By John G. Loughnane

Are Consumer Privacy Ombudsmen Theatrical Performers?

Concerns about privacy interests in personally identifiable information (PII) splashed across headlines in 1987. An intrepid reporter, curious to learn more about then-U.S. Supreme Court nominee Hon. Robert Bork, visited Judge Bork's neighborhood video rental store.[1] The reporter asked for — and obtained — a list of Judge Bork's rental history, then published a story referencing the judge's viewing habits. Troubled by this perceived invasion of privacy, Congress soon passed the Video Privacy Protection Act.

About a decade later, Congress again enacted reactive legislation concerning consumer privacy. This time, the precipitating cause was an effort by chapter 11 debtor Toysmart.com to sell the PII of customers in contravention of the company's privacy policy. The Federal Trade Commission (FTC) and various other regulators challenged the sale, leading to a negotiated settlement among the parties.

Congress reacted by including a mechanism within the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) for the appointment of a consumer-privacy ombudsman (CPO) in certain situations. With the legislation about to turn 20 years old, the time is right to assess the effectiveness of a CPO's role in today's environment.

Two articles published by Prof. **Christopher Bradley**[2] provide an excellent starting point for such an assessment. Set forth herein is a brief summary of each article. This article also shares some experiences from the author's recent service as CPO in the *Vantage Travel Service Inc.* case, which involved the privacy interests of thousands of consumers. It then concludes with suggestions of the possible next steps for further evaluation of the CPO's role moving forward.

Coordinating Editor John G. Loughnane
White and Williams LLP Boston

John Loughnane is a partner with White and Williams LLP in Boston and a member of ABI's 2023 "40 Under 40" Steering Committee.

The CPO Experience

"Privacy for Sale: The Law of Transactions in Consumers' Private Data" (referred to hereinafter as "Privacy for Sale")[3] and "Privacy Theater in the Bankruptcy Courts" (referred to hereinafter as "Privacy Theater")[4] are the result of extensive work compiling, then analyzing, every available CPO report from 2005-20. Let's take a look at "Privacy for Sale" first.

"Privacy for Sale" consists of three sections. First, it provides an overview of privacy laws in the U.S. highlighting the historical reliance on a "notice and choice" model, with recent data pointing to the need for adherence to reasonable privacy practices and attunement to consumer expectations.[5] Also included is detailed background about Toysmart and the legislative origins of the CPO. The second section provides detail on the structure and methodology employed in the research conducted for both articles. The third section describes the developing "common law of consumer privacy" and includes an analysis of the CPO reports with assessments of the implications for privacy law generally.[6]

In contrast to those themes, "Privacy Theater" "presents the first comprehensive empirical study of who ombudsmen are, what they charge, and what they do,"[7] and consists of three principal sections: (1) discussion of the existing CPO model and the general context of the law of privacy; (2) how the CPO model is implemented in practice; and (3) possible reforms.[8] "Privacy Theater" minces no words in describing the type of privacy "regime" as currently deployed in the Bankruptcy Code:

> Ultimately, the regime is best understood as a form of "privacy theater," intended to reassure the public that consumer data is protected in bankruptcy proceedings. By mobilizing the public's trust in expertise, coupled with an ignorance of the nuances of bankruptcy, the consumer privacy ombudsman regime projects what scholars have called "a myth of oversight."[9]

"Privacy Theater" continues by noting:

> A legal regime that functions as privacy theater is "largely ritualistic," used to "create a myth of oversight," and used to sustain that myth while obscuring the darker realities.

1 Michael Dolan, "Borking Around," *The New Republic* (Dec. 20, 2012), *available at* newrepublic.com/article/111331/robert-bork-dead-video-rental-records-story-sparked-privacy-laws (unless otherwise specified, all links in this article were last visited on Jan. 2, 2024).

2 Prof. Bradley began service as a U.S. bankruptcy judge for the Western District of Texas on Oct. 2, 2023. He previously served as the Wyatt, Tarrant & Combs associate professor at the University of Kentucky Rosenberg College of Law.

3 Prof. Christopher G. Bradley, "Privacy for Sale: The Law of Transactions in Consumers' Private Data," 40 *Yale J. on Regul.* 127 (2023), *available at* yalejreg.com/wp-content/uploads/05.-Bradley-Article.-Print.pdf.

4 Prof. Christopher G. Bradley, "Privacy Theater in the Bankruptcy Courts," 74 *Hastings L.J.* 607 (2023), *available at* repository.uclawsf.edu/hastings_law_journal/vol74/iss3/2.

5 "Privacy for Sale," *supra* n.3 at 133, 37-142.

6 *Id.* at 154-196.

7 "Privacy Theater," *supra* n.4 at 607.

8 *Id.* at 613.

9 *Id.* at 607.

> The [CPO] regime mobilizes public trust in experts and courts to "create a myth of oversight" while adding little "substantive" protection.[10]

"Privacy Theater" sets forth several recommendations for changes to the CPO's role to address the deficiencies perceived. In addition to suggested reforms to the bankruptcy system, it recommends new protocols for the disposition of consumer privacy information for distressed businesses outside of bankruptcy. With respect to reforms to the bankruptcy system, "Privacy Theater" offers three specific suggestions. First, it recommends that access to ombudsman reports be made much simpler and universal with the goal of promoting greater transparency.

Second, "Privacy Theater" recommends that Congress change the nature of the personnel serving as ombudsmen. In place of a court-appointed third party, it recommends consideration of one of two possible options: designation of attorneys with the U.S. Trustee or the FTC to serve in the ombudsman role; or eliminating the ombudman's role completely and instead requiring debtor's counsel to put forth evidence demonstrating compliance with applicable privacy law.

Third, "Privacy Theater" suggests that Congress "rewrite the rules" applicable to sales of consumer data in bankruptcy cases. Specifically, it recommends reforms to expand the Bankruptcy Code's definition of PII to provide more robust notice requirements to the FTC and state regulators of proposed consumer data sale transactions, and to expand the situations for the appointment of an ombudsman. Further, it proposes additional legislation to focus more on the interests of consumers, such as through an expanded role and shifting of the burden of proof on key issues.

Vantage Travel Service Inc.

The extensive research and analysis in Prof. Bradley's articles was of particular interest as I embarked on service as CPO in the *Vantage* chapter 11 case, which was filed in the U.S. Bankruptcy Court for the District of Massachusetts in late June 2023. Consideration of the specific recommendations contained in "Privacy Theater," together with recent experiences in *Vantage*, provides the basis for suggestions for further evaluation of the CPO role.

Founded in 1983, Vantage had provided international tours to more than 500,000 individuals over the years, but COVID-19 substantially impacted its operations. After Vantage's efforts to raise additional capital, restructure or consummate a sale outside of court failed, it commenced chapter 11 and immediately sought permission to sell substantially all of its assets. Vantage had no direct ownership in vessels or other substantial hard assets, but the company's most important asset consisted of information in its database regarding thousands of customers and prospective customers.[11]

News coverage of the filing focused on the significant number of consumers who prepaid for the company's services and, in some cases, purchased "insurance" from the company's self-insured offering. In the midst of customer confusion about Vantage's demise — and with the clock ticking on debtor-in-possession financing and the stalking-horse bid available to the company — the court approved bidding procedures in early July 2023.[12]

At the outset of the case, Vantage sought an order directing the Office of the U.S. Trustee to appoint a CPO. The court promptly granted that motion in early July 2023, ordering that the appointment be made and a report submitted by July 20, 2023 — ahead of the scheduled auction. Thus, as the bidding process unfolded, the CPO work also commenced.

The detailed recommendations in the final report included suggested provisions to include in a sale order with respect to consumer information. These recommendations included that the winning bidder (1) operate in the same industry; (2) comply with all applicable laws; (3) agree to become the successor-in-interest to the debtor's policy (or provide terms of a policy at least as protective); (4) be liable for any violation of the debtor's policy after the closing of the sale; and (5) follow all other recommendations adopted by and ordered by the court.

The report noted that consumers would be likely to experience a gain in privacy protections through the adoption of the recommendation that credit card, automated clearing house (ACH) payment information and passport numbers not be sold, as well as the recommendation that, in all instances, consumers have the chance to opt out of receiving future marketing-related communication or request that their data be deleted. Further, the report noted that an asset sale in accordance with the recommendations would allow consumers some value on account of their claims (in the form of a credit on a future trip booked with the purchaser), as no other source of recovery appeared immediately achievable.

The report considered various alternative solutions that could mitigate the privacy impact on consumers. Factors considered in evaluating possible alternatives included the type of data collected, the costs and benefits associated with requiring affirmative consent, the value perceived by potential bidders, and the reasonable expectation of the privacy rights of consumers.

Finally, the report noted that the debtor and all bidders agreed with the recommendations. The court eventually incorporated the recommendations into the order approving the sale, and the sale closed promptly. In November 2023, the court confirmed the company's liquidating plan.[13]

The CPO Moving Forward: To Be, or Not to Be?

As previously noted, "Privacy Theater" posited that a CPO constitutes a mere theatrical performer in a "ritual-

10 *Id.* at 612 (footnote omitted).

11 Vantage's sale motion sought approval of a sale of substantially all assets including a "Customer and Prospect Database," which unquestionably constituted PII of the debtor's customers and prospective customers, as defined in § 101(41A) of the Bankruptcy Code.

12 A competing bidder prevailed with an offer that included, in addition to cash consideration, an improved credit offer that Vantage customers could use against future travel arrangements with the buyer equal to up to 100 percent of the claim of such customers.

13 Confirmation of the plan was not universally supported. For example, the attorneys general of New York and Massachusetts filed a joint objection advancing several arguments, including attacks against the practical value of the travel credits offered to consumers (*see* cases.stretto.com/public/x254/12294/PLEADINGS/1229411072380000000196.pdf).

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istic" show conveying a "myth of oversight" to consumers "while obscuring the darker realities."[14] When viewed through a historical and documentary perspective, such a perspective may well be firmly and genuinely held. Certainly, in developing any reform proposals, the work of CPOs as reflected in final reports should be understood and evaluated, as should the perspectives in Prof. Bradley's articles about such reports.

Yet, in developing any proposal, the experiences of professionals who have served in the CPO role, served as counsel to parties in consumer-data-driven cases, guided relevant regulatory authorities, served with the U.S. Trustee's Office and helped advocate for consumer privacy interests should also be captured. A wide swath of perspectives is needed to shape constructive proposals that can be implemented effectively.[15]

Producing the CPO report in *Vantage* was critical, but by no means was it the sole function of the role. Just as important was facilitating communications with various parties around insolvency issues, privacy issues and the intersection of the two topics in a very compressed time frame. Consumers held deep concern about the case, their claims and their information, and many sought out the CPO as an independent source of credible information. Social media, the internet and the media all volunteered information about the process — but with widely divergent levels of accuracy — only adding to the economic and emotional stress experienced by consumers.

Similarly, the CPO frequently communicated with counsel for various bidders, counsel for various creditors, and counsel for the debtor and relevant employees of the debtor. The template and basic structure of the final report matched that of many other CPO reports, but reimagining the written deliverable in the short time allotted to meet the appointment mandate seemed neither necessary nor desirable.

The recommendations in "Privacy Theater" offer a terrific starting point for evaluating potential modifications to a CPO's role. As previously noted, input should also come from others with relevant experience. Given the topic's complexity, an organized task force focused on considering potential modifications to the Bankruptcy Code would be useful. Until that day, here are some reactions to the three specific recommendations put forth in "Privacy Theater."

First, easier and quicker access to past CPO reports would be helpful. Part of a task force's mission could be to help find an appropriate home to provide long-term access to prior reports and for new reports issued since the study period concluded in 2020.

Second, with respect to the proposal to change the nature of a CPO, a task force should consider the practicality and efficiency of designating either the U.S. Trustee or FTC to serve as CPO. Both of those agencies have significant responsibilities in their respective domains and likely lack the resources needed to do anything other than fulfill core missions.

In *Vantage*, many consumers had already been in touch with state or federal regulators. Similarly, many had also been in touch with the U.S. Trustee's Office regarding potential service on the creditors' committee. No consumer expressed any concern that the CPO was helping to "launder data" as part of a ritualistic performance, nor did the general consumer body appear resistant to communicating concerns out of deference to a mythic value of oversight.

The alternative proposal in "Privacy Theater" — to eliminate the CPO role completely and instead require debtor's counsel to put forth evidence to the court demonstrating compliance with applicable privacy law — also would need debate and discussion. Most bankruptcy sales happen just as the *Vantage* sale did: extremely quickly. A debtor could make such a showing, but who would be positioned to challenge it in most cases? A committee, even if formed, may be more focused on economic recoveries than consumer privacy issues, depending on the facts.

The third recommendation of "Privacy Theater" — congressional action to "rewrite the rules" applicable to sales of consumer data in bankruptcy cases — is certainly worthy of serious consideration. Too often, Congress has legislated on consumer privacy issues only in a reactionary and incomplete way, such as after the Judge Bork episode or after the *Toysmart* case. Given the substantial research conducted in connection with "Privacy for Sale" and "Privacy Theater" — as well as the experience accumulated over two decades by numerous professionals involved in PII sales from various perspectives — it now is an excellent time to evaluate all aspects of the CPO role moving forward. abi

14 "Privacy Theater," *supra* n.4 at 612.

15 Perspectives of others that have studied the role of CPOs also should be considered. *See* Prof. Laura Coordes, "Unmasking the Consumer Privacy Ombudsman," 82 *Montana Law Review* 1 (2021), *available at* ssrn.com/abstract=3745940.