Bankruptcy Law Section Newsletter

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Message From the Editor-in-Chief

By Rebecca K. McDowell

Welcome, Dear Readers, to the inaugural newsletter of the New Jersey State Bar Association's Bankruptcy Section!

A caveat: this is not technically "inaugural," as the Section has had a newsletter in the past. However, it's the first one we've had since I joined the Executive Committee in 2022, and we're changing it up a bit, so I'm treating it as inaugural. Besides, I don't want to get bogged down in semantics or split hairs. What lawyer ever engages in semantics and hair-splitting?

Regardless of its genesis, this newsletter is made for you, our Section membership, with the goal of providing content that is informative to you as practitioners but also, we hope, engaging and enjoyable.

We thank you for being a member of the Section, and please feel free to contact any of us with questions about our programs, such as our Annual Forum and our summer barbecue at the Law Center.

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Inside this issue

Message From the Editor-in-Chief 1
By Rebecca K. McDowell

With Updated Interpretation in *Zezas* Ruling, The Times They Are A-Changin' 3
By John M. August

Consumer Privacy Ombudsman Key for Bankruptcy Court 5
By Rebecca L. Rakoski

What's Old is New Again: Assignments for the Benefit of Creditors as a Bankruptcy Alternative 8
By Marc D. Miceli

NJSBA Bankruptcy Crossword Puzzle 9

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The opinions of the various authors contained within this issue should not be viewed as those of the Branruptcy Law Section, or the New Jersey State Bar Association.

With Updated Interpretation in *Zezas* Ruling, The Times They Are A-Changin'

By John M. August

In 1964, Bob Dylan told us:

Come writers and critics
Who prophesize with your pen
And keep your eyes wide
The chance won't come again
And don't speak too soon
For the wheel's still in spin
And there's no tellin' who
That it's namin'
For the loser now
Will be later to win
For the times they are a-changin'

We lawyers and judges may be Dylan's "writers and critics who prophesize with your pen." Then, as now, the times for us are a-changin', as U.S. District Court Judge Kathryn C. Ferguson recognized in her opinion *in In re Andrew B. Zezas*.[1]

Judge Ferguson found that the "majority rule" prohibiting setoff in bankruptcy under Bankruptcy Code § 553 against a debtor's rights in exempt assets under § 522(c) is a-changin':

> While that may have been the majority view at one point, that does not appear to be the current trend. The Third Circuit has not had occasion to rule on this issue but the other Circuits that have, including the Fourth, Fifth and Ninth, have concluded that setoff rights prime a debtor's right to shield exempt property from the claims of pre-petition creditors.[2]

Judge Ferguson reminds us that § 553 merely preserves pre-petition setoff rights; it does not create them. These rights are strictly construed against the party seeking setoff, who has the burden to prove the right to setoff as of the petition date. "But, once proven, setoffs in bankruptcy have been generally favored, and a presumption in favor of their enforcement exists."[3]

Then Judge Ferguson fires the big guns and engages the canons of statutory construction to support her opinion. "[T]his court finds that there is a way to read § 522(c) and § 553(a) in harmony with one another in a way that does not render either a nullity." Judge Ferguson calls § 553(a) "undeniably broad" where it provides that "[e]xcept as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt …."[4]

On the other hand, the provision of rights in exempt property in § 522(c) contains several exceptions. "Although § 553(a) is not listed among the exceptions, it works in a similar manner and if the delineated exceptions do not render § 522(c) a nullity then neither should § 553(a) be seen to do so."[5] Judge Ferguson concludes that, "the undeniably broad language of § 553(a) necessarily includes the property exemption provisions contained in § 522(c) and renders it subordinate to a creditor's setoff rights."[6] Under this analysis, the "majority rule" prohibiting setoff in bankruptcy against a debtor's rights in exempt assets no longer applies.

There are lessons we should learn from this opinion that go beyond §§ 522(c) and 553(a). Just because the majority may interpret the law a certain way does not mean that the interpretation is correct. There is always room for smart lawyers and judges to read the Bankruptcy Code, or any statute, carefully, and challenge prior interpretations. This is a good lesson for young lawyers to learn (and more experienced lawyers to re-learn).

So, thanks to the recently-retired Judge Ferguson for reminding us to read carefully and think critically. Now, as always, it seems "the times they are a-changin'."

John August is a bankruptcy and creditor's rights attorney with the firm of Saiber LLC and is the Chair of the Bankruptcy Law Section of the New Jersey State Bar Association for the 2023-2024 term.

Endnotes

1. No. 21-16570, 2023 Bankr. LEXIS 1327, 2023 WL 3560550 (Bankr. D.N.J. May 18, 2023).
2. *In re Zezas*, 2023 Bankr. LEXIS 1327, at *2.
3. *Id.* at *5.
4. *Id.* at *3 (emphasis in original).
5. *Id.*
6. *Id.*

Consumer Privacy Ombudsman Key for Bankruptcy Court

By Rebecca L. Rakoski

The phrase "Data is the New Oil"[1] is not uncommon and in fact highlights that data in a digital economy can be one of the most valuable assets a business possesses. The data can be in the form of intellectual property or trade secrets, but it most likely includes the personal data a business collects on its consumers. It naturally follows that bankruptcy courts will see a rise in the number of debtors that want to use this asset in bankruptcy. Specifically, debtors will sell their customer lists. These customer lists often include what is considered personal data or information which can significantly impact data privacy laws.

At the onset, it is important to understand that under most regulatory definitions of personal data, the term includes things like an individual's name with their address, financial information, social security number, and so forth. However, the specific definition of what constitutes personal data varies state by state, country by country, and statute by statute.

In 2005, Congress made significant changes to the Bankruptcy Code by enacting the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[2] Included in the amendments was a definition of what constitutes personally identifiable information (PII) under the Bankruptcy Code. The definition included a combination of an individual's name with their physical address, email address, telephone number, social security number, or credit card information that when taken together can identify the individual.[3] This definition of PII aligns with some laws, but newer data privacy laws tend to cast a wider net.

For the purposes of data privacy, BAPCPA also included a change to the way personal information could be sold in bankruptcy. Section 363(b)(1) of the Bankruptcy Code was amended to impose conditions on the sale of PII if the debtor has a privacy policy "in effect on the date of the commencement of the case" that prohibits the transfer of PII. Therefore, when considering the sale of consumer data, a bankruptcy court needs to consider the appointment of a consumer privacy ombudsman (CPO).[4] As data privacy laws continue to evolve, the legal analysis and technological know-how that a CPO will need to fulfill this role will also expand.

This first step notwithstanding will likely not change. A CPO would initially look at the debtor's privacy policy on the petition date to determine if the debtor's privacy policy prohibits the sale or transfer of personal data. If the privacy policy specifically prohibits the sale, the only way the sale can proceed is if a CPO, appointed by the bankruptcy court, approves the sale after finding the absence of any showing that the sale would violate applicable nonbankruptcy law.[5] Therefore, the next step in the analysis is where we will see this change. The CPO must examine the changing regulatory landscape of domestic and international privacy laws to explain to the bankruptcy court whether the sale would violate any one of the laws.

Traditionally, CPOs will review nonbankruptcy federal privacy laws including the Children's Online Privacy Protection Act (COPPA)[6] for children's information, the Health Insurance Portability and Accountability Act (HIPAA)[7] for medical information, and the Gramm-Leach-Bliley Act (GLBA)[8] for when the debtor provides financial services. Another common law considered by the CPO has been the Federal Trade Commission Act (FTC Act).[9] The FTC is charged specifically with protecting consumers from unfair or deceptive business practices and can commence legal actions against companies that do not comply with posted privacy policies.

However, given the changes in the data privacy landscape, the CPO will now need to expand their scope of the legal review to determine if the sale of personal data complies with bankruptcy and nonbankruptcy laws, i.e., privacy laws. In addition to nonbankruptcy federal laws, a CPO must consider international

data protection laws. The European Union enacted the General Data Protection Regulation (GDPR)[10] which impacts many companies in the U.S. that collect data on data subjects located in the European Union. Navigating the complexities of the GDPR and whether the debtor properly collected the personal data it seeks to sell is important. A qualified CPO unquestionably needs to have a thorough understanding of both the GDPR and its extraterritorial implications.

Furthermore, a determining factor for the sale of personal data is the way that data is categorized and stored. Many organizations do not have a data inventory or data categorization that would inform a CPO of the existence and storage of GDPR impacted personal data. A CPO would need to have a thorough understanding of the nature of the data collected, the primary and secondary purpose for the collection of that data, and whether the appropriate GDPR protections were afforded that data before they can even begin to perform a thorough analysis of whether that data can be sold. To say that the GDPR has complicated this analysis is an understatement. It is not the only fly in the proverbial ointment that could impact a debtor's ability to sell the consumer data.

In the absence of a federal data protection law, states have begun enacting their own data privacy laws. California was the first domestic jurisdiction to enact comprehensive privacy legislation with the California Consumer Privacy Act (CCPA),[11] which was followed up quickly by the California Privacy Rights Act (CPRA) that in addition to providing additional privacy rights to California residents also created the California

Privacy Protection Agency (CPPA) to enforce the CCPA and CPRA. Like the GDPR, the CCPA/CPRA provides strict protections to consumer data. Following California, other states that have enacted data privacy laws include Virginia, Colorado, Utah, Connecticut, Iowa, Indiana, Tennessee, Montana, Texas, and Oregon. These laws provide specific rights to people which include the right to access, right to correction, right to deletion, right to data portability, and right to opt out. What's more is each domestic law has its own jurisdictional threshold as to whether the business needs to comply, so a CPO needs to likewise consider whether the debtor's business activities trigger privacy protections to consumer data, and if so, whether those protections would be violated by the sale or transfer of the consumer data in the bankruptcy proceeding.

Finally, many more states are interested in passing privacy laws. States like Illinois, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, and Vermont have all introduced privacy laws. To say that the impact of data privacy laws on bankruptcy proceedings is just beginning is an obvious understatement.

Data privacy laws are seemingly impacting and implicating with greater frequency technology. CPOs will therefore need to begin thinking differently and formulating knowledge that goes beyond this traditional role, having multiple arrows in their quiver and the agility to adapt to this evolving legal landscape. More to the point, they will need an advanced understanding of domestic and international data privacy regulations, technology, and business operations to fully assist bankruptcy courts with consumer privacy issues. Bankruptcy courts have already seen a wave of cases that implicate consumer data privacy and could see a further increase in the event of any cyclical downturns in the economy. Having CPOs with a depth of knowledge on the complexities of privacy regulations, both domestic and international, coupled with an understanding of how it fits with technology will certainly advantage bankruptcy courts as those courts decide how to balance the need of the bankruptcy estate versus the right to data privacy under the law.

Bankruptcy courts have always had to balance the debtor's interest by maximizing the value of the asset against the consumer's privacy interest in their personal data. Data privacy has understandably not been a primary focus of bankruptcy law until recently, especially considering what many observers view as a rapidly developing legal frontier. As we see an increase both domestically and internationally of data privacy laws, more bankruptcy courts will be forced to equitably take into account the privacy impact on consumers when a debtor attempts to sell personal consumer information.

In short, consumers are demanding more protection, and the law is predictably reacting. The sale of consumer data in bankruptcy proceedings is on a clear-cut collision course with domestic and international privacy laws as the traditional notions of privacy are being inverted when states and countries create a privacy framework to protect the data of their citizens. Bankruptcy courts can and are more than able to meet this moment and adapt to this changing landscape by

understanding how to incorporate the more conventional practice in this area of law with the emerging but requisite needs present in the digital age. ■

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Endnotes

1. forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing/
2. *See* Pub. L. No. 109-8, § 231, 119 Stat. 23, 72-73 (2005). congress.gov/bill/109th-congress/senate-bill/256
3. 11 U.S.C. §101(41A).
4. §363(b)(1).
5. §332(b).
6. ftc.gov/legal-library/browse/rules/childrens-online-privacy-protection-rule-coppa
7. hhs.gov/hipaa/index.html
8. ftc.gov/business-guidance/privacy-security/gramm-leach-bliley-act
9. 15 U.S.C. §§41-58. ftc.gov/legal-library/browse/statutes/federal-trade-commission-act
10. gdpr-info.eu
11. oag.ca.gov/privacy/ccpa

What's Old is New Again: Assignments for the Benefit of Creditors as a Bankruptcy Alternative

By Marc D. Miceli

Debtors experiencing financial distress have several options to address their issues. Of course, bankruptcy proceedings under the federal Bankruptcy Code often come to mind, such as chapter 11 or, more recently, subchapter V reorganizations. Other options include liquidations under chapter 7 or even chapter 11. But under the right circumstances, state insolvency proceedings may be good alternatives. One such alternative is a New Jersey assignment for the benefit of creditors proceeding (ABC).

An ABC is similar to a federal chapter 7 bankruptcy liquidation. Many states have their own statutes governing ABCs, while others are governed under the state's common law. Some states use a court-supervised process, while some do not. In New Jersey, ABCs are court-supervised and governed under *N.J.S.A.* 2A:19-1, *et al*. (the "ABC Statute"). An old statute dating back to the late 1800s, ABCs are still used today in many successful business liquidations.

New Jersey ABCs are commenced by the filing of a written deed of assignment which is executed by the debtor (referred to as the "assignor") and filed in the Superior Court's Chancery Division, Probate Part. The deed conveys all of the assignor's assets in trust to an "assignee" for the benefit of creditors. While less formal than a bankruptcy petition, the deed includes a list of the assignor's assets and liabilities along with a list of its creditors. Notice of the deed is sent to all creditors and interested parties. Similar to a bankruptcy proceeding, the assignee is charged with marshalling and liquidating the assignor's assets and distributing the proceeds to creditors according to a priority scheme set forth in the ABC Statute. At the beginning of a case, assignees typically file first day papers seeking authorization to, among other things, retain professionals, such as the assignee's attorneys, accountants and auctioneers, and, on occasion, sell certain assets.

The assignee's role is very similar to a chapter 7 bankruptcy trustee. An assignee has the authority to sell or otherwise dispose of the assignor's property, set aside conveyances, collect preference payments, issue subpoenas and, under certain circumstances, even operate the assignor's business for a limited period of time until the assignor's assets can be sold as a going concern.

One of the key differences between an ABC and a bankruptcy proceeding is that there is no statutory automatic stay against creditor collection actions. While this is a major distinction, this difference is often mitigated by the fact that the assignee, who is a representative of all creditors of the assignor, stands in the shoes of a hypothetical executing judicial lienholder. Also, under appropriate circumstances, the Court may stay or restrain creditor actions so the case can be administered in one centralized forum.

Another key difference is that unlike a chapter 7 bankruptcy, where a trustee is randomly selected by the Office of the U.S. Trustee, the assignor or a creditor may select an assignee based on the assignee's experience or specialized knowledge of the assignor's assets, business or industry, which can maximize asset values. In addition to this flexibility, ABCs are also often quicker and more cost-effective than bankruptcy proceedings, which have government oversight and burdensome administrative requirements.

Debtors facing financial distress have several choices, which can range from federal bankruptcy proceedings to out-of-court workouts. State insolvency proceedings, such as ABCs, are yet another option which should be considered when counseling a debtor on an insolvency plan. With its flexibility, cost savings and efficiency, ABCs are often the best option for a debtor simply seeking to wind up its business. ■

Marc Miceli is with the firm of S. Mitnick Law PC and is the Secretary-Elect of the Bankruptcy Law Section of the New Jersey State Bar Association for the 2023-2024 term. Marc's practice focuses on all areas of insolvency law, with a special emphasis on state court general assignments for the benefit of creditors' proceedings, federal bankruptcy proceedings, corporate liquidations, asset recovery and creditors' rights.

NJSBA Bankruptcy Crossword Puzzle

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DOWN

1. Not consumer
2. Resolve
3. Retake possession of
4. Comprehensive document detailing operations
5. Latin for “his own”
6. Confirmation of Plan despite objections
7. The action or process of changing
8. To perform a function
9. Acronym for document evidencing debt
10. Something typically money that is owed
11. A series of questions or exercises
12. Based upon; concerned with the law
13. All the money and property owned
14. Method of conducting remote court/meetings
15. Judge’s approval of proposed repayment plan

ACROSS

1. The state of being insolvent
2. Borrower’s documents stating amount owed
3. Identification at start of Petitions
4. 11 USC § 363
5. Having as one’s possession
6. Something owned or possessed
7. One with whom an estate is entrusted
8. A negative Ballot
9. A useful of valuable thing
10. To carry out; put into effect; sign
11. Disapproval; opposition
12. Measure of financial resources
13. To stop the running of time
14. Lacking in legal significance/academic
15. Latin for “thing” or “matter”

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At the heart of the program, provided through industry leader Charles Nechtem Associates, is 24/7 access to a mental health professional with at least seven years of experience. The professional will counsel callers and help them find resources. If needed, they will help people find an accessible clinician who is accepting patients. Members are eligible for **up to three** in-person counseling sessions per issue. They can also access **unlimited text, phone and email support** and search an extensive Wellness Library with 25,000 interactive resourses to improve their personal and professional lives.

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