor's "Schedules," which

102. *See, e.g.*, *Gateway* Consent Order, *supra* note 40.

103. *See* Singer & Greer, *supra* note 23 ("There is some room for interpretation regarding whether such historic policies are 'in effect' and thus relevant for purposes of the Code. But absent the business having taken specific measures to ensure that old policies were adequately retired (e.g., purging data from consumers who did not explicitly opt into superseding privacy policies), the prudent and more supportable approach is to treat the business's historic policies as effective. This is consistent with general principles of privacy law—which dictate that the policy governing a consumer's information is the policy that was disclosed to her when her personal information was collected—and the approach frequently taken by ombudsmen."). For instance, the ombud in the General Motors bankruptcy looked to prior policies rather than one enacted shortly before bankruptcy due to his interpretation of this "in effect" language. His report notes that if the provision permitting the transfer had "been added several years ago rather than last month, there may not have been a need for a Privacy Ombudsman for this proceeding." Report of Consumer Privacy Ombudsman at 22–23, *In re* Gen. Motors Corp., No. 09-50026 (Bankr. S.D.N.Y. July 1, 2009), ECF No. 2873 [hereinafter *In re* Gen. Motors Corp. Report].

104. *See infra* Part II.A (noting vast number of cases in which no appointment was made, apparently due to boilerplate assertion that transfer did not violate privacy policy).

105. *See supra* notes 34–37 and accompanying text.

106. *See, e.g.*, Elvy, *supra* note 7, at 519 n.455.

107. *See generally* Bradley, *supra* note 15.

108. *See* 11 U.S.C. § 332(a) ("If a hearing is required under section 363(b)(1)(B), the court shall order the United States trustee to appoint . . . [one] disinterested person . . . to serve as the consumer privacy ombudsman, [but offering no explanation as to how a court will know that such a hearing is required].").

109. *Official Form 207: Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* 7, U.S. CTS., https://www.uscourts.gov/sites/default/files/form_b_207.pdf (last visited Feb. 23, 2023).

require summary disclosures of its assets and liabilities, also require disclosure of "[c]ustomer lists, mailings lists, or other compilations."[110]

Debtors and their lawyers often fail to fill out these forms accurately, whether intentionally or inadvertently.[111] The relevant questions are not particularly conspicuous. Many lawyers serving as counsel to debtors have never worked in a situation where an ombud was appointed and may not be familiar with the provisions.[112] The failure to make these disclosures could render the debtor or its counsel subject to sanction for misrepresentation or abuse of the process. But in many cases, the error may never be discovered, and even if it is, sanctions may be excused by a plea of inadvertence.

Even if the Statement of Financial Affairs does not indicate the possession of personally identifiable information, a debtor's motion to sell its assets should describe the assets to be sold.[113] If the motion states an intention to sell customer information, the U.S. Trustee, the bankruptcy court, or some other regulator or interested party can seek the appointment of an ombud. Several courts have local rules that specifically provide that a sale motion "shall include . . . [a] request, if necessary, for the appointment of a consumer privacy ombudsman under Bankruptcy Code section 332."[114] But "if necessary" seems to leave considerable room for the debtor's discretion, and that discretion is hardly likely to be exercised objectively. In addition, a sale motion might lump customer information into a catch-all category of "general intangibles," which would make detection of the inclusion of customer information more difficult. Some debtors may seek the appointment of an ombud themselves as statutorily required, but others may not, hoping to avoid the additional expense or scrutiny, or simply out of ignorance. The system leaves considerable room for error, and no doubt, cases slip through the cracks. A more prophylactic approach might require the debtor to disclose clearly if private information is to be transferred, and for an explanation to be provided if the debtor does not believe an ombud should be appointed.

Sixth, the statute appears to impose a default in favor of the transfer, stating that the court can approve the transfer if it "find[s] that no showing was made

110. *Official Form 206A/B: Schedule A/B: Assets – Real and Personal Property* 6, U.S. CTS., https://www.uscourts.gov/sites/default/files/form_b206ab_0.pdf (last visited Feb. 23, 2023).

111. *See* Dick, *supra* note 21, at 9 (providing detailed examples and discussing "the failure of most debtors to fully disclose the existence, nature, and potential value of their data assets").

112. There are thousands of business bankruptcy cases filed every year. *See, e.g.*, *Bankruptcy Statistics Data Visualizations*, U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-filings-statistics/bankruptcy-statistics-data (last visited Feb. 23, 2023) (indicating between 6,600 and 14,300 Chapter 11 cases per year from 2008 to 2021). As this study shows, only a few hundred cases have involved the appointment of ombuds in the fifteen years since the regime went into effect. *See* Thomson, *supra* note 21, at 32 (stating that in the first decade of the regime, approximately one hundred ombuds were appointed).

113. *See, e.g.*, 11 U.S.C. § 363(b) (requiring court approval for sale outside of ordinary course of business); *Guidelines re: Sale Orders*, U.S. BANKR. CT. FOR THE N. DIST. OF CAL., https://www.canb.uscourts.gov/procedure/guidelines-re-sale-orders (Mar. 19, 2009) (noting that a proposed order, which will be attached to motion for § 363 sale, should identify "the property to be sold").

114. *See* Bankr. D. Del. R. 6004-1(b)(iii).

that such sale or such lease would violate applicable nonbankruptcy law."[115] In other words, rather than the seller bearing the burden of establishing the legality of the transfer, it appears that the burden is on the challenging party to show its unlawfulness. It is unclear how much this factor might affect cases. After all, a court would likely pay close attention if an ombud opined that a transfer would be unlawful. But this statutory feature has been mentioned by ombuds in their reports, including one ombud who appeared to interpret it to mean that the court need only consider this factor "when the issue has been raised by a party."[116]

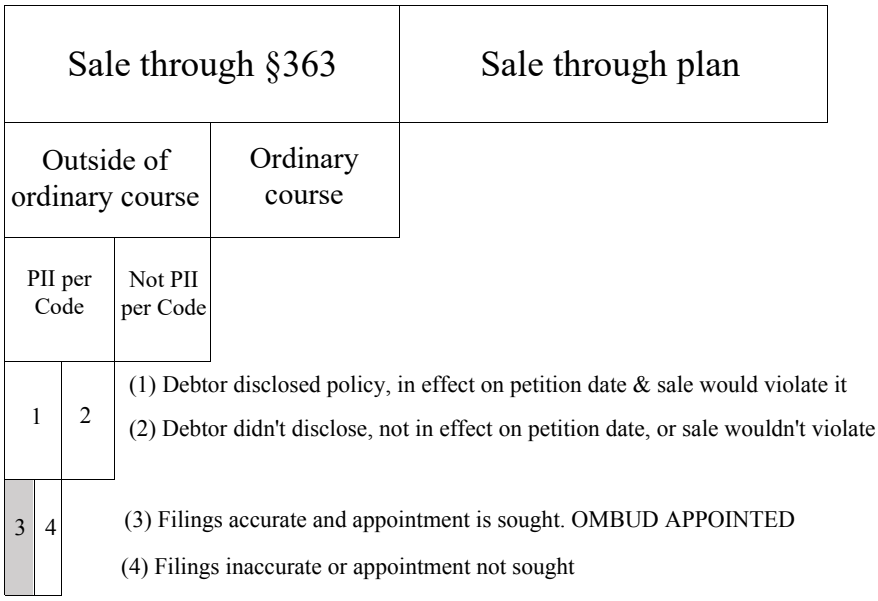
For at least these six significant reasons, Senator Leahy's confidence that his amendment would "prevent future cases like Toysmart.com," and his statement that "[o]nce somebody tells you we are going to keep your kids' information confidential, it will be," are not entirely warranted. Senator Leahy might have been correct that the exact circumstances of *Toysmart* are unlikely to be repeated after the passage of his legislation; it is true that a sale with the same structure and substance as *Toysmart*, contrary to a privacy policy in force at the time of bankruptcy, would trigger the appointment of an ombud who would impose restrictions very similar to those at play in *Toysmart*. But as the foregoing discussion shows, the law leaves consumers unprotected in many circumstances where protection is equally warranted.

The coverage of the ombud regime can be visualized in Figure 2 below.

115. § 363(b)(1)(B)(ii).

116. Report of the Consumer Privacy Ombudsman at 17, *In re* Agent Provocateur, Inc., No. 17-10987 (Bankr. S.D.N.Y. June 10, 2017), ECF No. 145 [hereinafter *Agent Provocateur* Report].

FIGURE 2: DATA SALES IN BANKRUPTCY

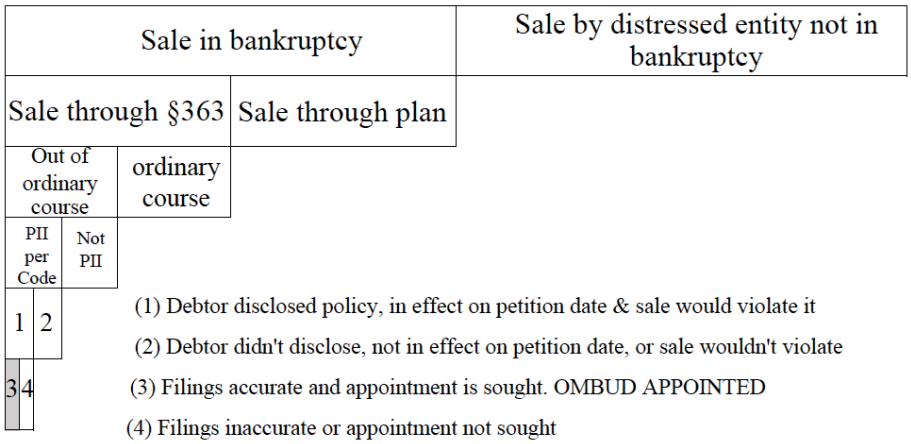


Because we lack data on how many sales fall in each category, Figure 2 simply divides evenly at each stage. But this approach likely overrepresents the protections of ombuds, because parties who wish to avoid ombud oversight have some control over how they structure their sale—for example, they may "select out" of oversight simply by choosing to conduct a sale via a plan rather than through a § 363 sale.

Even this may be overly rosy, because of course this only covers sales within bankruptcy. But as discussed above, distressed entities outside of bankruptcy raise similar concerns to those in bankruptcy,[117] and their sales of consumer data are never subject to review by an ombud. Thus, perhaps the most accurate representation of the scope of the consumer data protection problem is that in Figure 2.

117. *See supra* Part I.B.

FIGURE 3: DATA SALES BY DISTRESSED ENTITIES



In sum, it is true that the appointment of an ombud and the requirement of court approval provides more protection than a free-for-all auction with no consideration of privacy, but those hearing or reading Leahy's statement might be surprised by how many loopholes were left in the law whose passage he praised. The Leahy-Hatch amendment falls short of a rule of strict adherence to the strictures of existing privacy law, and given the many circumstances that it simply does not apply to, it cannot, in fairness, be said to "make[] the protection of consumer privacy an important focus of all bankruptcy proceedings in which personally identifiable consumer records are to be sold."[118]

II. REALITIES OF THE CONSUMER PRIVACY OMBUDSMAN REGIME

As the previous Part explained, despite broad assurances from lawmakers and others, the Bankruptcy Code's protections for the sale of consumers' private data are actually very limited. Whether the provisions can be fairly described as "privacy theater," though, depends on their implementation.

This Part provides a window into the implementation of the consumer privacy ombudsman regime. It draws upon the writings and observations of experts concerning the system, and it provides the first comprehensive empirical account of ombuds' qualifications, activities, and fees. This analysis lays the groundwork for an assessment of the role of ombuds and the consumer privacy ombudsman regime that has not been possible before, and it provides the basis for the proposed reforms discussed in Part III.

The study involves data collected from the dockets of every case between the time the Leahy-Hatch amendment was passed in 2005 to mid-2020. The

118. *See Activecare* Report, *supra* note 80, at 11.

dataset includes 141 cases in which an ombud was appointed, a written report was filed, and where consumer data was to be sold.[119] The research team gathered and coded a number of documents from these cases, including documents appointing ombuds, the ombuds' reports, and their fee applications and orders awarding them fees. The research team also ran docket searches for other documents related to the ombud, such as objections filed to their appointment, work, or fees. The lack of uniform docketing practices in the federal court document-filing system prevents absolute confidence that these searches revealed all relevant information. But a complete set of the basic documents—notice of appointment, report, and a fee application or order (if not both)—was obtained in all but five cases out of the dataset. The list of cases found through these searches were cross-checked against publicly available lists of cases and online searches of ombuds' professional histories.[120] Finally, the research involved locating documents explaining why ombuds were not appointed in many cases, revealing an increasingly common set of practices that businesses use to avoid the appointment of ombuds.

After gathering documents, the research team reviewed them, developed a list of variables to summarize the information contained in the documents, and coded the documents for all those variables. In a companion paper, I have summarized the results of the analysis and its impacts on the law of privacy as it relates to the use of consumer information.[121] This Article provides an analysis of the institution of the consumer privacy ombudsman itself.

Subpart A provides evidence concerning how the limits to the Bankruptcy Code's consumer privacy regime are observed in practice; the evidence confirms that ombuds are rarely appointed outside of the strictures of the Code's limits; it also reveals numerous practices that debtors in bankruptcy deploy to avoid the appointment of ombuds. Subpart B summarizes who the ombuds are, how much they cost, and what they do. As Subpart C argues, the data supports the argument

119. In specific, using the Bloomberg Law platform's docket search function, the research team ran broad searches on all U.S. bankruptcy dockets for "Consumer Privacy Ombudsman" and "11 U.S.C. § 332" (the main statutory provision on the appointment of an ombud), from the time the law was passed through July of 2020. Outside of this primary dataset, documents were also gathered from some cases in which courts declined to appoint an ombud, or in which an ombud did not file a report or provided an oral report. Our research revealed a number of cases in which an ombud was appointed and filed a written report, but in which there was no sale of personally identifiable information, or in which the ombud was primarily serving as a patient care rather than consumer privacy ombud. These were omitted.

120. For example, one case was initially excluded from the sample because no written report could be located. The report, which was ultimately located due to research into the background of the ombud, was docketed with the court only as Exhibit B to a declaration filed by counsel the U.S. Trustee in the case; the docket entry for this declaration neither mentioned the ombud nor linked the docket number of the notice of appointment of the ombud, and the text of the declaration was not filed in searchable format, so that broad searches did not uncover its existence. *See* Declaration of Ragan L. Powers at Exhibit B, *In re* Big Nev., Inc., No. 09-13569 (Bankr. W.D. Wash. May 26, 2010), ECF No. 74. This example illustrates why any empirical project such as this cannot guarantee comprehensiveness when reliant upon searches of federal bankruptcy court dockets.

121. *See generally* Bradley, *supra* note 15.

that the ombud regime is an example of "privacy theater." The bankruptcy law under which they operate is much less comprehensive and consumer protective than its most prominent supporters have claimed, and what ombuds actually do in particular cases, while not meaningless, is largely formulaic and less specialized, technical, or protective than may appear.

A. AVOIDING THE APPOINTMENT OF OMBUDS

As discussed earlier, the Bankruptcy Code provides for the appointment of an ombud only when certain conditions are met. The evidence suggests that this text has largely been interpreted to mean what it says and is thus simply not implicated in many sales of data. Although reports do not always provide clear analysis of the issue, there is a significant number of cases in which an ombud was appointed, a written report was submitted, and the business's privacy policy was at least arguably not violated as to the proposed transfer (or there was no "disclosed" policy at all).[122] So in some cases, an appointment can be initiated—presumably by the U.S. Trustee, the court, or a debtor, although the records we obtained do not usually say—even without a clear privacy policy violation.

But these cases appear to be only a small minority of the cases in which private information is actually transferred.[123] As noted above, *Toysmart* itself involved the violation of promises made in a privacy policy, and there is evidence that companies—including Amazon, which is already a prominent online retailer—shifted policies, presumably so that they could monetize data free of the *Toysmart* framework.[124] Often, they added "business continuity" provisions permitting transfers of data when the company merges, reorganizes in or out of bankruptcy, sells assets, or undergoes other transformative events.[125] Industry privacy lawyers encouraged similar steps in the wake of the Bankruptcy Code's provisions,[126] and their advice appears to have been heeded. Empirical evidence suggests that many privacy policies contain "business continuity"

122. *See, e.g.*, Report of Consumer Privacy Ombudsman at 9, *In re* Liberty State Benefits of Del., Inc., No. 11-12404 (Bankr. D. Del. Jan. 31, 2013), ECF No. 711 ("The Privacy Ombudsman was unable to locate a privacy policy that was provided to borrowers."); Report of Consumer Privacy Ombudsman at 12–13, *In re* Freedom Commc'ns Holdings, Inc., No. 09-13046 (Bankr. D. Del. Mar. 9, 2010), ECF No. 1142 (policies permit sale of data in bankruptcy).

123. Ideally, empirical work could determine how many sales took place without any restrictions, but the research would be challenging. Gathering and analyzing sale documents from dockets might be insufficient because these documents might simply lump consumer data in with the various other intangible or intellectual property assets to be sold. In addition, it might be difficult or impossible based on publicly disclosed information to ascertain whether debtors have violated bankruptcy law by failing to "check the box" even when the standard has been met, but it is hard to discount this possibility.

124. Richard A. Beckmann, Comment, *Privacy Policies and Empty Promises: Closing the "Toysmart Loophole*," 62 U. PITT. L. REV. 765, 788 (2001) ("Within two weeks of Judge Kenner's rejection of the Toysmart/FTC settlement, bellwether Internet retailer Amazon.com abruptly revised its privacy policy in an apparent direct response to the Toysmart case.").

125. Janger, *supra* note 21, at 1875.

126. Coordes, *supra* note 21, at 21 (noting that "some risks can be mitigated well in advance of any sale, through careful drafting of the privacy policy," and that, in other words, policies can be drafted broadly so that a sale should sail through).

provisions that permit sales in bankruptcy and in similar transactions.[127] A privacy expert who is often appointed as an ombud recently described "the now common practice of permitting the transfer of personally identifiable information . . . to an unaffiliated third-party as part of a larger business transaction."[128]

There are numerous examples of cases in which no ombud was appointed because a privacy policy was not violated.[129] In the bankruptcy of retailer Sports Authority, for instance, the court's order permitting the sale expressly found that the appointment of an ombud was not necessary because the policy was complied with.[130] A search using the language in *In re Sports Authority Holdings, Inc.* in Bloomberg Law's database of bankruptcy court dockets yielded eighty results in which language stated that no ombud needed to be appointed. The search suggests that language from *Sports Authority* has become part of the "boilerplate" that lawyers may include when they draft proposed orders attached to their sales motions.[131] Searches also revealed dozens of cases in which filings explicitly state the view, or request a finding from the court, that an ombud need not be appointed because the privacy policy permits the relevant transfer. Sometimes, this is because a "business continuity" clause permits the transfer. For example, in the bankruptcy of the company behind the sandwich

127. *See* Elvy, *supra* note 7, at 440–41; Natasha Singer & Jeremy B. Merrill, *When a Company Is Put Up for Sale, in Many Cases, Your Personal Data Is, Too*, N.Y. TIMES (June 28, 2015), https://www.nytimes.com/2015/06/29/technology/when-a-company-goes-up-for-sale-in-many-cases-so-does-your-personal-data.html ("Of the 99 sites with English-language terms of service or privacy policies, 85 said they might transfer users' information if a merger, acquisition, bankruptcy, asset sale or other transaction occurred.").

128. Declaration of Elise S. Frejka, Ex. B In Support of Debtors' Motion for Entry of (I) an Order (A) Approving Bidding Procedures and Bid Protections in Connection with the Sales of Certain of the Debtors' Assets, (B) Approving the Form and Manner of Notice, (C) Scheduling Auctions and a Sale Hearing, (D) Approving Procedures for the Assumption and Assignment of Contracts, and (E) Granting Related Relief and (II) an Order (A) Approving the Sale of Assets Pursuant to the Bidding Procedures, (B) Authorizing the Sale of Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (C) Authorizing the Assumption and Assignment of Contracts, and (D) Granting Related Relief at 219, *In re* Le Tote, Inc., No. 20-33332 (Bankr. E.D. Va. Aug. 2, 2020), ECF No. 27 [hereinafter *Le Tote* Declaration].

129. *See, e.g.*, Elvy, *supra* note 7, at 477–79 (providing several examples). One expert, who is also a frequently serving ombud, stated that "appointment of a privacy ombudsman was considered in approximately 400 federal bankruptcy cases" and that "appointments were made in approximately 100 of these cases." Thomson, *supra* note 21, at 32. The factual basis for this statement is not clear, but it supports the concern that many transfers are permitted without any consumer protections.

130. Corrected Order, Pursuant to Sections 105, 363, and 365 of the Bankruptcy Code, (I) Approving Sale of All Acquired Assets and (II) Granting Related Relief at 10 ¶ V, *In re* Sports Auth. Holdings, Inc., No. 16-10527 (Bankr. D. Del. July 19, 2016), ECF No. 2552 (finding that the transfer complies with privacy policy, so "appointment of a consumer privacy ombudsman . . . is not required"); Elvy, *supra* note 7, at 432–33.

131. The search was conducted on March 23, 2022, and included all federal bankruptcy dockets with no date limitation using these search parameters: "*appointment of a consumer privacy ombudsman*" n/20 "*is not required*." There were eighty-five hits. Results from adversary proceedings and from cases where the dataset reflected an ombud *was* appointed were excluded from the results, yielding the result reported in the text above. Based on dockets alone, it is impossible to say if protected information was ever transferred in the eighty cases. But the volume of results suggests that debtors' bankruptcy lawyers consider this to be a valuable finding to speed along their proposed sales and head off the risk of an ombud appointment.

and coffee retailer, Le Pain Quotidiene, the sale motion states that the sale was consistent with the Company's privacy policy:

> The Purchased Assets include, among other things, copies of all customer and mailing lists and related information, as well as the Debtors' websites, URLs, and internet domain names. The Company's privacy policy, which was last revised on September 8, 2018 (the "Privacy Policy"), describes how it collects, uses, and shares personal information . . . . Significantly, the Privacy Policy specifically states that "[i]f another company acquires our company, business, or our assets, we will also share information with that company." Accordingly, the transfer of such information . . . is entirely consistent with the Debtors' Privacy Policy as conveyed to their customers. According[ly], the Debtors submit that the proposed Sale is consistent with section 363(b)(1)(A) of the Bankruptcy Code and that a consumer privacy ombudsman i[s] unnecessary for purposes of this transaction.[132]

There are many additional cases where the debtor presents similar arguments.[133] In our docket searches, these efforts at avoiding the appointment of an ombud were invariably successful.[134]

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132. Motion of Debtors for an Order (I) Authorizing and Approving Sale of Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Other Interests; (II) Authorizing and Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto; and (III) Granting Related Relief at 22–23, *In re* PQ N.Y., Inc., No. 20-11266 (Bankr. D. Del. May 27, 2020), ECF No. 26; *see* Debtors' Motion for (I) an Order Pursuant to Sections 105, 363, 364, 365 and 541 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006 and 9007 and Delaware Bankruptcy L.R. 2002-1 and 6004-1 (A) Approving Bidding Procedures for the Sale of Substantially All Assets of Debtor; (B) Approving Procedures for the Assumption and Assignment or Rejection of Designated Executory Contracts and Unexpired Leases; (C) Scheduling the Auction and Sale Hearing; (D) Approving Forms and Manner of Notice of Respective Dates, Times, and Places in Connection Therewith; and (E) Granting Related Relief; (II) an Order (A) Approving the Sale of the Debtors' Assets Free and Clear of Claims, Liens, and Encumbrances; and (B) Approving the Assumption and Assignment of Designated Executory Contracts and Unexpired Leases; and (III) Certain Related Relief at 31, *In re* John Varvatos Enters., Inc., No. 20-11043 (Bankr. D. Del. May 6, 2020), ECF No. 21.

133. Cases in which similar language appears include *In re* Gordmans Stores, Inc., No. 17-bk-80304 (Bankr. D. Neb.); *In re* Midtown Campus Props., LLC, No. 20-bk-15173 (Bankr. S.D. Fla.); *In re* GUE Liquidation Cos., Inc., No. 19-bk-11240 (Bankr. D. Del.); *In re* AS Wind Down, LLC, No. 19-bk-11842 (Bankr. D. Del.); *In re* Miami Int'l Med. Ctr., LLC, No. 18-bk-12741 (Bankr. S.D. Fla.); *In re* SFP Franchise Corp., No. 20-bk-10134 (Bankr. D. Del.); *In re* Nine W. Holdings, Inc., No. 18-bk-10947 (Bankr. S.D.N.Y.), *appeal filed*, 20-03257 (2d Cir. Sept. 25, 2020); *In re* Tough Mudder Inc., No. 20-bk-10036 (Bankr. D. Del.); *In re* Charming Charlie Holdings Inc., No. 19-bk-11534 (Bankr. D. Del.); *In re* Ltd. Stores Co., No. 17-bk-10124 (Bankr. D. Del.); *In re* EO Liquidating, LLC, No. 17-bk-10243 (Bankr. D. Del.); *In re* PGHC Inc., No. 18-bk-12537 (Bankr. D. Del.); *In re* Advantage Holdco, Inc., No. 20-bk-11259 (Bankr. D. Del.); *In re* Charlotte Russe Holding, Inc., No. 19-bk-10210 (Bankr. D. Del.); *In re* Morehead Mem'l Hosp., No. 17-bk-10775 (Bankr. M.D.N.C.); *In re* AtopTech, Inc., No. 17-bk-10111 (Bankr. D. Del.). Other cases state that there is no privacy policy or that the policy simply does not prohibit the transfer of private information. *See, e.g.*, Order (A) Approving the Sale of Substantially All of the Debtors' Assets Free and Clear of All Claims, Liens, Rights, Interests, and Encumbrances, (B) Authorizing the Debtors To Enter Into and Perform Their Obligations Under the Purchase Agreement, (C) Approving Assumption and Assignment of Certain Executory Contracts, and (D) Granting Related Relief at 7, *In re* Synergy Pharms. Inc., No. 18-bk-14010 (Bankr. S.D.N.Y. Mar. 1, 2019), ECF No. 478 ("The Debtors' privacy policy does not prohibit the transfer of personally identifiable information, and therefore, the appointment of a consumer privacy ombudsman is not required.").

134. *See, e.g.*, Audio Recording of Hearing, *In re* Medone Healthcare, LLC, No. 17-14457 (Bankr. D. Ariz. Jan. 12, 2018), ECF No. 68 (denying appointment over trustee's objection because transfer is consistent with the privacy policy's business continuity clause).

Parties take numerous other steps to avoid the appointment of an ombud—and they are usually successful. In the Southern District of Texas bankruptcy case of *In re Ignite Restaurant Group, Inc.*, the U.S. Trustee objected to the debtor's proposed sale, explaining: "[W]hile the proposed sale process appears to propose the sale or transfer of personally identifiable information, the bidding procedures omit any analysis of privacy concerns or the need for a consumer privacy ombudsman as contemplated by 11 U.S.C. §§ 363(b)(1) and 332."[135] In response, rather than seek the appointment of an ombud, the debtor proposed adding consumer-protective language to the purchase order that would be agreed upon before the sale was completed. The debtor proposed that any buyer would have to agree to "employ appropriate security controls and procedures (technical, operational and managerial) to protect" data and to "abide by all applicable laws and regulations with respect to" data; that "absent a customer's express consent received after adequate notice," it would "abide by the Sellers' privacy policies and privacy-related covenants that were in effect as of June 6, 2017"; that it would "respect prior requests of customers to opt out of receipt of marketing messages"; and that it would "require express consent of a customer for any additional use of" personal data, "or before making material changes to the privacy policies that weaken a customer's consumer protection."[136] No ombud appears to have been appointed in the case, so apparently this language satisfied the court and the trustee. In another case, the debtor's motion to sell assets states that:

> It is anticipated that the Debtor will be selling its customer lists. However, the Debtor has ensured that the sale is consistent with the Debtor's current privacy policy by requiring all bidders to agree to abide by such privacy policy to the extent the Acquired Assets include the customer lists. Therefore, the appointment of a consumer privacy ombudsman is unnecessary.[137]

Numerous other cases take this approach.[138] These efforts, too, appear to have largely been successful; we were not able to locate any cases where an ombud was appointed despite such statements.

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135. Limited Objection of the United States Trustee to Debtors' Bidding Procedures and Sales Motion at 2, *In re* Ignite Rest. Grp., Inc., No. 17-33550 (Bankr. S.D. Tex. June 19, 2017), ECF No. 176.

136. Notice of Filing of Proposal To Address Objection Raised by the United States Trustee Regarding Personally Identifiable Information at 2, *In re* Ignite Rest. Grp., Inc., No. 17-33550 (Bankr. S.D. Tex. June 29, 2017), ECF No. 266.

137. Joint Motion for the Entry of: (I) an Order, (A) Establishing Bidding Procedures for the Sale of Assets, (B) Scheduling an Auction and Sale Hearing, and (C) Approving the Form and Manner of Notice Thereof; and (II) an Order Authorizing and Approving, (A) Debtor's Entry into a Certain Asset Purchase Agreement, (B) the Sale of Assets Free and Clear of Liens and Other Interests, and (C) Assumption and Assignment of Certain Executory Contracts and Leases at 17, *In re* Shandelee Lake LLC, No. 18-10265 (Bankr. S.D.N.Y. May 22, 2019), ECF No. 45.

138. *See* Debtor's Motion for the Entry of: (I) an Order (A) Establishing Bidding Procedures for the Sale of Assets, (B) Authorizing the Debtor To Select a Stalking Horse Bidder, (C) Scheduling an Auction and Sale Hearing, and (D) Approving the Form and Manner of Notice Thereof; and (II) an Order Authorizing and Approving (A) Debtor's Entry into a Certain Asset Purchase Agreement, (B) the Sale of Assets Free and Clear

Taking this approach one step further, some debtors have filed statements from privacy experts, including former ombuds, in support of their sale documents. In the *In re Le Tote, Inc.* bankruptcy case (which included the retailer Lord & Taylor), a fifteen-page sworn declaration from one of the most commonly appointed ombuds[139] is attached to the debtor's sale motion.[140] The statement outlines her credentials and details her prior service in numerous cases for approximately two pages; surveys the company's various privacy policies over time, focusing on terms governing data transfers and modifications of the policies, for approximately eight pages; spends a little more than a page discussing the ways in which the company gathers information with consumer consent and provides opt-out rights that are timely acted upon; and concludes by stating: "As such, I do not believe the appointment of a consumer privacy ombudsman is necessary or required to effectuate a transfer of the Company's customer lists to an unaffiliated third-party."[141] Unlike the vast majority of ombud reports,[142] the declaration does not mention section 5 of the FTC Act, *Toysmart*, or the qualified buyer framework. This ombud has submitted declarations in at least two other cases, *In re Pier 1 Imports, Inc.* and *In re Destination Maternity Corp.*, which are very similar to the *Le Tote* declaration both in substance and style, and which conclude verbatim.[143]

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of Liens and Other Interests, and (C) Assumption and Assignment of Certain Executory Contracts and Leases at 19, *In re* JM Holding Grp. Inc., No. 17-45647 (Bankr. E.D.N.Y. July 23, 2018), ECF No. 60 (same language as in block quote above); Order (A) Authorizing and Approving Sales of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances and Other Interests, (B) Authorizing and Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Executory Contracts; and (C) Granting Related Relief at 7, *In re* Glansaol Holdings, Inc., No. 18-14102 (Bankr. S.D.N.Y. Feb. 1, 2019), ECF No. 165 (similar language); *In re* Residential Cap., LLC, No. 12-12020, 2012 WL 12906668, at *6 (Bankr. S.D.N.Y. Nov. 21, 2012) ("The Debtors' disclosure of personally identifiable information pursuant to the Sale is in compliance with the Gramm-Leach-Bliley Act and is consistent with the privacy notices delivered by the Debtors to mortgage borrowers. For these reasons, no consumer privacy ombudsman has been appointed under section 363(b)(1) of the Bankruptcy Code."); *In re* Velocity Express Corp., No. 09-13294, 2009 WL 6690931, at *7 (Bankr. D. Del. Nov. 3, 2009) ("The Sale may include the transfer of 'personally identifiable information,' as defined in section 101(41A) of the Bankruptcy Code. No 'consumer privacy ombudsman' need be appointed under section 363(b)(1) of the Bankruptcy Code because Purchaser has agreed to adhere to any such privacy policies applicable to the Debtors."); *In re* Crucible Materials Corp., No. 09-11582, 2009 Bankr. LEXIS 4893, at *16 (Bankr. D. Del. Aug. 31, 2009) (no appointment because sale complied with privacy policy); *In re* Penn Traffic Co., No. 09-14078, 2010 Bankr. LEXIS 5399, at *14 (Bankr. D. Del. Jan. 8, 2010) (same).

139. *See supra* Figure 2.

140. *Le Tote* Declaration, *supra* note 128, at 215–29.

141. *Id.* at 228.

142. *See* Bradley, *supra* note 15, at 184–87.

143. Declaration of Elise S. Frejka, CIPP/US, in Support of the Debtors' Motion for Entry of an Order (I) Approving the Bidding Procedures, (II) Scheduling the Bid Deadlines and the Auction, (III) Approving the Form and Manner of Notice Thereof, and (IV) Granting Related Relief at 7, *In re* Destination Maternity Corp., No. 19-12256 (Bankr. D. Del. Oct. 25, 2019), ECF No. 107; Declaration of Elise S. Frejka, CIPP/US, in Support of the Debtors' Motion for Entry of an Order (I) Establishing Bidding Procedures, (II) Scheduling Bid Deadlines and an Auction, (III) Approving the Form and Manner of Notice Thereof, (IV) Approving the Form of Asset Purchase Agreement, (V) Authorizing the Assumption of the Plan Support Agreement, and (IV) Granting Related Relief at 11, *In re* Pier 1 Imports, Inc., No. 20-30805 (Bankr. E.D. Va. Feb. 17, 2020), ECF No. 36 [hereinafter *Pier 1* Report].

The debtor in each of these three cases was represented by Kirkland & Ellis, which has been counsel for more large bankruptcy cases than any other firm in recent years,[144] so this may indicate an emerging "cutting edge" insolvency practice. If so, it comports with a broader move toward reorganization cases in which a sale or plan is effectively arranged before the case is even filed, so that the case can move through the system very quickly—sometimes even in a matter of hours.[145] In light of this time pressure, even the relatively short timeframes under which ombuds typically operate—filing their recommendations a few days after their appointment—may be seen as inadequate. Allowing an expert to work on a declaration ahead of time may provide an opportunity for a more in-depth investigation of actual privacy practices. In *Pier 1*, for instance, the ombud describes personally visiting, or having others acting at her direction visit, several stores to confirm that personally identifiable information was not collected there.[146] In an interview with restructuring lawyers at a top law firm, the ombud portrayed this practice as a way that "[p]roactive companies contemplating bankruptcy that want to realize the value of their consumer data but know that they're going to have issues transferring that data" can prepare themselves for a sale of data in bankruptcy.[147] She notes that once they go through this process with her, she can "prepare a declaration that can be submitted on the day the case is filed to support a sales process or support continuation of customer programs and answer the court's questions early on."[148]

Not every debtor wishing to avoid the appointment of an ombud takes such extensive measures. Boilerplate language encouraging courts to approve sales without the appointment of ombuds has been making its way into the templates that bankruptcy lawyers use in their sale documents. Language about ombuds has begun to appear even in cases that appear to have little or no plausible connection to consumer data. For instance, in a case in the Western District of Texas involving oil and gas properties, the § 363 sale motion includes the following:

> Section 363(b)(1) of the Bankruptcy Code provides that a debtor may not sell or release personally identifiable information about individuals unless such sale or lease is consistent with its policies or upon appointment of a consumer privacy ombudsman pursuant to section 332 of the Bankruptcy Code. The

144. *See, e.g.*, Tom Corrigan, Joel Eastwood & Jennifer S. Forsyth, *The Power Players That Dominate Chapter 11 Bankruptcy*, WALL ST. J. (May 24, 2019), https://www.wsj.com/graphics/bankruptcy-power-players/ ("Kirkland & Ellis . . . handled the most large cases in the past decade . . . .").

145. *See* Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 248–53 (2022) (describing and criticizing the practice of ultra-short Chapter 11 cases).

146. *See Pier 1* Report, *supra* note 143, at 4–5.

147. Singer & Greer, *supra* note 23. She states that she will "review their privacy policies and practices, identify areas of concern, advise them on whether they should purge certain consumer data that's no longer being held for legitimate business or legal purposes." *Id.*

148. *Id.*

> Assets do not include any personally identifiable information. Therefore, appointment of a consumer privacy ombudsman is not appropriate.[149]

Numerous other cases include similar language, either stating that the assets to be sold do not include private data, often because it was never gathered in the first place,[150] or that there is simply no applicable privacy policy.[151] While this language may be vestigial boilerplate left over from a case where it was relevant, it indicates the desire to avoid the appointment of an ombud in order to streamline the transaction.

Similarly, as mentioned above, many debtors state—and often provide evidence—that the proposed transfer is consistent with their privacy policies.[152] In one case, a court appears to have been annoyed with unsupported boilerplate language concerning consumer privacy ombudsmen. In a docket entry in the bankruptcy case of a Harley-Davidson motorcycle dealership, a Wisconsin bankruptcy court inserted the following:

> Notice to counsel for the debtors: The proposed order authorizing the sale of debtor JHD's assets . . . was modified by the Court before signature in the following way: references to sections 363(b)(1), 332, and the appointment of a consumer privacy ombudsman have been deleted . . . as these specific requested findings or rulings were not part of the motion to sell free and clear.[153]

This turn away from robust, independent monitoring to formulaic representations concerning compliance can be seen as a way of streamlining a process that was already mostly theatrical, because appointments are rare and even when made provide only limited protection. But it could also be characterized more critically, as part of the broader trend in privacy law toward entrusting not just the enforcement but, in effect, the content of privacy law to "internal corporate governance structures"[154] and to a "managerialized compliance" model focused less on actual consumer protection than on procedural efficiency in service of commerce.[155] In any case, there are signs that

149. Debtor's Motion, Pursuant to Bankruptcy Code Sections 105(A), 363, and 365, and Bankruptcy Rules 2002, 6004, and 6006, for Entry of an Order (A) Approving Sale and Bidding Procedures in Connection with Sale of Assets of the Debtor, (B) Authorizing the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (C) Granting Related Relief at 30, *In re* Arabella Expl. LLC, No. 17-40120 (Bankr. N.D. Tex. Feb. 2, 2017), ECF No. 66 (citation omitted).

150. We uncovered at least twenty-one additional cases in which data was never gathered or was not to be sold.

151. We covered at least sixteen additional cases in which the documents state there is no applicable privacy policy; in many of these cases, however, it is unclear if any private consumer data is actually transferred. It is likely that in some cases the language is simply vestigial from whatever model the drafters of the corporate documents used.

152. *See supra* notes 143–49 and accompanying text.

153. Docket Entry 362, *In re* H2D Motorcycle Ventures, LLC, No. 19-26914 (Bankr. E.D. Wis. May 12, 2020).

154. *See* Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CALIF. L. REV. 1221, 1246 (2022).

155. *Id.* at 1242–46 (describing the managerial compliance mindset); *id.* at 1260–69 (warning of the dangers of compliance-driven lawmaking).

a different model than Congress intended has begun to take hold in the bankruptcy courts that may over time supplant the privacy theater of the ombuds with a privacy theater of self-representations of compliance with privacy law, persuasively presented to prevent appointment of an ombud.

Finally, in their reports, ombuds themselves occasionally cast doubt on whether the Bankruptcy Code's provisions are implicated by the proposed sale because the information to be sold does not fall within the law's definition.[156] In other cases, ombuds suggest that their appointment might not be strictly required because they were unable to find an applicable privacy policy.[157] Ombuds in such cases tend to go ahead and provide recommendations (and apply for their fees) anyway, but their work is colored by the recognition that the Bankruptcy Code's provisions do not seem to apply—and thus the ombuds' mandate is weak, at best.[158]

B. ASSESSING THE WORK OF OMBUDS

1. Who Ombuds Are

There are thirty-three individuals who served as ombuds in at least one case in the dataset. But the distribution of cases is concentrated among a small number of repeat ombuds. As Table 1 and Figure 4 reflect, the top four ombuds account for nearly half of the cases in the dataset, and the top seven ombuds account for two-thirds of the cases in the dataset.

156. Report of Consumer Privacy Ombudsman [11 U.S.C. § 332(b)] at 4, *In re* X-10 Wireless Tech. Inc., No. 13-17073 (W.D. Wash. Oct. 8, 2013), ECF No. 57 (noting that because the information was collected for marketing purposes and therefore not "in connection with obtaining a product or a service," it was outside the scope of § 101(41A)(A)'s protection); Report of Consumer Privacy Ombudsman [11 U.S.C. § 332(b)] at 6, *In re* Earth Class Mail Corp., No. 15-30982 (Bankr. D. Or. May 28, 2015), ECF No. 107 (same).

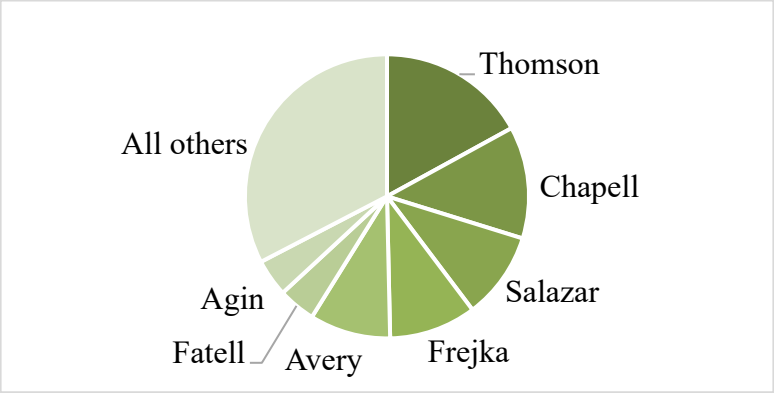
157. Report of Consumer Privacy Ombudsman at 3, 9, *In re* Liberty State Benefits of Del., Inc., No. 11-12404 (Bankr. D. Del. Jan. 31, 2013), ECF No. 711.

158. *Id.* at 9 ("[Because no privacy policy was located,] the Privacy Ombudsman sees little reason not to recommend the transfer of information as contemplated in this proceeding—particularly given that the Purchaser has agreed to meet the definitional requirements of a Qualified Buyer.").

TABLE 1: MOST FREQUENTLY SERVING OMBUDS AND THEIR CREDENTIALS

Name	Number of Cases	Privacy Certifications
Lucy L. Thomson	24	CIPP, CISSP
Alan Chapell	18	CIPP
Luis Salazar	14	CIPP
Elise S. Frejka	14	CIPP
Wesley H. Avery	13	CIPP
Bonnie Glantz Fatell	6	None (bankruptcy expert)
Warren E. Agin	6	None (numerous articles about privacy)

FIGURE 4: COMPARING APPOINTMENTS OF TOP OMBUDS TO THE REST



Using information obtained from dockets and from the internet, we researched the backgrounds of all thirty-three individuals who have served as ombuds. Most ombuds are specialists in privacy law, as demonstrated by privacy certifications (eleven), prior employment (two), or teaching or authoring publications in the field (four). The remainder are primarily experts in bankruptcy law (eleven), or in other closely related areas of business, consumer, or healthcare law (five). As Table 1 reflects, all of the top seven ombuds are accomplished lawyers, and all but one can be classified as a privacy expert.

Most ombuds with certifications have the Certified Information Privacy Professional (CIPP/US) qualification. Two ombuds have the Certified Information Systems Security Professional (CISSP) qualification. Both the CIPP/US and CISSP are well-recognized certifications offered by large, respected industry organizations, and they require passage of a specialized test in order to obtain certification.[159] CISSP certification also requires several years

159. *See Accreditations, Recognitions, and Endorsements*, $(ISC)^2$, https://www.isc2.org/about/Accreditation-Recognition-and-Endorsement (last visited Feb. 23, 2023); *CISSP—the World's Premier Cybersecurity Certification*, $(ISC)^2$, https://www.isc2.org/Certifications/CISSP (last visited Feb. 23, 2023)

of relevant job experience.[160] Internet sources suggest that the CIPP/US test requires fulltime study for at least one to two weeks, and that the CISSP test generally requires fulltime studying for two or three months.[161] Both certifications also require payment of fees and ongoing completion of specified hours of privacy training.[162]

That said, the certifications are widely held. There were 94,320 individuals in the United States with CISSP certifications as of January 1, 2022.[163] While exact numbers for the CIPP/US certification are not available, the organization that provides the certification, the International Association of Privacy Professionals, claims that as of August 2019, there are 25,000 certified individuals worldwide, and that because the CIPP/US was its first certification and remains its most prominent, it is likely that qualified holders of this certification number are in at least the thousands or tens of thousands.[164]

2. What Ombuds Cost

In the ordinary course of a business bankruptcy proceeding, professionals who wish to be paid for the work they have done file a fee application with the court.[165] If no objections are filed, then the court will usually review and grant the fees after (at most) a short hearing. But this procedure can be modified either for a particular professional or within a particular case. In some cases, for instance, there is a standing order permitting interim monthly payments of the

("CISSP is ideal for experienced security practitioners, managers and executives interested in proving their knowledge across a wide array of security practices and principles."); *IAAPCertification FAQs*, INT'L ASS'N OF PRIV. PROS., https://iapp.org/certify/faqs/ (last visited Feb. 23, 2023) (requiring completion of ninety questions in two hours; permissible rate of correct answers not specified); *CISSP CAT Certification Exam Outline*, (ISC)^2 (May 1, 2021), https://www.isc2.org/Certifications/cissp/Certification-Exam-Outline (between 100 and 150 questions, with a required passing grade of 70%).

160. *Membership Policies & Procedures*, (ISC)^2, https://www.isc2.org/policies-procedures/member-policies (last visited Feb. 23, 2023).

161. Jess Miers, *My Thoughts on Studying, Taking, and Passing the IAPP CIPP/U.S Exam*, CTRL-ALT-DISSENT BLOG (Aug. 19, 2018), https://ctrlaltdissent.com/2018/08/19/my-thoughts-on-studying-taking-and-passing-the-iapp-cipp-u-s-exam/ (indicating that thirty hours is considered the minimum but that the author studied eighty hours); Josh Fruhlinger, *CISSP Certification: Requirements, Training, and Cost*, CSO SPOTLIGHT: CERTIFICATIONS (Jan. 21, 2021, 2:00 AM), https://www.csoonline.com/article/3602822/cissp-certification-requirements-training-and-cost.html (reporting varying numbers from internet sources for hours required to pass the CISSP exam, ranging from a "couple of weekends" to "150-160 hours").

162. *Membership Policies & Procedures*, *supra* note 160; *IAPPCertification*, INT'L ASS'N OF PRIV. PROS., https://iapp.org/certify/cpe/ (last visited Feb. 23, 2023). This was confirmed in conversation with an IAPP official at the Privacy Law Scholars Conference in 2022.

163. *(ISC)^2 Member Counts*, (ISC)^2, https://www.isc2.org/en/About/Member-Counts (last visited Feb. 23, 2023).

164. Joseph Duball, *IAPP Hits 25k Certifications Globally*, INT'L ASS'N OF PRIV. PROS. (Aug. 27, 2019), https://iapp.org/news/a/iapps-25k-certifications-a-credit-to-members-staff/.

165. 11 U.S.C. § 330(a); FED. R. BANKR. P. 2016(a).

fees and costs applied for by professionals, sometimes subject to a "holdback" of 10% to 20%, with final approval of the fees put off until later in the case.[166]

We attempted to pull every fee application from consumer privacy ombudsmen and every order granting fees in the 141 cases in the dataset. In most cases, we found fee applications and orders awarding the fees. At least one such document was located in all but eleven of the cases. In those cases, we could locate no reliable record of ombuds either seeking to be paid or seeing their fees approved by a court. This may have been because the ombud intended to serve on a pro bono basis, whether from altruism, desire for the recognition of expertise, or as a loss leader, hoping that a "free" appointment might lead to paid appointments down the road. It may have been because the bankruptcy estate simply ran out of money before the ombud could get paid.[167] Or, possibly, we failed to search the right terms on the docket to uncover the fee applications or orders; there is a lack of uniformity in how such documents appear on bankruptcy court dockets.[168]

Table 2 summarizes the fee data gleaned from case dockets: the median and mean total cost of cases in which a fee was able to be ascertained; the median expenses reimbursed, usually for transportation costs to the court, and sometimes for legal research services; and the median hourly cost and hours spent by ombuds and other professionals on their team.[169]

166. *See, e.g.*, Second Monthly Fee Statement of Elise S. Frejka, CIPP/US for Services Rendered and Reimbursement of Expenses Incurred as Consumer Privacy Ombudsman from September 1, 2015 Through and Including September 30, 2015, at 2, 4, *In re* The Great Atl. & Pac. Tea Co., No. 15-23007 (Bankr. S.D.N.Y. Oct. 2, 2015), ECF No. 1144 (reflecting 20% holdback).

167. In bankruptcy parlance, this is referred to as being "administratively insolvent." *Administrative Insolvency*, WESTLAW GLOSSARY, https://content.next.westlaw.com/practical-law/document/I3a9a0f5fef1211e28578f7ccc38dcbee/Administrative-Insolvency?viewType=FullText&transitionType=Default&contextData=(sc.Default) (last visited Feb. 23, 2023).

168. In one of these cases, by looking through financial statements, researchers were able to discover what appeared to be a $7,500 payment, but the records were considered too unreliable to report. *See* Monthly Operating Reports, Summary of Significant Items at 6, *In re* Lock, Stock & Barrel, Inc., No. 09-43356 (Bankr. D. Neb. Nov. 4, 2010), ECF No. 110-1.

169. The hours are an estimate generated by dividing the total fees by the hourly rates specified. In addition to the five cases in which no fee information could be obtained, there were two additional cases where no hourly rates or hours logged were reported, and therefore no assessment of hourly rates was possible.

TABLE 2: AVERAGE FEES, EXPENSES, HOURLY RATE, AND HOURS OF CASES IN THE DATASET

Median total fees	$13,876.04	Median hourly rate	$474
Mean total fees	$23,761.63	Mean hourly rate	$466.88
Median hours spent by ombud	29.55 hours	Median expenses	$133.70
Mean hours spent by ombud	49.01 hours	Mean expenses	$469.54

The variation of fees awarded and hours worked was substantial. This is not surprising. Most cases are small and simple. Ombuds complete their work quickly. They file a report and sometimes appear in court to answer questions. Then they file their fee application, obtain payment, and go about their business. Large cases often present more complications, as groups of assets or lines of business may be sold in various waves, with repeated attention required from the ombud. The most expensive ombud was in *In re Borders Group, Inc.*, where fees ran to just over $305,000. Six-figure costs are not uncommon in cases of large, brand-name retailers such as Golfsmith ($144,380), RadioShack ($119,861), or Sears ($109,049). Several cases, including *In re Sears Holdings Corp.*, remain open, and it is possible that the ombuds are still active and accumulating fees.

"Discounts" in the form of reductions in fees or caps on the total fees are common. Out of the 130 cases in which fees were awarded, there were discounts in at least twenty cases (15.38%). In another case, fees were capped, but the ombud's actual fees were below that cap.[170] Table 3 summarizes the information given about reductions in ombuds' fees. Except as noted below, no specific reason was provided for the reductions.

170. *Compare* Order Approving Stipulation Regarding Appointment of Consumer Privacy Ombudsman at 1, *In re* The Tulving Co., No. 14-11492 (Bankr. C.D. Cal. Sept. 15, 2014) (noting cap), *with* Application for Payment of Final Fees and/or Expenses at 2, *In re* The Tulving Co., No. 14-11492 (Bankr. C.D. Cal. Nov. 19, 2014), ECF No. 190 (fees requested below amount of cap).

TABLE 3: REDUCTIONS IN OMBUDS' COMPENSATION

Debtor name	Information about reduction
Body Renew Winchester and Body Renew Winchester II	25% reduction of fees by court
Borders	$50,000 reduction by agreement with creditors' committee
Brookfit	Small reduction by court
Choxi	Voluntary discount of 15% of fees
Competition Accessories	Agreed to cap fees at $2,500, leading to a very low hourly rate of compensation (approximately $67.75)
CP Liquidation	Small reduction in fees awarded
DMCT	Ombud agreed to 90% due to debtor's "scarce resources"; almost $50,000 in waived fees; total of only $5,000 in fees awarded
EBHI Holdings	Small reduction in expenses
Flat Out Crazy	Small reduction at request of U.S. Trustee
Gottschalks	Small reduction at request of fee auditor in bankruptcy case
LHI Liquidation	Small reduction in fees awarded
Nationwide Asset Services	Capped at $6,500 per agreement, a nearly 50% reduction
Powell's International	Capped per agreement (amount of actual reduction, if any, not clear)
Quality Medical Plus Services	Small reduction in fees awarded
R.J. Gators	Discounted by more than two-thirds due to lack of available funds; total of $9,000 in fees awarded
Revel AC	Small reduction in fees awarded
Shutter Mart of California	Hourly rate significantly discounted to $150; total of $3,390 in fees awarded
The Bon-Ton Stores	Small reduction in fees awarded
Three As Holdings	Hourly rate was lowered from law firm's usual rate; blended rate of ombud and other professionals who worked on case is $300; total fees of nearly $60,000 were awarded
VoicePulse	Fees capped at $7,500 per agreement
Western Funding	Small reduction
WineCare Storage	Some hours "written off" by ombud

It is important to note that the fees charged by the ombuds and their teams are not the only expense that the current regime brings with it. Much of the work of ombuds involves meeting with professionals working for buyers and sellers, most of whom will also be charging by the hour. Thus, the costs outlined in this Subpart are only a fraction of the total costs connected with the current regime and the work of the ombuds.

3. What Ombuds Do

This Subpart provides an overview of the evidence concerning ombuds' work on cases, the reports they produce, and the way they appear to conceive of their role. It shows that their reports often rely very heavily on the text and analysis of reports from prior cases. In addition, ombuds appear to view their role largely not as one of consumer advocate, but as mediator weighing the privacy interests of consumers against the commercial imperatives of a proposed data sale.

a. Ombuds' Work and Reports

(1). Overview of Ombuds' Work

Once appointed, in accordance with their statutory mandate, ombuds investigate the proposed sale, review the debtor's privacy policies, analyze the facts and law, and submit a report to the court.[171] The statute requires an appointment "not later than seven days before" a hearing to approve the sale.[172] This is a remarkably short amount of time—which of course might include weekends or holidays—given the work required to investigate the situation and draft the report.[173] Often the timeline is even shorter. While the median time between date of appointment and date of the first written report of the ombud was fifteen days, in twenty-eight cases (19.86%) it was less than seven days.[174] In the bankruptcy of the retail sporting goods store Gander Mountain, the ombud states that she "received notice of the results of the auction on Friday afternoon April 29, 2017 [sic] and was provided four days over the weekend to analyze all privacy issues pertaining to the sale and prepare this CPO Report for filing on May 2, 2017."[175]

In other work, I have provided a detailed summary of what the reports of ombuds reveal about the substance of privacy law.[176] I show that ombuds generally follow FTC guidance from *Toysmart* and approve sales that are made to "qualified buyers"—that is, companies in the same industry as the seller, who agree to abide by the seller's privacy policy and use the information for the same general purpose as the seller. Ombuds often impose at least some barriers to further transfers of data and to modifications of privacy policies.

These requirements are lightened in some cases when a policy clearly permits a transfer on a less-restricted basis.[177] But ombuds tend to read policies

171. 11 U.S.C. §§ 332(a), 363(b)(1).

172. *Id.* § 332(a).

173. Coordes, *supra* note 21, at 26.

174. Some of these ombuds may have begun work before the date formally provided on the notice of appointment.

175. Consumer Privacy Ombudsman Report to the Court at 3 n.3, *In re* Gander Mountain Co., No. 17-30673 (Bankr. D. Minn. May 3, 2017), ECF No. 657 [hereinafter *Gander Mountain* Report].

176. *See generally* Bradley, *supra* note 15.

177. *See id.* at 192–93.

with a "thumb on the scale" toward applying the "qualified buyer" framework. Some ombuds take an even stronger stance, imposing stricter rules against the transfer of consumer information based on the reasonable expectations that consumers might have formed not just from the particular provisions of the privacy policies, but also from the overall impressions formed in the course of doing business with the seller.[178]

Importantly, this study is not able to establish whether ombuds' intervention caused changes in transactions. Many of the transfers appear to have had a qualified buyer from the start, whether because it was thought to be required or because the qualified buyers were willing to pay the highest price. But the evidence is suggestive that in at least some cases, the involvement of an ombud brought greater protections to consumer data.

(2). Ombuds' Reports

The median length of ombuds' reports in the dataset, excluding attachments, is fifteen pages.[179] But most of this material is not customized for each case—ombuds do not, in other words, fill fifteen pages with original analysis. Quite the contrary. Reports frequently include lengthy block quotes of privacy policies and various legal authorities.[180] And ombuds, who as noted are typically repeat appointees, tend to copy and paste large sections from one report to another, including both lengthy summaries of law and the most commonly repeated recommendations.[181] Occasionally even typos and grammatical errors are copied from one report to another.[182]

To be very clear from the outset, no part of this discussion is intended to discredit ombuds or call their work into question. The fact that the reports are interdependent and bear strong internal resemblances by no means indicates that ombuds' work on each case is insubstantial, or that there is anything unsavory about the practice of using prior materials to construct the reports. In research and drafting, lawyers and judges alike commonly draw on earlier documents

178. *See, e.g.*, Report of the Consumer Privacy Ombudsman at 3, *In re* Bristlecone, Inc., No. 17-50472 (Bankr. D. Nev. July 27, 2017), ECF No. 189 (noting ombud's view that transfer of information should be restricted in accordance with "consumer expectations").

179. *See* Bradley, *supra* note 15, at 151–52 nn.148–151 (further explaining methodology).

180. *See, e.g.*, *Michigan Sporting Goods* Report, *supra* note 79, at 10–18, 26–27 (providing approximately seven and a half pages of block quotes from privacy policies and quoting a page and a half from an FTC letter in the *RadioShack* case).

181. *See infra* Table 4, Table 5.

182. *See, e.g.*, Report of Consumer Privacy Ombudsman [11 U.S.C. § 332(b)] at 6, *In re* Nasty Gal, Inc., 16-24862 (Bankr. C.D. Cal. Feb. 7, 2017), ECF No. 357 ("The potential costs or benefits to consumers if the subject Sale is approved is that they will be given the opportunity to buy similar merchandize from the Purchaser."); Report of Consumer Privacy Ombudsman [11 U.S.C. § 332(b)] at 6, *In re* Deer Meadows, LLC, No. 16-33768 (Bankr. D. Or. May 12, 2017), ECF No. 156 (same sentence); Report of Consumer Privacy Ombudsman [11 U.S.C. § 332(b)] at 7, *In re* Anna's Linens, No. 15-13008 (Bankr. C.D. Cal. Sept. 24, 2015), ECF No. 1007 (same).

produced by themselves or others, even to the extent of verbatim copying.[183] An ombud rewriting the entirety of the analysis from scratch each time would waste the funds of the bankruptcy estate and depart from sound professional practices.

In addition to being unnecessarily costly, completely independent work would be less reliable. Reliance on sound prior work can increase the quality of later products.[184] As reports borrow from one another, ombuds mutually educate one another and engage in an asynchronous dialogue. Rather than condemning this practice, we should facilitate it by making reports more accessible for reference.

To take one example: ombuds occasionally take divergent views in their analysis of specialized areas of privacy law, such as EU law or HIPAA, and some non-specialists might benefit from drawing *more* (not less) from the work of better-informed ombuds. With respect to HIPAA, for instance, while there is a general consensus in the reports as to the privacy rule and the "business operations" exception to it, some ombuds omit this analysis.[185] Whatever the better view on the substance of the law, it would more likely emerge and be reliably applied if all reports were more readily available.

What follows are several illustrations of similarities across reports by several frequently serving ombuds. These tables show that the reports overlap in very significant part. These reports are not outliers, and again, these comparisons do not imply any criticism. As witnessed by their repeated appointments, the ombuds that produced these reports have been considered successful by the U.S. Trustee responsible for appointing them and thus in some respects have been considered exemplary in their performance of the role of ombud.

183. *See generally* Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57 (2017) (demonstrating and analyzing extensive borrowing from "precedential" template documents); Adam Feldman, *All Copying Is Not Created Equal: Borrowed Language in Supreme Court Opinions*, 17 J. APP. PRAC. & PROCESS 21, 29 (2017) (noting that Supreme Court opinions often copy language from parties' briefs "without attribution").

184. Analogously, transactional law scholars have argued for increased "standardized documentation" of deals. *See, e.g.*, Cathy Hwang, *Value Creation by Transactional Associates*, 88 FORDHAM L. REV. 1649, 1655–57, 1659–61 (2020) (summarizing and collecting academic literature on modularity in complex contracting). *See generally* Anderson & Manns, *supra* note 183.

185. *Compare* Report of Consumer Privacy Ombudsman [11 U.S.C. § 332(b)] at 11, *In re* Haggen Holdings LLC, No. 15-11874 (Bankr. D. Del. Sept. 23, 2015), ECF No. 142 (providing nuanced analysis of HIPAA Privacy Rule and related FTC laws), *with* Report of Consumer Privacy Ombudsman [11 U.S.C. § 332(b)] at 3, *In re* Nw. Fam. Dentistry LLC, No. 16-41750 (Bankr. W.D. Wash. Aug. 1, 2016), ECF No. 69 (noting that "[t]he Debtor's medical records constitute protected health information . . . which is governed by HIPPA [sic]" but providing no analysis of HIPAA).

TABLE 4: OMBUD 1 REPORTS COMPARISON

Debtor name	Northwest Health Systems, Inc.	Michael Anthony Management, Inc.	Altrec, Inc.
Date of report	7/31/16	9/28/10	2/12/14
Type of debtor	Specialty pharmacy	Online retailer	Online outdoor gear retailer
Basic conclusions	Privacy policy provided little protection, its application to this sale was unclear, and proposed sale is to qualified buyer, so sale should be approved.	Data to be sold probably does not meet definition of "PII" under Bankruptcy Code, and the sale is to a qualified buyer, so sale should be approved.	Data to be sold probably does not meet definition of "PII" under Bankruptcy Code, and the sale is to a qualified buyer, so sale should be approved.
Length of substantive analysis, excluding block quotes and footnotes	Approx. 600 words	Approx. 900 words	Approx. 900 words
Similarities of analysis to the other reports	Largely verbatim to other reports. Missing a 140-word subsection contained in *Altrec* and *Michael Anthony*; four other sentences slightly different. Only substantive difference is that unlike in *Altrec* and *Michael Anthony*, reports conclude that because the sale is to a qualified buyer, "there is no loss of privacy to consumers" whereas the other reports acknowledge "loss of privacy to consumers" but state that loss will be "mitigated" by the adoption of the seller's privacy policies by the buyer.	Verbatim to *Altrec* (with some proper nouns replaced).	Verbatim to *Michael Anthony* (with some proper nouns replaced).

TABLE 5: OMBUD 2 REPORTS COMPARISON

Debtor name	Real Mex Restaurants, Inc.	Advanced Sports Enterprises.
Date of report	2/8/12	1/19/19
Type of debtor	Restaurant	Manufacturer and seller of bicycles and related goods
Basic conclusions	Sale is to a qualified buyer and should be approved.	
Length of substantive analysis	"Applicable Law" and "Section 332 Factors to be Considered" sections of each report stretch to approximately eleven pages, approximately 2,900 words.	
Similarities of analysis to the other reports	The substantive sections are nearly verbatim, despite the nearly seven years that fell between the reports, with very minor exceptions: the later report includes several additional citations and a block quote from the 2015 *RadioShack* case, and omits several sentences concerning state data destruction laws and a short paragraph concerning the buyer's agreement to the ombud's recommendations. There are also a few, very minor verbal changes.	

This side-by-side analysis of reports from two frequently serving ombuds supports the notion that even when they draw slightly different conclusions based on particular circumstances, ombuds often recycle the text of their reports. In specific areas such as healthcare or finance, ombuds occasionally include different analysis sections, but these too will often be drawn from prior reports in those areas.

Some ombuds do less direct copying of text from report to report, but their debts to prior work are no less profound. Comparisons of isolated sections of reports reveal that even where the copying is not large-scale cut-and-paste, any given report will usually owe debts to reports that came before. A more systemic analysis of this borrowing will require future research, but one example is a passage that first occurs in the report filed by the ombud in *In re Chrysler LLC*. The report states:

> It should be noted that a tension exists between the language of section 363(b)(1) of the Bankruptcy Code and established principles of data protection or "privacy" law with respect to the effective date of privacy policies. The Bankruptcy Code identifies as the relevant privacy policy the one "in effect on the date of the commencement of the [bankruptcy] case," while accepted

> "privacy" law directs that the relevant privacy policy is the one in place on the date that the information is collected.[186]

The passage cites the Bankruptcy Code section that is the source of the first quote,[187] an FTC opinion summarizing the "privacy" law,[188] and, as a "see also" after the Bankruptcy Code, an article by Warren Agin, a privacy law commentator and frequently serving ombud. The Agin article is also attached as an exhibit to the report, and while it supports the notion expressed, it does not appear to contain any exact language used by the ombud.[189]

The above language and citations are reproduced verbatim in the report that the same ombud submitted in *In re General Motors Corp.* about a month later.[190] The two reports share considerable other language and analysis. This is unsurprising given their temporal proximity, the similarity of the debtors' businesses, and the fact that the same ombud was the author.

What is more surprising is that the "tension" language recurs four years later in a report by a different ombud in the bankruptcy case of a company that supplied professional uniforms to workers in the healthcare and food service industries. In this report, the passage from the *Chrysler* and *General Motors* reports is replicated with only six words changed (five added, one subtracted), without changing the meaning in any way, and includes the citations from those reports, reproduced verbatim in precisely the same places in the passage.[191] The passage recurs in yet another report by yet another ombud two years later, in the bankruptcy case of a fashion retailer. In a footnote, the report reproduces the exact language from the *Chrysler* and *General Motors* cases, although it removes "it should be noted that."[192] In what confirms a copy-and-paste from one of those reports into the footnote of this report, there is a footnote superscript after the quote from the Bankruptcy Code, but, presumably because word processing programs do not actually allow a footnote in a footnote, this reference leads nowhere and appears merely to be a legacy of the source of the verbiage.[193] The passage includes the final citation of the original passage to the FTC's *In re Gateway Learning Corp.* decision.[194]

Thus, this language has travelled across the years, deployed by at least three ombuds evaluating proposed sales of consumer data by three different debtors in bankruptcy. There is no reason to assume that our dataset includes either the

186. Report of Consumer Privacy Ombudsman at 1–2, *In re* Chrysler LLC, No. 09-50002 (Bankr. S.D.N.Y. May 26, 2009), ECF No. 2654 [hereinafter *In re* Chrysler LLC Report] (citations omitted).

187. 11 U.S.C. § 363(b)(1).

188. Gateway Learning Corp., 042 F.T.C. 3047 (2004).

189. Agin, *supra* note 93, at 58.

190. *In re* Gen. Motors Corp. Report, *supra* note 103.

191. Report of Consumer Privacy Ombudsman at 4–5, *In re* Life Uniform Holding Corp., No. 13-11391 (Bankr. D. Del. July 22, 2013), ECF No. 245 [hereinafter *Life Uniform* Report].

192. Report of Consumer Privacy Ombudsman at 10 n.13, *In re* Adinath Corp., No. 15-16885 (Bankr. S.D. Fla. July 29, 2015), ECF No. 427 [hereinafter *Adinath* Report].

193. *Id.*

194. *Id.*

original or all subsequent examples of this language (particularly given the imperfect nature of the software used to make the PDFs in our dataset searchable). The example illustrates how much of the ombuds' reports are drawn from prior reports as well as other authorities. Such instances of close borrowing are by no means isolated—this one was drawn more or less at random based on verbal similarities that the researchers happened to notice.

In the end, the evidence collected in this Subpart confirms that the bulk of ombuds' work is in investigating the seller's applicable policies and practices and the relevant characteristics of the proposed sale and the buyer, and developing an opinion about them—not in writing lengthy, original analysis. The analysis that is customized with respect to any particular case can be as little as a few sentences and is rarely more than a couple of pages. Again, this does not at all discredit the work of ombuds; it simply gives a more accurate basis on which to assess what they do. This evidence also supports several suggestions for streamlining the work of ombuds, presented in Part III.

b. Ombuds and Their Role

The role of ombudsman has a centuries-old history, but its meaning remains very flexible.[195] The appointment of an ombud is often a way of bolstering institutional accountability and providing an independent, and usually informal, mechanism for dispute articulation and mediation within large organizations such as universities, hospital systems, and government agencies.[196]

In the bankruptcy context, patient care ombudsmen are appointed "to represent the interests of the patients of the health care business" in a bankruptcy proceeding.[197] The idea is that patients may lack the ability to advocate for themselves, and in the throes of financial distress, the debtor organization cannot be trusted to do so.[198] Patient care ombudsman are put in place to fill this void.

The consumer privacy ombudsman's role is somewhat more complicated in that the statute does not straightforwardly instruct them to "represent the interests" of the affected consumers. Ombuds do not appear to view themselves as advocates representing the otherwise absent consumers. They seem to range between the role of intermediary or mediator, mostly responsible for ensuring transparency and communication in negotiations, and the role of special master,

195. McKenna Lang, *A Western King and an Ancient Notion: Reflections on the Origins of Ombudsing*, 2 J. CONFLICTOLOGY 56, 57 (2011) ("Early versions of the ombuds idea included protection of individuals as well as aims of good governance and conflict mitigation."); *What Is an Organizational Ombuds?*, INT'L OMBUDSMAN ASS'N, https://www.ombudsassociation.org/what-is-an-ombudsman (last visited Feb. 23, 2023).

196. *See, e.g.*, Kenneth Culp Davis, *Ombudsmen in America: Officers To Criticize Administrative Action*, 109 U. PA. L. REV. 1057, 1057–61 (1961); *Harvard Ombuds Office*, HARVARD UNIV., https://ombudsman.harvard.edu/ (last visited Feb. 23, 2023) (describing the office as "an independent, neutral and confidential place for visitors to discuss their academic and workplace issues and concerns").

197. 11 U.S.C. § 333.

198. Erin Masin, Comment, *The Patient Care Ombudsman: Taking Cost out of Patient Care Considerations*, 26 EMORY BANKR. DEV. J. 91, 93–96 (2009).

serving the court by providing neutral assessment in a technically complicated area of law.[199] Ombuds tend to view themselves as balancing consumer interests against maximizing the value of the distressed business.[200]

This is a natural frame of mind to anyone familiar with bankruptcy law, where realizing the maximum value for the estate is usually of paramount importance. This collective goal makes an individual consumer's preference subordinate. Not just debtors, but courts and other players in the bankruptcy system tend to adopt this mindset too, whether deliberately to improve the standing and prospects of their area of specialization, or unconsciously because they tend to believe that the tools they are most familiar with are indispensable.[201] In sum, the proposed sale is often presented as the only alternative to the value-destroying horror of a "piecemeal liquidation," and ombuds have little appetite to stand in the way of the sale. This leaves consumer interests unrepresented in many cases because there is only one "side" at the mediation "table": the pro-transaction side.

As *Toysmart* and other cases have shown, the FTC and state regulators can and do intervene on occasion,[202] but in the main run of cases, they do not. State attorneys general, in particular, seem to shift the balance considerably in favor of consumer protection, and their involvement seems more often to lead to the scuttling of deals and the destruction, rather than the monetization, of data.[203] But their involvement remains uncommon, and due to resource constraints, that is unlikely to change.

Although the Bankruptcy Code does not explicitly prohibit ombuds from balancing consumer interests against the commercial interests of accomplishing a sale, the Code could be read to privilege consideration of consumer interests over value to the estate. The Code instructs that an ombud "shall provide to the court information to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale or lease of personally identifiable information," and notes that:

> Such information may include presentation of—

199. *See, e.g.*, FED. R. CIV. P. 53 (providing authority for appointment of special masters); *What Are the Duties of a Guardian ad Litem?*, WASH. STATE DEPT. OF SOC. & HEALTH SERVS., https://www.dshs.wa.gov/faq/what-are-duties-guardian-ad-litem (last visited Feb. 23, 2023) (describing role of guardians ad litem).

200. *See* Rich Letter, *supra* note 24, at 5.

201. Professor LoPucki has been the sharpest and more consistent critic of this tendency. *See generally* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2006); Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247 (2022); Jacoby & Janger, *supra* note 2, at 868–69.

202. *See, e.g.*, *supra* notes 58–62 and accompanying text.

203. *See generally, e.g.*, Motion by the Office of the Texas Attorney General To Have Trustee Destroy Consumer Personally Identifiable Information upon Conclusion of Bankruptcy Case, *In re* Mulligan Mint, Inc., No. 13-34728 (Bankr. N.D. Tex. May 16, 2014), ECF No. 300 (noting intervention led to the exclusion of consumer information in privacy sale); Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747 (2016) (describing the involvement of state attorneys general in bankruptcy cases).

> (1) the debtor's privacy policy;
>
> (2) the potential losses or gains of privacy to consumers if such sale or such lease is approved by the court;
>
> (3) the potential costs or benefits to consumers if such sale or such lease is approved by the court; and
>
> (4) the potential alternatives that would mitigate potential privacy losses or potential costs to consumers.[204]

Notably, these factors do not include consideration of whether the bankruptcy estate would be losing out on significant value if the sale were not approved or if a less-damaging alternative were chosen. Granted, the section says that the ombud's report "*may include*" the stated factors, so it is clearly not an exclusive list of permissible considerations.[205] In addition, the court is tasked with "giving due consideration to the facts, circumstances, and conditions" of the proposed sale, as well as establishing that the sale does not violate "applicable nonbankruptcy law."[206] This could be read as permitting the court to approve sales so long as the minimal standard of "lawfulness" is met.

These provisions could also be read in a more consumer-protective way, as suggesting that consumer interests should remain paramount, or at least that the ombud should focus attention on consumers' interests and play the role of consumer advocate rather than the role of mediator. After all, there are many parties generally favoring completion of a sale, and there is otherwise no representative to advocate for the absent consumers who might oppose their private information being monetized contrary to privacy promises.

But ombuds do not appear to have adopted the more consumer-protective reading of the statute or to view themselves in the primary role of consumer advocate. Instead, nearly every report reflects the ombud tinkering with aspects of proposed sales while ultimately letting them proceed. A number of reports balance consumers' interests in data protection against the interest in realizing the value of the consumer information for the benefit of the seller, its bankruptcy estate, and its creditors. Six reports (4.26%) explicitly weigh consumer privacy with the estate's interest in maximizing the value of its assets. For example, in declining to impose a notice-and-consent regime in addition to the standard qualified-buyer protections, one report states: "In this case, the CPO does not believe that this mechanism is practicable, due to financial pressure on the Debtors, and the relatively low sales price."[207] Another report notes the need to "reap some value to the estate," and states:

> The Customer Lists are not an appropriate asset to include in a going-out-of-business sale. Yet the Customer Lists have some value to be sold separately

204. 11 U.S.C. § 332(b).

205. *Id.* The Bankruptcy Code's rules of construction provide that the word "including" is nonexclusive. *Id.* § 102(3).

206. *Id.* § 363(b)(1)(B).

207. *Agent Provocateur* Report, *supra* note 116, at 30.

> and should not go to waste simpl[y] because the Debtor is liquidating. Customers' expectation must be weighed against the need for the Debtor to maximize value of the estate.[208]

In addition to these cases in which such a tradeoff is explicitly acknowledged, another twenty-one reports (14.89%) suggest that the recommendation was the best possible in light of "practical considerations,"[209] which, if it means anything, seems to implicate this same impulse to realize value at the expense of some consumer protection.

In the remaining 114 cases (80.85%), such considerations are not mentioned, although it is of course possible—and perhaps likely—that the ombuds were aware of them. For example, in a piece called "Confessions of a Consumer Privacy Ombudsman," a former ombud justified her approval of a sale of consumer data in part because to deny the sale would mean squandering "the debtor's assets[,] . . . which included dozens of fully staffed retail stores prepared for end-of-the-year holiday sales."[210] Even the FTC has shown openness to the lenient, pro-commerce approach, as evidenced by a letter from Jessica L. Rich, then-Director of the Bureau of Consumer Protection, to the ombud in *In re RadioShack Corp.*[211] The letter advocates for consumer privacy protections but also seems to concede that consumer interests have to flex in light of the imperatives of bankruptcy because "bankruptcy presents special circumstances, including the interest in allowing a company to get back on its feet—or alternatively, to marshal remaining assets for its creditors—consistent with any promises made to customers."[212] This is part of the justification for the use of the *Toysmart* framework. Rich states that if protections along the lines of *Toysmart* were imposed, "our concerns about the transfer of customer information inconsistent with privacy promises would be greatly diminished."[213]

Thus, a fundamentally pro-transactional mindset appears to guide the perspective of ombuds as well as other players, including the FTC and the U.S. Trustees responsible for appointing ombuds, who should be deemed to have tacitly endorsed the viewpoints of those they repeatedly appoint. This perspective is neither unlawful nor necessarily harmful as a policy matter. As I

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208. Report of Consumer Privacy Ombudsman at 21, *In re* The Rugged Bear Co., No. 11-10577, (Bankr. D. Mass. Mar. 31, 2011), ECF No. 239 [hereinafter *Rugged Bear* Report]; *see* Consumer Privacy Ombudsman's Report at 25, *In re* Vanity Shop of Grand Forks, No. 17-30112 (Bankr. D.N.D. Nov. 17, 2017), ECF No. 495 ("Although the goals of insolvency and privacy laws may often be a cross-purpose, it is possible in this case to maximize ViCorp's asset values, while minimizing consumers' loss of privacy, provided appropriate conditions are imposed on ViCorp and any purchaser.").

209. *See, e.g.*, *Activecare* Report, *supra* note 80, at 21 ("In summary, the Ombudsman believes the Recommendations in this CPO Report strike an appropriate balance between the privacy rights of consumers and customers and practical considerations associated with this bankruptcy sale.").

210. Porter, *supra* note 62, at n.17. She also argued that "efficiency was particularly critical in the . . . cases given the number of employees and unsecured creditors who depended on a buyer taking over the debtors' operations quickly and seamlessly." *Id.* at n.25.

211. Rich Letter, *supra* note 24, at 4–5.

212. *Id.*

213. *Id.* at 5.

have argued elsewhere, the work of ombuds both relies upon and contributes to a wider body of privacy law that is independent of any momentum in the bankruptcy proceeding.[214] But in assessing the work of ombuds, it is important to recognize that the pressure of the deal is behind them, and that they conceive their role to be one of accommodation and agreement rather than adversarial representation or advocacy.

C. THE OMBUDSMAN REGIME AS PRIVACY THEATER

As mentioned, the concept of privacy theater was developed by scholars concerned that privacy laws sometimes foster a "myth of oversight" with little reality.[215] The notion is a useful one in the context of the bankruptcy system's consumer privacy ombudsman system.

Certainly, the system provides less protection than its primary senatorial sponsor, Senator Leahy, has suggested and that many observers of the system assume. Arguably, the public outraged by *Toysmart* has been given false consolation. Many sales of data in bankruptcy simply do not implicate the work of ombuds, but the complexity of the bankruptcy process means that many members of the public, and even lawyers, regulators, and other policymakers, may lack understanding of just how limited the provisions are and how easy they are to evade, whether lawfully or not.[216]

Further, even when ombuds are appointed, much of their work is theater. Because most ombuds are recognized privacy experts, their involvement in cases is a way of quite visibly (and not cheaply) seeking to communicate that consumers have not been abandoned to the bankruptcy wolves. The regime also takes advantage of the pervasive transparency and judicial oversight that are oft-trumpeted features of the bankruptcy regime, which may further lull both consumers and regulators (such as the FTC and state attorneys general) into a sense of security and complacency, even though many sales of data are never subjected to scrutiny—and if they are, the scrutiny is not particularly strict. Judges, the U.S. Trustee (frequently described as the bankruptcy "watchdog"), and the professionals and officers of both the buyers and sellers of data all have well-defined roles to play in this elaborate and pricey drama.

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214. *See generally* Bradley, *supra* note 15.

215. *See supra* notes 26–27 and accompanying text.

216. As Professor Diane Dick concluded in her incisive recent article:

> Sophisticated debtors have developed and refined a bankruptcy playbook for monetizing data assets in a way that effectively bypasses the minimal privacy-related procedural safeguards in the Bankruptcy Code. Then, by failing to engage in meaningful disclosures, debtors effectively guarantee that there will be no explicit discussion of their data assets in court or on the docket—even if they are in fact among the most valuable assets of the estate.

Dick, *supra* note 21, at 10. She emphasizes the failure to disclose information assets, but the additional inadequacies of the regime discussed here only support her conclusion further. *Id.* at 9.

A deeper look shows that the regime represents, largely, a "myth of oversight."[217] Ombuds tend to serve in case after case, and they reuse most of the text of their reports from one situation to the next. I do not want to overstate my case. In almost every instance, ombuds provide at least some customized analysis, and overall, they make meaningful contributions to the law of privacy, as I have argued elsewhere.[218]

But ombuds do not tend to bring significant amounts of technical or legal expertise to bear on the cases they work on. Their work is mostly formulaic and could be done by any lawyer. While some of them inquire into security practices, which sometimes veer into the technical aspects of data privacy, most ombuds do not inquire deeply into any complex technical issues. Ombuds' recommendations concerning security practices, for instance, are often vague. Consider one such example: "to maintain at least the same level of information security currently maintained by the Debtors, and [to] comply with applicable privacy laws and regulations governing the transfer, storage, maintenance, and access to Customer PII."[219] Legally, ombuds apply the *Toysmart* framework or other more specific laws, such as that drawn from HIPAA or the Gramm-Leach-Bliley regulations of financial institutions.[220] They tend to apply these predictably by locating a business's applicable privacy policies (if any), considering the sensitivity or other characteristics of the information to be transferred, asking questions about the proposed buyer, obtaining the required representations, and approving the deal subject to a relatively limited menu of restrictions.

Even in the relatively rare cases in which they are appointed, ombuds do not stand in the way of many transactions—indeed, they insist that most transactions do not meaningfully harm consumers at all.[221] Some state attorneys general, other privacy experts, and consumer advocates deem the law of privacy, as developed by ombuds, insufficient.[222] Other critics might argue that ombuds could be more aggressive in their interpretation of their role and the law they are retained to apply. But defenders might point out that ombuds are constrained by the bankruptcy system, that they are not clearly instructed to play the role of consumer advocate, and that they may be under pressure, both explicitly and

217. Schwartz, *supra* note 26, at 288.

218. *See generally* Bradley, *supra* note 15.

219. Consumer Privacy Ombudsman's Report at 22, *In re* Real Mex Rests., Inc., No. 11-13122 (Bankr. D. Del. Feb. 8, 2012), ECF No. 877.

220. Bradley, *supra* note 15, at 184–85.

221. *Id.* at 176–78 (noting that most reports characterize the harm of data transfers to consumers as minimal or nonexistent).

222. *See* Objection of the Commonwealth of Massachusetts (and 46 States) to the Debtor's Motion to Approve Settlement with Federal Trade Commission and for Authority to Enter into Consent Agreement at 6–7, *In re* Toysmart.com, LLC, No. 00-bk-13995 (Bankr. D. Mass. Aug. 3, 2000), ECF No. 180; Report of Michael St. Patrick Baxter Consumer Privacy Ombudsman at 43–44, *In re* Borders Grp., Inc., No. 11-bk-10614 (Bankr. S.D.N.Y. Sept. 21, 2011), ECF No. 1830 (noting that state attorneys general did not agree with *Toysmart* framework).

implicitly, by the U.S. Trustees who appoint them and by the judges who award them their fees.

In the first fifteen years of the regime, ombuds' work from case to case has not been subject to much variation, and it is not clear that the retention of experts continues to be necessary to provide whatever consumer protection the system does supply. Granted, there are rare cases where ombuds do provide a valuable service reliant on expertise in privacy law, such as in the bankruptcy of St. Vincent's hospital in New York, which required extensive and nuanced analysis of several bodies of both federal and state laws.[223] Not only are such cases exceedingly rare (maybe two to three out of the entire dataset of 141 cases), but they also often have little to do with the concerns that motivated the ombud regime in the first place. In *In re St. Vincent's Catholic Medical Centers of New York*, for instance, the case had less to do with the monetization of private data and more to do with consumer (patient) protection and compliance with complicated regulatory schemes.[224] These isolated cases could be dealt with by appointments of experts on an ad hoc basis. The main run of cases where an ombud was appointed involve much simpler analysis and little exercise of discretion.

In a way, ombuds can be thought of as the victims of their own success—they have made the law of privacy relatively predictable in this arena. The one major caveat to this analysis emerged from the lack of easy availability of the reports. It took many hours for researchers to pull together reports from the full range of cases in the dataset, and this fact seems notable. While there are numerous articles and presentations about ombuds, the details of their work have gone unanalyzed outside of a few prominent cases such as *RadioShack*. Publicizing reports as they are made would help future ombuds, as well as the courts and regulators who oversee them, to keep track of additional developments in privacy law.

In sum, the consumer privacy ombudsman system produces a feeling that we can "trust the experts" and encourages an uncritical acceptance of the story spun by the privacy theater of the bankruptcy courts. The theater provides comfort to consumers, and perhaps to others, such as judges and regulators; the message is that thanks to the involvement of experts, consumers can be protected even while commerce proceeds. But the system provides little opportunity to monitor the actual substance of the activities these experts perform in case after case. This Article seeks to begin to pierce the aura of expertise and reveal the substance of the supposed consumer protections to allow for more sober policy consideration, for better or worse.

Revealingly, in both published writings and in other statements concerning their work, ombuds have taken steps not only to insist that their involvement

223. Report of Consumer Privacy Ombudsman ¶¶ 36–38, *In re* St. Vincent's Catholic Med. Ctrs., No. 10-11963 (Bankr. S.D.N.Y. July 12, 2010), ECF No. 593.

224. *Id.*

protects consumers, but also to reassure businesses that the process will not be too painful or destructive of the businesses' intentions to monetize consumer assets.[225] Ombuds have even emphasized that they may provide the valuable service of deflecting public criticism.[226] This perhaps explains why debtors fail to object to the appointment of ombuds even when, arguably, the appointment is not warranted under a strict interpretation of the law.[227] Perhaps these debtors realize the usefulness of ombuds in heading off scrutiny from the public at large or from often vociferous objectors like state attorneys general. In other words, perhaps these debtors viewed ombuds as being useful tools to, as it were, "launder" the sale of data.

III. REFORMING THE PRIVACY THEATER

This Part surveys possible reforms to the consumer privacy ombudsman regime. It begins with potential changes to the bankruptcy system, both institutional and doctrinal. It suggests that given the relatively settled nature of the law applied by ombuds, their role could be played by lawyers who work for the Office of the U.S. Trustee, or could be fitted into a more traditional form, where the proponents of a sale would present necessary proofs to the judge to ensure compliance with the law. Such a shift would be aided by the collection and publication of the reports that are produced by ombuds. This shift would also have the virtue of promoting a more accurate understanding of the law of privacy as ombuds see it, which advocates, regulators, and industry actors could continue to shape and develop on a more informed basis.

In addition, the many gaps in the current law could be covered so that all sales of private information are evaluated for compliance with governing law, and for the burden to demonstrate compliance to be more clearly on the proponents of the sale. In addition, lawmakers could shift ombuds from the more neutral role they have played up to this point and instruct them to act as advocates for consumers' interests and as investigators of data privacy practices.

Still, changes to the institutional framework only go so far. As with other areas of conflict between bankruptcy law and consumer interests, Congress should consider lawmaking in this area. Regulators and outside professionals such as ombuds can serve a purpose, but their involvement is often spotty at best. In addition, both they and the courts in front of which they appear often lack the

225. Luis Salazar, *Don't Fear the Consumer Privacy Ombudsman*, 26 AM. BANKR. INST. J., Dec./Jan. 2008, at 42, 63 ("[T]he consumer privacy ombudsman has thus far been easily integrated into situations involving 10 lightning-quick § 363 processes."); Singer & Greer, *supra* note 23 ("In bankruptcy, you're forcing people to think about what they really need. That's where the push and pull comes in. It's me trying to explain—I'm not looking to destroy your business. This is a collaborative process. Tell me what you really need and why you need it, and I will do my best to figure out a way for you to have it.").

226. Salazar, *supra* note 225 ("[B]y essentially serving as a voice for consumers who have no privacy protection, ombudsmen legitimize a process that could otherwise attract unwanted and highly disruptive attention from regulators or angry consumers.").

227. Other parties, such as creditors or creditors' committees, could also object. *See* 11 U.S.C. § 1109. However, they usually would share the debtor's incentives of promoting a controversy-free sale.

substantive guidance needed to resolve the important policy tensions presented routinely in bankruptcy. These tensions would best be addressed at the legislative level rather than being left to uneven, ad hoc determination.

Finally, change should not be limited to the bankruptcy system. For the reasons surveyed above,[228] financially distressed businesses present special risks whether they are in bankruptcy or not. Their technical capacities are often degraded, their personnel and pockets depleted, and their concern for reputation and good customer relations diminished. Potential reforms involve requiring regulatory preclearance of transactions in data or, less onerously, requiring advance notification of such transactions. These steps would give regulators, and potentially the public, the opportunity to prevent abuses. Because there is no workable way to identify and target distressed businesses in particular, legal reforms would likely have to be applicable to all transactions in private information by all businesses. Financial distress could serve as a factor that would lead to more scrutiny due to the increased likelihood of abuse.

A. CHANGES TO THE BANKRUPTCY SYSTEM

1. Publish the Reports

Currently, studying the work of ombuds in detail is difficult and expensive. It took several intelligent and hardworking research assistants, together with a lead investigator with significant experience in the bankruptcy system, and hundreds of hours to locate, download, and organize the documents necessary to undertake this study. Even so, due to the irregularities in document-naming and docketing practices, it is entirely possible that the study is missing the work of some ombuds.

All documents related to the work of ombuds should be made readily available to the public. This would be an easy and significant improvement on the status quo. The U.S. Trustee should collect and publish these documents online. This would allow for easier analysis of the substance of the law as applied to particular cases. It would make the job of ombuds easier by showing what other ombuds have done in similar circumstances, it would allow companies and their counsel to plan decisions more straightforwardly as they consider bankruptcy, and it would aid in the lawmaking and regulatory process. Most of all, it would help bolster public understanding and accountability, dispelling some of the "myth of oversight" by giving a clearer understanding of the protection that ombuds do and do not provide to consumers' private information.

228. *See supra* Part I.B.

2. Change the Personnel

Under the law as it stands, there is a good argument that ombuds are not necessary, and that their involvement may mislead consumers and policymakers into thinking that what protections they offer are more robust than they are. The involvement of privacy experts communicates that consumers can "trust the experts," implicitly suggesting that the problem is a technical one best resolved by recourse to experts, rather than a matter of difficult policy decisions, subject to little guidance from existing law and not particularly illuminated even by experts. While the most frequently appointed ombuds are certainly experts in privacy law, it is not clear how much that expertise adds to their work. Perhaps in 2005, privacy law in this area was so nascent, and the general familiarity of lawyers with privacy issues was so low, that experts were necessary. But this is no longer the case. The factual distinctions among the sales considered by ombuds are generally minor and nontechnical in nature.

Once they have reviewed the applicable principles of law, including those gleaned from prior ombuds' reports, most capable lawyers would find applying the governing legal principles to these facts to be a relatively simple task. At this point, ombuds hew closely to the *Toysmart* framework and make several relatively minor modifications to it, providing useful case studies in applying privacy law to concrete situations, but not breaking much new ground. To be sure, ombuds vary in the nuance of their analyses, but the conclusions are strikingly similar. In sum, the involvement of these experts may have theatrical value, but it is unclear that it adds much protection to consumer privacy as a functional matter.

Accordingly, two potential reforms should be considered: designate a government attorney with the U.S. Trustee or the FTC to perform the task, or simply leave the task to the court and the parties to work it out for themselves.

a. Designate a U.S. Trustee or FTC Attorney for the Task

One reform would be for the U.S. Trustee to train several of its lawyers in privacy law, so that they could either serve in the role of the ombud or assign the role to an attorney at the FTC.[229] This could save significant expense for debtors, and the additional expense borne by the general public would be minimal, perhaps requiring as little as the equivalent of one additional attorney nationwide. Cases are not particularly frequent—an average of fewer than ten per year.[230] While the median hours spent by ombuds on each case is 29.55, a designated specialist lawyer with the Department of Justice's U.S. Trustee Program could perhaps do the work in less time. Representatives of the U.S.

229. This would require an amendment to the Code. The Code clearly prohibits U.S. Trustees themselves from serving as ombuds, and their staff attorneys would be unlikely to meet the requisite standard of "disinterestedness" as well. *See* 11 U.S.C. § 332(a); *see also* Salazar, *supra* note 82, at 59 ("[A]nyone can serve in the role, even a representative of the more usual privacy enforcers—the FTC or a state attorney general.").

230. Our dataset has 141 cases over the years 2005 to 2020; the average of these cases is 9.4.

Trustee already have extensive contact with every debtor,[231] which would facilitate the necessary inquiries into privacy policies, and the added expertise developed by frequent appointments would aid the attorney(s) designated to serve in this role.

There might also be accountability benefits to this approach. Rather than outsourcing the role to private actors, a public employee ultimately answerable to politically accountable leaders would be taking a position about the legal protections appropriate in particular cases. As mentioned above, often an ombud's appointment is made only after a sale process is already in motion, pursuant to an agreement reached prior to the bankruptcy filing and on a very short time frame. It is possible that an actual U.S. Trustee attorney would be better able to resist any pressure to rush the analysis.

b. Leave It to the Judge and Lawyers in the Case

Another proposal would be to leave the matter more squarely with debtors' attorneys and judges—in other words, to cut out the middleman. The law could provide that proponents of a sale of private data are responsible for demonstrating that the sale complies with governing law. Working from the existing body of ombuds' reports, both the debtor's lawyers and the judge would be able to apply the framework relatively easily. Judges might expect to see all applicable privacy policies and to receive evidence concerning the data privacy and security practices, the data to be transferred, and the buyer. Judges would make the same ultimate determination they make now, but they would be presented with the evidence and arguments directly from the involved parties rather than also hearing from the ombud.

As noted above,[232] the evidence suggests that a somewhat watered-down version of this approach may already be taking hold. Some parties avoid the appointment of an ombud and seek to resolve privacy concerns without an appointment or report. Some simply reference the privacy policy (or the lack thereof) and state that the proposed sale would not violate it.[233] Others include an undertaking from any potential purchaser to honor privacy obligations.[234] Finally, some retain a privacy expert to file a report on consumer data privacy implications of the sale, essentially preempting the role of any potential ombud.[235] All of these efforts appear to have been successful at heading off the appointments of ombuds.[236]

These approaches bring benefits, including that they may permit parties to enter bankruptcy with more certainty regarding the likely parameters of a permissible data sale. But the current hands-off approach comes with

231. *See, e.g.*, FED. R. BANKR. P. 2015.
232. *See supra* Part II.A.
233. *See supra* notes 150–51 and accompanying text.
234. *See supra* notes 135–38 and accompanying text.
235. *See supra* notes 139–43 and accompanying text.
236. *See generally supra* notes 135–51 and accompanying text.

considerable risks as well. Relying on the parties' representations, which are often mere boilerplate,[237] without any independent investigation leaves an accountability vacuum. While the prebankruptcy retention of an expert provides some additional accountability, allowing the debtor to choose who will serve as its "quasi-ombud" is a conflict of interest. Those who serve in such a role repeatedly, particularly at the behest of the same law firm, might find their objectivity called into question; whether fairly or not, observers might become suspicious that the expert's view is slanted by the desire to curry favor with those who retain them.[238] In sum, these approaches may draw criticisms that they amount to abdication of regulation of the regulated parties—a criticism that has been leveled against other industry-guided "social practices of privacy law."[239]

3. Rewrite the Rules

In general, privacy law seems ill-suited to address the concerns raised by businesses in financial distress. As discussed, this is both because the reputational and liability constraints upon which privacy law relies may have little hold on distressed entities, and because the lack of staffing and funding often leads to lax security practices and losing the institutional memory concerning privacy practices and promises.[240] Accordingly, the consumer privacy ombudsman provisions of bankruptcy law seek to provide additional protections to ensure that companies in bankruptcy abide by privacy law when they seek to monetize consumer data.

But as discussed at length, the Code's actual provisions are full of gaps, so that ombuds are never appointed in many cases; and if they are appointed, their ability to impose consumer protections is limited. Legislators could take a number of steps to broaden the coverage of bankruptcy laws protecting consumer privacy and to strengthen consumer protection once the appointment of an ombud is made.

a. Close the Gaps and Shift the Burdens

Some potential changes are obvious and responsive to the limitations discussed above. For example, the law could replace the narrow statutory definition of "personally identifiable information" to include the full range of customer information in the possession of the debtor, regardless of how it was gathered, so long as the data could potentially be used to identify a particular

237. *See generally supra* notes 135–51 and accompanying text (noting appearance of boilerplate language in cases apparently not involving consumer data privacy transactions).

238. *Cf.* Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors* 24–37 (Eur. Corp. Governance Inst., Working Paper No. 593/2021, 2022), https://ecgi.global/content/working-papers (describing the phenomenon of "independent" directors appointed in many bankruptcy cases and discussing conflict of interest concerns).

239. *See generally* Waldman, *supra* note 154, at 1233–45.

240. *See supra* Part I.B.

customer or household.[241] A starting point for a broader definition could be the definition of "personal information" provided by the California Consumer Protection Act.[242]

In order to deal with the problem of debtors not declaring their possession of private information and their intention to sell it, the Code could simply state that if the transfer of such information is not expressly disclosed, the protections of the Bankruptcy Code do not apply to the buyer as to that information, and the lawfulness of the transfer can be challenged at any time it should come to light. Sale and plan confirmation orders routinely provide significant protections from successor liability and other claims and attacks. If such protections were not available absent engagement with the dedicated procedures, buyers would take more care to ensure compliance.

Notice of bankruptcy sales should also be provided to the FTC and to relevant state regulators as a matter of course.[243] Already, regulators are involved in cases on occasion, and several ombuds mention that notice was provided in particular cases. One report, for instance, includes this statement:

> The Ombudsman also notes that he was informed by Debtor's counsel that notice of the Sale was served on the FTC and the attorneys general of each state in which the Debtor did business and, as of the filing of this Report, to the best of the knowledge, information, and belief of the Ombudsman, neither the FTC for any attorney general has objected to the Sale of the Customer Data . . . .[244]

But the process is ad hoc rather than systematic. Bankruptcy law requires that notice be provided to regulators in other types of cases,[245] and it would be a simple matter to require such notice in the case of privacy sales. These regulators have taken more aggressive consumer protective positions in prominent cases,[246] and they might intervene more consistently if informed in a wider range of cases.

Finally, bankruptcy law could provide for an ombud to be appointed to consider all proposed transfers, regardless of whether a privacy policy may be violated and whether the sale is to occur via § 363 or a plan of reorganization.[247] Some have speculated that, by exercising their equitable authority, bankruptcy courts may already be able to appoint ombuds even where not expressly

241. Advocates have argued for the protection of broader groups of consumers as well, and if they succeed at shifting privacy law to take these concerns into account, an even broader definition might be warranted. *See, e.g.*, Viljoen, *supra* note 8, at 634–37.

242. CAL. CIV. CODE § 1798.140(v)(1) (West 2023); *see* Chander et al., *supra* note 8, at 1750.

243. This suggestion is somewhat analogous to arguments that have been made for other regulators, including the Consumer Financial Protection Bureau, to play a larger role in bankruptcy proceedings. *See generally* Alexandra Sickler & Kara Bruce, *Bankruptcy's Adjunct Regulator*, 72 FLA. L. REV. 159 (2020).

244. *Adinath* Report, *supra* note 192, at 5.

245. *See, e.g.*, FED. R. BANKR. P. 2002(j).

246. *See supra* note 207 and accompanying text.

247. *See* Elvy, *supra* note 7, at 520–22 (critiquing reliance on privacy policies in privacy law).

permitted by statute.[248] But I have unearthed no cases in which an ombud was appointed to evaluate a proposed transfer under a plan of reorganization.[249] In practice, the only appointments that have been made outside of the strict statutory text are several cases in which ombuds have been appointed despite the proposed sale arguably not violating the governing privacy policy. Given the difficulty of ascertaining the precise scope of any privacy policy and the apparent lack of opposition by debtors to the appointments in those cases, this prophylactic approach is understandable. But there are also cases in which courts refused to appoint an ombud despite a request to do so by the U.S. Trustee on statutory grounds,[250] and exceptions to the statutory requirements are otherwise rare or nonexistent. If Congress's intention was to permit appointments under other circumstances, the safer course would be for it to amend the statute to say so.

b. Broaden the Mandate and Clarify the Role

Ombuds could also be given a broader mandate to investigate overall protection of privacy by the company seller and by the buyer. Such an investigation might reveal the sorts of behaviors that have raised objections from state attorneys general concerning how data was gathered, the expectations that consumers might have formed, and whether the buyer and seller have abided by promises they have made.[251] Adverse findings might lead ombuds to impose more restrictions on the sale or to alert regulators, such as the FTC or state attorneys general, to potential abuses. Ombuds pay some attention to these issues now, but they usually focus on the standards for approving the sale itself rather than investigating broader compliance with consumer protection norms.

In addition, as discussed above, a number of reports either expressly weigh the value of the data to the debtor in their recommendations, or reference "practical considerations" that seem to include the fact that consumer data is a valuable commodity in the hands of the debtor.[252] Even when it goes unstated, concern for the estate and its value likely colors how the interests of consumers are treated. While they lack direct financial motivations to complete any particular transaction, courts and U.S. Trustees generally have an interest in the success of the bankruptcy system as a whole and tend to want to bring about

248. *See* 11 U.S.C. § 105(a) (providing residual equitable authority); Carl Wedoff & David P. Saunders, *Big Data Meets Bankruptcy: Will the Increased Value of Consumer Data Lead to a Weakening of Privacy Protections in Bankruptcy Sales?*, 39 AM. BANKR. INST. J., July 2020, at 14, 50 ("[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."); COLLIER ON BANKRUPTCY ¶ 332.02 (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) ("Bankruptcy courts often expand upon a statutory authorization such as section 332 to order the appointment of officers or professionals at the expense of the estate when the court feels that it could benefit from the additional information or assistance that a neutral third party might provide.").

249. *See supra* note 104 and accompanying text.

250. *See supra* note 154 and accompanying text.

251. *See supra* note 222. *See generally* Bradley, *supra* note 15 (discussing role of state attorneys general).

252. *See supra* Part II.B.3.b.

successful transactions where possible. Ombuds are not immune to such pressures as they are appointed by U.S. Trustees, wish to convince courts to follow their recommendations, and are in close contact with highly motivated parties such as the buyer's and seller's managers and lawyers. By contrast, there is no established mechanism or requirement for them to be in contact with affected consumers, consumer advocates, or regulators.

To deal with this imbalance, another potential amendment might be to instruct ombuds that the interests of the estate in the assets should be ignored, and that they should focus their attention only on what would best serve the interests of consumers. In other words, the ombuds should be positioned more squarely as consumer advocates. After considering their reports, bankruptcy judges could then decide how to balance consumer interests with the interests of the bankruptcy estate.

A further step would be to change the law to instruct *courts* that a sale should only be permitted if consumers would be benefitted on net. This requirement would not necessarily bar the bankruptcy estate from reaping the value of a sale. It would merely mean that instead of balancing the estate's interest in the sale against the damage it might have to consumers, the sale would only proceed—and the estate would only reap a benefit—if there is a net positive value to consumers from the Code. It is unclear how many transactions this would affect. According to our analysis of ombuds' reports, many sales of data would still be permitted because consumers are benefitted from continuity in services that can only occur if the information is transferred, and the harm to consumers is de minimis. Still, reorienting toward consumer welfare might bring increased protection even if most transactions are ultimately permitted.

Finally, the law could shift the burden of proof on several matters. Lawmakers could shift the burden of demonstrating lawfulness from requiring a "showing . . . that such sale or such lease would *violate* applicable nonbankruptcy law,"[253] to requiring the proponents of sale to make an affirmative demonstration that the transaction does *not* violate the law. Another form of burden-shifting would be to presume that unless companies can produce records of the time and manner in which they collected information and all representations made concerning privacy at that time—including, but not limited to, those in a formally designated privacy policy—then the transfer is presumptively unlawful. Ombuds expressed concern or uncertainty over debtors' recordkeeping in seventeen cases (12.06%) out of the dataset, often stating that it was unclear which policy was presented to particular customers when data was gathered, or if any privacy representations were made at all. It is possible that other companies had lax recordkeeping practices that ombuds overlooked. Imposing the obligation to demonstrate sound recordkeeping as a

253. 11 U.S.C. § 363(b)(1)(B)(ii) (emphasis added); *see supra* note 116 and accompanying text.

condition of transfer of data would ensure that ombuds and debtors alike pay closer attention to these matters.

c. Make Law, Not Institutions

As with many other court proceedings, bankruptcy proceedings generally have an adversarial structure with parties obligated to represent themselves. However, bankruptcy proceedings also can affect the interests of parties that cannot (e.g., future claimants) or will not (e.g., most consumers) bother to do so. In addition, a few crucial players, such as the debtor and powerful creditors, tend to exercise an outsized influence on proceedings and may manipulate the outcome to serve their interests. Accordingly, the bankruptcy system imposes various obligations on participants, including professionals serving the debtor, and relies upon other institutions such as the U.S. Trustee, case trustees, examiners, ombuds, and various federal and state regulators to protect the public interest from abuse at the hands of the bankruptcy process.

The public interest is not served in a system that relies on an elaborate superstructure of duties and institutions where the substantive law is unclear and institutional involvement is inconsistent. The ombudsman regime described in this Article provides an apt example of this phenomenon. The institutional mandate is dramatically incomplete, and even with changes to it, ombuds are likely to continue to need more substantive guidance from lawmakers concerning the crucial underlying questions of exactly how much consumers' interests can and should be compromised in the bankruptcy process. A similar principle likely applies to numerous other areas where consumer interests are affected by bankruptcy, such as gift cards, warranties, and the servicing of leases and loans.[254] We should be under no illusion that even well-designed institutions, without sufficient substantive guidance, are enough.

B. PROTECTING PRIVACY BEYOND BANKRUPTCY

The ombudsman regime, which would be strengthened by some of the proposals in the previous Subpart, is intended to bolster the privacy of consumers whose information is held by companies in bankruptcy. But it is not just bankrupt companies that inspire acute consumer protection problems. Many companies encounter financial distress, and indeed fail and liquidate completely without ever filing for bankruptcy—indeed, the *Toysmart* situation initially arose outside of bankruptcy.[255] This raises similar concerns for the companies in bankruptcy. This Subpart explores the potential justifications for, and challenges to, a regime focused primarily on protecting consumer privacy in bankruptcy. It then proposes some ways in which protections could be extended beyond

254. *See* Jason B. Binford, Layla D. Milligan & Abigail Rushing Ryan, *Use It Before You Lose It: Chapter 11, Gift Cards and Consumer Protection*, 39 AM. BANKR. INST. J., Oct. 2020, at 14.

255. *See infra* notes 315–17 and accompanying text.

bankruptcy law, suggesting some lessons that the consumer privacy ombudsman system might hold for commercial law outside of bankruptcy.

1. Bankruptcy Exceptionalism and Consumer Privacy

One of the perpetual areas of debate in bankruptcy law is the degree to which bankruptcy should give special treatment to particular claims or interests as compared with their status outside of bankruptcy.[256] The issue is important because bankruptcy often serves as a battleground where the claims of large numbers of injured parties clash with financial realities and the interests of investors and organizations in moving on or making the best of a bad situation. Bankruptcy courts have been an arena for all sorts of high-profile struggles of victims, from products liability to sexual abuse.[257] On a more mundane level, bankruptcy has to deal with claims of pensioners, or holders of warranty rights or gift cards, all of which can be seen as implicating bankruptcy's consumer protection function, and can present tensions with, or even directly collide with, the general distribution scheme and entitlements of bankruptcy law.[258]

Using bankruptcy law to provide consumer privacy protection implicates these tensions. The consumer privacy ombudsman provisions require companies to take additional steps in bankruptcy that they might not have to take outside of it. Forcing businesses to pay more attention to privacy in bankruptcy than out of it will affect the calculations underlying their decision whether to file for bankruptcy relief. If bankruptcy's costs are raised too high, then enterprises that would benefit from bankruptcy will avoid it.

Part I.B argued that entities in distress present particular risks to consumers' privacy interests. But it may not be sensible to impose a special regime covering only some distressed companies—those in bankruptcy—while leaving the rest out. Perhaps we should look to reform generally applicable privacy laws rather than forcing bankruptcy law to bear more weight than it can or should.

On one hand, paying special attention to the context of bankruptcy can be justified in part by the fact that the protections provided to buyers of a bankrupt

256. *See* Jacoby, *supra* note 5, at 1721–28. *See generally* Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 U. PENN. L. REV. 1675 (2018).

257. *See supra* note 5.

258. Baird et al., *supra* note 256, at 1707–08 (discussing frequent flyer miles); Binford et al., *supra* note 254, at 14; Mark G. Douglas, *Second Circuit Ruling Makes Pension Plan Termination in Bankruptcy More Expensive*, JONES DAY PUBL'N (July/Aug. 2009), https://www.jonesday.com/en/insights/2009/07/second-circuit-ruling-makes-pension-plan-termination-in-bankruptcy-more-expensive ("The perceived ease with which financially strapped companies have been able to jettison billions of dollars in pension liabilities has figured prominently in headlines for many years."); Hayley Peterson, *Here's What Will Happen to Your Sears Warranty If the Company Goes Bankrupt*, BUS. INSIDER (Oct. 12, 2018, 1:10 PM), https://www.businessinsider.com/sears-warranties-could-be-dissolved-in-bankruptcy-2017-3 ("Sears would have a lot of creditors to pay—including its suppliers—before customers and their outstanding warranties and loyalty points would be considered . . . ."); Aisha Al-Muslim, *Bankrupt Retailers Stand To Pocket Millions from Unused Gift Cards*, WALL ST. J. (June 9, 2020, 6:00 AM), https://www.wsj.com/articles/bankrupt-retailers-stand-to-pocket-millions-from-unused-gift-cards-11591696801?tpl=bankruptcy&tesla=y.

company's assets are much more extensive than those provided outside of bankruptcy. Whether through a plan or a § 363 sale, buyers can acquire the assets "free and clear of any interest in such property" and can be immunized from suit from a variety of claims, such as successor liability claims and consumer protection claims related to consumer data.[259] These benefits may make it worth imposing a heavier burden on debtors in bankruptcy.

But providing extensive protections to consumers in bankruptcy fails to protect those consumers whose information is transferred prior to or outside of bankruptcy, opening the possibility of regulatory arbitrage on the part of companies holding private information.[260] It could deter companies from filing for bankruptcy if they intend a sale of private information, leaving consumers less protected on net.[261] It could also encourage strategic behavior before bankruptcy. The process might be analogous to the "regulatory evasion" that Jared Ellias has identified with respect to payouts of bonuses to executives of bankrupt companies.[262] He has shown that reforms intended to limit the circumstances under which such bonuses could be paid in bankruptcy appear not to have actually affected overall compensation of executives of failed companies; various strategies can be used to avoid the bite of the new bankruptcy laws, including paying bonuses just before the bankruptcy filing when the rules do not apply.[263]

The existing bankruptcy system may already encourage such arbitrage, but raising the costs of bankruptcy to companies, as some of the reforms proposed in the previous Subpart would do, makes the arbitrage ever more attractive. Recall that Toysmart had already begun the process of auctioning off customer information before bankruptcy.[264] Toysmart entered an actual bankruptcy proceeding only because its creditors initiated such a proceeding involuntarily, which is a rare occurrence.[265] Thus, even the company that prompted the consumer privacy ombudsman provisions to be established nearly evaded bankruptcy. In that case, it appears that the proposed sale might have been stopped anyway because Toysmart's placing of prominent ads in the *Wall Street Journal* and *Boston Globe* might have drawn the attention of consumer advocates and regulators prior to bankruptcy.[266] But today, a Toysmart-like company that remains out of bankruptcy and auctions its assets through quieter means might easily evade scrutiny altogether.

259. 11 U.S.C. § 363(f).

260. Janger, *supra* note 21, at 1877; Elvy, *supra* note 7, at 519.

261. Stacy-Ann Elvy notes a similar concern with her proposals to protect consumers whose information could be transferred under Article 9 of the Uniform Commercial Code. *See* Elvy, *supra* note 7, at 519.

262. Jared A. Ellias, *Regulating Bankruptcy Bonuses*, 92 S. CAL. L. REV. 653, 681 (2019).

263. *Id.* at 677–80.

264. *Toysmart* Stipulation, *supra* note 44.

265. *Id.*

266. *Id.*

There is in fact a strong argument that because bankruptcy requires so much more transparency, and because transactions outside of the ordinary course of business require court approval, consumers might already be more protected in bankruptcy than out of it. Thus, perhaps the legal requirements for the sale of consumer data should be higher *outside* of the bankruptcy system rather than within in. This Article doesn't go that far, but certainly there is an argument that the burden outside of bankruptcy should be raised.

2. Reforming the Commercial Law of Consumer Privacy

This Subpart sketches potential approaches to the reform of the commercial law of transactions in consumers' private information. In order to draw lessons from the consumer privacy ombudsman system, it focuses on institutional and procedural protections rather than protections based in substantive privacy law, which are already the subject of a substantial literature.[267] The first proposal is to require preclearance of all transfers of consumer data in an administrative or judicial forum, which may or may not be public depending on whether confidentiality is thought to be necessary and worth the tradeoff in public accountability. The second proposal is similar, but rather than preclearance, it would simply require that regulators, as well as potentially affected consumers and advocacy groups, receive notice in advance of a transfer and have the opportunity to object if they wish, again in a regulatory or judicial forum.

Either reform should likely be generally applicable and not triggered by a finding of financial distress. This is because there is no clear threshold for when a company might be distressed enough to require particular attention to its consumer privacy protection practices. Imposing protections triggered by any particular event or threshold—such as a payment default, the inability to pay debts generally as they come due, or a balance-sheet insolvency test—would draw the same gamesmanship and arbitrage as a regime keyed only to a bankruptcy filing, and the actual triggering moment might be even harder to ascertain.[268] For instance, in a somewhat analogous context, Stacy-Ann Elvy has argued that secured parties seeking to "obtain and dispose of collateral" under Article 9 of the Uniform Commercial Code should be required to seek judicial intervention and the appointment of an ombud.[269] This proposal has considerable appeal. But as she notes, even this proposal would leave consumers unprotected in the many sales outside of that context—for instance, pursuant to a settlement or workout agreement.[270] Rather than seeking to impose protective structures

267. *See, e.g.*, *supra* note 8 (collecting sources).

268. *See, e.g.*, Robert J. Stearn, Jr. & Cory D. Kandestin, *Delaware's Solvency Test: What Is It and Does It Make Sense? A Comparison of Solvency Tests Under the Bankruptcy Code and Delaware Law*, 36 DEL. J. CORP. L. 165, 172–83 (2011) (discussing different methods of measuring insolvency and noting the elements of judgment required for all); *cf.* Elvy, *supra* note 7, at 505–08 (discussing proposals to restrict interests under Article 9 from arising in biometric and health-related data).

269. Elvy, *supra* note 7, at 518.

270. *Id.* at 519 (noting arbitrage concerns).

based only on distress, distress should be merely one factor that regulators or courts consider as they weigh the propriety of a transfer under one of the frameworks below.

Enforcement of violations of privacy laws should also be on the reform agenda. This Subpart proposes revamped sanctions and clawback regimes for unlawful transactions in consumer data.

Finally, this Subpart notes that even data transfers within a firm can violate consumers' privacy expectations and should be subject to scrutiny. These transfers might be from one subsidiary or line of business to another or might simply be transitions in how data is used—for instance, if a firm "pivots" its business model.

These proposals are intended to be realistic starting points, imposing substantial protections without restricting transactions altogether.[271] They focus more on public accountability than on consumer consent, although consent remains relevant to assessing the lawfulness of proposed transfers.

a. Require Advance Notification and Clearance for Transactions in Consumer Data

One proposal is to require that companies seeking to transfer consumer information either be required to submit the transaction for advance regulatory approval from federal regulators as well as any state or international regulators whose laws and citizens are implicated. If clearance is not granted, then companies would be entitled to challenge that determination in a regulatory or judicial forum. The clearance documents could require disclosure of the type and amount of information to be transferred; when the information was gathered, and from what source; all applicable privacy policies and privacy-related representations; and information about the proposed transfer, including the proposed uses of the data, the privacy policies that would apply, and the identity of the recipient.[272] The disclosures could be structured using a template to summarize the seller's policies on important major issues, such as future modifications, permitted uses, the security and data protection mechanisms that are in place, and applicable data breach notification practices.

Based on these disclosures, regulators could choose to approve or challenge the transaction. Inaction within a certain time—perhaps a few weeks—would be treated as constructive approval of the transaction. Regulators would presumably devote most of their attention to transactions that raised red flags in various ways; a company in financial distress, whose privacy and security practices are likely to be degraded for the reasons surveyed above,

271. *Cf. id*. at 504–05 (endorsing state and federal legislation prohibiting the transfer of biometric and health-related data regardless of consent).

272. Disclosure of the actual policies is necessary because policies can be misleadingly drafted to convey more protection than they provide. *See, e.g.*, *id.* at 448 ("[T]he first few statements of a company's privacy policy may lure consumers into believing that their data will be protected. However, there will likely be several exceptions to the company's initial promise not to sell, disclose or transfer consumer data.").

would presumably merit considerable attention. Lax recordkeeping practices, such as the absence of complete data concerning the source of data and the privacy representations made at the time data was gathered, would also serve as a red flag. So long as the "notice and choice" framework remains a major part of privacy law, companies should be charged with keeping both the policy and any other representations they make to consumers.

The regulatory approval process could be accomplished confidentially with notice to regulators, or disclosures could be made publicly. Companies may resist public disclosure on grounds that it would reveal trade secrets or otherwise threaten competitive advantage, and this is a factor that would have to be weighed against the benefits of this potential regime. Public disclosure could have several benefits. First, public disclosure gives more teeth to the reputation rationale for privacy regulation. If current privacy regulation relies significantly on the notion that most companies will protect privacy in order to preserve their reputation with consumers, then additional disclosure of how companies are actually using information would help this form of reputational regulation by giving consumers more accurate information concerning disclosure practices. Second, it would permit consumers and their advocates to take the initiative regarding data privacy rather than relying on regulators. Third, it would better inform lawmakers and regulators about transactions that are taking place so that they can better sculpt regulation.

Almost twenty years ago, Ted Janger proposed a collective mechanism for "quieting title" to privacy assets modeled on procedures in bankruptcy law,[273] and his discussion has influenced this Article's proposal. Perhaps the primary difference is that he fashioned his proposal with the consumer privacy ombudsman regime that had been proposed but not yet enacted into law; he suggested the appointment of an ombud-like figure, in the form of "a guardian or committee . . . to represent the holders of information property rights" in a fuller range of transactions in private information. This Article emphasizes regulatory and public involvement in part because, as explored above, the law as applied by ombuds is fairly mechanistic in most cases, and ombuds themselves have proven conservative in their recommendations rather than zealously advocating for consumer interests. Still, Janger's proposal forms another alternative, and perhaps the appointment of representatives who are empowered and directed to play a more direct pro-consumer role in a broader array of transactions may be feasible.

b. Require Advance Notification to Regulators and Advocates

Another alternative is to require that a party provide advance notice of a transfer of consumer data. The notification regime could include federal regulators, regulators in affected states and countries, and affected customers

273. Janger, *supra* note 59, at 924–29.

and consumer advocacy groups. Once notified, regulators or others could bring an action to seek to stop the transfer if the transfer is not in accordance with law. Where necessary, a cause of action could be made available, providing for a judicial or regulatory venue for contesting the legality of the transfer. The notification format could be prescribed roughly along the lines outlined above, with a deadline set for some reasonable amount of time in advance of the proposed transfer date—presumably a couple of weeks at a minimum. Again, financial distress would usually be easy to ascertain and could be a factor considered by potential challengers to a given transfer.

This notification regime might bring significant benefits at a smaller regulatory cost because, presumably, most transfers would go into effect smoothly. Regulators could over time gain more information concerning transfers, and if the notifications were publicly filed, the regime would bolster transparency and accountability in the generally murky space of data transfer law.

Two examples serve to illustrate the benefits that this proposed system might bring. The first example is from the bankruptcy of Choxi.com, an online discount clothing retailer.[274] The company ran into trouble—and not just the financial sort—as bankruptcy approached. According to the ombud in the case, prior to bankruptcy, Choxi engaged in an unlawful transaction in consumer data at the same time it was being accused of "fraud" and "irregularities." As the ombud's report explains:

> In August 2016 Choxi informally licensed the use of approximately 125,000 Choxi customer records to USA Dawgs, then a Choxi creditor . . . . The Choxi Privacy Policy was not followed in this transaction. This transfer of customer records took place during the period that customers alleged irregularities with Choxi business practices and fraud.[275]

In bankruptcy, Choxi sought to license its 21.9 million customer records to a "newly formed" company owned by a private equity group in the e-commerce and marketing field.[276] The ombud's report ultimately recommended approval of the transfer, but imposed an opt-out procedure with a two-week window during which consumers could decline to have their information transferred.[277]

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274. Consumer Privacy Ombudsman Report to the Court at 4 n.4, *In re* Choxi.com, No. 16-bk-13131 (Bankr. S.D.N.Y. Jan. 19, 2017), ECF No. 71 [hereinafter *Choxi* Report] ("Why Choxi? Well, we're all about choice and always chock-full of in-demand products, so we wanted a new name and a new look that shares our commitment to quality and unbeatable selection. Plus, it's pretty fun to say!").

275. *Id.* at 5; Matt Lindner, *Discount E-Retailer jClub Aims To Win over Former Choxi.com Customers*, DIGIT. COM. 360 (June 26, 2017), https://www.digitalcommerce360.com/2017/06/26/discount-e-retailer-jclub-aims-to-win-over-former-choxi-com-customers/ ("[After its initial success,] the company was dealing with vendors who claimed they hadn't been paid, angry customers who hadn't received merchandise and numerous complaints from shoppers on social media.").

276. *Choxi* Report, *supra* note 274, at 6–7 (describing buyer); *id.* at 17 (number of records).

277. *Id.* at 19. For the results of this and other similar opt-out opportunities, see Bradley, *supra* note 15, at fig. 5.

The Choxi transfer is a good example of a situation where, had notice been provided, either of the initial licensing to USA Dawgs or the subsequent licensing to the private equity group, regulators and consumer advocates likely would have objected. A company that is drowning in complaints about "alleged irregularities" and "fraud" likely has little concern for customer service or reputation, and therefore is more likely to abuse consumers.

A second example highlights the self-regulatory benefits that might accrue from a notification system requiring extensive disclosures concerning privacy and security information. Frequently, ombuds' reports find extensive evidence of unlawful security practices; in several instances, the reports suggest that the ombuds' investigation itself uncovered lax practices and helped introduce new, lawful practices. In the bankruptcy of Western Medical, Inc., a seller of medical equipment and supplies,[278] the ombud's investigation uncovered several violations of HIPAA.[279] The ombud's report notes that "[f]rom the privacy perspective, this sale process is assisting in shining the light on some areas of concern" and bringing the company into compliance with governing law.[280]

Thus, in addition to raising red flags for regulators, the process of putting together the required disclosures might induce greater awareness of and commitment to compliance with privacy policies within companies—in essence, the notification process would encourage companies to give themselves at least a rudimentary privacy check-up.[281]

c. Provide More Aggressive Enforcement, Including Sanctions and Clawbacks of Noncompliant Transactions

Reforms to the law of privacy often leave unresolved the problem of enforcement. The ease with which transfers of data can be made—it is often as easy as transferring a spreadsheet file or small database by thumb drive or email—raises significant concerns that they are made regularly without detection or compliance with privacy policies and privacy law. Unless the penalties of the substantive law are extremely draconian, they are unlikely to deter misbehavior that is so easily covered up and unlikely to be detected.

To ensure compliance with the proposals above, privacy law could make more causes of action available to consumers and their advocates, and raise the penalties for violations that *are* uncovered to a sufficient level such that parties will think twice before committing violations.[282] Achieving this deterrence

278. Consumer Privacy Ombudsman Report to the Court at 2, *In re* W. Med., Inc., No. 06-bk-01784 (Bankr. D. Ariz. Aug. 1, 2006), ECF No. 169 [hereinafter *Western Medical* Report].

279. *Id.* at 5–6.

280. *Id.* at 8.

281. *See* Bamberger & Mulligan, *supra* note 7.

282. HOOFNAGLE, *supra* note 7, at 346 ("To achieve more parity and more reasonable privacy practices, consumers need rights that are more powerful than contract."); Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241, 248–49

might require the introduction of personal liability for owners and managers of violators, and empowering regulators to bring actions for monetary and potentially criminal sanctions, including in situations where individuals cannot bring claims themselves for lack of sufficient damage to support standing.[283] There are existing regimes in other areas of law, such as construction and farming, that impose strict penalties for the misuse of assets that are held in trust for another.[284] Similar laws could conceivably be fashioned in the privacy arena.[285] This approach comes with the risks that, unless actions are carefully calibrated, penalties may be unfair and overly severe in particular instances, or may under-deter wrongdoers who manage to evade detection, are judgment-proof, or are effectively beyond the jurisdictional reach of the relevant authorities.

Stacy-Ann Elvy has explained that Article 9 of the Uniform Commercial Code, which is law in all fifty states, permits even a party that does not own information to transfer rights in it under some conditions.[286] All sorts of other property and commercial laws may have similar effects. Thus, in order to make the reforms effective, the law should provide that noncompliant purported transfers are *ineffective* to transfer rights under any regime, and that transferees unable to show a verifiable chain of proper receipt of information do not lawfully possess it. Such a regime would incentivize parties to a transfer to comply with the law and retain records of compliance. These potential requirements would present new barriers to transfers in private data. But given the ever-increasing value of data and the number of companies whose business is data, the costs might be reasonable.

d. Scrutinize Intra-Firm Transfers and Business "Pivots"

Scrutiny should not be limited to inter-firm transfers. The ombuds regime, as well as the proposed reforms discussed above, focus on transfers of information assets from one firm to another. But of course, if the information is sold together with the entirety of a business (as is common), such a transaction

(2007). *See generally* Lauren Henry Scholz, *Private Rights of Action in Privacy Law*, 63 WM. & MARY L. REV. 1639 (2022) (explaining the importance of private rights of action for consumers harmed by privacy practices).

283. *See generally* Neil M. Richards, *The Limits of Tort Privacy*, 9 J. ON TELECOMM. & HIGH TECH. L. 357 (2011).

284. *See, e.g.*, Bartholomew M. Botta, *Personal Liability for Corporate Debts: The Reach of the Perishable Agricultural Commodities Act Continues To Expand*, 2 DRAKE J. AGRIC. L. 339, 354 (1997) (discussing individual liability for misuse of agricultural funds held in a trust); Jack E. Byrom, *A Matter of Trust – Avoiding the Pitfalls of the Texas Construction Trust Fund Act*, PORTER HEDGES (Mar. 12, 2020), https://www.porterhedges.com/texas-construction-law/a-matter-of-trust-avoiding-the-pitfalls (discussing potential civil and criminal liability for misuse of funds held in a trust in construction).

285. *See, e.g.*, Elvy, *supra* note 7, at 508 ("One could contend that perhaps consumers should be viewed as giving only a license (rather than 'ownership') to a company to use their data for purposes of allowing the consumer to enjoy all aspects of IoT products and service. . . . Companies could also simply be viewed as stewards or custodians of consumer IoT data.").

286. *See, e.g.*, *id.*

could be structured not as an asset sale but as an equity sale. For instance, the seller could simply create a subsidiary and transfer the assets to that subsidiary, and then sell the equity in that subsidiary to the buyer. Technically, the ownership of the customer information has not changed, even if the owner of the data *has* changed. Even under the various reforms proposed above, the sale might not garner any scrutiny, despite having the same effects on consumers as an asset sale that would provoke the imposition of the full panoply of consumer protections. In the world of corporate transactions, such a sharp distinction between asset and equity sales is not uncommon,[287] but the distinction is difficult to justify, as a practical matter, in terms of consumer privacy protection.

In our dataset, this issue appears in only one report. That report permits the transfer of information because the equity in the firm, and not the assets themselves, were the subject of the transfer.[288] It is, of course, possible that other transactions were structured like this and no ombud was appointed on the theory that no privacy policy was violated by such a transactional structure. In any case, this example highlights one of the limits of a regulatory approach focused so narrowly on the identity of the custodian of information rather than on the substance of the protections provided, as it may be easy to evade by creative transactional or corporate structure.

Similar problems could emerge even without a transfer of assets or equity. Consider a large conglomerate with many types of businesses. Consumers might reasonably expect their information to be "siloed" within the subsidiary or line of business to which they gave their information. Or consider the example of a company that "pivots" its business model, perhaps from retailing to electronic advertising. A consumer who volunteered their private information to a retailer might not expect the information to be used in the new business of data mining or online ad personalization.

Privacy law generally provides that a significant shift in how a holder of information uses it is not lawful.[289] Depending on the particular circumstances, informed consumer consent may permit information to be used for a new purpose.[290] But enforcement of these requirements is not usually subjected to any external scrutiny.

Some ombuds show awareness of the concern that even after a permissible transfer, information may then be used in impermissible ways. As I have quoted elsewhere, one report articulates, particularly clearly, what is meant by the requirement that a qualified buyer use the purchased information for purposes consistent with the seller:

> Buyer shall not attempt to use the database for any affiliated businesses that are not directly tied to the Debtor's "core business." Historically, the "core

287. *See, e.g.*, JEFFREY J. HAAS, CORPORATE FINANCE 484–516 (2d ed. 2021) ("M&A Deal Structures").
288. *See In re* Chrysler LLC Report, *supra* note 186, ¶ 24.
289. *See, e.g.*, HOOFNAGLE, *supra* note 7, at 166.
290. *Id.*

> business" of Robb & Stucky has been the retail sale of high end, interior-design driven, home furnishings. In other words, Buyer will only use the customer database for marketing to prospective customers looking for home furnishings. For instance, if Buyer happens to own a sister business that is involved in sales of gardening related items, Buyer would not attempt to use the database for marketing for that business.[291]

Several other reports expressly limit the use of the information to the particular line of the buyer's business that is to operate as successor to the seller.[292] But some reports do not include such a restriction, even when the buyer appears to be a private equity firm that may license the data more broadly than a reasonable consumer would expect.[293]

These concerns suggest another potential item for a regulatory agenda, which is that even when information remains within the same firm or corporate group, its use outside of one particular line of business should not be permitted without some regulatory scrutiny. As with the proposals discussed above, the ideal form of scrutiny is not clear, as each approach has tradeoffs. The lowest level would be internal scrutiny by privacy compliance officers, and at the upper end would be formal regulatory scrutiny with advance public disclosure of the proposed change in data use.

Although this Article leaves the precise shape of the scrutiny for a later work, the basic point remains crucial. In designing a regime for better regulation and enforcement of the commercial law of privacy transactions, scrutiny cannot be limited to inter-firm purchasing, selling, or licensing of private data. Instead, it should include changes to the information's use within an existing corporate structure due to a change of ownership, pivot to a new line of business, or use by corporate affiliates.

CONCLUSION

Theater is not meaningless. Theater serves a purpose—sometimes one that affects public policy, whether beneficially or not. The privacy theater in bankruptcy courts certainly affects policy, but whether it is beneficial is more doubtful. The meaning and purpose of privacy theater may be to distract from a lack of sufficient protections by cultivating a "myth of oversight," an illusion that the involvement of experts will provide protection when, in fact, it does not. The consumer privacy ombudsman regime applies only sporadically, and where

291. *In re* Chrysler LLC Report, *supra* note 186, at 6; *In re* Robb & Stucky Ltd., No. 11-bk-02801 (Bankr. M.D. Fla. May 20, 2011), ECF No. 561; *see supra* Part III.B.2.a. *See generally* Bradley, *supra* note 15.

292. Report of Consumer Privacy Ombudsman at 7–8, 19, *In re* Urban Brands, Inc., No. 10-bk-13005 (Bankr. D. Del. Oct. 27, 2010), ECF No. 427; Report of Consumer Privacy Ombudsman at 9, *In re* Eddie Bauer Holdings Inc., No. 09-bk-12099 (Bankr. D. Del. July 22, 2009), ECF No. 487; *see supra* Part III.B.2.a. *See generally* Bradley, *supra* note 15.

293. Consumer Privacy Ombudsman's Report to the Court at 2, *In re* Storehouse, Inc., No. 06-bk-11144 (Bankr. E.D. Va. Sept. 11, 2007), ECF No. 910; Report of Alan Chapell, Consumer Privacy Ombudsman at 3–4, *In re* The Rockport Co., No. 18-bk-11145 (Bankr. D. Del. July 12, 2018), ECF No. 371; *see supra* Part III.B.2.a. *See generally* Bradley, *supra* note 15.

it does apply, its protections tend to fall into well-worn grooves. The time has come to consider either remaking the regime so that its privacy protections have more breadth and bite, or acknowledging that the regime has become a narrow and established set of protections that can be applied without the theatric aura of expertise.

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