AMERICAN BANKRUPTCY INSTITUTE

2019 Southeast Bankruptcy Workshop

PLENARY SESSION

Protect Your Privates: Cybersecurity, Data Breaches and Other Privacy-Related Ethical Considerations During Bankruptcy

Jennifer M. Meyerowitz, Moderator
Summit Investment Management LLC; Atlanta

Ashley A. Edwards
Parker Poe Adams & Bernstein LLP; Charlotte, N.C.

Scott Ferber
King & Spalding LLP; Washington, D.C.

Lara R. Sheikh
Thomson Reuters Practical Law; New York

Travis K. Vandell
Stretto; Irvine, Calif.

2019

AMERICAN BANKRUPTCY INSTITUTE

Bankruptcy in a Modern World: How to Protect your Privates

2019 Southeast Bankruptcy Workshop

KING & SPALDING | Parker Poe | STRETTO | SUMMIT INVESTMENT MANAGEMENT | THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Speakers

Ashley Edwards
Parker Poe

Scott Ferber
King & Spalding

Jennifer Meyerowitz
Summit Investment Management

Lara Sheikh
Thomson Reuters

Travis Vandell
Stretto

KING & SPALDING | Parker Poe | STRETTO | SUMMIT INVESTMENT MANAGEMENT | THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Emerging Threat Landscape

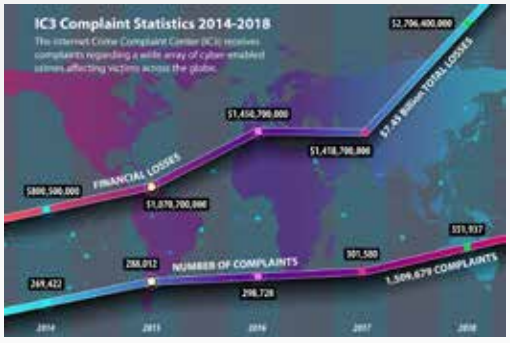
KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Emerging Landscape

2018 - Year of the Data Breach … Again

- Many thought 2017 was peak year (record high number of reported data breaches in U.S., representing 47% increase from 2016)
- Sep. 2017: **Equifax** announced data breach impacting over **145M** consumers
- ***2018 appears similarly daunting***
- June 2018: Marketing & data aggregator **Exactis** announced database access issues exposing **340M** records
- May 2018: **Under Armour** announced breach impacting **150M** MyFitnessPal users
- Sep. 2018: **Facebook** announced **50M** user records compromised
- Nov. 2018: **Marriott** announced data breach impacting **500M** guest records



KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Emerging Landscape

2019 – Year of Protected Privacy?

- **Class action lawsuits** on the rise (Marriott filed same day as announced)
- **Regulators** flexing their muscles
- Active **State legislatures** (CCPA, coast-to-coast data breach laws, ODPA)
- **Supreme Court** weighing in (Carpenter v. United States)
- **Congressional appearances** by big tech (Amazon, Apple, AT&T, Charter, Facebook, Google, Twitter)
- **GDPR**
- **Public** paying attention (Equifax, Marriott, Facebook, Cambridge Analytica)

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Emerging Landscape

And the hits keep on coming -- Nation state & criminal threat actors upping their game

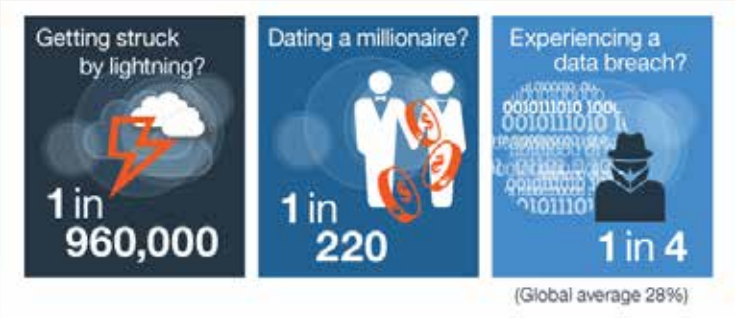
- Ongoing use of **offensive cyber capabilities** for variety of malign purposes
  - **Theft of sensitive information for commercial gain** (DOJ indictments of PRC intel officers & IRGC-affiliated actors)
  - **Influence & disinformation** (DNC/DCCC, WADA/USADA, OPCW)
  - **Destruction** (Sony, VPNFilter, NY dam hack)
  - **Traditional intelligence gathering**
- Increasingly virulent, pervasive strains of **ransomware**
- Hackers **following the data** (Marriott, Cloudhopper, Equifax, Yahoo!)
- Forecasted misuse of AI and ML in **"smart" attacks**

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Emerging Landscape

What are the odds?



Source: Know the Odds: The Cost of a Data Breach in 2017, Larry Ponemon & Wendi Whitmore, SecurityIntelligence, June 20, 2017

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Legislative and Regulatory Developments

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Recent Legislative Developments (federal)

- Draft Federal Privacy Legislation
  - Senate Commerce Committee hearings this fall
  - Oct. 2018 White House Request for Comment on national privacy framework
  - Involvement by tech companies (e.g., committee appearances and Intel draft bill)
- Federal Credit Freeze Law
  - Requires consumer reporting agencies to provide free credit freezes and year-long fraud alerts to consumers
- Clarifying Lawful Overseas Use of Data (CLOUD) Act
  - Framework for law enforcement cross-border data requests to service providers
- Foreign Investment Risk Review Modernization Act
  - Reforms and modernizes CFIUS review process

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Recent Legislative Developments (state-level)

- California Consumer Privacy Protection Act (CCPA)
  - Effective Jan. 1, 2020
  - Protects personal information of California resident "consumers"
  - Right to Deletion, Access/Portability, Receive Notice, Opt Out/Opt In, Be Free From Discrimination
- California SB-327 Information Privacy: Connected Devices
  - Effective Jan. 1, 2020
  - Requires connected devices to have "reasonable security features"
- New York Cybersecurity Regulation 23 NYCRR 500
  - Effective Mar. 2017, phased compliance deadlines through Mar. 1, 2019
  - Establishes cybersecurity requirements for financial services companies

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Recent Legislative Developments (state-level)

- Coast-to-Coast State Data Breach Laws
  - South Dakota and Alabama enacted laws in Mar. 2018 (joining the other 48 states, DC, Guam, Puerto Rico, and USVI)
  - Arizona, Colorado, Louisiana, Nebraska, Oregon, and Virginia amended theirs in 2018
  - Vermont imposed data breach requirements on "data brokers"
- Ohio Data Protection Act
  - Effective Nov. 2, 2018
  - Safe harbor for entities that implement written cybersecurity program that "reasonably conforms" to an industry-recognized cybersecurity framework
- Municipal Data Privacy & Security Regulation
  - Oakland Surveillance and Community Safety Ordinance
  - Chicago Personal Data Collection and Protection Ordinance
  - San Francisco charter amendment to establish privacy policy guidelines

AMERICAN BANKRUPTCY INSTITUTE

International Developments

No privacy discussion would be complete without a word on GDPR

- Applies to "processing" of Personal Data
  - Establishment in EU
  - Monitoring behavior
  - Offering goods or services
- Data Controller Responsibilities:
  - Privacy by Design, Use of Processors, Recordkeeping, Security, Breach Notification, Data Protection Officer, Data Transfers
- Access, Rectification, Erasure, Data Portability, Object (Opt-Out) rights
- **ePrivacy Regulation:** Will strengthen privacy rules for electronic communications

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

International Developments

Elsewhere in the world ….

- China's Regulation on Internet Security Supervision & Inspection by Public Security Organs
- Canada's PIPEDA
- Australia's Notifiable Data Breaches scheme
- Israel's Privacy Protection Regulations (Data Security)
- Bahrain's Personal Data Protection Law No. 30 of 2018
- Brazil's Lei Geral de Proteção de Dados
- Argentina's Personal Data Protection Law (PDPL)
- India's draft personal data protection bill

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Regulatory Developments

2018: Active year in Data Privacy and Security Enforcement

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Regulatory Developments (a sampling)

State Attorneys General

- Record $148 million Uber settlement with all 50 states and DC for failure to disclose 2016 breach
- Arizona AG's office to investigate Google's location tracking practices
- Multi-state settlement (CT, DC, NJ, WA) with Aetna relating to mishandling of protected health information and improper disclosures of patients' HIV status

Federal Trade Commission (FTC)

- Increasingly active in area of data privacy and security, particularly against companies with unreasonable data security practices or that act inconsistently with public privacy policies
- Settlement with Uber for failure to adequately disclose 2016 data breach
- Settlements with IDmission, LLC, mResource LLC, SmartStart Employment Screening, Inc., and VenPath, Inc. for falsely claiming certification under Privacy-Shield framework

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Regulatory Developments (a sampling)

Securities and Exchange Commission (SEC)

- Disclosure rules include Board role in overseeing cybersecurity
- Oct. 2018 report of investigation emphasizing need for sufficient internal accounting controls to prevent cyber-related fraud (particularly business email compromise)
- Feb. 2018 guidance on public company cybersecurity disclosures
- **Recent Enforcement Actions**
  - $35M settlement with Altaba/Yahoo! for handling of massive data breaches
  - $1.25M settlement with Mizuho Securities USA for failing to protect customer info
  - $1M settlement with Voya Financial Advisors for violating Identity Theft Red Flags Rule

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Hill Action

Recent Congressional Hearings

- **2017-18:** Equifax has appeared multiple times before various committees (incl. Senate Banking, Commerce, Judiciary; House Energy & Commerce)
- **July 2018:** Facebook, Google, and Twitter appeared before House Judiciary to address "content filtering practices of social media giants"
- **Sep./Oct. 2018:** Amazon, Apple, AT&T, Charter, Google and Twitter appeared before Senate Commerce on federal data protection laws

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Where Do Companies Go From Here?

What to expect?

- Class action lawsuits continuing apace
- Regulators continuing to flex their muscles
- Patchwork quilt of on-the-book laws with which to contend
- Ongoing Congressional and public attention
- Potential new laws around the corner
- Motivated, increasingly sophisticated malicious actors

What to do?

- Proactive, thoughtful approach
- Robust compliance / privacy / security regimen
- In-place, stress-tested policies, procedures, and processes
- Due diligence / risk assessment
- Ounce of prevention is worth a pound of cure
- Training
- Secure, siloed systems, with limited, controlled access and permissions

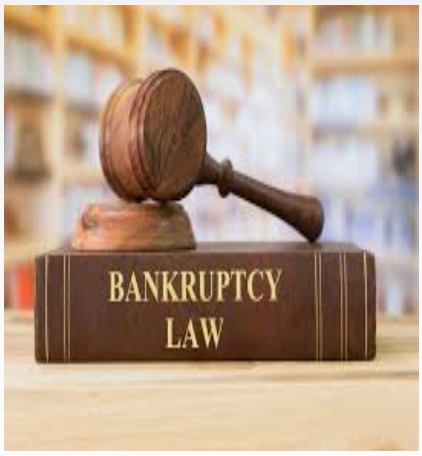
KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Protection of Sensitive Information in a Bankruptcy Context



KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Introduction

A debtor filing for bankruptcy has an obligation to protect confidential information under data security laws, including applicable non-bankruptcy law and bankruptcy law.

Data privacy obligations are often at odds with bankruptcy policies, such as:

- Open access to court records.
- Noticing and due process for all creditors, vendors, suppliers, lenders, customers, patients and all parties interest; all of whom are also protected by privacy laws.
- Conserving estate assets by minimizing noticing and storage costs.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Excluding Sensitive Information from Filings

The Bankruptcy Code sets out the general rule that filings in a bankruptcy case are public records subject to certain exceptions. These exceptions protect individuals from disclosure of information if it would:

- Disclose the name of a minor child (§ 112, Bankruptcy Code).
- Cause a disclosure of scandalous or defamatory matter (§ 107(b)(2), Bankruptcy Code).
- Create an undue risk of identity theft or other unlawful injury to the individual or their property (§ 107(c), Bankruptcy Code).

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Moving for Relief to Protect Information

Bankruptcy Rule 9018 sets out procedures for moving for relief under section 107. It permits the court to enter any order required to protect the estate or any entity about:

- Trade secrets.
- Confidential research, development, or commercial information.
- Scandalous or defamatory matter.
- Governmental matters made confidential by statute or regulation.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Redacting and Sealing of Filings

Federal Rule of Bankruptcy Procedure 9037(a) requires parties to redact certain personal information and the names of minor children in bankruptcy court documents filed with the court by limiting:

- Social security and tax ID numbers to the last 4 digits.
- Birthdates to only the year.
- Names of minor children to their initials.
- Financial account numbers to the last 4 digits.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Treatment of Personally Identifiable Information

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

PII Defined

PII includes the following items individuals provide in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes:

- Name (first (including first initial) and last name).
- Mailing address.
- Email address.
- Phone number.
- Social security number.
- Credit card information.
- Birth date or place.
- Any other information that can be used to contact or identify the individual.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Collection of PII in Bankruptcy

Data collection in preparation for a corporate bankruptcy commonly includes collecting data containing PII such as:

- Customer lists.
- Supporting documentation for claims and settlements.

AMERICAN BANKRUPTCY INSTITUTE

Appointment of Consumer Privacy Ombudsman (CPO)

If a debtor seeks to use or sell PII in a way that is inconsistent with its privacy policy on the petition date, the Bankruptcy Court must direct the US Trustee to appoint a Consumer Privacy Ombudsman (CPO) at least seven days before the sale hearing.

The CPO is often a bankruptcy practitioner or an attorney from the FTC and must be a disinterested person (§ 332(a), Bankruptcy Code).

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Role of CPO

The role of the CPO is to investigate and provide the court with information relating to:

- The debtor's privacy policy.
- Potential losses or gains of privacy and potential costs or benefits to consumers if the court approves the sale.
- Alternatives that would mitigate potential privacy losses or potential costs to consumers.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Role of CPO: Identifying PII

CPO must identify PII data in the debtor's custody or control and know where it is located. PII may be stored in many locations including:

- The cloud.
- On personal devices, such as smartphones, tablets, or laptops.
- On company computers and hard drives.
- In legacy databases.
- On cash register terminals.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Role of CPO: Evaluating PII

Once the CPO identifies the universe of PII, it must:

- Evaluate the sensitivity of the data.
- Determine what data can be sold.
- Help determine how consumers should be notified.
- Develop a data destruction plan for data that will not be sold.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Sale or Transfer of PII

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Sale or Transfer of PII

The Bankruptcy Code provides conditions under which a debtor may sell PII even though it violates the debtor's privacy policy and raises red flags under non-bankruptcy law.

However, even with sale conditions, it can be difficult to sell customer data if the transfer is inconsistent with the company's privacy policy.

If possible, a debtor should draft (or revise) the privacy policy before the petition date in a way that minimizes restrictions on the sale of PII.

AMERICAN BANKRUPTCY INSTITUTE

Selling PII in Violation of Privacy Policy

Under section 363(b)(1), a debtor may not sell or lease PII outside the ordinary course of business unless either:

- The sale or lease is permitted by the debtor's privacy policy and complies with all of its terms.
- A CPO is appointed under section 332 of the Bankruptcy Code and the court approves the sale or lease after:
  - considering the facts, circumstances, and conditions of the sale or lease; and
  - finding that the sale or lease does not violate applicable non-bankruptcy law.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Selling PII Without a CPO

Notwithstanding section 363(b)(1), courts routinely approve sales of PII without appointing a CPO if:

- The buyer agrees to comply with the terms of the debtor's privacy policy, whether or not the policy prohibits the transfer.
- The sale is subject to other conditions based on the particular facts and circumstances of the case.

AMERICAN BANKRUPTCY INSTITUTE

Limiting Scope of PII Subject to Sale

Scope of sold PII data can be limited based on:

- Recommendations by the CPO.
- Customer expectations relating to uses of PII.
- Type and age of data.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Strategies for Resolving PII Disputes

- **Mediation**: Often used in bankruptcy to resolve multi-party disputes relating to PII.
- **Consent Order**: The FTC often participates in bankruptcy cases to enforce consumer protection laws. Consent orders are used to address:
  - privacy issues presented by the sale;
  - disclosure of PII; or
  - other sensitive purchase history information.

AMERICAN BANKRUPTCY INSTITUTE

Treatment of Patient Records

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Whether to Notice Patients

Deciding whether to notice patients in a healthcare business bankruptcy case requires careful analysis.

A bankruptcy case should resolve as much debt as possible, which may require noticing patient creditors.

This must be done carefully both to:

- Avoid violating HIPAA or other applicable laws.
- Minimize the substantial costs of noticing all patients.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

HIPAA Compliant Noticing Strategies

If patients are served with a bar date notice, the following steps should be taken to protect the disclosure of PHI:

- Include a disclaimer that a patient creditor who discloses their PHI risks public disclosure of this information and waives any objection to this disclosure.
- Seek a bankruptcy court order restricting public access to proofs of claim filed by patients and requiring patients to:
  - use a specific claims form sent with the bar date notice; and
  - indicate that claimant is a current or former patient of the debtor, for example, by including a prominent check box on the claim form that asks whether the claimant is or was a patient.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Measures to Protect Patient Records

A healthcare business debtor must take protective measures to ensure that PHI is not disclosed in violation of HIPAA and other applicable law:

- Assume that all documents may contain PHI whether the data is contained in a creditor matrix, proof of claim, claims register, call log, affidavit of service, or any other document. These documents should not be made public until they can be reviewed to ensure that they do not contain protected data.
- Create security measures and court-ordered protections to ensure that HIPAA-protected data is not disclosed.
- Determine what creditors are also patients and develop a plan for noticing them without violating HIPAA.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Disposing of Records and Data

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Disposing of Burdensome Records

Under section 554 of the Bankruptcy Code, a party in interest may move to abandon assets that are burdensome or of inconsequential value to the estate.

Abandonment allows a debtor to walk away from an asset having no value to the debtor's estate without any further financial obligation.

Right to abandon property is not absolute. Many states have enacted laws governing the disposal of personal data held by businesses that require the destruction or disposal of PII so that it is undecipherable or unreadable.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Destruction of Medical Records: Section 351

If debtor lacks funding to comply with applicable non-bankruptcy law, section 351 of the Bankruptcy Code provides a multi-step procedure to destroy patient records:

- Publish a notice of intended disposition in newspapers.
- Give written notice to patients and their insurance providers.
- If records are not claimed within a year, send a request to an agency of federal government to accept the records or, if the agency will not accept the patient records, inform the agency of the trustee's intent to destroy the patient records.
- If records remain unclaimed after this process, trustee may destroy the records by shredding, burning, or another process that renders the records unreadable.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

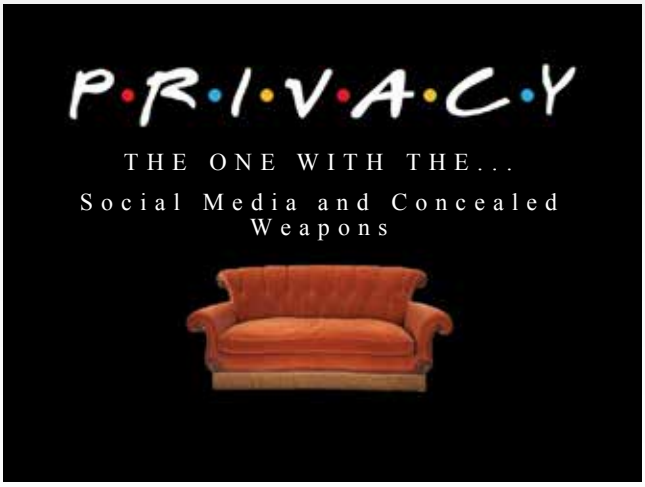
Priority of Expenses

If the DIP or trustee stores records to comply with non-bankruptcy law, bankruptcy court may find that these costs are not a "necessary and actual expense" of preserving the estate, especially after a company stops operating (§ 503(b)(1)(A), Bankruptcy Code).

Costs of closing a healthcare business are authorized as administrative expenses (§ 503(b)(8), Bankruptcy Code). This includes the cost of disposing of patient records. The Code does not reference the priority of future medical record storage costs.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE



KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

In re CTLI, LLC, 528 B.R. 359 (Bankr. S.D. Tex. 2015)

- A 2015 Chapter 11 case in the Southern District of Texas.
- Debtor sold guns and ammunition and operated a shooting range.
- Pursuant to Confirmed Plan filed by estranged business partner, the Principal of the Debtor was required to deliver possession and control and all passwords to social media accounts to business partners.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

In re CTLI, LLC, 528 B.R. 359 (Bankr. S.D. Tex. 2015)

- Court reasoned that like "subscriber or customer lists" social media accounts are property of the estate.
- Court rejected the argument that turning over social media accounts violated the principal's privacy rights analogizing it to use of business email for personal matters where principal should have known the risk of non-privacy on that forum.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

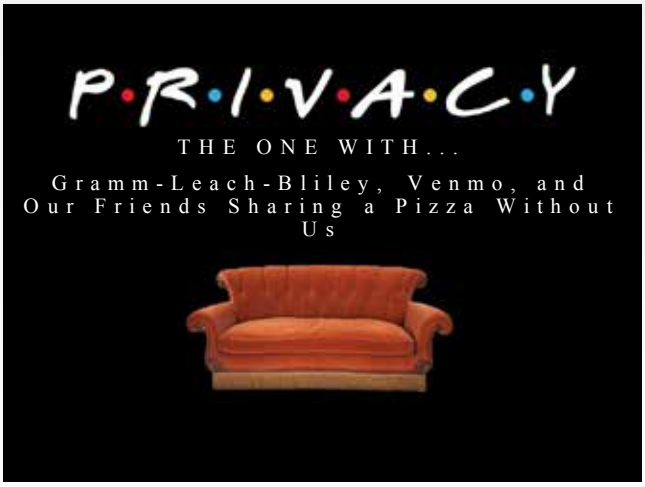
AMERICAN BANKRUPTCY INSTITUTE

Interesting Twist

- The two accounts in question were a Facebook Account and Twitter Account.
- Prior to the hearing, the Principal had requested Facebook change the name from Tactical Firearms to "Jeremy Alcede Entrepreneur". Apparently, for pages with more than 200 likes a Facebook user can only change the name once. Thus, once the principal changed it to his personal page name, the name change was irreversible.
- The Court seems to ask Facebook to make the change back saying Facebook could make an exception to its policy or find the name is misleading for Tactical Firearms.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE



KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

In the Matter of PayPal, Inc., United States of America Federal Trade Commission, File No. 162-3102

- Not a Bankruptcy case, but very relevant for all "financial institutions".
- In 2017, the FTC filed a complaint against Paypal, Inc. charging that Venmo (1) misled consumers regarding the extent they could control the privacy of each transaction and (2) misrepresented the extent consumers' financial accounts were secured breaching Gramm-Leach-Bliley.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

In the Matter of PayPal, Inc., United States of America Federal Trade Commission, File No. 162-3102

- First, Venmo would notify consumers that funds had been credited to their accounts, but it would freeze or remove these funds after analyzing the underlying transaction. This caused problems because consumers would not actually be able to pay their bills with those funds or consumers would rely on that notification and then hand over the valuable item thereafter sustaining losses when the transfer was unwound.
- Second, Venmo offered privacy settings to enable consumers to limit who can view their transactions, but misled the extent of these settings. Venmo seemed to indicate it was a single step to keep transactions private, when in fact, the consumer had to take multiple steps to keep them private and in some cases the other party to the transaction could publicize the transaction for both parties.

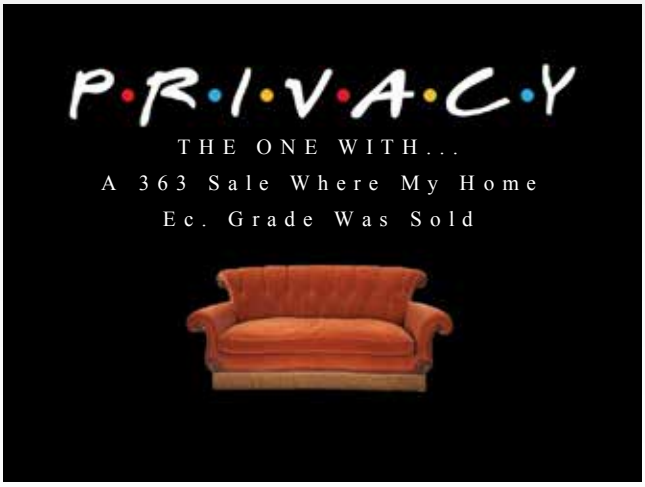
AMERICAN BANKRUPTCY INSTITUTE

Interesting Twist

- The FTC determined that because Venmo is significantly engaged in "transferring money" and processing and transmitting financial data, it is a "financial institution" under the Gramm-Leach-Bliley Act ("GLBA"). Therefore, Venmo's failure to maintain a comprehensive written security program with certain stated safeguards violated the Safeguards Rule.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE



KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

In re ConnectEdu, Inc., No. 14-11238 (Bankr. S.D.N.Y. May 27, 2014)

- Chapter 11 case of an education technology company with 20 million records for middle school through college students.
- Student records included test scores, grade point average, learning disabilities, email and home addresses, phone number, and date of birth.
- After the filing of a 363 sale motion the FTC wrote a letter to the Court expressing its privacy concerns and asking the Court to either (1) appoint a privacy ombudsman, (2) have the information deleted, or (3) at least inform students of the sale of their personal information.
- There were no employees of the Debtor so the piecemeal purchasers were responsible for notifying students of the sale.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

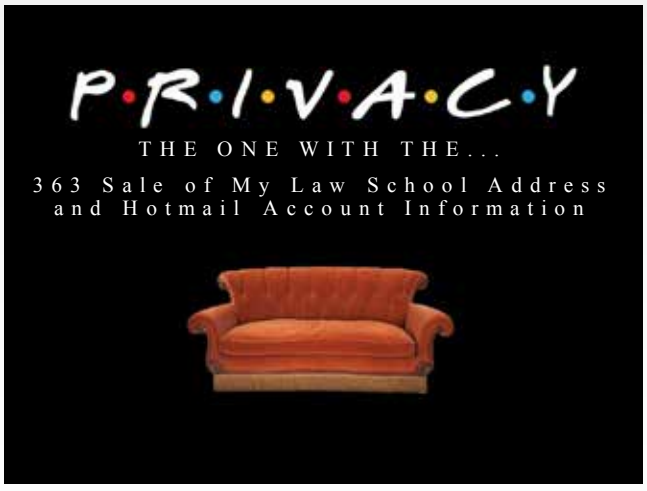
AMERICAN BANKRUPTCY INSTITUTE

Interesting Twist

- Only 1% of students notified by one of the purchasers had their information deleted.
- Thereafter, 50 education technology companies on the grade school level signed a Student Privacy Pledge making a public commitment to treatment of student personal information.
- Under Section 5 of the Consumer Protection Act, the FTC can take action against companies that commit deceptive trade practices by signing the pledge, but having practices which do not conform with such privacy standards.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE



KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

In re RadioShack Corp. et al., No. 15-10197 (Bankr. D. Del. May 21, 2015)

- Chapter 11 with 363 going concern sale of 1,700 stores to General Wireless, Inc. in March 2015. Then proposed a separate sale of the customer record database and some IP which drew many objections from its business partners.
- Ultimately, the Debtor reached settlement agreements with the objectors generally by removing some of the proposed PII from the sale or having the buyer agree to comply the objector's reseller agreement. The Court allowed the sale of the customer record database on this basis.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

In re RadioShack Corp. et al., No. 15-10197 (Bankr. D. Del. May 21, 2015)

- Chapter 11 for going concern sale of 1,700 stores to General Wireless, Inc. in March 2015. Then proposed a separate sale of the customer record database and some IP which drew many objections from its business partners.
- Ultimately, the Debtor reached settlement agreements with the objectors generally by removing some of the proposed PII from the sale or having the buyer agree to comply the objector's reseller agreement. The Court allowed the sale of the customer record database on this basis.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

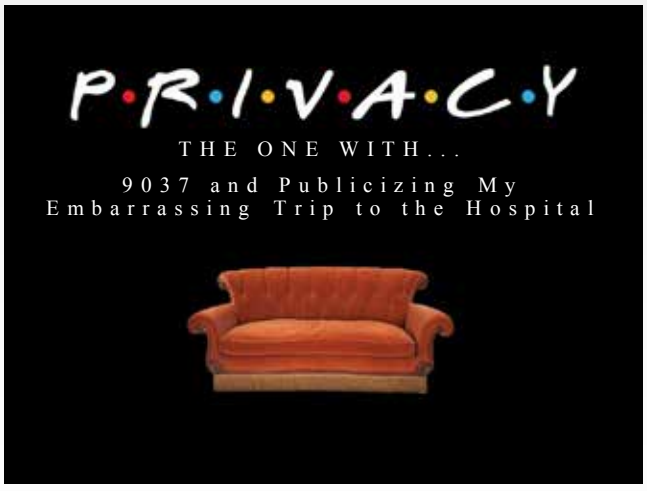
AMERICAN BANKRUPTCY INSTITUTE

Interesting Twist

- Section 332 of the Bankruptcy provides that even if a Debtor's privacy policy prohibits sale of the personal information, the PII may be sold under the supervision of a consumer privacy ombudsman along with the Bankruptcy Court.
- The FTC has sale terms limiting the PII sale and although not a party to the settlement agreement had an active role in the mediation which led to the settlement agreement.
- Some of the limitations in the settlement agreement included only email addresses active in the prior two years, only about 1/3 of the fields of data allowed and buyer bound by Debtor's privacy policy.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE



KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Branch vs. Wakemed, 569 B.R. 657 (Bankr. E.D.N.C. 2017)

- Defendant filed a Proof of Claim that had an attachment with a medical record number and patient number as well as date of admission and discharge from Hospital.
- Debtor filed his own Motion to Seal Proof of Claim and thereafter Defendant filed Ex Parte Global Motion to Establish a Procedure to restrict access to claim pursuant to 107.
- The Court denied Debtor's subsequent motion for sanctions because Defendant did not knowingly violate a provision of the bankruptcy code and denied request for attorney's fees in filing sanction motion.
- Court seems to help define "financial account"/PII- "did not contain a social security number, date of birth, or any account number linked to a credit card or other account at a financial institution."

AMERICAN BANKRUPTCY INSTITUTE

Dorsey vs. U.S. Dept. of Education, et. al 2015 WL 7754642 (Bankr. E.D. La. Dec. 1, 2015)

- Creditor filed Loan Consolidation and Promissory Note which had date of birth and financial account number.
- Creditor filed and the Court approved the Motion to Redact under 9037(d).
- In denying the motion for sanctions against the 9037 violating creditor, Court found that nothing in 9037 indicates an award of sanctions or damages would be appropriate remedy.
- To impose sanctions the creditor must have violated 9011(b) and none of the pleadings of the creditor could have been characterized as filed to harass, cause unnecessary delay or increase the cost of litigation.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

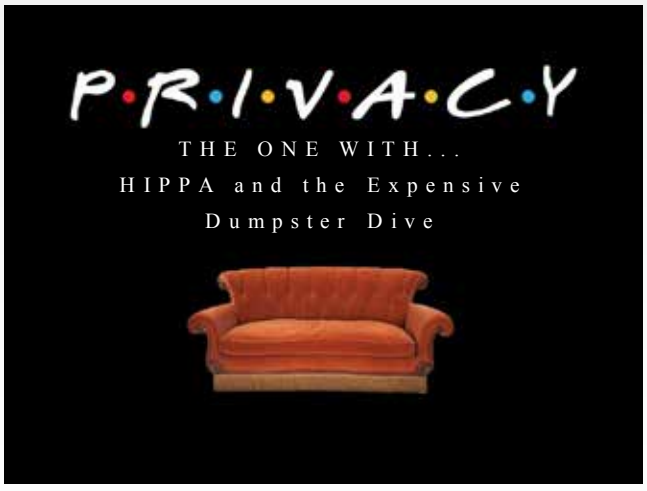
AMERICAN BANKRUPTCY INSTITUTE

In re: James Moore, 2016 WL 1467492 (Bankr. E.D. Tenn. Apr. 12, 2016)

- A software company had the Debtor's personal information potentially including SSN but did not obtain it from the court but from some other purchase. Allegedly, the software company would disseminate the PII to its subscribers- debt purchasers.
- Court held that it had no authority to require redactions or limit access to records held by a third party obtained from a source other than the Court.
- 9037 "addresses the operation of the court, not the behavior of parties who appear before it."

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE



KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

In re Filefax, Inc., Circuit Court of Cook County, Illinois, in Case No. 2015 D 9931

- February 2018, the Department of Health and Human Services (HHS) Office for Civil Rights (OCR) fined Filfax a document storage company in Chicago $100,000 to settle violations regarding improper document disposal.
- Facts arouse in February 2015 when the OCR received a complaint that regarding the a dumpster with greater than 1,000 pounds of paper.
- Someone had tried to sell the paper out of the dumpster to a recycling company.
- The shredding company noticed that the documents had medical information and informed the attorney general.

AMERICAN BANKRUPTCY INSTITUTE

Interesting Twist

- The company liquidated in 2016.
- Also, Filefax was a HIPAA business associate, meaning a vendor or organization hired by a covered entity that necessarily encounters PHI in any way over the course of work.
- The HIPAA Omnibus Rule sets national standards that BAs must comply with and was first enacted in 2013. The first fine was in 2016, but the numbers of entities fined has grown since that time.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

When the rubber hits the road …

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Several Kinds/Categories/Locations of Sensitive Information

- Various Schedules/SOFA Exhibits
- Potential Purchasers
- Patients (HIPAA)
- Employees (home addresses)
- SSNs & Other Sensitive Information (POCs)
  - Proofs of Claim/Claims Registers
- Account Numbers (checking, savings)
- Affidavits/Certificates of Service
- Call Logs
- Billing Entries

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Preparation for a Bankruptcy Filing

- Lawyers, FAs and claims agents requesting lists of creditors, lists of vendors, lists of employees, lists of contracts, data, data, data
- Spreadsheets, data, contracts, etc. are being passed around to professionals in the case at all hours of the day and night as the eve of filing approaches
- Rushing to get files and exhibits and information to professionals for

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

Preparation for Bankruptcy Filing

- Method for transferring data
- Who are you transferring data to?
- Is all the data being transferred needed?
- What purpose is the data being used for? Might need to be redacted

AMERICAN BANKRUPTCY INSTITUTE

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Transfer of Data to Professionals

- Use Secured Sites and/or Encrypted Emails
- Ensure the proper parties have the data and not extra people (make sure you know everyone on the distribution list)
- Remove unnecessary data sets – social security numbers, birthdates, credit card information, etc.
- Understand use of information and where it is being disclosed

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Schedules/Statements

SOFA 3 – Payments made within 90 days of Petition Date (a/k/a Preference Payments)

- Includes expense reimbursement and "non-regular" employee compensation
  - Executives often do not want this information made available to public

SOFA 4 – Payments to Insiders made within one year of Petition Date

- Similarly, executives do not want this information made available for public consumption

SOFA 30 – Payments/Distributions to Insiders

- *rinse, repeat*

Schedule AB 11 – Accounts Receivable

- Payments from customers (or patients) may appear here
- UGHS example

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

SCHEDULES/SOFAs are Public Documents!

- Required to be filed (w/in 14 days following Petition Date; DE Local Rules provide an extra two weeks).
  - Required that you provide full and honest answers.
  - *AT A MINIMUM*: Have your claims agent redact these portions from the documents posted to the case website.
- No rule or requirement re: claims agent websites
  - "I do what I want."
- FULL-COURT PRESS: Motion to File Under Seal
- *Warning*: The UST may or may not approve of this strategy.
  - Recent Chicago case, the UST literally suggested it.
  - Lately, DE is not a fan of this tactic.

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Potential Purchasers = Tire Kickers

AMERICAN BANKRUPTCY INSTITUTE

HIPAA = Health Insurance Portability and Accountability Act of 1996

- Data privacy and security provisions re: PHI (Protected Health Information

- Violations include:
  - Minimum fine for willful violations is $50,000
  - Maximum criminal penalty for violation by an individual is $250,000
  - Criminal violations as a result of negligence face up to one-year prison time

AMERICAN BANKRUPTCY INSTITUTE

Obvious Redactions

- Medical Records
  - Appended as supporting documents to POCs
  - Claim objection exhibits
- Claims Register
  - Website or filed w/ Court
- Affidavits/Certificates of Service
  - Major mailings to creditor matrix:
    - Notice of 341 Hearing/Notice of Commencement
    - Notice of Bar Date
    - Notice of Sale Hearing
    - Notice of D/S Hearing
    - Notice of Confirmation Hearing
    - Notice of Effective Date
- Proofs of Claim - If patient files a POC, then any mailing relating thereto
- Ballots
- Accounts Receivable (see Schedule AB11)

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Grab-Bag of Other Potential Pitfalls

- Affidavits/Certificates of Service
  - Oftentimes leave out names and/or addresses in lieu of qualifying language
- Claim Registers
  - If w/ Court, most don't bother to redact *as of this moment*
  - If w/ Claims Agent, often required by made public
    - Options:
      - First page only… but still names
      - Don't make viewable at all (i.e., healthcare cases)
- Ballots
  - Not public documents, per se
  - Beware of tabulation results and related certification
- Call Logs
  - Not public documents, but still…
- Billing Entries
  - If you file fee applications

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

You know just enough to be dangerous…

- Takeaways are:
  1. Identify sensitive information early on
  2. Set protocols ASAP
  3. Scare the bajeezus out of employees
  4. Micro-manage, if necessary

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Questions?

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS

AMERICAN BANKRUPTCY INSTITUTE

Thank You!

KING & SPALDING Parker Poe STRETTO SUMMIT INVESTMENT MANAGEMENT THOMSON REUTERS