"Business Bankruptcy Committee: The World's Largest Organization of Bankruptcy Restructuring Lawyers" The Business Bankruptcy Committee looks forward to seeing you at the ABA Business Law Section Annual Meeting in Austin, Texas from September 13 to September 15, 2018. We have a dynamite lineup of interesting and informative programs for bankruptcy and business law practitioners. See the programs below (which remain subject to changes prior to the meeting).

Programs sponsored and co-sponsored by the Business Bankruptcy Committee in conjunction with the 2018 Business Law Section Fall Meeting in Austin, Texas.

Thursday, September 13, 2018 - CLE Programs

2:30 p.m. - 4:30 p.m.: It's Good to Know the Bad: Financial Crime and How to Counsel Clients
Location: Fairmont, Congressional C, 3rd Floor
Presented by: Banking Law, Business Bankruptcy
Co-sponsoring Committees: Corporate Counsel, Corporate Compliance, International Business Law, International Coordinating, Taxation
Program Chair: Jeffrey M. Sklarz
Program Moderator: Caroline Ciraolo
Speakers:
James Lee, Director of Operations - Southern Area
Johnny Sutton, Ashcroft Sutton Reyes, Austin, TX

Description: A thoughtful lawyer can be the difference between whether a financial transaction is creative or criminal. Investigations into potential financial crimes often involve allegations of criminal tax violations, wire and mail fraud, bankruptcy fraud, money laundering, etc. Our expert panel will review current government enforcement priorities, explain how to identify important issues and potential violations, and discuss best practices in counseling clients who (may) have crossed the line. The panel will also address the direct and collateral consequences of a federal criminal investigation and prosecution.

2:30 p.m. - 4:30 p.m.: IP Financing 360º: Market and Legal Dynamics
Location: Convention Center, Room 5BC, Level 3
Presented by: Commercial Finance Committee
Program Chair and Moderator: Kiriakoula Hatzikiriakos
Speakers:
Erik Hille, Consultant, Syzygy Partners LLC, Indianapolis, IN
Phillip Kline, Managing Director, 284 Partners, Detroit, MI
Michael Rubenstein, Attorney/Shareholder, Liskow & Lewis, Houston, TX
Pauline Stevens, Partner, Allen Matkins, Los Angeles, CA

Description: The program will examine the legal and practical challenges and
opportunities faced by borrowers and lenders in the financing landscape. The following topics will be addressed: IP secured lending issues, IP valuation & monetization, IP financing vehicles, IP considerations in bankruptcy & insolvency. The goal is to assess whether reform to IP & secured transactions laws (and bankruptcy/insolvency laws) would enhance market and legal dynamics for IP financing transactions.

Friday, September 14, 2018 - CLE Programs

8:30 a.m. - 10:00 a.m.: Six Simple Rules for In-House Counsel to Avoid Most Hidden Insolvency Risks in Commercial Transactions
Location: Convention Center, Room 6A, Level 3
Presented by: Business Bankruptcy
Co-sponsoring Committees: Co-sponsoring Committees: Business Financing, Corporate Counsel, Private Equity and Venture Capital
Program Co-Chairs and Moderators: Matt Ochs and Sheryl Toby
Program Materials Coordinator: Chelsea Davis, Student, Barry University, Dwayne O. Andreas School of Law, Orlando, FL
Speakers:
Matt Ochs, Attorney, Holland & Hart LLP, Denver, CO
Sheryl Toby, Member, Dykema Gossett, Detroit, MI
Description: The panel will provide techniques for spotting potential bankruptcy and insolvency risks associated with ordinary course commercial contracts and transactions, and practical guidance for raising and addressing such risks with clients.

9:30 a.m. - 11:00 a.m.: What's New for Indenture Trustees and Everybody Who Owns Debt Securities: The Good, The Bad and The Ugly
Location: Fairmont, Indigo, 4th Floor
Presented by: Trust Indentures and Indenture Trustees
Co-sponsoring Committees: Securitization and Structured Finance Committee, Business Bankruptcy
Program Chair: Mark F. Hebbelin
Speakers:
Yesenia Batista, Partner, Thompson Hine LLP, New York, NY
Beth Brownstein, Associate, Arent Fox LLP, New York, NY
Shane Ramsey, Partner & Vice Chair, Bankruptcy & Financial Restructuring Practice Group, Nelson Mullins Riley & Scarborough LLP, Nashville, TN
Tab Timothy Stewart, Vice President & Senior Regulatory Counsel, American Bankers Association, Washington, DC
Description: Our expert panel will help trustees, investors and other interested parties navigate recent developments in debt issuance structures and documentation, address scary new cases with far-reaching results, provide updates on defaults, workouts and bankruptcies, and will also identify trends and offer some drafting suggestions.

10:30 a.m. - 12:00 p.m.: Business Divorce in Delaware, New York and California: Around the Horn
Location: Fairmont Park View B, 7th Floor
Presented by: Business and Corporate Litigation
Co-sponsoring Committees: Business Bankruptcy, Judges Initiative
Program Co-Chairs
Timothy Driscoll, Justice, New York Supreme Court, Mineola, NY
Peter Ladig, Director, Bayard, P.A., Wilmington, DE
Program Materials Coordinator: Meghan Adams, Associate, Morris James LLP, Wilmington, DE
Speakers:
Honorable Gail Andler, Mediator/Arbitrator/Special Master, JAMS, Orange, CA
Garland Kelley, Partner, Glaser Weil, Los Angeles, CA
Helen Maher, Partner, Boies, Schiller & Flexner, LLP, Armonk, NY
Honorable Joseph Slights, III, Vice Chancellor, Court of Chancery, Dover, DE
Susan Wood Waesco, Partner, Morris Nichols Arsh & Tunnell, Wilmington, DE

Description: This program addresses how New York, California and Delaware address common topics in business divorce. The panel includes a current or former member of the judiciary and a lawyer from each state.

2:00 p.m. - 3:30 p.m.: Caselaw Updates: Federal Appellate Bankruptcy Decisions for 2017-2018
Location: Convention Center Room 5BC, Level 3
Presented by: Consumer Bankruptcy Committee
Co-sponsoring Committee: Business Bankruptcy
Program Chair: Steven Fender, Shareholder/Owner, Steven Fender PA, Ft. Lauderdale, FL
Moderator: Alan Hochheiser, Principal, Maurice Wutscher LLP, Beachwood, OH
Program Materials Coordinator:
Steven Fender, Shareholder/Owner, Steven Fender PA, Ft. Lauderdale, FL
Speakers:
Frank Eaton, Of Counsel, Linda Leali, PA, Miami, FL
Honorable Jean FitzSimon, US Bankruptcy Judge, United States Bankruptcy Court, Philadelphia, PA
Michael A. Sabella, Associate, Baker Hostetler LLP, New York, NY

Description: The panel discusses bankruptcy opinions of note issued from July of 2017 through July of 2018 from the Supreme Court, all federal courts of appeal, and all bankruptcy appellate panels.

3:30 p.m. - 5:00 p.m.: Successor Liability in Asset Acquisition Transactions
Location: Fairmont Indigo, 4th Floor
Presented by: Mergers and Acquisitions
Co-sponsoring Committee: Business Bankruptcy, Business & Corporate Litigation
Program Chair and Speaker:
John Lawrence, Jr., Partner, Shipman & Goodwin LLP, Hartford, CT
Moderator:
Byron Egan, Partner, Jackson Walker LLP, Dallas, TX
Additional Speakers:
Scott Cohen, Shareholder, Engelman Berger, P.C., Phoenix, AZ
Daniel H. Peters, Partner, Winston & Strawn LLP, Los Angeles, CA
Joseph Quarantello, Risk Strategies Company, Boston, MA

Description: For years, a basic truth of acquisition planning was that a buyer's best protection against a target's unknown liabilities is an asset purchase. While an asset purchase may still offer the best structural protection, there remain significant successor liability risks against which further protective measures should be considered, as evidenced by the fact that in the past seven years there have been over 240 reported decisions where a pre-closing creditor of the seller sought to impose successor liability on the buyer in an asset purchase. This program will present a comprehensive approach to analyzing and minimizing successor liability risk in asset purchase transactions through specific structural steps, due diligence and insurance strategies.

Saturday, September 15, 2018 - CLE Programs

8:30 a.m. - 10:00 a.m.: Gaming Law Basics for Business Lawyers
Location: Fairmont Iris, 4th Floor
Presented by: Gaming Law
Co-sponsoring Committees: Business Bankruptcy, Business Financing, Project Finance & Development, Young Lawyer
Program Chair and Moderator: Kathryn R.L. Rand
Moderator and Program Materials Coordinator: Keith Miller, Professor, Drake Law School, Des Moines, IA
Speakers:
Peter Kulick, Attorney, Dickinson Wright, Lansing, MI
Mindy Letourneau, President, Casino Essentials, San Diego, CA
Sean McGuinness, Attorney, Butler Snow, Denver, CO

Description: Legalized gambling is a $70 billion industry. As gaming expands, business lawyers often have clients whose interests implicate gaming law—a complex and idiosyncratic set of laws, regulations, and policies that vary significantly by jurisdiction. Business lawyers should understand how gaming law intersects with clients' interests to recognize potential pitfalls.

MEETINGS

Thursday, April 12, 2018 - Meetings

4:00 p.m. - 5:00 p.m.: Governance Issues of Distressed Companies Jt. Subcommittee Meeting
Location: Fairmont, Verbena, 14th Floor
Co-Chairs: J. William Boone and Rolin Bissell

Member Spotlight: Sharon Weiss

Beginning this quarter, the Business Bankruptcy E-Newsletter will feature a member spotlight every month, asking them about their professional background and experiences in the Business Bankruptcy Law Section. This quarter's member spotlight is on Sharon Z. Weiss.

Sharon Z. Weiss is a partner in the Los Angeles office of Bryan Cave Leighton Paisner LLP in the Bankruptcy, Restructuring and Creditors Right Practice Group. Ms. Weiss has more than 20 years of extensive experience in a wide area of insolvency matters from various perspectives, including representation of lenders, creditors, franchisors, individuals and corporate debtors, trustees, and creditors' committees. She represents clients in a variety of issues, including financing and cash collateral, executory contracts, lease negotiations, and termination of franchise agreements. Among her many achievements, Ms. Weiss was recognized as one of the "Top Women Lawyers" in California by the Daily Journal in 2013, and as a notable practitioner in Chambers USA every year since 2012 in the California bankruptcy and restructuring practice area. She was also the first recipient of the Kathryn Heidt Memorial Award, which is the highest award bestowed by the Business Bankruptcy Committee. Currently, she is a member of Council of the American Bar Association Business Law Section, co-chair of the Secured Creditors subcommittee of the Business Bankruptcy Committee and the Content Director of the Diversity and Inclusiveness Committee, where she is helping to update the Section's Diversity and Inclusiveness Plan. Ms. Weiss was also the 2018 conference co-chair of the California Bankruptcy Forum Insolvency Conference, where she served as president from 2012 to 2013.

Who is Minding the Minders: Is Your Personal Information Safe in Sale or Crisis?

Lucy L. Thomson

On April 13, 2018, at the Business Law Section Spring Meeting in Orlando, the Business Bankruptcy Committee and the Bankruptcy Court Structure and Insolvency Process Committee presented a joint panel "Who is Minding the Minders: Is Your Personal Information Safe in Sale or Crisis?" The panel consisted of Elise S. Frejka, Esq. of Frejka PLLC, New York, N.Y., Susan N.
Goodman, Esq., a partner at Mesch Clark Rothschild, Tucson, Arizona, Lucy L. Thomson, Esq., principal of Livingston PLLC, Washington, D.C., and Lara Liss, Esq., an Assistant General Counsel at UnityPoint Health, Des Moines, Iowa. The panel was expertly moderated by Michael St. Patrick Baxter, Esq., a partner at Covington & Burling LLP, Washington, D.C. The speakers addressed a variety of complex and challenging issues related to consumer and patient privacy, both in and outside the bankruptcy arena.

Companies are creating and collecting massive amounts of personal information. The types of personal data have expanded dramatically to encompass virtually all aspects of the lives of millions of individuals around the globe. Many bankruptcy cases have involved the sale of the most sensitive data, including preferences about dating, romance and sex; financial records, including tax returns; medical records and genetic data; students’ PI; purchases of publications and videos viewed; and details of retail transactions. The creation of electronic health records, telemedicine, and the explosion of the Internet of Medical Things (IoMT) have greatly expanded the universe of healthcare data.

Read more...

Student Tuition and Fraudulent Transfers: A Roadmap

Krista L. Kulp

In March of this past year, Chief Judge Carla Craig from the Eastern District of New York authored a decision entitled Pergament v. Hofstra University (In re Adamo), 582 B.R. 267 (Bankr. E.D.N.Y. 2018), which adjudicated issues relating to fraudulent transfers involving transfers for the payment of student tuition. But she approached the issue in a different way than most other courts have done in the past. Most of the cases have focused on whether the debtor receives fair consideration or reasonably equivalent value in exchange for undergraduate or graduate tuition payments. Rather than focusing on the issue of whether the parents received reasonably equivalent value from the schools, Judge Craig questioned whether the schools could even be considered initial transferees under 11 U.S.C. § 550.

This question seems to have first caught the attention of lawyers and courts back in November 2016 when an article was published authored by James M. Wilton and William A. McGee in which the authors questioned whether the colleges that were subjected to fraudulent transfer lawsuits could even be considered initial transferees. James M. Wilton and William A. McGee, Robbing Peter to Pay for College? A Good-Faith Defense in Tuition Clawback Fraudulent Transfers, XXXV Am. Bankr. I. J. 11, 32-33, 64, November 2016.

Read more...

Submit Articles for the Business Bankruptcy Newsletter

The Business Bankruptcy Committee invites you to submit articles for possible publication in future issues. The articles do not need to be long or in-depth, and it is a great way to get involved in the Business Bankruptcy Committee. Articles can survey the law nationally or locally, discuss particular business bankruptcy issues, or examine a specific case. If you are interested in submitting an article, please contact Newsletter Editor-in-Chief, Krista L. Kulp at kristaleighkulp@gmail.com or Co-Editor-In-Chief, Michael A. Sabella at MSabella@bakerlaw.com.
Member Spotlight – Sharon Z. Weiss

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Spotlight Questions and Answers:

1. How did you come to be a bankruptcy practitioner?

A bit by accident. In law school I wanted to be an advocate, protecting First Amendment rights, and possibly a lobbyist. I made fun of my fellow classmates who took bankruptcy in law school, obviously not understanding at the time what I was giving up.

It was very difficult to find a legal job when I graduated law school in 1993. My father set up an “informational interview” with a partner in a local business law firm that he worked with on a regular basis to see if he could help me find a position at another firm or company. During our conversation I told the partner while I sincerely appreciated his help, I think he should hire me and gave him a long list why that made sense. After he had a big chuckle, I received a call about a week later with a job offer. I thought I would be assigned to the insurance defense group, but on my first day, the bankruptcy partner told me he needed help and I was assigned to him. I immediately purchased “Debtor / Creditor Law In a Nutshell” and took a weekend crash course in bankruptcy. Most of our work was consumer-based, which gave me an excellent education about the required disclosures and a real sense of helping people who needed it most. After a few years, and after falling in love with bankruptcy law, I switched firms to part of a bankruptcy boutique. From there I transitioned into business bankruptcy cases.

2. How did you get involved with the ABA BBC?

As a third-year associate in 1997, the senior partner of our firm said it was time to start going to ABA meetings. I was 4 months pregnant and have only missed 2 meetings since then – one after giving birth to my daughter and one after my mother was diagnosed with breast cancer (she is fully recovered now). I met the best people in the world at my first Spring meeting – people I consider close friends to this day. With the help of my partner and these friends, I became involved in programs and sub-committees, and eventually BBC leadership. Those opportunities further lead to leadership positions within the Section, for which I am grateful.

3. What is your most memorable ABA BBC moment?

There are so, so many, but if I have to limit it to just one – it was receiving the Kathryn Heidt Memorial Award. I received overwhelming support for this award that was very personal to me and the Committee.

4. Who was the best mentor you have had, and why?

My parents. By far, my parents have always, always been there for me and supported everything I want to do, even if they did not agree. Although my father is now deceased, I still hear his words in my head. My mom is very good at helping me weigh the pros and cons of any situation and I know she believes in me.
5. What tips do you have for other mentors?

To be more than a mentor – you should look for opportunities to be a true sponsor. Find someone you believe in and be their advocate. Be willing to knock down doors and help others to help themselves.

6. What advice would you give to younger members of ABA?

You will get way more from the ABA than you expect. The resources and opportunities are immense, but you have to be present and open to the opportunities. Take advantage of the many opportunities in the Section.

For further information about Ms. Weiss, the link for her bio is: https://www.bryancave.com/en/people/sharon-z-weiss.htm
**Who is Minding the Minders: Is Your Personal Information Safe in Sale or Crisis?**

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On April 13, 2018, at the Business Law Section Spring Meeting in Orlando, the Business Bankruptcy Committee and the Bankruptcy Court Structure and Insolvency Process Committee presented a joint panel "Who is Minding the Minders: Is Your Personal Information Safe in Sale or Crisis?" The panel consisted of Elise S. Frejka, Esq. of Frejka PLLC, New York, N.Y., Susan N. Goodman, Esq., a partner at Mesch Clark Rothschild, Tucson, Arizona, Lucy L. Thomson, Esq., principal of Livingston PLLC, Washington, D.C., and Lara Liss, Esq., an Assistant General Counsel at UnityPoint Health, Des Moines, Iowa. The panel was expertly moderated by Michael St. Patrick Baxter, Esq., a partner at Covington & Burling LLP, Washington, D.C. The speakers addressed a variety of complex and challenging issues related to consumer and patient privacy, both in and outside the bankruptcy arena.

Companies are creating and collecting massive amounts of personal information. The types of personal data have expanded dramatically to encompass virtually all aspects of the lives of millions of individuals around the globe. Many bankruptcy cases have involved the sale of the most sensitive data, including preferences about dating, romance and sex; financial records, including tax returns; medical records and genetic data; students' PII; purchases of publications and videos viewed; and details of retail transactions. The creation of electronic health records, teledermatology, and the explosion of the Internet of Medical Things (IoMT) have greatly expanded the universe of healthcare data.

Whether prior to or in bankruptcy, company officials and counsel should do pre-planning to determine what types of personal consumer or patient data the company collects and maintains, evaluate its sensitivity, and determine how the data was collected (point of sale, online), where is it stored and how is it accessed (on-line/in the cloud or network attached storage)? This may not be easy to do, because volumes of data are now created on mobile devices such as smartphones and tablets, and, frequently, on social media. Cloud accounts may be established outside the purview of IT, unknown to management.

Next, it is recommended that the parties conduct a policy review, including gathering information about third-party relationships, contracts, document retention policy, and prior or current compliance efforts. The privacy policy should be reviewed to determine what disclosures and representations were made to consumers or patients, under what circumstances the policy can be modified, and what restrictions, if any, govern the sale or transfer of personal data. The analysis should determine what data can and should be sold by assessing the sensitivity of the data, and the potential relevance of the data and associated PII to the successful bidder. Any cross-border data transfer issues should be identified by looking at whether consumers reside outside the U.S. Data that is old or no longer accurate or has not been used by the debtor for several years should not be sold. Finally, applicable bankruptcy and non-bankruptcy laws may contain requirements for the sale of PII such as HIPAA-HITECH, Gramm-Leach-Bliley, CAN-SPAM, state laws, and the European Union General Data Protection Regulation (GDPR), and other country laws, among others.

**Consumer Privacy Ombudsman**

Initially enacted to address concerns about the sale of data about children and medical records, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to protect the privacy rights of consumers. Under BAPCPA, specified personal consumer records may not be sold if a bankruptcy sale would violate the debtor's published privacy policy unless a Consumer Privacy Ombudsman (CPO) is appointed and the process set forth in the statute is followed. Further, the sale may not violate any applicable non-bankruptcy law. 11 U.S.C. §§332 and 363.

The privacy ombudsman is appointed by the U.S. Trustee. The Bankruptcy Code provides a broad mandate for the ombudsman -- to investigate and provide the Court with information relating to the debtor's privacy policy; potential losses or gains of privacy; potential costs or benefits to consumers if the sale is approved; and possible alternatives that would mitigate potential privacy losses or costs to consumers.

In recent years the “privacy policy,” relied on to notify consumers of the privacy protections companies will provide, has been transformed into a vehicle that companies are using to authorize and facilitate the sale or transfer of personally identifiable information (PII) in the event of a bankruptcy sale, merger, or corporate restructuring without review or approval of the bankruptcy court or the appointment of a CPO as may be required by BAPCPA. Companies justify this use of the privacy policy in this way to maximize the value of the consumer records they have collected. Privacy advocates suggest that this circumvents the consumer privacy protections of BAPCPA.

Interesting questions about privacy policies were posed by the moderator Michael Baxter: what if there is no privacy policy in place at the time of the contemplated sale? Does this mean that a CPO is not needed? Some privacy policies are so vague that a Court has to decide how to proceed. What should be done if a company has several different policies with conflicting provisions – one online, another presented at check-out and a different policy in retail stores.
The panel addressed the following query: what if an existing privacy policy is modified on the eve of bankruptcy from a restrictive to a flexible one to allow the transfer of more data than initially contemplated? Would the Court allow a sale of PII even though the policy might have been manipulated for purposes of the sale? These are important questions the Court and the CPO will need to sort out.

Patient Care Ombudsman

When the debtor in a bankruptcy case under chapter 7, 9, or 11 is a health care business, the court shall order the appointment of a patient care ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business. However, the court may find that the appointment of the ombudsman is not necessary for the protection of patients under the specific facts of the case. 11 U.S.C. §333.

The PCO is appointed to monitor the quality of patient care provided to patients of the debtor and report his/her findings to the Court every 60 days. If the PCO determines that the quality of patient care provided to patients is declining significantly or is otherwise being materially compromised, s/he must file a motion or a written report with the court about the situation.

The role of the PCO is particularly vital in healthcare bankruptcies. The panel agreed that the appointment of a PCO is valuable, necessary, and often under-appreciated. While the Debtor’s duty to patient welfare was mandated by Congress when section 333 was added as part of BAPCPA, the appointment of the PCO is most often waived. Much has been written, both pro and against, the appointment of a PCO. Unfortunately, most analysis is contextualized solely in bankruptcy law without integrating the body of knowledge related to health care operational and regulatory considerations. The result has been a body of bankruptcy case law that most often supports ombudsman dismissal. If a PCO appointment occurs at all, it has most often been under a PCO code provision with the expectation that patient data/record protection is part and parcel of that role.

The speakers engaged in a lively discussion that focused on a broad array of important issues concerning the protection of consumer and patient information.

Elise Frejka, a consumer privacy ombudsman appointed in many cases, highlighted these points:

- A company should review its privacy policy prior to filing for bankruptcy and gain a clear understanding of what data is collected and what the privacy policy states. If the privacy policy prohibits the sale or transfer of PII and a sale of the e-commerce business is contemplated, a prospective debtor should add this action item to the pre-bankruptcy checklist to maximize recoveries in the event of an asset sale and consider amending the privacy policy.

- Even when a privacy policy clearly states that PII may be sold as part of an asset transfer, there are enormous benefits that a CPO can bring to the sale process and the Debtor and U.S. Trustee should consider an appointment in all sale transactions involving PII as there are typically multiple points of collection and potentially inconsistent privacy policies in effect. The CPO process provides a level of diligence that is cost efficient while protecting consumer’s PII in that a CPO can question data collection and retention practices and the relevancy of data retained by a company.

- Companies generally engage a third-party provider to host and manage personal data and these third parties may have had a data breach that has not been disclosed to the company. It is critical that the debtor stay on top of the integrity of its customer data.

Susan Goodman, appointed patient care ombudsman in more than 20 cases, provided these insights:

- In the cases in which she served as a PCO, only once was her role officially expanded to include CPO responsibilities. Most of the time, record issues were handled within the PCO role.

- Critical vendor analysis decisions/negotiations precede PCO appointment – it is important to consider record access early.

- Economies exist if HIPAA language can be included in the appointment order to bring record access under the health care oversight activities – this avoids need for an emergency petition to the court for access or for individual authorizations.

- Internal conspicuous posting is preferable to individual service on patients of a 2015.1 pleading.

- A PCO is appointed in a minority of cases, so absent a CPO, record issues are left to counsel.
Lara Liss, in-house counsel for a healthcare company, outlined the following key considerations for due diligence:

- Use data mapping (informal or electronic) to understand what information is in play.
- Weigh the value of various sources of data against the potential liability and storage cost it will bring before deciding to acquire it. Data typically loses its value over time.
- Ask to review the security risk analysis if one has been completed. Ask if the company has a risk management tool or process in place for reviewing and managing vendor relationships, such as a tracking database and/or vendor assessment questionnaire.
- Ask if the company maintains a privacy compliance program. If so, review documentation of the program, including a third party audit of the program’s effectiveness if one was ever obtained.

**Protecting Consumer Data in Today's Changing World**

The speakers agreed that the expanding use of technology is creating unprecedented challenges for the protection of personal information in bankruptcy sales. The types and volume of personal data that can be sold in bankruptcy cases has expanded dramatically over the last decade.

Lucy Thomson, consumer privacy ombudsman in 24 cases, pointed out that on the horizon, new technologies, including mobile devices, the IoT and IoMT and connected cars will generate unprecedented volumes of highly sensitive personal data, including biometrics, geolocation data, healthcare records and genetic data, and other confidential information. This data may no longer be protected under privacy policies published by companies to avoid the privacy protections of BAPCPA. When companies seek to sell consumer data to the highest bidder in bankruptcy, an appropriate privacy framework must be in place to ensure that consumer and patient privacy is protected in the era of “big data” and the widespread selling and sharing of sensitive PII.
In March of this past year, Chief Judge Carla Craig from the Eastern District of New York authored a decision entitled *Pergament v. Hofstra University (In re Adamo)*, 582 B.R. 267 (Bankr. E.D.N.Y. 2018), which adjudicated issues relating to fraudulent transfers involving transfers for the payment of student tuition. But she approached the issue in a different way than most other courts have done in the past. Most of the cases have focused on whether the debtor receives fair consideration or reasonably equivalent value in exchange for undergraduate or graduate tuition payments. Rather than focusing on the issue of whether the parents received reasonably equivalent value from the schools, Judge Craig questioned whether the schools could even be considered initial transferees under 11 U.S.C. § 550.

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It appears that Judge Craig's decision is the first case that deals with this issue head on. She found that it was undisputed that the debtor's children were the initial transferees and the schools were entitled to the good faith defense under Section 550(b) of the Bankruptcy Code.

Section 550(b) of the Bankruptcy Code provides in pertinent part that "The trustee may not recover under section [1] (a)(2) of this section from—(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or (2) any immediate or mediate good faith transferee of such transferee."

The facts of this case were simple and for the most part undisputed. The trustee sued Hofstra University, Fairfield University and Brooklyn Law School on account of tuition paid for the debtor's three children for either college education or legal education. *Pergament*, 582 B.R. at 268. Some of the transfers were prepetition and some were post-petition. Therefore, the trustee sued under Section 548(a)(1)(B) and Section 549 of the Bankruptcy Code and New York's Debtor Creditor Law Sections 273, 273-a and 285. *Id.*

Each of the schools has a policy whereby the parent can deposit funds into a student account run by the school. *Id.* at 270-71. Once the student registers for classes only then can the school access the funds. *Id.* at 275. The student has control over that account, not the school. *Id.* Therefore, the student may withdraw from classes and get a refund from the account. *Id.* The funds do not go back to the parent. *Id.* Therefore, student was the initial transferee rather than the school.

The defendants in this adversary proceeding essentially argued that the student portals were akin to bank accounts and for that reason they are mere conduits. In her decision, Judge Craig likened the situation to that of *Bonded Financial Service v. EAB* and equated the students tuition accounts to bank accounts. *Bonded Fin. Servs. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988). *Bonded Financial* sets forth the standard for which to determine whether an entity is a "transferee" or a "mere conduit". Under this standard a transferee must have "dominion and control" over the money or asset and the right to put the money to one's own use. *Id.*

For example, lawyers have escrow accounts that they maintain for their clients. However, lawyers do not have dominion or control over those funds because they cannot do with the money as they please. They can only disburse the funds under limited circumstances as dictated by the client.

In finding that the defendants were not liable, Judge Craig opined:

*Bonded* is exactly on point. Although the funds transferred by the Debtor to the students' accounts were ultimately received by the Defendants as tuition payments, at the time of the initial transfer by the Debtor, the Defendants' electronic system was merely holding the funds on behalf of the student account holders. The Defendants were mere conduits, and did not have dominion and control over the funds; rather, the students did. To the extent the Trustee argues the opposite, that the students' accounts were mere conduits to the Defendants, he is incorrect. HN9 A conduit is an entity that holds the transferred asset for the true recipient, and has no legal right to utilize the asset while in its possession. *Finley, Kumble*, 130 F.3d at 56-58 (adopting *Bonded Fin. Servs.*); *Bonded Fin. Servs.*, 838 F.2d at 893 ("[T]he minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes."). Here, the children had the power to withdraw from the programs and receive
the funds to use as they wish. The Defendants only received dominion and control over the funds once the students enrolled in classes and the funds were applied to the tuition bill.

_Pergament_, 582 B.R. at 278.

Because, the Court found that the children whose names were on the accounts were the initial transferees, the Court determined that the good faith defense under Section 550 of the Bankruptcy Code applied because schools provided value to the students in good faith.

The trustee did not dispute that the schools provided reasonably equivalent value to the children in the form of education. _Id._ at 276. The Court therefore did not have to decide whether the debtor received reasonably equivalent value from the schools for his children's education.

This decision has raised certain interesting issues.

The decision has essentially given schools a roadmap to avoid liability from these types of suits. However, a school may still be sued and will have to prove that it was not the initial transferee and demonstrate its policies to avoid liability. The costs associated with this are still considerable. But the decision may also have a chilling effect on these lawsuits if trustees do not believe it would be worthwhile in the long run to litigate.

This decision also raises the question of whether trustees may now go after a debtor's child as an initial transferee. It has essentially shifted the risk of liability to the students. It is unlikely that the trustee would do so, considering most college age students are not usually an attractive target given their general financial wherewithal. Even if the students were then sued, it could be argued that children may have a better chance succeeding on the merits rather than the school.

Further, there has been some push for legislation to deal with this issue. For example, a bill was presented to Congress on May 12, 2015 by Representative Chris Collins from New York entitled PACT (Protecting All College Tuition). However, it was referred to a subcommittee on June 1, 2015 and no further action has been taken. https://www.congress.gov/bill/114th-congress/house-bill/2267. This legislation would have amended Section 548 of the Bankruptcy Code to preclude trustees from avoiding a good-faith payment by a parent of post-secondary education tuition for the child. However, it would not amend Section 544 of the Bankruptcy Code so trustees would still be able to commence suits under a state's fraudulent transfer law. However, it is unlikely at this point that this bill will gain any traction.

States, however, have started to amend their own fraudulent transfer laws to protect schools. For example, Connecticut passed a law that took effect on October 1, 2017 that amends the state's Uniform Fraudulent Transfer Act. Public Act 17-50, An Act Revising the Uniform Fraudulent Transfer Act. The Act expressly states that a payment is not voidable against a college or university if it "was made ... by a parent or guardian on behalf of a minor or adult child in furtherance of the child's undergraduate education." While this will not affect claims by trustees under Section 548 of the Bankruptcy Code which only has a two-year lookback, it will curtail claims under Section 544 of the Bankruptcy Code that brings in state fraudulent transfer laws that usually have longer lookback periods. Further, it seemingly only applies to undergraduate tuition and not graduate tuition. It will be interesting to see if any other states pass similar legislation in the future.