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NOTE: WHEN YOU CAN'T SELL TO YOUR CUSTOMERS, TRY SELLING YOUR CUSTOMERS (BUT NOT UNDER THE BANKRUPTCY CODE)[*]

Introduction

As the global economy increasingly relies upon computers as both a means of consumer shopping and as an outlet for leisure activities, new legal issues will arise. [1] Such legal issues will interact with Bankruptcy law as more of the often−overvalued dot−com companies [2] seek relief from creditors through the shelter of the Bankruptcy Code [3] ("the Code"). When such a business is forced into liquidation proceedings, its most valuable asset may prove to be its customer lists. [4] These lists are generated during the course of business, often including the Personal Information of its customers. [5]

Aware of consumer concern over privacy [6] and in an effort to attract traffic to their websites, [7] Internet companies have made pledges to safeguard the Personal Information obtained from their patrons. [8] Commonly referred to as a website operator's "privacy policy," these pledges run the gamut from promising complete and strict confidentiality, [9] to guarantees specifically conditioned on various events. [10]

What happens when a company with a strongly worded privacy policy violates it? Throw in an insolvent company and the unique characteristics of the Code [11] and the question becomes: what happens to a customer list developed from a strongly worded privacy policy during the administration of a debtor's estate?

When Internet companies file for bankruptcy, they may attempt to sell their customer list and any additional Personal Information obtained over the course of their operations. [12] They assert that these lists constitute property of the estate [13] and can be sold to outside entities in to bring money into the estate for distribution to creditors. [14] Privacy policies, however, could be read to prohibit such sales to third parties. [15] Would bankruptcy law recognize the enforceability of these prohibitions? [16] Perhaps more to the point, would bankruptcy law allow a debtor to avoid performing its obligation under its privacy statement? [17] This year, these issues recently were raised in *In re Toysmart*. [18]

In *In re Toysmart*, a debtor website operator tried to sell its customer list in contravention of a privacy policy it posted promising never to disclose its customers' Personal Information. [19] This Note seeks to explore some of the issues likely to arise when parties object to these sales. Part I of this Note will introduce the background of *In re Toysmart*. [20]

Part II hypothesizes that a debtor in possession of a customer list will try to assign its obligations under the privacy statement to a third party as provided in section 365 of the Code. [21] Under the majority definition of executory contracts, however, the contract between Toysmart and its customers does not constitute an executory contract. [22] Since the customers do not have any further obligations under the contract created by the privacy statement, [23] assignment in this context is improper. The customers' obligation to provide their Personal Information to the website has been fully performed, rendering the contract unilaterally executory and therefore disqualifying it for treatment under section 365.

Likewise, for jurisdictions that look only to the debtor's remaining obligations in determining whether a contract is executory, [24] assignment is still impermissible. In these jurisdictions, the contract between Toysmart and its customers would be considered executory since Toysmart remains obligated to keep the Personal Information of its customers confidential. Notwithstanding the general principle in bankruptcy that executory contracts are assignable, [25] since the

obligation of the website is a non−delegable duty, [26] assignment should not be permitted under the Code. [27]

Part III of this Note analyzes the issues when a trustee or debtor−in−possession [28] attempts to sell its customer list as an asset under section 363. [29] Given the nature of the customer's interest [30] in his or her Personal Information, a sale of the customer list in this context should not be authorized. A trustee could try to sell the customer lists free and clear of the customers interests, [31] but would fail to meet the statutory criteria. [32] Theoretically, a sale also could be authorized *subject to* the privacy interests of customers. [33] Whereas usually the interest would survive the sale of the property, [34] here that interest would be destroyed by the sale. That is, by the very fact of a sale to a third party, the information ceases to be private and the interest is destroyed.

Part IV of this Note discusses the ramifications of *In re Toysmart* on the Internet community. [35] This section also comments on new legislation proposed in the Senate that would designate these lists as excluded from property of the estate under section 541. [36] By excluding these lists from property of the estate, Congress hopes to protect consumer privacy by eliminating the ability of a debtor to sell these lists in a bankruptcy case.

Background

After lackluster sales during the 1999 Christmas season, [37] on−line retailer Toysmart.com announced on May 22, 2000 that it was ceasing its operations and auctioning off its assets. [38] One such auction, announced before its creditors forced Toysmart into chapter 11, [39] offered for sale a list it had compiled containing its customers' names, addresses, their children's names, birthdays, and even "wish lists of toys they hoped to receive in the future." [40] The list also contained the social security numbers, Internet Protocol Addresses, [41] and credit card numbers of its customers. [42]

On July 10, 2000, the Federal Trade Commission ("FTC") filed a complaint seeking to permanently enjoin Toysmart from selling its customer list. [43] The FTC asserted violations of section 5 of the FTC Act, [44] the Children's Online Privacy Protection Act, [45] and alleged Consumer Injury. [46] The FTC claimed that the proposed auction violated Toysmart's privacy policy and constituted an unfair business practice. [47]

The complaint focused on two promises made in Toysmart's Privacy Statement: "(1) Personal information voluntarily submitted by visitors to our site, such as name, address, billing information and shopping preferences, is never shared with a third party. All information obtained by toysmart.com is used only to personalize your experience online; and (2) When you register with toysmart.com, you can rest assured that your information will never be shared with a third party." [48]

After filing its complaint, the FTC and Toysmart reached a tentative agreement to settle the lawsuit. They moved for bankruptcy court approval of a stipulation that would allow Toysmart to sell the list subject to certain conditions. Specifically, the stipulation provided, *inter alia*, that Toysmart could sell the list only to a "Qualified Buyer" [49] and that the list would be destroyed unless, by July 31, 2001, the Bankruptcy Court approved a sale of the customer list or confirmed a chapter 11 Reorganization plan. [50]

After hearing objections from both the Committee of Unsecured Creditors [51] (the "Committee") and TRUSTe, [52] Bankruptcy Judge Carol Kenner rejected the proposed settlement. [53] Without determining whether a sale would be permitted under the Code, Judge Kenner reasoned that, without any realistic offers from "Qualified Buyers," it would not be in the best interests of the creditors to condition the sale. [54] In essence, Judge Kenner found a way to delay the inevitable: at some point, a Bankruptcy Court will have to rule on whether a debtor can sell its customers' Personal Information. [55]

Discussion of Section 365

A. Privacy Statements are Contracts Enforceable Against Website Operators

It is important first to address the possibility that visitors to certain websites do not read the privacy policies of the website operators. [56] How is it, then, that a customer could claim to have an interest created by a document that he or

she never read? The answer lies in the fact that in the Toysmart situation, it is the debtor seeking to avoid its obligations under the Privacy Statement. Another recent case helps to understand this situation.

In the case of *Ticketmaster Corp. v. Tickets.com, Inc.*, ("Tickets.com) [57] Ticketmaster Corporation ("Ticketmaster") sued Tickets.com alleging copyright infringement, trespass, false advertising and breach of contract. [58] Ticketmaster claimed that Tickets.com was, among other things, breaching a contract not to use the information displayed on its website for commercial use. [59]

Ticketmaster's web site was organized to sell tickets to concerts and the other entertainment events to online shoppers. [60] It did this by first directing customers to the site's home page and allowing them to choose specific events *via* a hyperlink. [61] Upon clicking the link, users would be sent to a page describing the event and giving them the opportunity to purchase tickets. [62] Tickets.com, however, gathered information from the event page created by Ticketmaster, listed this information in its own format, and allowed users of its site to hyperlink directly to the Ticketmaster page where tickets could be purchased. [63]

In addition to several copyright infringement claims, Ticketmaster claimed, as the basis for its breach of contract claim, that Tickets.com violated the "terms and conditions" for the use of its website. [64] Those terms and conditions prohibit the commercial use of the information contained on the pages of Ticketmaster's website. [65] Ticketmaster claimed use of the website constituted consent to be bound by those "terms and conditions." [66]

The court granted Tickets.com's motion to dismiss this part of Ticketmaster's complaint. [67] It rejected Ticketmaster's argument that the "terms and conditions" here were akin to the "shrink−wrap license" cases where licensing agreements were enforced against purchasers of software who became bound when they removed the shrink−wrap from their recently−purchased software. [68] The court distinguished those cases "because [those licenses] were open and obvious, and in fact, hard to miss." [69] Also, the court noted that "customers . . . are likely to proceed to the event page of interest rather than reading the 'small print.'" [70] Therefore, Ticketmaster could not enforce obligations contained in the "small print." [71]

The basic difference in *In re Toysmart* is that the website operator sought to avoid the obligations created by the privacy policy, [72] whereas in *Ticketmaster* it was the website operator seeking to *enforce* the obligations created by the "terms and conditions," [73] This selective use of the unconscionability doctrine [74] would seem counter−intuitive. Certainly Toysmart, the creator of the contract, knew of its obligations under the policy and cannot claim that simply because the other party may not have known its rights the contract should not be enforced. [75]

B. A Privacy Statement is Not an Executory Contract Under Section 365

Notwithstanding the unenforceability of any contractual language prohibiting assignment, [76] section 365 of the Code allows a debtor to assume, assign or reject an *executory* contract. [77] Although the Code furnishes no express definition of an executory contract, [78] the legislative history to section 365(a) indicates that Congress intended the term to mean a contract "on which performance is due to some extent on both sides." [79]

Under Professor Countryman's definition, followed by a majority of jurisdictions, an executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." [80] A minority of jurisdictions expand the traditional view expressed by Professor Countryman and consider a contract to be executory "when something remains to be done by one or more of the parties." [81]

In the jurisdictions following the Countryman definition, an Internet company's obligations to keep its customer Personal Information confidential would not constitute an executory contract. The contract works like this: "you, the customer, give me your Personal Information, and I, Toysmart will, in return, promise to keep that information private." [82] Hence, as soon as the customer provided his or her Personal Information to the debtor, the contract immediately became non−executory in the Countryman−sense. The only obligation remaining, then, is the debtor's duty not to disclose the customers' Personal Information. Analysis under section 365 would end here if the Countryman definition prevails. [83]

C. Even if the Privacy Statement is an Executory Contract, it is not Assignable

Because of the inability to transfer under the majority/Countryman view, [84] the only way a debtor could entertain assignment of its contract with its customers is if the minority definition of executory contracts applies. [85] In these jurisdictions, it is likely that a court would hold that the Privacy Statement at issue in *In re Toysmart* is an executory contract because there remains an obligation to be performed on the part of the debtor. Namely, Toysmart must continue to hold the Personal Information of its customers in confidence. If the analysis were to end here, Toysmart would have the powers granted to a trustee under the Code with respect to its obligations under the contract. [86] Courts should hold, however, that they cannot assign their obligation under the agreement because the duties created are so personal in nature that they are non−delegable. [87]

Under the Code, an executory contract may be assigned [88] unless section 365(c) operates to prevent assignment. [89] One purpose of section 365(c) is to ensure that the nondebtor party is not denied essential elements of the benefit of its bargain. [90] To that end, section 365(c) prevents assignment of contracts where applicable law would "excuses a party . . . from accepting performance from or rendering performance to an entity other than the debtor." [91] The applicable law that would prevent assignment deal not only with personal service contracts, [92] but also contracts where non−delegable duties are involved or there exists a special relationship between the parties. [93]

This rationale for preventing assignment of contracts involving non−delegable duties should be employed in Toysmart's situation. That is, only Toysmart can perform its obligations of nondisclosure. The very assignment of the obligation violates the obligation not to disclose. Therefore, even if a court were to hold that the remaining obligation Toysmart owes to its customers constitutes an executory contract, the personal nature of that obligation would likely render such contract unassignable under section 365(c). [94]

Discussion of Section 363

A. Customers Have an Interest in Their Personal Information

When a bankruptcy case commences, an estate is created. [95] Section 541(c) defines what property is included in this newly formed estate. [96] That section, however, does not discuss the scope of the debtor's interest in any property. As the United States Supreme Court held in *Butner v. United States*: [97]

Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a state serves to reduce uncertainty, to discourage forum shopping and to prevent a party from receiving a windfall merely by the happenstance of bankruptcy. [98]

Section 541(c)(1) does not increase a debtor's interest in property. It merely preserves the interest held pre−petition. [99] Further, a trustee takes the property subject to the same restrictions that existed at the commencement of the case. [100] As such, "to the extent an interest is limited in the hands of a debtor, it is equally limited as property of the estate." [101] Therefore, if another party has a pre−petition interest in any property of the debtor, then that interest is preserved after filing.

In *In re Toysmart*, the committee of unsecured creditors opposed the stipulation between the debtor and the FTC allowing Toysmart to sell its customer lists subject to certain restrictions. [102] They claimed that the restrictions placed on the proposed section 363 sale of the customer list would effectively doom the bidding process before it began by limiting the number of potential bidders that may participate in the sale. [103] Likewise, according to the committee, "[i]t is not clear that consumers would have an interest that could defeat a judgment creditor or consensual lien holder . . . or otherwise serve as the basis for a proper objection to a proposed sales [sic] under 11 U.S.C. § 363." [104]

1. What is an Interest Under Section 363(f)?

Determining whether a person has an "interest" in Personal Information for section 363 purposes requires examination of cases where courts define the extent of "interests" in this context. In *In re Leckie* [105] the Fourth Circuit ruled that a section 363(f) sale could be ordered free and clear of obligations to make premium payments to two federally created employee benefit plans covering retired and orphaned coal workers. [106]

In *Leckie*, several coal companies had filed voluntary petitions for relief under chapter 11 and sought approval of an asset sale to another company. [107] Before the buyer would agree to purchase the assets, it required that such a sale be done "free and clear of liabilities that might arise under the Coal Act." [108] Before deciding if such a sale could be executed free and clear of Coal Act liability, the court determined that the pension plans had an "interest" within the meaning of section 363. [109] The court held:

the [funds'] rights to collect premium payments from [the debtors] constitute interests in the assets that [the debtors] now wish to sell, or have sold already. Those rights are grounded, at least in part, in the fact that those very assets have been employed for coal−mining purposes: if [the debtors] had never elected to put their assets to use in the coal−mining industry, and had taken up business in an altogether different area, [the funds'] would have no right to seek premium payments from them. *Because there is therefore a relationship between (1) the [funds'] rights to demand premium payments from [the debtors] and (2) the use to which [the debtors] put their assets, we find that the [funds] have interests in those assets within the meaning of section 363*. [110]

Similarly, in *In re Toysmart*, the debtor's rights in its customers' Personal Information were limited to the use of this information for the purpose of personalizing the online experience. [111] The customers, however, exercised their right to limit the dissemination of their Personal Information by disclosing their Personal Information only to an entity that promises not to disclose this information without their consent. [112] Presumably, they have read the Privacy Statement and were induced to provide their information to Toysmart on the basis of the promises made therein. [113] Hence, there is a relationship between Toysmart's ability to use the information and the customers' right to restrict its dissemination. [114]

Another case defining an "interest" for section 363(f) purposes is *WBQ Partnership v. Virginia Department of Medical Assistance Services* (*In re WBQ Partnership*). [115] There, the debtor sought approval of a section 363(f) sale of its nursing home free and clear of the Virginia Department of Medical Assistance Services' ("DMAS") right to reduce future reimbursements it would owe to the buyer who would continue to operate the nursing home. [116] Moreover, DMAS had, prior to filing, reimbursed the debtor for depreciation expenses it incurred as a result of operating the nursing home. [117] A Virginia statute [118] allowed DMAS, upon sale of the nursing home, to "recapture" depreciation reimbursements from the seller (here, the debtor) or the buyer. [119] It had proposed to recapture these reimbursements by setting off future reimbursements to the buyer of the home until all prior depreciation reimbursements were recaptured. [120]

After determining that the sale of the debtor's nursing home was permissible under section 363(b), [121] the court held that "DMAS's right of recapture falls within the category of 'any interest' that is subject to § 363(f)." [122] Moreover, according to the court, DMAS's right of recapture "runs with the property, so it is more than a mere claim against the debtor." [123] That is, the right to recapture depreciation payments made on behalf of the debtor was directly related to the specific property sold. [124]

What these cases suggest is that the one constant that exists for section 363(f) interest purposes is that "the term 'any interest' is intended to refer to obligations that are connected to, or arise from, the property being sold." [125] Like the cases mentioned above, the sale of Personal Information by debtors should be governed by section 363(f) since the owners of the Personal Information (the customers) have an "interest in such property" within the meaning of that section. Moreover, Toysmart's customers are owed the obligation to keep their Personal Information confidential. The asset being sold (the customer list) is a compilation of Personal Information that Toysmart promised to keep confidential. Hence, the customers' rights to enforce that promise are directly related to the specific asset.

2. Constitutional Basis For Customer Interest

Generally, government action is required to infringe upon a person's Constitutional rights. [126] Assuming, for the moment, that a customer has such a right in his or her Personal Information, if a Bankruptcy Judge approves a sale of a debtor's customer list pursuant to section 363, the governmental action required for Constitutional violation should exist. [127]

In *Shelley v. Kraemer*, [128] a state court's enforcement of restrictive covenants in deeds that racially discriminate by prohibiting sale of land to minorities comprised governmental action. [129] The Court stated: "but for the active intervention of state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties without restraint." [130]

Similarly, in *Toysmart*, no sale of the customer list could occur without Bankruptcy Court approval. [131] Hence, so long as there exists a Constitutional right of privacy, a Bankruptcy Court should not approve such a sale without sufficient justification under Constitutional law. What follows is an analysis of that right and the justifications present in the bankruptcy context.

a. Constitutional Right of Privacy

Variously framed as falling under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution, [132] there are generally two categories of privacy interests: (1) "[the] independence in making certain kinds of important decisions;" [133] and, (2) "the individual interest in avoiding disclosure of personal matters." [134] With respect to the latter privacy interest, whether Personal Information is entitled to protection depends upon the reasonable expectations of the person identified by the information and of society as a whole. [135] The more intimate and personal a particular piece of information, the greater the expectation that it will be and can be kept confidential. [136]

The Toysmart customer list contained information that ranged from the most public to the most private. The former included names and addresses [137] while the latter included credit card and social security numbers, and even the names and preferences of customers' children. Considering that retail sellers and marketing associations routinely sell customer lists during the course of their business, can a customer reasonably expect Toysmart to keep this information private?

In *United States v. Hambrick*, [138] a criminal defendant sought suppression of all evidence obtained by the government pursuant to a subpoena ordering an Internet Service Provider to release the identity of a suspected trafficker in child pornography. [139] Moreover, "[b]ecause of the anonymity of the Internet, [the detective] did not know the true identity" of the defendant. [140] Hence, the detective obtained and served a subpoena on the Atlanta−based Internet Service Provider and retrieved the defendant's "name, address, credit card number, email address, home and work telephone numbers, fax number, and the fact that the Defendant's account was connected to the Internet at the Internet Protocol address." [141]

Because the subpoena was concededly invalid, [142] the defendant sought suppression on grounds that his Fourth Amendment rights were violated. [143] The court cited *Katz v. United States* [144] as the "starting point" from which the scope of the Fourth Amendment's protections are determined. [145] A person is protected by the Fourth Amendment if he or she has a "legitimate expectation of privacy in [an] invaded place." [146] Since *Katz*, the court noted that the Fourth Amendment's protections extend "only where: (1) the citizen has manifested a subjective expectation of privacy, and (2) the expectation is one that society accepts as 'objectively reasonable.'" [147]

After assuming the defendant had the subjective expectation his Personal Information would be kept private, [148] the court went on to hold the defendant's Fourth Amendment right of privacy was not violated because "there can be no reasonable expectation of privacy in [Personal Information]." [149] Where the defendant voluntarily and knowingly revealed his Personal Information to the Internet Service Provider, he could not legitimately expect his privacy to be maintained. [150]

In dicta, however, the court set forth the factual situation that has arisen in the *Toysmart* case. The court found in holding that the defendant had no reasonable expectation of privacy that "there [was] nothing in the record to suggest that there was a restrictive agreement between the defendant and the [Internet Service Provider] that would limit the

right of [it] to reveal the defendant's Personal Information to nongovernmental entities." [151] In addition, the court recognized the common practice of Internet Service Providers to provide the Personal Information of its subscribers to third parties. [152] These facts, according to the court, dictate that a person who reveals certain information *via* the Internet cannot reasonably expect that such information would be kept private. [153] Whether a privacy statement like the one at issue in *In re Toysmart* would be sufficient to create the reasonable expectation of privacy remains to be ruled upon by any court. [154]

A court should determine that an express promise by a private website operator to keep its customers/visitors' Personal Information confidential creates a "reasonable expectation of privacy." Not only do customers/visitors subjectively believe that "Personal information voluntarily submitted [to Toysmart] . . . is never shared with a third party" [155] it is reasonable in terms of what society would expect that courts will hold entities like Toysmart to their word. When a website promises, not once, but twice to never reveal its customers Personal Information, [156] an attempt to disclose such information to another private entity ought to be prohibited.

b. Balancing Privacy Interests Against Governmental Interests in Bankruptcy

Establishing that there exists, at least on some level, privacy interests involved in the unauthorized dissemination of a person's Personal Information, a court must balance the need for disclosure in terms of the governmental interest in doing so against that privacy interest. While no court has described the right to keep Personal Information confidential as "fundamental to the concept of ordered liberty," [157] a result that would require strict scrutiny balancing, [158] there are cases balancing privacy interests in this context against governmental interests. [159] If the latter outweighs the former, then disclosure would be allowed. [160]

In *Ferm v. United States Trustee* (*In re Crawford*), [161] a non−attorney bankruptcy petition preparer challenged the section 110(c) requirement that he include his Social Security Number on a petition that he prepared for a debtor. [162] He alleged that this requirement violated his right of "informational privacy" since the Social Security Number will ultimately become part of the public record. [163]

The Ninth Circuit recognized that, "in an era of rampant identity theft . . ., disclosure of Social Security Numbers can raise serious privacy concerns." [164] Whether the preparer's constitutional right of privacy was violated depended upon balancing the following factors:

Relevant factors to be considered include: . . . the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access. [165]

The petition preparer did not want to reveal his Social Security Number out of fear that his identity could be stolen by anyone willing to access the public bankruptcy records. [166] This interest was weighed against the government's interests in providing "public access" to bankruptcy records and in preventing fraud in the Bankruptcy Petition Preparer's industry. [167] The scales tipped in the government's favor as the court held that requiring disclosure was not violative of the preparer's right to privacy. [168]

Employing this type of balancing in the *In re Toysmart* context, a court should find the balance tipped in the customers favor. The governmental interests underlying the Code are the efficient and orderly administration of the debtor's estate, the granting of a fresh start to the debtor, and the protection of the interests of creditors. [169] Section 363 is designed to maximize the amount of those distributions and to provide notice to creditors where those sales are made outside the ordinary course of business.

Balanced against that is the customers privacy interests in his or her name, Social Security Number, home address and telephone number. Given that these numbers are for the most part publicly available, these should not cause the balance to tip in a significant manner. In the *Toysmart* case, however, the wish lists of customers' children were also offered for sale. [170] Since matters relating to raising children are considered quite private, this type of information

deserves greater weight in tipping the scale towards the customer's end.

In spite of the considerable privacy interest involved in the *Toysmart* case, if the governmental interests mentioned above are deemed "compelling" in the Constitutional sense, when balanced against an individual's right of privacy, disclosure would be justified. Toysmart had acquired the information of approximately 250,000 customers during the course of its operations. [171] The offer made for this information was approximately $50,000. [172] Furthermore, the total liabilities incurred by Toysmart exceeded $25,000,000. [173] First, the addition of a mere $50,000 will not significantly alter the distribution to creditors is such a way that would justify the infringement upon these customer's rights of privacy. [174] More importantly, the proceeds of a sale under section 363 of the Code will first be used to satisfy the "liens" the customers hold on their Personal Information. [175] Therefore, the governmental interest presumed to justify the infringement upon the customers right to privacy, maximizing the distribution to creditors, will not be furthered by a sale of the customer lists. [176]

The Constitutional analysis articulated above is not the only interest that a customer has in his or her Personal Information. As alluded to earlier, an "interest" can be created in a variety of ways. [177] So long as the 'interest' is intended to refer to obligations that are connected to, or arise from, property being sold, the interest is created. [178] These obligations can be created by statute, [179] or arise from a contractual relationship, [180] or arise from the property rights of a person affected by sales under section 363. [181]

B. The Bankruptcy Code Does Not Authorize a Sale Free and Clear of the Customers' Interests

Having concluded that a person's interest in his or her Personal Information should fall within the purview of section 363(f), this Note now turns to the subsections of section 363(f) to determine whether the court can order/approve sales free and clear of such interests. [182]

Before such analysis begins, it is important to recognize that the Privacy Statement issued by Toysmart is a restriction on transfer. While under section 541, restrictions on transfer do not affect the ability of property to become property of the estate, [183] the rule differs when dealing with section 363. [184] As expressed in section 363(*l*), [185] when such restriction is based on the financial condition or insolvency of the debtor, or are tied to the debtor's bankruptcy, such clauses will not be enforced. A restriction on transfer not conditioned on the debtors financial condition is enforceable. This distinction in the Code codified the case of *Chicago Board of Trade v. Johnson*. [186]

In that case, the trustee sought to sell the debtor's seat on the Chicago Board of Trade, without acting in accordance with the Board's rule that a seat owner's debt to other seat owners must be satisfied before a seat may be transferred. [187] The Court held that since the restriction was not based on the financial condition of the debtor, although it did require payment of debts, the trustee was required to abide by the restriction and sell the board seat only upon satisfaction of the condition. [188] Similarly, a court should enforce the restrictions placed by the debtor websites which restrict the ability to transfer the customer's Personal Information.

1. Section 363(f)(1)

Notwithstanding the existence of an interest, under section 363(f), a trustee may sell property of the estate free and clear of interests in that property if one of five situations exists. [189] The first situation is if "applicable nonbankruptcy law permits sale of such property free and clear of such interest." [190] While it is clear that a trustee needs to find support in just one "applicable nonbankruptcy law," this Note will discuss several areas of nonbankruptcy law which will prohibit a sale "free and clear" of the interest held by the customers of Toysmart.

"Applicable nonbankruptcy law" would find that Toysmart could not delegate its duties under the contract even without an anti−assignment clause in the contract. Applicable law would excuse customers from accepting performance from anyone other than Toysmart because the duties are non−delegable. [191] The obligation owed by Toysmart was an obligation not to disclose Personal Information. [192] This is a contract that can only be performed by one party, Toysmart. Not only is this obligation non−delegable because of the personal nature of the obligation, any delegation of the duty not to disclose the information, by its very nature, discloses the Personal Information and breaches the contract.

Toysmart may try to argue that a transfer under section 363(f) would be a sale of a customer list and not an assignment of its contractual rights and obligations under the privacy statement. Since Toysmart has entered into contracts with its customers and TRUSTe that prohibit disclosure of Personal Information, any sale would result in a breach of those contracts that prohibited by the general law of contracts. Bankruptcy Courts should not facilitate such breaches of contracts.

With respect to the property interest the customers have in their Personal Information, "applicable nonbankruptcy law" will not allow for the sale free and clear of those interests. Individuals have a property interest in their Personal Information. [193] As with any property interest, the interest consists of a "bundle of rights." [194] Among those rights is the ability to restrict others from use of their property. [195] Just as a landowner can limit who may enter his or her land by granting or restricting access to real property, [196] Internet users may limit who has access to their Personal Information. Similarly, just as a landowner can transfer certain "sticks" in his "bundle of rights" and retain others, [197] the customers only transferred specific "sticks" to Toysmart. Mainly, the customers granted Toysmart the ability to use their Personal Information, compile various customer lists and analyze data. The customers, however, expressly prohibited Toysmart from transferring the information to a third party. This is analogous to a landlord−tenant situation. The landlord (the customers) gives the tenant (Toysmart) the ability to use the property, but never gives the tenant the ability to sell the landlord's property: that stick remains with the landlord.

A look at how the Bankruptcy Courts have dealt with restrictive covenants in real property offers another useful analogy with property interests. In *Gouveia v. Tazbir*, [198] the court looked at restrictive covenants in real property and held that property sold in bankruptcy can not be sold free and clear of the interests created by those covenants. [199] In *Gouveia*, the landowner decided to build a commercial music store on property located in a residential subdivision. [200] The property was burdened by a restrictive, reciprocal land covenant prohibiting use of the property for any purpose other than residential use. [201] When the state court ruled that the covenant was unenforceable, the landowner began construction. [202] The state court of appeals reversed and held the covenant enforceable and the landowner was enjoined from using the property in a commercial manner. [203] Unable to meet her financial obligations, the landowner sought relief under chapter 11 of the Code. The landowner, as debtor−in−possession, sought to sell the property free from the restrictive covenant. The neighbors objected and the court held that section 363 did not permit a sale free and clear of the restrictive covenant. [204]

The court ruled a restrictive covenant should not be extinguished if an opposing party continues to benefit from the restriction. [205] Consequently, "as long as the original purpose of the covenants can still be accomplished and substantial benefit will inure to the restricted area by their enforcement, the covenants stand even though the subject property has a greater value if used for other purposes." [206]

Likewise, the restrictive covenant made by Toysmart not to disclose the Personal Information of its customers created an interest. Following the *Gouveia* rationale, a sale of the customer information may not be executed free and clear of that interest, especially when the customers are still benefiting from the non−disclosure of their Personal Information. It is noteworthy, however, that some commentators have criticized the *Gouveia* court for not allowing the sale of the property free and clear of the restrictive covenants. [207]

One such commentator, Professor Basil Mattingly, argues that the "doctrine of changed conditions" should allow section 363(f)(1) to operate to sell the property free and clear of the restrictive covenant. [208] Mattingly points out that "virtually every jurisdiction's real property laws permit the avoidance of, or hold as unenforceable, servitudes and covenants against the encumbered land." [209] Under the doctrine of changed conditions, the change in conditions must be so "radical so as to destroy the essential purpose of the agreement." [210] Mattingly, however, concedes that "courts will refuse to extinguish covenants under the doctrine of changed condition [sic] if a parcel of land is perceived to be continuing to enjoy the benefit of the restrictions." [211]

Applying the principles from Mattingly's article to Toysmart clearly results in the conclusion that: (i) there has been no change in conditions which warrant a changed conditions analysis; (ii) even under the changed conditions analysis the party benefited by the restriction, the customer, still benefits from the restriction. Therefore, the restriction should not be avoided.

Moreover, other "applicable nonbankruptcy laws" that would prohibit the sale of customer lists are those pertaining to the rights created by the Constitution. [212] As mentioned above, the Constitution protects a person's right of informational privacy to the extent that there is a reasonable expectation of privacy. Accordingly, a bankruptcy court could not authorize sales of customer lists free and clear of those interests as such action would violate the Constitution.

2. Section 363(f)(2)

Under section 363(f)(2) of the Code, the trustee may sell property free and clear of any interest in such property of an entity other than the estate if such entity consents. If the customers are properly noticed, it has been held that failure to object results in implied consent, which is sufficient to authorize a sale under section 363(f). [213] Therefore, without an objection, the trustee could sell the Toysmart customer list free and clear of the interest created by the privacy agreement. It is therefore assumed that the customers will object to the sale of the customer lists so that section 363(f)(2) will not operate to allow the bankruptcy court to authorize a sale under section 363(f).

3. Section 363(f)(3)

The third way that a trustee may sell property free and clear of any interest in such property is "if such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." [214] As discussed above, the promise made by Toysmart constitutes a restrictive covenant between Toysmart and its Customers. Some courts have held that restrictive covenants are not "liens." [215] Clearly, in these courts section 363(f)(3) would not be available as a means for selling the customer lists.

There is, however, the position that restrictive covenants are "liens." The Code defines "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation." [216] According to Professor Mattingly, in *Gouveia*, "the neighbors, who objected to the construction of the music store, held an interest in the debtor's property (the use restriction) to secure performance of the obligation by the debtor that she would not construct a non−residential structure." [217] Using this analysis, the interest held by the customers in their Personal Information, and, by extension, in the customer list compiled by a website, seems to constitute a lien. [218] As a result of the promises made in the Privacy Statement, the customers' have retained the right to restrict dissemination of their Personal Information. Another way of saying this is Toysmart has agreed to be bound by a restrictive covenant and have granted its Customers a "lien" against the customer list to secure this obligation.

If a court follows the reasoning expressed by Professor Mattingly, mainly that a restrictive covenant is, in fact, a "lien" under the Code, the analysis of section 363(f)(3) is applicable. If the interest is a "lien" then the sale price must exceed the "aggregate value of all liens" on the property. [219] Presumably, under this analysis, all customers would have liens, and, as such, the customer list must be sold for a price exceeding the value of those liens in order for the court to authorize the sale under section 363(f)(3). [220]

4. Section 363(f)(4)

Under subsection four of section 363(f), the trustee may sell property free and clear of any interest if the interest is subject to bona fide dispute. [221] Courts have developed a standard to determine the existence of a "bona fide dispute." A court must look at whether there is "an objective basis for either a factual or legal dispute as to the validity of the asserted interest." [222] This standard does not require the Court to resolve the underlying dispute or determine the probable outcome of the dispute, but merely whether one exists. [223] In *In re Taylor*, the court suggested a two−prong analysis. [224] First, courts are to determine whether the right asserted is of the type of interest intended to be included under section 363. [225] Assuming the court finds an "interest", a court will then determine whether the party objecting to the sale actually and validly holds that interest. [226]

Applying the *Taylor* analysis, this Note argues that: (i) there is, in fact, a valid interest in Personal Information; [227] and (ii) that the customers hold that interest. [228] The interests, having been established earlier, clearly arise from contractual, property and Constitutional rights. [229] Also, there can be no dispute that a person whose Personal Information is being distributed without his or her consent holds that interest. As such there is no bona fide dispute

that would enable a court to authorize a sale free and clear of the customers' interests.

5. Section 363(f)(5)

The final way that a trustee may sell property free and clear of a third party's interest in such property is under section 363(f)(5). Under this section, the court will authorize such sale if the third party "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." [230] It is noteworthy that an entity must be "compelled" to accept money damages for this section to apply. In other words, "if the money damages are available *upon the consent* of those who hold the covenant, then such persons are not compelled to accept money, and thus § 363(f)(5) does not apply." [231] Furthermore, the Bankruptcy Court for the Eastern District of Virginia has noted:

it should be emphasized that section 363(f)(5) specifies a money satisfaction, which suggests that the interest must be reducible to a claim. The Bankruptcy Code defines "claim" as a "right to payment" −− something that can be satisfied with money. Accordingly, if a holder of an interest cannot be compelled to accept a cash award in lieu of equitable relief, the sale cannot proceed under section 363(f)(5). [232]

The court in *In re WBQ Partnership* offered the hypothetical of a restrictive covenant running with the land in explaining its analysis. [233] That court, citing Gouevia, explained that in these situations "an adequate remedy available to the landowners would be prospective relief, namely an injunction that enforces the covenant as an equitable servitude. In this situation, there is nothing that can force the landowners to 'forego equitable relief in favor of a cash award.'" [234] Similarly, the only adequate relief for the customers is an injunction prohibiting the website from selling the customer information. Furthermore, as explained by the *Gouveia* court, since the option of injunction is available to the customers, they can not be "compelled" to take money damages. [235]

The Future After In re Toysmart

A. Changes in the Online Industry

The ramifications of the *Toysmart* case have been felt even before the court has ruled on the matter. Amazon.com has recently amended its Privacy Statement to avoid the problem now facing Toysmart. [236] Specifically, Amazon.com changed its privacy policy blocking the ability of its users to prohibit the sale of their Personal Information. [237] Under their old policy, users of Amazon.com could email the company asking that data about them not be sold or given to third parties and those requests would be honored. [238] Now, new customers will not have such a luxury.

Amzaon.com's actions point to the difference between a website with a privacy statement promising non−disclosure and those without. As outlined in this Note, the difference is critical. Without the non−disclosure language, the ability to restrict the sale is severely weakened. It is the Privacy Statement that constitutes the manifestation of the Customer's intent to constrain the use of their Personal Information −− i.e., they retain an interest for themselves and prohibit website operators from doing anything other than what the Privacy Statement allows. [239]

While Amazon.com is one of the first websites to change its privacy policy, it certainly won't be the last. The "chilling effect" from the *Toysmart* controversy may help shape how consumer privacy is handled in the new millennium. As the often overvalued dot−com world begins to seek protection under the Code, their customer lists may be the only asset that can generate any semblance of a meaningful distribution to creditors in a liquidation or raise enough capital to finance a meaningful reorganization. Therefore, one can expect many more changes to privacy policies in the near future.

B. Congressional Legislation Attempts to Solve Privacy Problem

Perhaps the largest potential for change as a result of the *Toysmart* filing will come in the form of congressional action. Senators Patrick Leahy (D−Vt.), Herb Kohl (D−Wi.) and Robert Torricelli (D−N.J.) have introduced a bill in Congress to amend section 541, the Code's property of the estate provision. [240] The hope is that, if enacted, this section will limit the debtor's ability to sell its customer lists under section 363 because such lists will not be "property of the estate" within the meaning of 363 and 541. Section 541(b) will read:

Property of the estate does not include ***

(6) if the sale or disclosure of personally identifiable information violates a Privacy policy of the debtor in effect at the time at which such information was collected, such personally identifiable information (including any compilation or record in electronic or any other form of such information), including −−

(A) a first and last name, whether given at birth or adoption, assumed, or legally changed;

(B) a home or other physical address, including street name and name of city or town;

(C) an e−mail address;

(D) a telephone number;

(E) a Social Security account number;

(F) a credit card number

(G) a birth date, birth certificate number, or place of birth; or

(H) any other identifier that permits the physical or electronic contacting of a specific individual. [241]

While the goal of this Congressional legislation may be worthwhile, this Note asserts that enactment of this legislation may not have the effect the Senators envision. The Privacy Policy Enforcement in Bankruptcy Act of 2000 (PPEBA) was introduced to close the "loophole" that many feared was exposed by the *Toysmart* case. [242] The legislation seeks to prohibit the sale and transfer of Personal Information in bankruptcy. [243] The effect of excluding these customer lists from property of the estate counteracts the very goal of the legislation. [244]

Removing the customer lists from the classification of property of the estate would take these lists out of the jurisdiction of the Bankruptcy Court. Absent Bankruptcy Court jurisdiction, the automatic stay would not protect the customer lists. [245] As such, creditors could potentially use state−law remedies to execute on the customer database to sell the customer lists to the highest bidder at a foreclosure sale −− the very result that Congress seeks to prohibit. [246] Leaving the customer list under the classification of "property of the estate" will allow for objections based on the arguments explored by this Note to be raised to prohibit any transfer of the customer list.

Conclusion

The public outcry over privacy issues has surged ever since the information revolution began. Consumers and advocacy groups alike have been screaming for laws protecting their privacy. This Note suggests, however, that, at least in the context of a situation like *In re Toysmart*, new legislation might not be necessary. These authors' believe that Bankruptcy Courts are adequately armed to prevent the unauthorized dissemination of Personal Information when debtors seek to sell their customer lists.

The Code grants extensive powers to trustees and debtors−in−possession in furtherance of its goal of maximization of distributions to creditors. It is clear, however, in the *Toysmart* context that this fundamental tenet of the Code must take a back seat to the privacy interests of Internet users. Theoretically, these users have gone out of their way to visit a site that has afforded them much desired guaranties of confidentiality. This expectation ought to be, and we believe is, protected under the Bankruptcy Code.

Andrew B. Buxbaum

Louis A. Curcio

FOOTNOTES:

[*] This title was derived from the opening sentence of an editorial in The Atlanta Journal dated 9/6/00. See Amazon Betrays Customers With New Privacy Policy, The Atlanta Journal, Sept. 6, 2000, at A8. Back To Text

[1] See Mary Jo Obee & William C. Plouffe, Jr., Privacy in the Federal Bankruptcy Courts, 14 Notre Dame J.L. Ethics & Pub. Pol'y 1011, 1017 (discussing progression of collection of information beginning during migration of people into cities). Back To Text

[2] See Steven D. Homan, Attorneys and Wall Street Deal With the Dot−Com Downturn, N.Y.L.J., Aug. 29, 2000, at 5 (compiling list of Internet companies in dire straits for December, 1999 to July, 2000 period). Back To Text

[3] 11 U.S.C. §§ 101−1330 (1994). Back To Text

[4] See Homan, supra note 2, at 5 (discussing issues unique to dot−com companies that have filed for protection under the Code); Larren M. Nashelsky, On−line Privacy Collides With Bankruptcy Creditors; Potential Resolutions for the Competing Concerns, Highlighted by Unresolved Toysmart Case, N.Y.L.J., Aug. 28, 2000, at S1 (describing how debtor dot−com company will try and "liquidate what may be the most significant asset in the bankruptcy case"); Customer List in Limbo, The Bankr. Strategist, Sept. 2000, at 9 (noting that customers lists and data may be only valuable asset in internet bankruptcies). Back To Text

[5] Throughout this Note, we will refer to the term "Personal Information" to include: names, addresses, telephone numbers, Social Security Numbers, shopping preferences, and Internet Protocol. See Obee & Plouffe, supra note 1, at 1014 (stating "commentators define Personal Information as any information which is linked or related to an individual through a commonly used, yet unique identifier"). Back To Text

[6] See Obee & Plouffe, supra note 1, at 1018 (discussing concerns of public regarding unauthorized dissemination of Personal Information for purposes unrelated to reason originally collected). Back To Text

[7] See Tamara Loomis, Online Privacy: Advising Clients in Unsettled Territory, N.Y.L.J., July 13, 2000, at 5 (noting that strong privacy policy can have marketing advantages). Back To Text

[8] See Jane Kaufman Winn & James R. Wrathall, Internet Customer Databases, Nat'l L. J., Sept. 18, 2000, at B8 (stating that website's privacy policy is designed to inform visitors of information practices of operator). Back To Text

[9] See First Amended Complaint for Permanent Injunction and Other Equitable Relief, (visited Sept. 19, 2000) <http://ftc.gov/os/2000/07/toysmartcomplaint.htm> (including privacy policy of Toysmart.com that promised never to disclose information gathered on its customers). Back To Text

[10] See Tamara Loomis, Amazon Revamps Its Policy on Sharing Data, N.Y.L.J., Sept. 21, 2000, at 5 (noting that Amazon.com has changed its privacy policy in light of Toysmart case to set forth specific instances where Personal Information will or will not be shared). Back To Text

[11] 11 U.S.C. §§ 1−1330 (1994) Back To Text

[12] See supra note 4. Back To Text

[13] Property of the estate is defined in 11 U.S.C. § 541 (1994) (stating that, subject to certain limitations, property of the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case"). Back To Text

[14] See Luis Salazar, FTC Takes Action, Nat'l L. J., Oct. 9, 2000, at B6 (noting competing interests between high value placed on customer lists and consumer privacy); Customer List in Limbo, supra note 4, at 9 (noting Toysmart's announcement that it was shutting down operations and selling customer lists). Back To Text

[15] For discussion of privacy policy as restrictions on transfer of Personal Information see infra notes 184−88 and accompanying text. Back To Text

[16] In certain sections, the Code would not enforce language that prevents assignment. See, e.g., 11 U.S.C. § 365(f)(1) (1994) (allowing assignment of executory contract notwithstanding language in contract prohibiting it); 11 U.S.C. § 363(l) (1994) (allowing sale of assets notwithstanding clause altering debtor's interest in event that debtor becomes insolvent and/or files for bankruptcy); 11 U.S.C. § 541(c) (1994) (including in property of estate any interest of debtor notwithstanding any provision restricting or conditioning transfer of interest). Back To Text

[17] See In re Schnabel, 611 F.2d 315, 317 (7th Cir. 1980) (stating "rejection thus has the effect of relieving the estate of 'any future burdens imposed by the contract'") (quoting Danning v. Brunswick Corp., 466 F.2d 1010, 1011 n.1 (9th Cir. 1972)); In re Constant Care Community Health Ctr. 99 B.R. 697, 702 (Bankr. D. Md. 1989) (noting debtor's decision to reject contract relieves debtor of obligation to pay employee) Back To Text

[18] In re Toysmart, LLC, No. 00−13995−CJK (Bankr. D. Mass. filed June 9, 2000). Back To Text

[19] See Nashelsky, supra note 4, at S1. Back To Text

[20] See infra notes 37−55 and accompanying text. Back To Text

[21] 11 U.S.C. § 365 (1994). Back To Text

[22] The majority of jurisdictions follow the definition of executory contract explained by Professor Vern Countryman. According to this definition, an executory contract exists "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Vern Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973). Back To Text

[23] This Note argues that a contract was created wherein Toysmart promised to keep the customer's Personal Information private in exchange for the customer's giving his or her Personal Information to Toysmart. Back To Text

[24] A minority of jurisdictions do not follow the "Countryman definition." In these jurisdictions a contract is executory "when something remains to be done by one or more of the parties." See Tonry v. Hebert, (In re Tonry), 724 F.2d 467, 468 (5th Cir. 1984); In re Ashley, 41 B.R. 67, 70 (Bankr. E.D. Mich. 1984) (holding that contract was executory under either Countryman definition or In re Tonry method). Back To Text

[25] Generally, a trustee may assume and assign an executory contract, however certain executory contracts are not assignable. See 11 U.S.C. § 365(c) (1994) (stating grounds for prohibition of assignment of executory contracts). Back To Text

[26] Since this contract can only be performed by one party, the obligations therein are not delegable. See infra notes 87−94 and accompanying text. Back To Text

[27] Under 365(c) of the Code, an executory contract may not be assigned if applicable law excuses a party from accepting performance from an entity other than the debtor; the Code will not allow for assignment of that obligation. See 11 U.S.C. § 365 (1994) Back To Text

[28] "A debtor in possession shall have all the rights…and powers, and shall perform all the function and duties…of a trustee." 11 U.S.C. § 1107(a) (1994). Back To Text

[29] Section 363 of the Code deals with "Use, sale, or lease of property." The trustee may sell property of the estate under 11 U.S.C. § 363(b) (1994) or 11 U.S.C. § 363(c) (1994). See infra notes 95−235 and accompanying text. Back To Text

[30] See infra Part III.A. Back To Text

[31] Under § 363(f) of the Code, a trustee may sell property free and clear of any interest in such property of an entity other than the estate if the trustee can meet one of five criteria. See 11 U.S.C. § 363(f) (1994). Back To Text

[32] Sale of the customer list would not be permitted by applicable non−bankruptcy law; presumably, customers would not consent; the interests, even if they were "liens" against the list, would have an aggregate value greater than any sale price; the interests are not in bona fide dispute; and individuals could not be compelled to accept money satisfaction of such interest. See id. Back To Text

[33] See Gouveia v. Tazbir, 37 F.3d 295 (7th Cir. 1994) (finding that § 363(f)(5) did not allow sale of real property free and clear of restrictive use covenant, but property could be sold subject to such restrictive use covenant); In re Creative Restaurant Management, Inc., 141 B.R. 173, 179 (Bankr. W.D. Mo. 1992) (authorizing sale subject to NLRB remedies for violation of collective bargaining agreements). Back To Text

[34] See id. Back To Text

[35] See infra notes 236−46 and accompanying text. Back To Text

[36] Privacy Policy Enforcement in Bankruptcy Act of 2000, S. 2857 (2000). Back To Text

[37] See Victoria Slind−Flor, Privacy or Creditors: Who Holds the Trump?, The Nat'l L. J., Sept. 4, 2000, at A1. Back To Text

[38] Chapter 11 Update, Andrews Publications, Inc. at 5, Aug. 2000. Back To Text

[39] See In re Toysmart, LLC, No. 00−13995−CJK (Bankr. D. Mass. filed June 9, 2000). Back To Text

[40] Slind−Flor, supra note 37, at A1. Back To Text

[41] An Internet Protocol Address is "the term used to describe how computer systems communicate with each other at the bit and byte level." Cliff Green, An Introduction to Internet Protocols for Newbies (visited Nov. 4, 2000) <http://www.halcyon.com/cliffg/uwteach/shared_info/internet_protocols.html>. It is these numbers that allow a particular computer to be "named" on the Internet. See id. Back To Text

[42] See Tom Reilly, Toysmart Case Can Set Bar for Online Privacy, Computerworld, Sept. 4, 2000, at 36. Back To Text

[43] See First Amended Complaint For Permanent Injunction and Other Equitable Relief, (visited Sept. 19, 2000) <http://ftc.gov/os/2000/07/toysmartcomplaint.htm>). Back To Text

[44] 15 U.S.C. § 45(a) (1994) (prohibiting unfair or deceptive acts or practices in or affecting commerce). Back To Text

[45] 15 U.S.C. § 6502(a), (b) (1994 & Supp. 2000) (prohibiting online retailers marketing towards children from gathering information in violation of federal regulations). Toysmart had, according to the complaint, been gathering information about children under the age of thirteen during the course of an ongoing dinosaur trivia contest. See First Amended Complaint supra note 25, at ¶ 19. Back To Text

[46] See First Amended Complaint supra note 25, at ¶ 21−2 (stating that Toysmart's proposed sale would "injure consumers throughout the United States by invading their privacy"). Back To Text

[47] See id. at ¶¶ 1−18 (discussing business practices of Toysmart.com). Back To Text

[48] See id. at ¶ 9 (quoting privacy policy of Toysmart). Back To Text

[49] See Stipulated Consent Agreement and Final Order (visited Nov. 4, 2000) <http://www.ftc.gov /os/2000/07/toysmartconsent.htm>. A Qualified Buyer is one who concentrates its business in the family commerce market and expressly agrees to abide by the Privacy Statement of Toysmart. See id. Back To Text

[50] See id. Back To Text

[51] The Committee of Unsecured Creditors objected, not to the sale per se, but rather to the conditions placed on such sale. They argued that these conditions have soured the market for Toysmart's customer list and, as such, potential bidders no longer were willing to bid for the list. See Limited Opposition By Official Committee of Unsecured Creditors to Motion For Approval of FTC Settlement at ¶ 8, In re Toysmart, LLC, No. 00−13995−CJK (Bankr. D. Mass. filed Aug. 11, 2000). Back To Text

[52] Trusted Universal Standards in Electronic Transactions ("TRUSTe") is a watchdog group dedicated to building users' trust and confidence on the Internet. See Objection of Trusted Universal Standards in Electronic Transactions to Motion to Approve Stipulation at 1, In re Toysmart, LLC, No. 00−13995−CJK (Bankr. D. Mass. filed Aug. 3, 2000) Toysmart.com and TRUSTe entered into a licensing agreement under which Toysmart agreed to comply with the TRUSTe Program. Id. at 1−2. Pursuant to the agreement, Toysmart displayed the "TRUSTe Privacy Mark." See id. at 2. TRUSTe, in accordance with the TRUSTe Program, approved Toysmart’s privacy statement before it was displayed on Toysmart's web page. Id.

TRUSTe objected to the sale of the customer list arguing that Toysmart is bound by contract to give notice to users prior to disclosure and an opportunity to consent to such disclosure. See Objection of Trusted Universal Standards in Electronic Transactions ("TRUSTe") to Motion to Approve Stipulation at 4, In re Toysmart, LLC, No. 00−13995−CJK (Bankr. D. Mass. filed Aug. 3, 2000). Back To Text

[53] See Richard Raysman and Peter Brown, Consumer Privacy Clashes with Creditors' Rights, N.Y.L.J., September 12, 2000, at 3. Back To Text

[54] See id. Back To Text

[55] See Nashelsky, supra note 4, at S1 (noting judge's denial of settlement avoided having to rule on objections). Back To Text

[56] See Winn & Wrathall, supra note 8, at B8 (stating that customers who do not know of privacy policy's existence should not be able to enforce it as contract). Back To Text

[57] See Ticketmaster Corp. v. Tickets.com, Inc., No. CV−99−7654 HLH (BQRx) 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. March 27, 2000). Back To Text

[58] See id. at *1. Back To Text

[59] See id. at *2. Back To Text

[60] See id. at *2−3. Back To Text

[61] See id. at *3. Back To Text

[62] See id. Back To Text

[63] See id. Back To Text

[64] See id. at *7−8. Back To Text

[65] See id. Back To Text

[66] See id. Back To Text

[67] See id. at *8. Back To Text

[68] See id. See also ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding that shrink−wrap licenses are enforceable unless general contract law requires otherwise); Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000) (noting that shrink−wrap licenses where "the customer impliedly assents to [the terms of the license] by, for example, opening the envelope enclosing the software distribution media, are generally valid and enforceable"). Back To Text

[69] See Ticketmaster Corp., 2000 U.S. Dist. LEXIS at *8. Back To Text

[70] Id. However, leave to amend was granted in case on remand the facts showed that Tickets.com in fact knew of the terms and conditions. See id. Back To Text

[71] See id. Back To Text

[72] Sale of customer lists constitutes disclosure in violation of the privacy policy. See supra note 48 and accompanying text. Back To Text

[73] See supra notes 56−71 and accompanying text. Back To Text

[74] Under this doctrine, one of the factors in determining the enforceability of particular language is whether it is "hidden in a maze of fine print." M.A. Mortenson Co., Inc. v. Timberline Software Corp., 998 P.2d 305, 315 (2000) (citing Nelson v. McGoldrick, 896 P.2d 1258, 1262 (1995)). See also American Airlines v. Wolens, 513 U.S. 219, 249 (1995) (noting that use of fine print is within concept of procedural unconscionability) (O'Connor, J., dissenting); Williams v. First Gov't Mortgage & Investors Corp., 225 F.3d 738, 748 (D.C. Cir. 2000) (considering whether important terms were hidden such that one party could not make meaningful choice). Back To Text

[75] Also, it should be recognized that The Uniform Electronic Transactions Act, §§ 1−21 (1999) and The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq. (2000) may also validate privacy policies as enforceable contracts. However, this Note will not address this issue any further. Back To Text

[76] The Code, moreover, allows assignment of executory contracts even if the contract expressly prohibits such assignment. See 11 U.S.C. § 365(f) (1994); Headquarters Buick/Nissan, Inc. v. General Motors Corp. (In re Headquarters Dodge, Inc.), 13 F.3d 674, 682 (3d Cir. 1993) (stating that § 365(f) "was designed to prevent anti−alienation or other clauses in leases and executory contracts assumed by the Trustee from defeating his or her ability to realize the full value of the debtor's assets in a bankruptcy case"); Metropolitan Airports Comm'n v. Northwest Airlines, Inc. (In re Midway Airlines, Inc.), 6 F.3d 492, 494 (7th Cir. 1993) (noting that trustee may assume or reject executory contracts without consent of other party and notwithstanding prohibition in contract against assignment). However, if § 365(c) applies, then an executory contract may not be assumed or assigned under any circumstances. See 11 U.S.C. § 365(c)(1)−(4) (1994) (prohibiting assumption or assignment under certain circumstances even if contract or lease does not do so); Perlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment, Inc.), 165 F.3d 747, 750 (9th Cir. 1999) (stating that debtor cannot assign executory contract where applicable law would prohibit assignment). Back To Text

[77] The discussion of whether the relationship between a website and its customers based on a Privacy Statement creates a contract is a discussed supra Part II.A. Back To Text

[78] Although not defined in the Code, the Supreme Court has stated that an executory contract is one "on which performance is due some extent on both sides." NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984). This was interpreted by the Ninth Circuit as "executory contracts are those in which the obligations of both parties are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." In re Rehbein, 60 B.R. 436, 440 (B.A.P. 9th Cir. 1986) (citations omitted). Back To Text

[79] H.R. Rep. No. 95−595, at 347 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6903; see also, S. Rep. No. 95−989, at. 58 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5844. Back To Text

[80] Countryman, supra note 22 at 460. A number of circuits have applied this definition. See, e.g., Counties Contracting & Constr. Co. v. Constitution Life Ins. Co., 855 F.2d 1054, 1060 (3d Cir. 1988) (applying Countryman definition); In re Speck, 798 F.2d 279, 279−80 (8th Cir. 1986) (same); In re Pacific Express, Inc., 780 F.2d 1482, 1487 (9th Cir. 1986) (same); Lubrizol Enter. Inc. v. Richmond Metal Finishers, 756 F.2d 1043, 1045 (4th Cir. 1985) (same). See also Chattanooga Memorial Park v. Still (In re Jolly), 574 F.2d 349, 351 (6th Cir. 1978) (applying "functional definition" of executory contract based upon underlying purpose of § 365 of enhancing debtor's estate). Back To Text

[81] Tonry v. Hebert (In re Tonry), 724 F.2d 467, 468 (5th Cir. 1984). See also Sipes v. General Dev. Corp. (In re General Dev. Corp.), 177 B.R. 1000, 1012 (S.D. Fla. 1995) (stating that determining whether contract is executory for rejection purposes depends on benefits that would be produced for the estate); Texaco, Inc. v. Louisiana Land & Exploration Co., 136 B.R. 658, 668 (M.D. La. 1992) (holding that mineral lease was executory in spite of fact that obligation to perform is "imposed almost exclusively upon one party"); In re Ashley, 41 B.R. 67, 70 (Bankr. E.D. Mich. 1984) (holding that contract was executory under either Countryman definition or In re Tonry method). Cf. In re WRT Energy Corp., 202 B.R. 579, 582 (Bankr. W.D. La. 1996) (reasoning that Tonry decision was aberration because of nature of contract involved was attorney contingent fee contract in chapter 7 liquidation cases). Back To Text

[82] Toysmart's privacy policy does not contain obligations other than the promise by Toysmart to keep Personal Information Confidential. See First Amended Complaint For Permanent Injunction and Other Equitable Relief, (visited Sept. 19, 2000) <http://ftc.gov/os/2000/07/toysmartcomplaint.htm> (attaching Toysmart privacy policy that sets forth unilateral obligation of company to keep information confidential). Back To Text

[83] Since the contract would be deemed to be non−executory there is no further analysis as to assumption, assignment or rejection of an executory contract. For instance, in In re Noco, Inc., 76 B.R. 839 (Bankr. N.D. Fla. 1987) the bankruptcy court found that the only remaining obligation of the debtor under a franchise agreement was the duty not to compete. This contract was deemed not executory and therefore was not subject to rejection under § 365. Id. at 843. See also In re Stein and Day Inc., 81 B.R. 263, 267 (Bankr. S.D.N.Y. 1988) (holding that where author has fully performed his obligation to write two books, publisher in bankruptcy may not reject its obligation to pay royalties). Back To Text

[84] See supra Part II.B. Back To Text

[85] See supra note 81. The contract between Toysmart and its customers may be executory if the customers have obligations that have yet to be performed. For instance, the customer may still have to remit payment to Toysmart for goods it ordered while online. Notwithstanding this possibility, the analysis under this part of the Note will be unchanged due to the non−delegable nature of the duties Toysmart has undertaken pursuant to its privacy policy. Back To Text

[86] Generally, an executory contract may be assumed, assigned or rejected by the trustee or debtor in possession under § 365 of the Code. See 11 U.S.C. § 365 (1994). Back To Text

[87] See infra notes 88−94 and accompanying text. Back To Text

[88] § 365(f)(2) states:

The trustee may assign an executory contract or unexpired lease of the debtor only if –

the trustee assumes such contract or lease in accordance with the provisions of this section; and

adequate assurance of future performance by the assignee of such contract or lease provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2) (1994). Back To Text

[89] Section 365(c) states:

The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional residential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same persons, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

11 U.S.C. § 365(c) (1994). Back To Text

[90] See 4 Norton Bankruptcy Law & Practice § 39:20 (William L. Norton, Jr. et al. eds., 2d ed. 1997) (noting that purpose of subsection (c) is "consistent with the general thrust of Code § 365"). Back To Text

[91] 11 U.S.C. § 365(c)(1)(A) (1994). See In re Schick, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999) (stating "[g]enerally, a right is not assignable if assignment would materially change the duty of the obligor, increase his burden or risk or impair the chance of receiving a return performance or reduce its value"). Back To Text

[92] A personal service contract is one that:

contemplates the performance of personal services involving the exercise of special knowledge, judgment, taste, skill, or ability forms an exception to the general rule of assignability of contracts, and is not assignable by the party under obligation to make such performance, without the consent of the other party to the contract . . . . Whether a contract requires the personal services of the contracting party depends on the intention of the parties as shown by the language and subject matter of the contract viewed in the light of surrounding circumstances.

6A Corpus Juris Secundum § 32 (1975) (footnotes omitted).

The Restatement (Second) of Contracts defines a personal service contract as one where the duty is so unique that the duty is thereby rendered nondelegable. A nondelegable duty is defined as follows: "Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised." Id. at § 318(2) (1981). Back To Text

[93] See Ford Motor Co. v. Claremont Acquisition Corp. (In re Claremont Acquisition Corp.), 186 B.R. 977, 983 (C.D. Cal. 1995) (rejecting argument that § 365(c) applies only to personal service contracts); In re Nitec Paper Corp., 43 B.R. 492, 497−98 (S.D.N.Y. 1984) (holding that Niagara Redevelopment Act imposed on utility company nondelegable duty which could not be assigned in bankruptcy) (citing In re Pioneer Ford Sales, Inc., 30 B.R. 458, 459 (D.R.I. 1983)). Back To Text

[94] It remains possible that a court may use the expanded definition of "executory contract" and hold that since there is a material obligation owed by the debtor, § 365 is applicable. However, as mentioned above, assignment is impermissible because the contract involves a non−delegable duty. This, of course, would not prohibit an Internet company from timely rejecting the contract pursuant to 11 U.S.C. § 365(a). Such rejection would be viewed as a breach of contract and give all customers and TRUSTe claims for such breach under 11 U.S.C. § 502(g). Notwithstanding this breach, the customers still would maintain an interest in the customer lists developed by the website and a sale of those lists should be prohibited. See infra Part III. Back To Text

[95] See 11 U.S.C. § 541 (1994). Back To Text

[96] See 11 U.S.C. § 541(c) (1994). Back To Text

[97] 440 U.S. 48 (1979). Back To Text

[98] Id. at 55. (internal citations omitted). See also Integrated Solutions, Inc. v. Service Support Specialties, Inc., 193 B.R. 722, 729 (D.N.J. 1996) (stating that bankruptcy estate succeeds only to property that debtor possessed outside of bankruptcy and extent of titles and rights thereto generally are defined by state law). Back To Text

[99] See Gumport v. Sterling Press (In re Transcon Lines), 58 F.3d 1432, 1438 (9th Cir. 1995) (noting that "non−bankruptcy law defines the nature, scope and extent of the property rights that come into the hands of the bankruptcy estate…only those property rights which are owned by the debtor become property of the estate."); see also In re Sanders, 969 F.2d 591, 593 (7th Cir. 1992) (noting "the basic tenet of bankruptcy law that a bankruptcy trustee succeeds only to the title and rights in property that the debtor had at the time she filed the bankruptcy petition"); In re Silldorff, 96 B.R. 859, 866 (C.D. Ill. 1989) (noting that the trustee is only entitled to the property or assets which the debtor have or have rights to pre−petition). Back To Text

[100] See Integrated Solutions Inc. v. Service Support Specialists, Inc., 124 F.3d 487, 492−93 (noting "the trustee does not have greater rights in the property of the estate than the debtor had before filing for bankruptcy"); In re Bishop College, 151 B.R. 394, 398 (Bankr. N.D. Tex. 1993) (noting bankrupt's estate receives trust assets "subject to any restrictions imposed by state law, pre−petition"). Back To Text

[101] In re Balay, 113 B.R. 429, 445 (Bankr. N.D. Ill. 1990). See also In re Brooks, 60 B.R. 155, 160 n.4 (Bankr. N.D. Tex. 1986) (stating "a bankruptcy trustee can acquire no greater rights in the property than the debtor possessed"). Back To Text

[102] See supra notes 49−55 and accompanying text. Back To Text

[103] See Limited Opposition By Official Committee of Unsecured Creditors to Motion For Approval of FTC Settlement at ¶ 7, In re Toysmart, LLC, No. 00−13995−CJK (Bankr. D. Mass. filed Aug. 11, 2000). Under the terms of the proposed stipulation, only an entity that "concentrates its business in the family commerce market" and agrees to be bound by the terms of the Privacy Statement will be considered a "qualified buyer." See Stipulated Consent Agreement and Final Order (visited Nov. 4, 2000) <http://www.ftc.gov /os/2000/07/toysmartconsent.htm>. Back To Text

[104] See Limited Opposition By Official Committee of Unsecured Creditors to Motion For Approval of FTC Settlement at ¶ 9 n.3, In re Toysmart, LLC, No. 00−13995−CJK (Bankr. D. Mass. filed Aug. 11, 2000) (emphasis added). The argument made by the Committee appears to be that without an "interest," the customers could not prevent a sale of the customer lists free and clear of that "interest" under § 363(f). Back To Text

[105] 99 F.3d 573 (4th Cir. 1996). Back To Text

[106] See id. at 576 (affirming judgment of district court). Back To Text

[107] See id. at 577. Back To Text

[108] Id. Coal producers were required to contribute premiums based upon a statutory formula basis to two federal benefit plans. See id. at 576−77. It also provided that "successors in interest" could, under certain circumstances, be required to make like contributions. See id. Back To Text

[109] See id. at 582. Back To Text

[110] Id. (emphasis added). Back To Text

[111] See First Amended Complaint For Permanent Injunction and Other Equitable Relief, (visited Sept. 19, 2000) <http://ftc.gov/os/2000/07/toysmartcomplaint.htm> (quoting privacy policy of Toysmart). Back To Text

[112] See id. Back To Text

[113] See Obee & Plouffe, supra note 1, at 1019−20 (noting general public concern over disclosing social security number). Back To Text

[114] The ability to use the information −− that is, the stated purpose for obtaining the information was to tailor the customers' online experience −− was granted by the customers subject to the terms of the Privacy Statement. Back To Text

[115] 189 B.R. 97, (Bankr. E.D. Va. 1995) Back To Text

[116] See id. Back To Text

[117] See id. at 100. Back To Text

[118] See Va. Code Ann. § 32.1−329 (Michie 1992) (repealed 1999). Back To Text

[119] See In re WBQ Partnership, 189 B.R. at 101. Back To Text

[120] See id. Back To Text

[121] See id. at 102−04 (holding that sale satisfies the elements of "sound business purpose test"). Back To Text

[122] Id. at 105. Back To Text

[123] Id. Back To Text

[124] See id.; see also Michigan Employment Sec. Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co., Inc.), 930 F.2d 1132, 1147 (6th Cir. 1991) (holding that debtor's experience history is not an interest that attaches to property sold under § 363 "so as to cloud its title."); Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (stating that § 363(f) "authorizes sales free and clear of specific interests in property being sold; liens, for example.") (emphasis added). Back To Text

[125] Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 259 (3d Cir. 2000). Back To Text

[126] See Morse v. North Coast Opportunities, 118 F.3d 1338, 1340 (9th Cir. 1997) (reciting lower court's inquiry into governmental action where it held that council was not actor and could not be held liable for violation of constitutional rights); Medical Inst. of Minnesota v. National Ass'n of Trade and Technical Sch., 817 F.2d 1310, 1312 (8th Cir. 1987) ("[a] fundamental principle of federal constitutional law is that private action . . . can not violate the equal protection or due process guarantees of the United States Constitution"). Back To Text

[127] See Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial action can include enforcement of private agreements); but see Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) (stating that mere acquiescence in private

action has not been held to constitute state action). Back To Text

[128] 334 U.S. 1 (1948). Back To Text

[129] See id. at 19. Back To Text

[130] Id. Back To Text

[131] See 11 U.S.C. § 363(b) (1994) (requiring "notice and a hearing" before trustee may sell assets outside the ordinary course of business). Back To Text

[132] See U.S. Const. amend. I, IV, V, IX, XIV; Bowers v. Hardwick, 478 U.S. 186, 207−08 (1986) (stating that Fourth Amendment affords individual right to conduct intimate relationships in privacy of his own home) (Blackmun, J., dissenting); Whalen v. Roe, 429 U.S. 589, 599 n. 23, 25 (1977) (stating that right of privacy has been found in First, Ninth, and Fourteenth Amendments); Roe v. Wade, 410 U.S. 113, 152 (1973) (citing cases where right of privacy was found under various amendments to the Constitution). Back To Text

[133] Paul P. v. Verniero, 170 F.3d 396, 400 (3d Cir. 1999) (citing Whalen, 429 U.S. at 598−600). Back To Text

[134] Id. See Ferm v. United States Trustee (In re Crawford), 194 F.3d 954, 958 (9th Cir. 1999) (deciding whether required disclosure of Bankruptcy Petition Preparer's Social Security Number violated second privacy interest formulated in Whalen). Back To Text

[135] See Paul P., 170 F.3d at 401 (citing Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 112−17 (3d Cir. 1987)). Back To Text

[136] See id. Back To Text

[137] With respect to the name and address of customers, while the argument can be made that this information is often available to the public by way of phone books, this is not dispositive. As stated by one court "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Doe v. Poritz, 662 A.2d 367, 409 (N.J. 1995) (citing United States Dep't of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 501 n.8 (1994)). Back To Text

[138] 55 F. Supp. 2d 504 (W.D. Va. 1999), aff'd No. 99−4793, 2000 U.S. App. LEXIS 18665 (4th Cir. Aug. 3, 2000). Back To Text

[139] Hambrick, 55 F. Supp. 2d at 505 (stating that New Hampshire police officer, posing as 14 year old boy "concluded that [the defendant operating under a screen name in a chat room] sought to entice a fourteen−year−old boy" to leave New Hampshire and live with him in Virginia). Back To Text

[140] Id. Back To Text

[141] Id. Moreover, every computer registers a unique Internet Protocol number while it is online. See supra note 41. Back To Text

[142] See Hambrick, 55 F. Supp. 2d at 506 (stating that justice of peace who signed subpoena did not issue it pursuant to "matter pending before himself, any other judicial officer, or a grand jury"). Back To Text

[143] See id. Back To Text

[144] 389 U.S. 347 (1967). Back To Text

[145] See Hambrick, 55 F. Supp. 2d at 506. Back To Text

[146] Id. (citing Katz, 389 U.S. at 353). Back To Text

[147] Id. (citing California v. Greenwood, 486 U.S. 35, 39 (1988)). Back To Text

[148] See id. Back To Text

[149] Id. at 509. It is important to note, however, that the court does not frame its holding in terms of the second prong of the Katz test −− i.e., that what society finds objectively reasonable was not necessary to the analysis. See id. Back To Text

[150] See id. at 508 (citations omitted). Back To Text

[151] Id. at 509. The court here was most likely referring to a privacy statement like that under scrutiny in In re Toysmart. Back To Text

[152] Id. at n.3. Back To Text

[153] See id. at 509. Back To Text

[154] In affirming the lower court, the Fourth Circuit also notes the absence of a restrictive agreement. It cites United States v. Miller, 425 U.S. 435, 443 (1976) for the assertion that "an individual has no Fourth Amendment privacy interest in information released to a third party and later conveyed by that third party to a governmental entity, 'even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.'" United States v. Hambrick, No. 99−4793, 2000 U.S. App. LEXIS 18665, at *10 (4th Cir. Aug. 3, 2000). In support of the District's conclusion, the Fourth Circuit stated that the lack of a restrictive agreement between the defendant and the internet service provider coupled with the common practice of providers of revealing Personal Information to marketing firms went far in concluding that no reasonable expectation of privacy could exist to an internet website user. See id at *10 n.3. Back To Text

[155] See First Amended Complaint For Permanent Injunction and Other Equitable Relief, (visited Sept. 19, 2000) <http://ftc.gov/os/2000/07/toysmartcomplaint.htm> (quoting privacy policy of Toysmart). Back To Text

[156] See id. Back To Text

[157] See Paul v. Davis, 424 U.S. 693, 713 (1976) (stating that right of privacy is limited to those implicit in ordered liberty concept); Griswold v. Connecticut, 381 U.S. 479, 485−86 (1965) (holding that law forbidding use of contraceptives invades fundamental right of marriage). Back To Text

[158] See id. at 504 ("statutes regulating sensitive areas of liberty do . . . require strict scrutiny.") (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). See also Watkins v. United States Army, 847 F.2d 1329, 1336 (9th Cir. 1988) (delineating differences between strict scrutiny, intermediate scrutiny, and rational basis review). Back To Text

[159] See Paul P. v. Farmer, 227 F.3d 98, 107 (3d Cir. 2000) (noting that, even if privacy interest exists in Personal Information, they are outweighed by compelling governmental interest in disclosure to public); Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987) ("[m]ost circuits appear to apply an 'intermediate standard of review' for the majority of confidentiality violations . . . with a compelling interest analysis reserved for 'severe intrusions' on confidentiality.") (citations omitted). Back To Text

[160] See Paul P., 227 F.3d at 107 (holding that governmental interests outweigh privacy interests). Back To Text

[161] 194 F.3d 954, (9th Cir. 1999). Back To Text

[162] See id. at 956. Back To Text

[163] Id. at 958. Back To Text

[164] Id. Back To Text

[165] Id. at 959 (citing Doe v. Attorney General, 941 F.2d 780, 796 (9th Cir. 1991)). Back To Text

[166] See id. at 956. Back To Text

[167] See id. at 960. Back To Text

[168] See id. (holding that "speculative possibility of identity theft is not enough to trump the importance of the governmental interests" behind disclosure requirement). Back To Text

[169] See In re Tessier, 190 B.R. 396, 405 (Bankr. D. Mont. 1995). Back To Text

[170] See Slind−Flor, supra note 37, at A1. Back To Text

[171] See Homan, supra note 2, at 5 (noting that sale of list of this size "sparked criticism" from many state Attorneys General). Back To Text

[172] See Raysman & Brown, supra note 53, at 3 (noting Disney's offer to buy and destroy list). Back To Text

[173] See Nashelsky, supra note 4, at S1. Back To Text

[174] While we contend that no dollar amount would justify the infringement on customers' right of privacy, certainly, this minimal amount would not. Back To Text

[175] See In re Oglesby, 196 B.R. 938, 943 (Bankr. E.D. Va. 1996) (noting that while § 363(f) sale requires tax liens to be satisfied by proceeds from sale, § 724(b) places administrative expenses above them); In re Creative Restaurant Management, Inc., 141 B.R. 173, 177 (Bankr. W.D. Mo. 1992) (stating that, once sale is made free and clear of interests and valid lien is established, creditor may only look to sale proceeds and not purchaser for satisfaction of its claim); In re Channel One Communications, Inc., 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990) (noting that sale of assets free and clear require that interests attach to proceeds); see infra Part III.B.3. Back To Text

[176] Several courts have ruled that even though rejection of a debtor's chapter 13 plan that calls for periodic payments to churches substantially burdens the debtor's first amendment right to free exercise, such rejection was justified because the Code serves a compelling governmental interest. See Weinman v. Word of Life Christian Ctr. (In re Bloch), 207 B.R. 944, 951 (D. Col. 1997) (stating that even if Code places substantial burden on religious practices, such burden is justified by compelling governmental interest); Morris v. Midway Southern Baptist Church (In re Newman), 203 B.R. 468, 477 (D. Kan. 1996) (same). However, some Bankruptcy Courts also have found that no compelling governmental interest exists to restrict a debtor's first amendment rights. See United States v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1420 (8th Cir. 1997) (holding that Code is not related to national security or public safety so is not compelling governmental interest); Fitzgerald v. Magic Valley Evangelical Free Church (In re Hodge), 200 B.R. 884, 898 (Bankr. D. Idaho 1996) ("interests advanced by the bankruptcy system are not compelling as that term has been developed under First Amendment and RFRA jurisprudence"). One should note, however, that the results in the latter cases cited above have been overruled by the Supreme Court's decision in City of Boerne v. Flores, 521 U.S. 507 (1997), which held that the RFRA was unconstitutional. See id. at 536. Back To Text

[177] See supra notes 104−125 and accompanying text. Back To Text

[178] See supra note 124. Back To Text

[179] See In re Pintlar Corp., 187 B.R. 680, 682 (Bankr. D. Idaho 1995) (holding that debtor cannot sell property free and clear of EPA's statutorily created interests); WBQ Partnership v. Commonwealth of Virginia Dep't of Med. Assistance Services (In re WBQ Partnership), 189 B.R. 97, 105 (Bankr. E.D. Va. 1995) (stating that Virginia statute giving Virginia Department of Medical Assistance Services right of depreciation recapture created interest). Back To Text

[180] See McFarland v. Miller, 14 F.3d 912, 914 (3d Cir. 1994) (holding that cause of action for unauthorized exploitation of person's name survives his death such that it may be pursued by his heirs); Acme Operating Co., Inc. v. Kuperstock, 711 F.2d 1538, 1544 (11th Cir. 1983) (holding that person who has assigned right to use name has created, by contract, an inheritable property right) (citing Lugosi v. Universal Pictures, 603 P.2d 425, 433 (Cal. 1979)). Back To Text

[181] See Gouveia v. Tazbir 37 F.3d 295, 299 (7th Cir. 1995) (holding that restrictive covenants in real property constitutes an interest); Restatement (Second) of Torts § 652I cmt. b (1977) ("[s]ince appropriation of name or likeness is similar to impairment of a property right and involves an aspect of unjust enrichment of the defendants or his estate, survival rights may be held to exist following the death of either party"). Back To Text

[182] See Ninth Ave. Remedial Group v. Allis−Chalmers Corp., 195 B.R. 716, 729−30 (N.D. Ind. 1996) (stating that § 363(f) allows sale of assets free and clear of all "liens, claims, taxes, encumbrances, obligations, contractual commitments and interests") (citing In re Apex Oil Co., 92 B.R. 847 (Bankr. E.D. Mo. 1988)). The criteria necessary to authorize sales under sections 363(f)(1) −(5) are disjunctive so only one need be met. See In re WBQ Partnership, 189 B.R. at 105 (stating "the 'or' that precedes subsection (f)(5) indicates that the five conditions are phrased in the disjunctive, meaning that property may be sold free of an interest if that interest falls into only one of the five conditions"). Back To Text

[183] See 11 U.S.C. § 541(c) (1994). Back To Text

[184] See 11 U.S.C. § 363(l) (1994). Back To Text

[185] 11 U.S.C. § 363(l) states in pertinent part that during the course of a chapter 11 case, a "trustee may use, sell or lease property? . . . notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor." Id. Back To Text

[186] 264 U.S. 1 (1924). Back To Text

[187] See id. at 13. Back To Text

[188] See id. Back To Text

[189] The purpose of § 363(f) "is to enable a debtor to liquidate its assets without adversely affecting the rights of creditors." In re Creative Restaurant Management, Inc., 141 B.R. 173, 179 (Bankr. W.D. Mo. 1992). Back To Text

[190] 11 U.S.C. § 363(f)(1) (1994). Back To Text

[191] See supra notes 87−94 and accompanying text. Back To Text

[192] For a discussion on the non−assignability in bankruptcy of certain contracts, see supra Part II.C. Back To Text

[193] See supra notes 180−81. Back To Text

[194] See Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (recognizing the metaphor of bundle of rights); see also Adams v. Cleveland Cliffs Iron Co., 602 N.W. 215, 218 n.6 (Mich. Ct. App. 1999) (noting that the metaphor of property as including a bundle of sticks comes from Cardozo). See generally Benjamin N. Cardozo, The Paradoxes of Legal Science 129 (1928). Others have credited Professor Wesley Newcomb Hohfeld with creating this metaphor in

his combined works Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913) and Fundamental Legal Conceptions As Applied in Judicial Reasoning, 26 Yale L. J. 710 (1917). Back To Text

[195] See Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (describing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property") (quoting Kaiser Aetna, 444 U.S at 176). Back To Text

[196] See id. Back To Text

[197] See City of West Bend v. Continental IV Ltd. Partnership, 535 N.W.2d 24, 26 (Wis. Ct. App. 1995) (noting, in the case of leasehold estates, owner transfers part of bundle of rights to lessee for duration of the lease). Back To Text

[198] 37 F.3d 295, 298 (7th Cir. 1994). Back To Text

[199] See id. at 297. Back To Text

[200] See id. Back To Text

[201] See id. Back To Text

[202] See id. Back To Text

[203] See id. Back To Text

[204] See id. While the court paid particular attention to the fact that § 363(f)(5) did not authorize the sale of the property free and clear of the restrictive covenant, since only one of the five elements of 363(f) must be met to sell a property free and clear of the "interest" it therefore must also be that the court said that "applicable nonbankruptcy law" −− § 363(f)(1) −− must also not allow the sale. Back To Text

[205] See id. at 300. Back To Text

[206] West Alameda Heights Homeowners Ass'n v. Board of County Comm'rs., 458 P.2d 253, 256 (Colo. 1969). Back To Text

[207] See Basil H. Mattingly, Sale of Property of the Estate Free and Clear of Restrictions and Covenants in Bankruptcy, 4 Amer. Bankr. Inst. L. Rev. 431, 447 (1996). Back To Text

[208] See id. Back To Text

[209] See id. Back To Text

[210] Rombauer v. Comptom Heights Christian Church, 40 S.W.2d 545, 553 (Mo. 1931). See also, Mattingly supra note 207, at 448 ("The fact that the subject property is in the bankruptcy estate is insufficient in itself to establish changed conditions"). Back To Text

[211] See Mattingly supra note 207, at 448 (citing Western Land Co. v. Truskolaski, 495 P.2d 624, 626 (Nev. 1972)) (supporting the proposition that party wishing to extinguish covenant must demonstrate lack of benefit derived from restriction); West Alameda Heights Homeowners Ass'n v. Board of County Comm'rs., 458 P.2d 253, 256 (Colo. 1969) (same); Deak v. Heathcote Ass'n, 595 N.Y.S.2d 556, 557 (App. Div. 1993) (same). Back To Text

[212] See supra Part III.A.1.a. Back To Text

[213] See Citicorp Homeowners Services, Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345−46 (E.D. Pa. 1988) (holding that failure to file timely objection by properly noticed party constitutes consent under § 362(f)(2); Pelican Homestead v.

Wooten (In re Gabel), 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (same). Back To Text

[214] 11 U.S.C. § 363(f)(3) (1994). Back To Text

[215] See In re 523 E. Fifth St. Hous. Preservation Dev. Fund Corp., 79 B.R. 568, 570 (Bankr. S.D.N.Y. 1987) (concluding, without discussion of Code's definition of lien, that restrictive covenant requiring property to be only used for low−income housing was not lien). Back To Text

[216] 11 U.S.C. § 101(37) (1994). Back To Text

[217] Mattingly supra note 207, at 450 (citing Gouveia v. Tazbir, 37 F.3d 295, 297 (7th Cir. 1994)). Back To Text

[218] See id. (discussing the definition of "lien" from 11 U.S.C. § 101(37) and applying that definition to the facts of Gouveia). Professor Mattingly asserts that "a restrictive use covenant, such as the one at issue in Gouveia is precisely an interest to secure performance of an obligation." Id. Back To Text

[219] See 11 U.S.C. § 363(f)(3) (1994); Scherer v. Federal Nat'l Mortgage Assoc. (In re Terrace Chalet Apartments, Ltd.), 159 B.R. 821, 825−26 (E.D. Ill. 1993) (noting split in Circuits whether "value of all liens" refers to actual economic value of lien or face amount of lien). If the total aggregate value of the liens exceeds the sales price the trustee would have no incentive to sell the property since the interest would attach to the proceeds of the sale and there would be no benefit to the estate by selling the property free and clear of the lien. As such, the trustee may abandon the property pursuant to § 554(a) of the Code as being property that is "of inconsequential value to the estate." 11 U.S.C. § 554(a) (1994). Back To Text

[220] This Note will not delve into attempting to value the interest a customer has in his or her Personal Information as created by the Privacy Statements. It is worth mentioning, however, that in the Toysmart case the settlement reached between the debtor and the Federal Trade Commission would have allowed the sale to Disney for $50,000. The customer list contained approximately 250,000 names. Theoretically, if all customers object to the sale, the court would have to value the interest at less than twenty cents to allow for the sale pursuant to § 363(f)(3). Back To Text

[221] 11 U.S.C. § 363(f)(4). The trustee has the burden of proving that a "bona fide dispute" exists. See In re Terrace Chalet Apartments, LTD., 159 B.R. at 828 (stating that trustee has burden of establishing existence of bona fide dispute) (citing In re Octogan Roofing, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991)). Back To Text

[222] In re Taylor, 198 B.R. 142, 162 (Bankr. D.S.C. 1996). Back To Text

[223] See id; In re Collins, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995) (stating that court must determine whether there is "an objective basis for either a factual or legal dispute as to the validity of the debt") (citing In re Octagon Roofing, 123 B.R. at 590). However, not any alleged dispute satisfies the subsection. There must clearly be some sort of meritorious, existing conflict. See In re Atlas Machine & Iron Works v. Bethlehem Steel, 986 F.2d 709 (4th Cir. 1993). See also Sipple v. Atwood (In re Atwood), 124 B.R. 402, 407 (Bankr. S.D. Ga. 1991) (defining bona fide dispute as "genuine issue of material fact that bears upon the Debtor's liability, or meritorious contention as to the application of law to undisputed facts"). Back To Text

[224] In re Taylor, 198 B.R. at 161. Back To Text

[225] Id. at 161−62. Back To Text

[226] Id. at 162−63. Essentially, in this analysis, a court looks to the validity of the interest. See, e.g., In re Collins, 180 B.R. at 452 (examining the validity of a lien); In re Olympia Holding Corp., 129 B.R. 679, 681 (Bankr. M.D. Fla. 1991) (stating that trustee's answer to interest−holder's complaint in adversary proceeding was sufficient to put issue of interest in bona fide dispute). Back To Text

[227] A detailed analysis asserting that the customers do have an interest in their Personal Information can be found supra Part III.A. Back To Text

[228] The cases cited where the Debtor contends that even if the rights claimed by the third party constitute an interest, the third party does not hold an interest in the property. Here, once an interest is created by an express privacy policy, there is no denying that the customers have that interest. Back To Text

[229] See supra Part III.A. Back To Text

[230] 11 U.S.C § 365(f)(5) (1994). Back To Text

[231] Gouevia v. Tazbir, 37 F.3d 295, 299 (7th Cir. 1994) (emphasis added). In Gouevia, the covenant at issue provided that parties seeking to enforce the covenant had the option of seeking either an injunction or damages. Since the neighbors elected to restrain the violation, the neighbors could not be compelled to accept money damages. Id. Back To Text

[232] WBQ Partnership v. Commonwealth of Virginia Dep't of Med. Assistance Services (In re WBQ Partnership), 189 B.R. 97, 106 (Bankr. E.D. Va. 1995) (stating that Virginia statute giving Virginia Department of Medical Assistance Services right of depreciation recapture created interest) (citations omitted). Back To Text

[233] See id. Back To Text

[234] See id. Back To Text

[235] If, despite the arguments laid out above, the court authorizes the sale free and clear of the customers interest in their Personal Information, or, the trustee attempts to sell the customer lists subject to those interests, another means of blocking the sale might be available to the customers under § 363(e). Under § 363(e) of the Code, the court may prohibit the sale of the customer lists as necessary to protect the customer's interest in their Personal Information. § 363(e) requires a court to prohibit the sale where it is necessary to provide adequate protection of an interest. See 11 U.S.C. § 363(e) (1994); Circus Time, Inc. v. Oxford Bank and Trust (In re Circus Time, Inc.), 5 B.R. 1, 3 (Bankr. D. Me. 1979) (holding that sale of assets may be made free and clear of interests and adequate protection under § 363(e) made by having interests attach to proceeds of sale). In In re Toysmart, since sale would destroy the interests of the customers, that of privacy in their Personal Information, such sale should be prohibited.

There is at least an argument that this should occur notwithstanding the fact that customers of Toysmart are not secured creditors in the traditional sense. See In re Megan−Racine Associates, Inc., 192 B.R. 321, 326 (Bankr. N.D.N.Y. 1995) (noting that two views of adequate protection under § 363(e)). While the strict view requires a creditor seeking adequate protection be secured, a more liberal approach is to allow adequate protection to those with "at least a reversionary interest in the property." Id. (stating that 1994 amendments to Code seem to reject the strict view). Hence, since by the terms of the privacy policy with Toysmart, the customer's ostensibly have retained an interest in their Personal Information, then they would seem to fit within the "reversionary interest" noted by the In re Megan−Racine Court. Back To Text

[236] See Loomis, supra note 10, at 5 (stating Amazon.com has changed its privacy policy partially in response to Toysmart case). Back To Text

[237] See id. Back To Text

[238] See id. Back To Text

[239] Without the reservation by customers, they would not have any contractual, proprietary or constitutional interest. See Shibley v. Time, Inc., 341 N.E.2d 337, 339 (Ohio App. 1975) (holding that magazine publisher did not violate plaintiff's right of privacy when it sold its customer's name and address to direct mail marketer). Back To Text

[240] See The Privacy Policy Enforcement in Bankruptcy Act of 2000, S. 2857, 106th Cong. §§ 1−2 (2000). Back To Text

[241] See id. Back To Text

[242] Obviously, the analysis of this Note contends that there is no "loophole." Simply put, these lists cannot be sold. Back To Text

[243] See Bankruptcy Privacy Bill Introduced in Senate, Consumer Bankruptcy News, Aug. 8, 2000 (quoting Senator Leahy as saying it is wrong to allow debtors to sell customer databases in violation of stated privacy policy). Back To Text

[244] See Salazar, supra note 14, at B6 (noting that bill may hurt privacy in sense that debtor's become powerless to protect Personal Information); Winn & Wrathall, supra note 8, at B8 (stating same); Back To Text

[245] See Salazar, supra note 14, at B6. Back To Text

[246] Id. In addition to concern of creditors levying against the customer list, there also is a possibility that if the customer list is outside the jurisdiction of the Bankruptcy Court, a debtor could sell the list in a private transaction without the otherwise necessary Bankruptcy Court approval. Back To Text