

Court Orders Privacy Ombudsman in Bankruptcy Case

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Crumbs Bake Shop Inc. shut down in July and filed for bankruptcy in New Jersey court that same month. The bankruptcy court ordered an auction sale, and a purchaser has come forward to buy all of the company's assets. The Department of Justice's US Trustee requested that a consumer privacy ombudsman be appointed to protect customer information during the transaction, since as part of the sale the company is selling its customer lists. According to the US Trustee, the company's website privacy_policy discusses sharing personal information of consumers "only if we are compelled to do so by order of a duly-empowered governmental authority, we have the express permission of the consumer, or it is necessary to process transactions or provide our services."

The bankruptcy code prohibits selling personal information as part of a bankruptcy sale if there is a policy in place not to share information. However, the information can be shared if either (1) sharing is consistent with the policy or (2) a consumer privacy ombudsman is appointed and the court approves the sale of the personal information after "giving due consideration to the facts" and finding that no nonbankruptcy law would be violated. 11 USC § 363(b)(1). Here, the US Trustee argued that the sale was prohibited by the policy, and thus an ombudsman must be appointed otherwise the privacy policy would be rendered "meaningless, leading consumers to believe their personal information was protected, when in fact, it is not." The court agreed and appointed the ombudsman.

TIP: This case is a reminder for companies to review their privacy policies to determine if they have appropriate language about what will happen to consumer information in the event of a sale or purchase of the company. Remember to review any changes to your privacy policy with legal counsel to determine if those changes are material, and if so, what the appropriate next steps are to implement the changes.

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