

*Financial Advisors & Investment  
Banking/Technology & Intellectual  
Property*

**You Are Selling My What?  
Valuation and Sale of Intellectual  
Property and Customer  
Information by a Distressed  
Company**

**Seth Van Aalten**

*Cooley LLP; New York*

**J. Scott Victor**

*S&S Capital Advisors, LLC; Conshohocken, Pa.*

**Hon. Brenda Moody Whinery**

*U.S. Bankruptcy Court (D. Ariz.); Tucson*



AMERICAN  
BANKRUPTCY  
INSTITUTE

# DISCOVER



**search**  
search.abi.org

---

NEW Online Tool Researches ALL ABI Resources

---



***Online Research for \$295\*  
per Year, NOT per Minute!***

**With ABI's New Search:**

- One search gives you access to content across ALL ABI online resources -- *Journal*, educational materials, circuit court opinions, *Law Review* and more
- Search more than 2 million keywords across more than 100,000 documents
- FREE for all ABI members

**One Search and You're Done!**  
**search.abi.org**

\*Cost of ABI membership

---

66 Canal Center Plaza • Suite 600 • Alexandria, VA 22314-1583 • phone: 703.739.0800 • abi.org

Join our networks to expand yours:   

© 2015 American Bankruptcy Institute All Rights Reserved.

**Lessons from *RadioShack*: Selling Personally  
Identifiable Information in Chapter 11**

**Seth Van Aalten**

**Cooley LLP, New York, New York**

Personally identifiable information (“PII”) is a valuable intangible asset that can be monetized in chapter 11 for the benefit of creditors. But whereas bankruptcy courts generally have extensive authority to aid a chapter 11 debtor’s sale process, the Bankruptcy Code expressly forbids the sale of PII if the sale would violate applicable non-bankruptcy law. RadioShack’s sale of its U.S. intellectual property and customer data to General Wireless (an affiliate of Standard General) in June 2015 highlights the legal issues implicated by PII sales in bankruptcy and provides a road map of what debtors and asset buyers should expect from objectors, particularly in the context of mature companies like RadioShack with restrictive (and perhaps outdated) privacy policies that include express covenants not to sell or transfer PII.

**I. PII Sales in Chapter 11**

Restructuring professionals – particularly those focused in retail – have witnessed a demonstrable growth in interest among buyers of PII over the past decade. Many cases have involved extremely sensitive data beyond routine consumer contact information, including “preferences about dating, romance and sex; women’s health; financial records, including tax returns; medical records and genetic data; students’ PII; publication purchases and videos that have been viewed; and details of retail transactions.”<sup>1</sup> Moreover, the PII found in the hands of today’s chapter 11 debtors likely originates, at least in part, from third party data brokers who are compiling information on 700 million people from public and private sources.<sup>2</sup> Well beyond the limited chapter 11 context, companies commonly purchase data from these brokers to enhance the information provided by the consumer directly.

---

<sup>1</sup> Lucy L. Thomson, Personal Data for Sale in Bankruptcy: A Retrospective on the Consumer Privacy Ombudsman, 34-6 *ABLIJ* 32 (June 2015) (case citations omitted).

<sup>2</sup> *Id.*

This new and robust market for PII has heightened our collective sensitivity to the risks and consequences of cybercrime. The Sony Pictures e-mail breach and the recent Ashley Madison hack are two very public, very high profile examples of the extraordinary dangers presented by the unregulated transfer of PII. There exists a vibrant black market for PII and a potential for harm that extends beyond common credit card fraud to blackmail, public embarrassment and discrimination.

Remarkably, Congress foresaw these dangers in the chapter 11 context and the potential for abuse in a landscape driven by the overriding principle of value maximization. The Bankruptcy Abuse and Consumer Protection Act of 2005 introduced three consumer privacy-related amendments to the Bankruptcy Code: (1) section 101(41A), which defines PII;<sup>3</sup> (2) amendments to section 363(b)(1) concerning the sale of PII and the appointment of a “consumer privacy ombudsman” (“CPO”) in certain circumstances;<sup>4</sup> and (3) section 332 concerning the appointment and duties of the CPO.<sup>5</sup>

Section 101(41A) of the Bankruptcy Code defines PII to generally encompass “any . . . information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.” The definition includes, among other information, an individual’s name, address, e-mail address and phone number.

Section 363(b)(1) expressly prohibits a non-consensual sale or lease of PII where the transfer is inconsistent with the debtor’s existing privacy policy unless (i) a CPO is appointed and the procedures set forth in section 332 are followed, and (ii) after notice and hearing, the bankruptcy court finds that the sale does not violate applicable non-bankruptcy law. The

---

<sup>3</sup> 11 U.S.C. § 101(41A).

<sup>4</sup> 11 U.S.C. § 363(b)(1).

<sup>5</sup> 11 U.S.C. § 332.

language of the amendment implies – and the subsequent case law seems to agree – that a debtor may transfer PII without reference to section 363(b)(1) if the existing policy does not prohibit such transfer or if the buyer agrees to take the PII subject to the debtor’s existing privacy policy.<sup>6</sup>

Section 332 sets forth the process for appointing a CPO and the duties of the CPO once appointed. Under section 332(a), the Court shall order the U.S. Trustee to appoint a CPO (if warranted under section 363(b)(1)) at least five days prior to the sale hearing. The CPO shall provide the court with information to assist the court’s consideration of the proposed PII sale.

## II. The Sale of PII in RadioShack<sup>7</sup>

On March 4, 2015, the court entered an order directing the U.S. Trustee to appoint a CPO in connection with the anticipated sale of RadioShack’s intellectual property assets and PII.<sup>8</sup> On March 12, 2015, Elise S. Frejka was appointed as the CPO by the U.S. Trustee.<sup>9</sup> RadioShack filed a motion to approve bidding and sale procedures relating to their domestic intellectual property assets, including customer data and other PII, on April 10, 2015 and received court approval of the proposed sale process on April 30, 2015.<sup>10</sup> Qualified bids were received by the May 6, 2015 bid deadline and an auction was held on May 11, 2015. At the conclusion of the auction, the debtors selected General Wireless as the highest or otherwise best bidder.

---

<sup>6</sup> See e.g., *In re SkyMall, LLC*, Case No. 2:15-bk-00679-BKM (Bankr. D. Ariz. Mar. 19, 2015) (Docket No. 281) (denying US Trustee’s motion to appoint a consumer ombudsman where debtor’s privacy policy did not prohibit the transfer of PII to third parties and the sale of PII was subject to prepetition privacy policy); *In re Velocity Express Corp.*, 2009 WL 6690931, at \*7 (Bankr. D. Del. 2009) (finding that “[n]o ‘consumer privacy ombudsman’ need be appointed under section 363(b)(1) of the Bankruptcy Code because the Purchaser has agreed to adhere to any such privacy policies applicable to the Debtors”); *In re THQ, Inc.*, 2013 WL 428623, at \*14 (Bankr. D. Del. 2013) (same).

<sup>7</sup> *In re RS Legacy Corporation, et al.*, Case No. 15-10197-BLS (Bankr. D. Del. 2015).

<sup>8</sup> *Id.* (Docket No. 809).

<sup>9</sup> *Id.* (Docket No. 953).

<sup>10</sup> *Id.* (Docket Nos. 1768 and 1981).

**A. RadioShack's PII**

Prior to the bankruptcy filing, RadioShack collected customer data at retail points of sale, through its e-commerce platform and from dealer franchise locations.<sup>11</sup> Customer data was pooled and maintained in three databases hosted and managed by RadioShack: (a) a customer database containing name, physical mailing address and phone number (the “Customer Database”), (b) a contact database containing email addresses (the “Contact Database”), and (c) a transaction database containing 117 fields of transaction data, including credit and debit card numbers (the “Transaction Database” and collectively, the “Database”).<sup>12</sup> Combined, the Customer Database and the Contact Database contained approximately 117 million customer records and historical consumer information obtained from various sources over the course of decades.<sup>13</sup> Pursuant to separate agreements with Verizon, Sprint, AT&T and other wireless carriers, RadioShack also collected PII (including sensitive PII such as social security numbers and other government issued identification numbers) in connection with enrolling consumers in wireless phone and data service plans.<sup>14</sup>

RadioShack offered a subset of the Database for sale containing customer information that was used prior to the bankruptcy filing by the company for marketing purposes. The information was limited to customers who either opted-in to receiving email communications or made a purchase (and provided their name and physical mailing address) from RadioShack

---

<sup>11</sup> See Report of the Consumer Privacy Ombudsman (the “CPO Report”), at ¶ 11, *In re RS Legacy Corporation, et al.*, Docket No. 2148.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*; see also Mediation Term Sheet (the “Mediation Agreement”), at ¶ 1(d), *In re RS Legacy Corporation, et al.*, Docket No. 2187-1.

<sup>14</sup> See CPO Report, ¶ 13.

within the prior 12 months.<sup>15</sup> Specifically, RadioShack sought to sell: (i) the Contact Database, consisting of approximately 3.1 million opt-in email addresses of customers who made a purchase within the prior 12 months;<sup>16</sup> (ii) the Customer Database, consisting of approximately 11.9 million names and physical mailing addresses of customers who made a purchase with the prior 12 months;<sup>17</sup> and (iii) 21 of the 117 fields of transaction data maintained in the Transaction Database.<sup>18</sup> Notably, (i) sensitive information, such as social security numbers or other unique governmental identification numbers credit card numbers were not maintained in the Database, and (ii) debit card numbers, and transaction data would not be sold, thereby eliminating the risk of identity theft.<sup>19</sup>

**B. RadioShack's Privacy Policies**

RadioShack had two privacy policies in effect at the time of the bankruptcy filing – the “Stores Privacy Policy” and the “Website Privacy Policy.” The Stores Privacy Policy, which was displayed as signage or a placard at the checkout register in stores, provided:

Protecting Customer Information

At RadioShack, we respect your privacy. We do not sell our mailing list. The information you give us is treated with discretion and respect. We pride ourselves on not selling our private mailing list. From time to time, we may send you information from our company or from select, responsible companies that have joined with RadioShack to bring you special offers.

If you no longer wish to receive offers and information, please call us at 1-800-843-7422 or visit us at [www.RadioShack.com](http://www.RadioShack.com).<sup>20</sup>

---

<sup>15</sup> See *id.*, ¶ 15.

<sup>16</sup> See *id.*, ¶ 16.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*, ¶ 11; Mediation Agreement, ¶ 1(d).

<sup>19</sup> See *id.*, ¶ 43.

<sup>20</sup> See *id.*, ¶ 20.

The Website Privacy Policy applied “only to the RadioShack.com website and information provided by [a consumer] or otherwise collected online through RadioShack.com” and provided:

Information sharing and disclosure

- Agents, employees and contractors of RadioShack who have access to PII are required to protect this information in a manner that is consistent with this Privacy Policy and the high standards of the corporation.
- Information about you specifically will not be used for any purpose other than to carry out the services you requested from RadioShack and its affiliates. All of our affiliates have agreed to maintain the security and confidentiality of the information we provide to them.
- We will not sell or rent your PII to anyone at any time.
- We will not use any personal information beyond what is necessary to assist us in delivering to you the services you have requested.
- We may send PII about you to other organizations when:
  - We have your consent to share the information (you will be provided the opportunity to opt-out if you desire). For example, if you opt-in for emails we will share this information with our marketing provider.
  - We need to share your information in order to provide the product or service you have requested. For example, we need to share information with credit card providers and shippers to bill and ship the product you requested.
  - We are required to do so by law, for example, in response to a court order or subpoena.<sup>21</sup>

**C. Sale Objections**

The proposed sale of the RadioShack’s PII drew multiple consumer-related objections. Most notably, the Federal Trade Commission (the “FTC”) and State Attorneys Generals from

---

<sup>21</sup> See *id.*, ¶ 21.

thirty eight (38) states (including the District of Columbia) (collectively, the “State AGs”) objected to the terms of the PII sale as inconsistent with RadioShack’s existing privacy policies.

On May 16, 2015, Jessica L. Rich, the Director of the FTC’s Bureau of Consumer Protection, addressed the FTC’s concerns for RadioShack’s PII sale in a letter to the CPO.<sup>22</sup> The FTC acts to protect consumer privacy through the enforcement of Section 5 of the Federal Trade Commission Act (the “FTC Act”), which prohibits unfair or deceptive acts or practices.<sup>23</sup> The FTC expressed concern that a sale of RadioShack’s PII would contravene the company’s express promise not to sell or rent such information and constitute a deceptive or unfair trade practice under Section 5 of the FTC Act.<sup>24</sup>

The FTC recognized, however, that “bankruptcy presents special circumstances, including the interest in allowing a company to get back on its feet – or alternatively, to marshal remaining assets for its creditors – consistent with any promises made to customers.”<sup>25</sup> The FTC cited to the resolution it achieved with the debtor in the *Toysmart*<sup>26</sup> case as providing an instructive framework to permit the the transfer of customer information under the following limited circumstances: (1) the debtor had to agree not to sell customer information as a standalone asset, but instead to sell it as part of a larger group of assets, including trademarks and online content; (2) the buyer had to be an entity involved in the the same line of business; (3) the buyer had to agree to treat the personal information in accordance with the terms of the seller’s

---

<sup>22</sup> See *id.*, Exhibit D.

<sup>23</sup> Unfair acts or practices include conduct that (a) causes substantial consumer injury; (b) is not outweighed by countervailing benefits to consumers or competition; and (c) results in an injury that consumers could not reasonably have avoided.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See Stipulation and [Proposed] Order Establishing Conditions on Sale of Customer Information, *In re Toysmart.com, LLC*, Case No. 00-13995-CJK (Bankr. E.D. Mass. 2000).

privacy policy; and (4) the buyer had to agree to seek affirmative consent before making any changes to the policy.<sup>27</sup> While stopping short of an endorsement of the *Toysmart* resolution as a one-size-fits-all remedy to PII sales where the debtor’s privacy policies (like RadioShack’s) expressly pledge to not sell or transfer customer information to third parties, the FTC did acknowledge that its “concerns about the transfer of customer information inconsistent with privacy promises would be greatly diminished” if the *Toysmart* conditions were met by RadioShack and the successful bidder.<sup>28</sup>

The State AGs, led by the State of Texas, also objected to RadioShack’s proposed PII sale as impermissible under section 363(b)(1) of the Bankruptcy Code. Pointing to the direct language of RadioShack’s privacy policies, the State AGs argued that the proposed PII sale violated state laws governing deceptive trade practices and consumer protection.<sup>29</sup> The Texas AG argued that the sale was patently impermissible because the bankruptcy court must make a finding that no applicable non-bankruptcy law would be violated as a condition to approval.

#### **D. The Mediation Agreement**

On May 14, 2015, RadioShack, General Wireless, and the State AGs participated in a mediation to resolve the objections raised by the State AGs to the proposed PII sale. The mediation resulted in the following agreed upon resolution (the “Mediation Agreement”):<sup>30</sup>

1. General Wireless would be bound by RadioShack’s preexisting privacy policies with regard to customers listed in the purchased PII. Material changes to the policies could be made only upon a customer’s affirmative exercise of an opt-in option.

---

<sup>27</sup> See CPO Report, Exhibit D.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*, ¶37.

<sup>30</sup> See Mediation Agreement.

2. Customer telephone numbers would not be sold.
3. Credit and debit card numbers would not be sold.
4. The RadioShack website would contain both an online opt-out and a toll-free telephone number to call to opt-out.
5. Only email addresses that were active within the two-years prior to the bankruptcy filing would be sold.<sup>31</sup>
6. Only the following seven fields of transaction data collected by RadioShack in the five years prior to the bankruptcy filing would be sold:
  - store number;
  - ticket date/time;
  - SKU number;
  - SKU description;
  - SKU selling price;
  - tender type; and
  - tender amount.<sup>32</sup>
7. With respect to PII for which email addresses were available, General Wireless agreed to send an email communication to such customers prior to the PII transfer providing for the following:
  - conspicuous notice of the sale and the opportunity to opt-out of the PII transfer within 7 days of notice;
  - In the event an email is returned as undeliverable, PII for such person would not be transferred; and
  - PII not transferred by RadioShack would be destroyed.
8. With respect to customers for which no email address was available, but for whom there was a physical mailing address, General Wireless agreed to provide a communication providing for the following notification at such time a mailing is made (if ever):

---

<sup>31</sup> As noted above, RadioShack had sought approval to sell approximately 8.5 million email addresses, of which approximately 3.1 million were active within the 12 months prior to the filing.

<sup>32</sup> As noted above, RadioShack had sought approval to sell 117 million customer records obtained over the course of decades with over 21 transaction fields.

- General Wireless purchased the operational assets of RadioShack;
- The recipient has an opt-out opportunity, which may be exercised by calling a toll-free number within 30 days of the communication;
- Any person exercising the opt-out would continue to be subject to RadioShack's preexisting privacy policy;
- With regard to any person to whom mail is returned undeliverable, such person's PII would be destroyed; and
- The foregoing conditions would only apply if a mailing is made within 2 years of the closing of the sale transaction.

**E. The CPO Report**

**1. Analysis**

On May 16, 2015, the CPO filed her report with the bankruptcy court (the "CPO Report").<sup>33</sup> The CPO determined that the following nonbankruptcy laws were potentially applicable to RadioShack's proposed PII sale: (a) Section 5 of the FTC Act; (b) the Children's Online Privacy Protection Act of 1998 ("COPPA"); and (c) applicable state consumer protection laws.

**a. Section 5 of the FTC Act**

The CPO noted that "[s]ection 5 of the FTC Act, as enforced by the FTC, would likely prohibit the Debtors from transferring consumer data, including PII, to the Successful Bidder, as doing so is contrary to the Debtors' privacy representations and could be deemed a deceptive trade practice."<sup>34</sup> Citing the FTC's negotiated resolution in the *Toysmart* case, the CPO recognized the need to strike an appropriate balance between consumer privacy rights and the

---

<sup>33</sup> *In re RS Legacy Corporation, et al.*, Docket No. 2148.

<sup>34</sup> CPO Report, ¶25.

interests of chapter 11 debtors and creditors.<sup>35</sup> The CPO explained that the *Toysmart* resolution “has become the benchmark used by the FTC” in evaluating PII sales and “bankruptcy courts have relied on the criteria set forth in *Toysmart*” in analyzing the compliance of proposed sales.<sup>36</sup>

**b. COPPA**

COPPA prohibits unfair or deceptive trade practices in connection with the collection, use, or disclosure of PII from and about children under the age of 13 obtained from the Internet.<sup>37</sup> COPPA requires companies that collect information from children under the age of 13 to comply with website notice requirements concerning the disclosure of such information. Companies must obtain parental consent in order to make a material change to collection or disclosure practices. RadioShack’s Website Privacy Policy provided the following with respect to such data collection:

RadioShack.com does not seek to collect identification information about kids under 13 years of age. If we discover such information, we will delete it. Thus, we typically retain no identifiable information about kids. However, if a parent believes his/her child has provided us information, simply call and request that we delete it.<sup>38</sup>

The CPO found no evidence of RadioShack’s collection of personal information from children under the age of 13 or non-compliance with COPPA.<sup>39</sup>

---

<sup>35</sup> See *id.*, ¶ 26.

<sup>36</sup> *Id.*

<sup>37</sup> 15 U.S.C. § 6501, *et seq.* (2006); 16 C.F.C. § 312 (2006). See also Children’s Online Privacy Protection Rule, Final Rule, 64 Fed. Reg. 59888 (Nov. 3, 1999) (explaining basis and purpose of the Act).

<sup>38</sup> See CPO Report, ¶ 30.

<sup>39</sup> See *id.*, ¶ 33.

c. State Laws

All 50 states and the District of Columbia have adopted consumer protection statutes which, despite some variation among them, all prohibit deceptive consumer representations.<sup>40</sup> The CPO determined that RadioShack was required to comply with each of these consumer protection laws because the company held PII from customers in all U.S. States, and concluded that the relevant analysis would be substantially similar to the FTC Act previously discussed.<sup>41</sup>

2. Conclusions

The Mediation Agreement was supported by the CPO based on her observations concerning the nature of RadioShack's PII and the limited subset of PII proposed to be sold, the potential relevance of the PII to General Wireless's business, and the costs and benefits associated with requiring the parties to obtain affirmative customer consent to the transfer of the PII.

---

<sup>40</sup> See, e.g., Alabama, Ala. Code § 8-19-1 et seq.; Arizona, Consumer Fraud Act, A.R.S. §§ 44-1521-44-1534; California, Cal. Bus. & Prof. Code §17200 et seq.; Connecticut, Conn. Gen. Stat. § 42-110a et seq.; Colorado, Colorado Revised Statute § 6-1-105 (e); Delaware, Del. Code Ann. tit. 6, § 2511 et seq.; Florida, Fla. Stat. § 501.201 et seq.; District of Columbia, Consumer Protection Procedures Act, D.C. Code §§ 28-3901 et seq.; Hawaii, Haw. Rev. Stat. § 487; Idaho, Consumer Protection Act, Idaho Code §§ 48-601 et seq.; Illinois, 815 Ill. Comp. Stat. Ann. §§ 505/1 et seq.; Indiana, Deceptive Consumer Sales Act, Indiana Code sec. 24-5-0.5-3(a) and (b)(1); Iowa, Consumer Fraud Act, Iowa Code § 714.16; Kentucky, Ky. Rev. Stat. Ann. §§ 367.110-367.300; Maryland, Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13-101 et seq.; Massachusetts, Massachusetts Consumer Protection Act, Mass. Gen. Laws c. 93A, § 2(a) and the regulations promulgated thereunder, 940 CMR 3.00 et seq. and 6.00 et seq.; Michigan, Mich. Comp. Laws §445.911 et seq.; Minnesota, Minn. Stat. § 325D.44-.48; Mississippi, Mississippi Consumer Protection Act, Miss. CODE ANN. §§ 75-24-1, et seq.; Missouri, § 407.020 of the Missouri Merchandising Practices Act; Montana, Mont. Code Ann. § 30-14-133 et seq.; Nebraska, Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59-1601 et seq.; Nevada, Nev. Rev. Stat. § 598.0915(5); New York, N.Y. Gen. Bus. Law § 349 et seq.; North Carolina, N.C. Gen. Stat. 75-1.1; Ohio, Consumer Sales Practices, Ohio Rev. Code Ann. §§ 1345.01 et seq.; Oklahoma, Oklahoma Consumer Protection Act, 15 O.S. § 751 et seq.; Oregon, Or. Rev. Stat. §§ 646.605 et seq.; Pennsylvania, Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, et seq.; South Carolina, South Carolina Unfair Trade Practices Act, §§ 37-20-190(A), 39-5-20(a), Section 39-5-10(b); South Dakota, S.D. Codified Laws § 37-24-1 et seq.; Tennessee, Consumer Protection Act, T.C.A. § 47-18-102 et seq.; Utah, Utah Code Ann. § 13-11-1 et seq.; Virginia, Virginia Consumer Protection Act, Virginia Code §§ 59.1-196 through 59.1-207; Washington, Washington Consumer Protection Act, RWC 19.86.020, West Virginia, West Virginia Consumer Credit & Protection Act, W. Va. Code §§ 46A-1-101 et seq.; Wisconsin, Wis. Stat. § 100.18.

<sup>41</sup> See CPO Report, ¶ 36.

First, the CPO concluded that General Wireless was a “Qualified Bidder,” as that term was defined in the order approving the PII sale in the *Toysmart* case.<sup>42</sup> Specifically, the CPO determined that General Wireless: (a) was acquiring the PII as part of a larger asset sale; (b) agreed to operate the stores and website as a going concern operating in the same business or market as RadioShack; (c) agreed to be bound by and succeed to RadioShack’s existing privacy policies; (d) agreed to be responsible for any violation of existing privacy policies; and (e) agreed to obtain affirmative customer consent before making any material change to the existing privacy policies.<sup>43</sup>

Second, the CPO found that the temporal limitations, notice requirements and opt-out elections agreed upon by RadioShack, General Wireless and the State AGs were reasonable substitutes for traditional notice of the sale by postal mail – on either an opt-in or opt-out basis – which was not financially feasible or likely to yield a significant response rate under the circumstances.<sup>44</sup>

Third, the CPO noted that the PII to be sold by RadioShack was not of a sensitive nature (with most of it being available from public sources) and no credit or debit card numbers were included in the sale. Accordingly, the CPO did not believe that the PII being transferred rose to a level requiring affirmative opt-in consent by individual customers.<sup>45</sup>

---

<sup>42</sup> See *id.* at ¶48.

<sup>43</sup> See *id.* at n.5.

<sup>44</sup> See *id.* at ¶¶ 44-46.

<sup>45</sup> See *id.* at ¶43.

## F. Sale Approval

On June 4, 2015, the bankruptcy court entered an order approving RadioShack's PII sale to General Wireless in accordance with the terms of the Mediation Resolution.<sup>46</sup> At the hearing to consider the sale, Judge Shannon refused to reopen the auction process to allow an alternative bidder to submit a \$30 million bid which, if accepted, would have topped the General Wireless bid by nearly \$4 million. Interestingly, in his ruling, Judge Shannon expressed concerns about how the reopening of the auction – and the possible replacement of General Wireless as the winning bidder – would impact the Mediation Resolution, particularly as the Texas AG stated on the record that the State AGs would not support the sale if General Wireless was not named the winning bidder.

## III. Lessons from RadioShack

There are quite a few takeaways from the RadioShack PII sale and other prior cases that should resonate with companies and restructuring professionals alike:

1. In cases where the debtor's privacy policies do not include promises not to sell or transfer PII, and where the PII sale is conditioned on the buyer's acceptance of the debtor's policies, estate representatives have consistently defeated requests for appointment of a CPO.
2. The FTC and State AGs will vigorously oppose PII sales in cases where the debtor's privacy policies include promises not to sell or transfer. Outside of bankruptcy, companies should consider modifying their privacy policies to remove such language or, better still, provide an insolvency or bankruptcy-related exception.
3. The FTC and State AGs will have significant leverage to achieve material concessions in cases where the debtor's privacy policies include promises not to sell or transfer.
4. The FTC, State AGs and CPOs have thus far demonstrated a willingness to negotiate terms of a PII sale where the debtor's privacy policies include promises not to sell or transfer. In major cases like *RadioShack* and *Borders*, resistance by these parties has yet to drive away the buyer. However, the PII sought to be sold

---

<sup>46</sup> *In re RS Legacy Corporation, et al.*, Docket No. 2333.

in these cases has not been of a sensitive nature. It is safe to assume that resistance will be stauncher as the sensitivity of the information heightens.

5. Estate representatives should anticipate resistance to PII sales prior to filing the bid procedures motion (preferably prior to filing the bankruptcy case) and should seek to resolve the concerns of the FTC and State AGs as quickly as possible. When explaining his reasoning for not reopening the RadioShack auction to allow a competing bid that was significantly higher than General Wireless's bid, Judge Shannon cited, among other reasons, uncertainty regarding whether a PII sale to a bidder other than General Wireless would be approved in view of the substantial negotiations that preceded the FTC's and State AG's consent to the sale. Inability to obtain court approval of an alternative PII bid may temper the interest of alternative bidders and result in a lower sale price.