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Privacy Concerns Jeopardize Sale of RadioShack Customer Data

When it comes to customer data, privacy and value can be in direct competition. RadioShack's latest move is a good example.

Earlier this week, RadioShack, which filed Chapter 11 bankruptcy in February, commenced an auction of some intellectual property and other intangible assets. Bidding for the assets has purportedly reached \$17.3 million to date. Part of the assets that RadioShack is hoping to auction off, and likely one of its most valuable assets, is its customer database, reportedly consisting of 8.5 million customer email addresses and 67 million customer name and postal address files.

Last month a Delaware bankruptcy judge, Judge Brendon Shannon, approved the bid procedures for the auction, but cautioned that any potential bidder "with an IQ above room temperature" should know that the sale involves significant privacy issues, which may ultimately prevent the sale from going forward.

Judge Shannon is alluding to a fundamental principle of privacy and data security law in the United States: in many situations, personally identifiable information may only be transferred to a third party (which includes any entity other than the collector, including the collector's affiliates) in accordance with the privacy policy in effect at the time the personally identifiable information was collected. This applies unless the customer's express consent is obtained to share the customer's information in a materially different way than set forth in the applicable privacy policy. This issue arises not only in the bankruptcy context, but very frequently upon the sale of the company or its assets, and can be a headache for both buyer and seller to address at that stage. In this scenario, both parties may be focused primarily on the value of the data itself and less focused on the ability to legally transfer or share that data with a third party.

While companies understandably are drawn to adopting privacy policies boldly asserting that customer data will never be sold or shared with a third party, a preferable approach is to think broadly about anticipated sharing (and uses) of the collected information as early as possible and draft the privacy policy accordingly. For companies that have already collected data under a less than ideal privacy policy, it is preferable to put in place a revised privacy policy and undertake the required step of obtaining the affirmative opt-in of existing customers sooner rather than later.

This document is intended to provide you with general information regarding privacy policies. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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