



NDC NEWS

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Understanding Bankruptcy Privacy Issues: Are We In Compliance?

By Kevin Anderson, President

The National Data Center ("NDC") has now been open since April 2002. There are currently four subscribers accessing the site on a regular basis, and the NDC is generating sufficient revenue to pay current operating expenses. Negotiations are ongoing to add new subscribers and to obtain data from other Chapter 13 software vendors. In short, the NDC is beginning to fulfill its objective articulated four years ago:

It is the mission of the NDC to furnish national Chapter 13 case information to parties-in-interest via a single, secured internet site while protecting the legitimate privacy interest of debtors.

Now that the NDC is a reality, many trustees have asked, "What are the legitimate privacy interests of debtors regarding Chapter 13 case information made available to parties-in-interest over the Internet?"

The purpose of this article is to help trustees more fully understand bankruptcy privacy issues so they can better fulfill their statutory duty to provide parties-in-interest with Chapter 13 case information and how the NDC can help trustees comply with appropriate privacy standards in bankruptcy.

**WHY THE CONCERN ABOUT A DEBTOR'S PRIVACY?
I THOUGHT A DEBTOR'S BANKRUPTCY FILE WAS A
PUBLIC RECORD AVAILABLE FOR REVIEW BY ANY
ENTITY.**

This perception is correct so far as it is limited to papers filed with the bankruptcy court. Court files constitute a "public record" that may be reviewed by any entity at the bankruptcy court. See 11 U.S.C. § 107. See also *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (the public has a common law right to review judicial records).

However, the public's right to review bankruptcy court files cannot be interpreted so broadly as to permit the unrestricted **resale, reuse or republishing** of all bankruptcy information. The reuse of bankruptcy information must be subject to reasonable and appropriate limitations that properly balance the public's right to information against a debtor's right to privacy.

Furthermore, creditors are often most interested in Chapter 13 payment and disbursement records, which is information that is created and maintained exclusively by the Chapter 13 trustees and is technically not public information under 11 U.S.C. § 107 because it is not filed with the court.

Satori Trustees Providing Data To The NDC.

The NDC is proud to announce that the Satori Trustees are now providing Chapter 13 case information to the NDC. It is anticipated, with full participation from Satori Trustees, that this will add approximately 40,000 active cases to the NDC database. The



and professional attitude of Satori in contributing to the success of the NDC.

The NDC would also like to thank the employees at Walter O'Cheskey's office who carefully reviewed the data to ensure that the data was represented correctly.

Bankruptcy Privacy (continued)

WHAT ARE THE CONCERNS ABOUT A DEBTOR'S PRIVACY?

In exchange for the substantial benefits of a discharge, debtors are required to make full, complete and accurate disclosures of their assets, debts, income, expenses, and prior financial transactions. While such wholesale disclosure is essential to the administration of the case and to maintaining the integrity of the bankruptcy system, it also has the potential to reveal highly sensitive personal information about the debtor.

For example, by carefully reviewing a debtor's statements and schedules, one could ascertain whether the debtor is divorced, has illegitimate children, is seeking psychiatric help, is incarcerated, is an illegal alien, is paying a criminal fine, has a drinking or gambling problem, is co-habiting, smokes, watches X-rated movies, owns a gun, has political and/or religious affiliations, and even where they buy their underwear (Victoria's Secret or K-Mart)! Such personal disclosures have the potential for substantial abuse by aggressive lenders, unscrupulous marketers, or vindictive ex-spouses. As stated by one website that is selling bankruptcy information: *"Our database is an excellent source for marketing leads and consists of businesses and individuals that are in desperate need of specialized services."*

Therefore, while debtors have reduced expectations of privacy, that does not mean they have waived all privacy protections – especially as to persons who are not parties-in-interest to their bankruptcy case.

WHY THE RECENT FOCUS ON DEBTOR PRIVACY?

Since court records have historically been available without restriction, many wonder why the recent concerns about a debtor's privacy interests. This shift in policy is the result of a number of factors.

Increased Bankruptcy Filings: Bankruptcy filings are at record levels, and as more persons are affected by bankruptcy, the issue of a creditor's rights to information versus a debtor's right to privacy has moved to the forefront of bankruptcy policy issues.

Computerized Databases: Trustees now maintain Chapter 13 information on computerized databases. Ten years ago, electronic databases were limited to large organizations. However, the availability and affordability of powerful computers and software has made it possible for every trustee to maintain a sophisticated and comprehensive database of Chapter 13 Information.

The Internet: The World Wide Web (www) has created an unquenchable demand for information. Creditors who were once content with obtaining bankruptcy information one case at a time from a trustee's 28kps dial-in system are now demanding immediate access to national bankruptcy information over the internet on a real time basis. Furthermore, now that there are more than 200 trustees across the country, creditors will no longer tolerate the burden of accessing 200 different information systems using 200 different logins to review their thousands of claims one case at a time.

The combined effect of these factors is two fold. First, creditors are demanding more efficient access to national bankruptcy information. Second, these revolutionary changes in information technology have altered the nature of a debtor's privacy interests in bankruptcy information. *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) ("Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files ... and a computerized summary located in a single clearinghouse of information.")

Previously, if the public wanted to review bankruptcy information, they had to travel to the courthouse, request the file, and peruse its contents. Therefore, while court records were available to the public, the difficulty of actually reviewing the court file limited its accessibility. This is known as the concept of "Practical Obscurity."

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Bankruptcy Privacy (continued)

However, with the advent of computerized databases, the Internet, and the federal court's PACER system, all of these hurdles have now vanished, and a debtor's bankruptcy information has become "Super Public," meaning that anyone, anytime, and anywhere in the entire world can access such information. Couple this development with the epidemic of identity theft and marketing abuses, and you have an ever-increasing awareness about the privacy implications arising from personal disclosures made in bankruptcy papers.

Based on such awareness, President Clinton directed in April 2000 that the Department of Justice, the Department of the Treasury, and the Office of Management and Budget (hereinafter the "Study Agencies") determine how to best address issues arising from the posting of bankruptcy case information on the Internet. The President's directive contained the following comment about bankruptcy privacy:

Bankruptcy records contain detailed sensitive information about debtors (including account numbers, social security numbers, account balances, income sources, and payment histories). In addition, aggregation and electronic distribution of this information could lower bankruptcy costs, but it also could make information easily available to neighbors, employers, marketers and predators looking for those most likely to be lured by scams.

WHAT WAS THE RESULT OF PRESIDENT CLINTON'S STUDY OF FINANCIAL PRIVACY AND BANKRUPTCY?

In January 2001, the Study Agencies published the *Study of Financial Privacy and Bankruptcy* (hereinafter the "Privacy Study"). Representatives from the NACTT actively participated in the Privacy Study. A summary of the findings made in the Privacy Study is set forth below:

1. Balance Interests in Efficiency, Government Accountability and Privacy. As technology broadens public access to bankruptcy case information, there is a need to rethink privacy issues in bankruptcy. The protection of personal privacy in bankruptcy should be given increased emphasis through the adoption of a national bankruptcy information policy that will appropriately balance society's interests in fair and efficient case administration, maintaining the integrity of the system, ensuring government accountability, and protecting debtors' privacy.
2. The General Public Should Have Access to Core Information. The public should have access to basic case information to ensure accountability of the bankruptcy system. At the same time, the public should not have access to other bankruptcy information that raises substantial privacy risks. Such information includes Social Security numbers, financial accounts, dates of birth, employer information, etc. Similarly, the bankruptcy statements and schedules, showing personal spending habits, medical information, family status, etc., should be removed from the public record. Finally, special attention should be given to protecting information regarding non-debtors such as spouses, children, relatives, or business partners.
3. Parties-In-Interest Should Continue to Have Access to Non-Public, Highly Sensitive Data, Subject to Reuse and Redisclosure Limitations. Parties in interest and potential parties in interest should have access to a broad range of bankruptcy information so they can effectively participate in the bankruptcy case. However, parties-in-interest should be prohibited from reusing or re-publishing such information for purposes other than asserting or collecting a claim in a bankruptcy case.
4. Incorporate Fair Information Principles. The bankruptcy system should incorporate the Fair Information Principles of Notice, Consent, Access, Security, Use Limitations And Accountability (see below).



"Revolutionary changes in information technology have altered the nature of a debtor's privacy interests in bankruptcy information."

Bankruptcy Privacy (continued)

WHAT ARE THE FAIR INFORMATION PRINCIPLES?

The privacy study recommends that the Fair Information Principles be applied to the disclosure of bankruptcy information. These principles are intended to ensure that a debtor's case information is only used for legitimate purposes reasonably related to the administration of the bankruptcy case. The Fair Information Principles, in regards to Chapter 13 case information, can be summarized as follows:

1. Notice to Debtors: Debtors should be informed in writing that trustees will make Chapter 13 case information available to parties-in-interest through various means, including the Internet, and how debtors can access and review their Chapter 13 case information.
2. Debtor Access: For purposes of verifying its accuracy, debtors are entitled to review their Chapter 13 information that is made available to creditors. Debtors are also entitled to have erroneous information expeditiously corrected or removed by the trustee.
3. Security: Trustees should employ adequate security standards to ensure that creditors only have access to bankruptcy cases in which they are a party-in-interest.
4. Access and Use Limitations: A trustee's Chapter 13 case information can only be accessed and used by a party-in-interest to legally assert or collect a claim against a bankruptcy estate.
5. Accountability: Any access or use of bankruptcy information that is inconsistent with these principles is improper and should subject the violator to civil and/or criminal prosecution by the debtor, state or federal agencies, or other appropriate entities.

DO THE FAIR INFORMATION PRINCIPLES APPLY TO CHAPTER 13 TRUSTEES?

In a word, yes. In connection with their administrative responsibilities, trustees collect and store, on computerized databases, Chapter 13 case information that is significantly more extensive than that found in the bankruptcy court file. As fiduciaries, trustees hold such data as custodians for the benefit of all parties to the bankruptcy system including the court, creditors, debtors, and the U.S. Trustee.

While the Chapter 13 trustee has a statutory duty to make information regarding the estate and the estate's administration available to parties-in-interest who request such information, the trustee also has a fiduciary responsibility to take reasonable steps to ensure that a debtor's bankruptcy information is not misused. How then can a trustee strike an appropriate balance between making bankruptcy information available to creditors while at the same time protecting a debtor's privacy? The answer is by complying with the Fair Information Principles set forth above.

"The Fair Information Principles are intended to ensure that a debtor's case information is only used for legitimate purposes reasonably related to the administration of the bankruptcy case."

Bankruptcy Privacy (continued)

IS THERE A PROBLEM IF THE CHAPTER 13 SOFTWARE VENDORS SELL CHAPTER 13 CASE INFORMATION TO CREDITORS?

For the same reasons that it is ethically and legally wrong for a trustee to profit from Chapter 13 data, so is it ethically and legally problematic for Chapter 13 software vendors (the “Vendors”) to sell such data.

Based on the unique nature of their business relationship, Vendors hold Chapter 13 data in a derivative-fiduciary relationship with the Chapter 13 trustees. It is undeniably improper for trustees to use their position or property of the estate, which includes Chapter 13 data, to realize income in excess of their allowed statutory compensation. The legal and ethical issues that arise if a trustee sold Chapter 13 information were summarized in the Privacy Study:

The FTC suggested that the commercial use of highly personal and sensitive [bankruptcy] data should be prohibited for several reasons. First, such disclosure may facilitate identity theft or other illegal conduct. Second, trustees receive sensitive private information as a result of governmental action, and the use of non-public information for commercial purposes appears to be outside the scope of their responsibilities. Third, the commercial use of debtor information conflicts with the trustees’ fiduciary duties and responsibilities, and the Department of Justice’s policy prohibiting trustees from using estate funds for their personal benefit. Finally, the commercial sale of debtor information may implicate concerns under the Fair Credit Reporting Act (FCRA).

Consequently, Vendors should be subject to the same limitations as trustees regarding the use and selling of Chapter 13 data. Vendors only have access to Chapter 13 data by virtue of their unique business relationship with the trustees. Vendors are not “parties-in-interest” in that they do not have a claim against the estate. Indeed, absent their role as a software provider to the trustees, Vendors would have no right to access, review or store the Chapter 13 data collected by trustees. Consequently, Vendors should be subject to the same use-limitations regarding bankruptcy data as trustees, and just as trustees are not be allowed to “profit” from the bankruptcy data acquired in connection with their fiduciary responsibilities, Vendors should not be allowed to derive additional profit by virtue of their unique association with the Chapter 13 trustees.

WHAT ABOUT OTHER ENTITIES SELLING CHAPTER 13 CASE INFORMATION TO CREDITORS?

The operation of a regional or national Chapter 13 database by any “for-profit” entity would create similar problems. An entity with a profit motive does not have the same incentive to limit a subscriber’s access or use of Chapter 13 data or to enforce such limitations because they inherently reduce the value of the data, which reduces the price that a vendor can charge. As noted by the *REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES*, prepared by the Judicial Conference Committee on Court Administration, it would be undesirable to encourage a “cottage industry” of data re-sellers who would create their own web site *“thus profiting from the sale of public information and undermining restrictions intended to protect privacy.”* (Report at Page 7, emphasis added).

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Bankruptcy Privacy (continued)

DOES THE NDC COMPLY WITH THE FAIR INFORMATION PRINCIPLES?

The NDC was designed from the ground up to comply with the Fair Information Principles. The NDC spent significant time and expense to ensure that subscribers can only view cases in which they are a party-in-interest. The NDC also limits subscribers to basic case information such as case status, debtor receipts, and creditor disbursements. The NDC has strict contractual controls that limit a subscriber from using Chapter 13 data for any purpose other than asserting or collecting a claim in a bankruptcy case. Finally, the NDC contracts contain substantial penalties for a violation of the reuse restrictions including monetary damages and the reporting of such violations to an appropriate governmental agency such as the U.S. Trustee and/or the Federal Trade Commission. Trustees who provide their data to the NDC can do so with confidence that it is being handled in a manner consistent with the Fair Information Principles.

The NDC Needs More Trustee Participation

The National Data Center would like to thank the Chapter 13 Trustees who signed and returned their contracts authorizing their software vendor to provide their data to the NDC. In order for the National Data Center to continue, we need the participation of every Chapter 13 Trustee. Please join other Chapter 13 Trustees in supporting this important project.

“Trustees who provide their data to the NDC can do so with confidence that it is being handled in a manner consistent with the Fair Information Principles.”

Trustee	Location	Service Provider	Trustee	Location	Service Provider
Amrane Cohen	Orange, CA	CBIS	Ray Hendren	Austin, TX	CBIS
Andres' Diaz	Salt Lake City, UT	CBIS	Richard Fink	Kansas City, MO	CBIS
Beverly Burden	Lexington, KY	CBIS	Rick Yarnall	Portland, OR	CBIS
Bob Brothers	Indianapolis, IN	CBIS	Robin Weiner	Fort Lauderdale, FL	CBIS
Camille Hope	Macon, GA	CBIS	Rod Danielson	Riverside, CA	CBIS
Carl L. Bekosfske	Flint, MI	CBIS	Russ Greer	Modesto, CA	CBIS
Carla Forsythe	Vancouver, WA	CBIS	Russell Brown	Phoenix, AZ	CBIS
Cindy Boudloche	Corpus Christi, TX	CBIS	S. Beaulieu	Metairie, LA	CBIS
Cleve Reding	Montgomery, AL	CBIS	Steven Tate	Statesville, NC	CBIS
Dale Wein	Aberdeen, SD	CBIS	Sylvia Brown	Savannah, GA	CBIS
Daniel Brunner	Spokane, WA	CBIS	Thomas Billingslea	San Diego, CA	CBIS
David Coop	North Little Rock, AR	CBIS	Tim Truman	North Richland Hills, TX	CBIS
David Howe	Tacoma, WA	CBIS	Tom King	Oshkosh, WI	CBIS
David Peake	Houston, TX	CBIS	Tom Powers	Dallas, TX	CBIS
David Skelton	San Diego, CA	CBIS	Tom Vaughn	Chicago, IL	CBIS
Dianne Kerns	Tucson, AZ	CBIS	W Keenan Stephenson	Columbia, SC	CBIS
Frank Pees	Worthington, OH	CBIS	Warren Tadlock	Charlotte, NC	CBIS
Fred Long	Eugene, OR	CBIS	William Bonney	Muskogee, OK	CBIS
George Neal	Portsmouth, VA	CBIS	William Griffin	Fairway, KS	CBIS
Glen Stearns	Lisle, IL	CBIS	William Heitkamp	Houston, TX	CBIS
Henry Hildebrand	Nashville, TN	CBIS	William Lawrence	Louisville, KY	CBIS
James Bone	Atlanta, GA	CBIS	Willie Banks	Alexandria, LA	CBIS
Jan Hamilton	Topeka, KS	CBIS	Bernie Rakozzy	Boise, ID	CMC
Jana Countryman	Plano, TX	CBIS	Jan Sensenich	White River Junction, VT	CMC

Trustee	Location	Service Provider	Trustee	Location	Service Provider
Jeffrey Kellner	Dayton, OH	CBIS	Lawrence Sumski	Amherst, NH	CMC
Jo-Ann Goldman	Little Rock, AR	CBIS	Michael Joseph	Wilmington, DE	CMC
John C. McAleer, III	Mobile, AL	CBIS	Peter Fessenden	Brunswick, ME	CMC
John F. Logan	Raleigh, NC	CBIS	Robert Hyman	Richmond, VA	CMC
John Hardeman	Oklahoma City, OK	CBIS	Terry Smith	Bradenton, FL	CMC
John LaBarge	Saint Louis, MO	CBIS	Brett Rodger	Grand Rapids, MI	EPIQ
Jose Carrion	San Juan, PR	CBIS	C. Still	Chattanooga, TN	EPIQ
Joy Goodwin	Columbia, SC	CBIS	David Burchard	Foster City, CA	EPIQ
Joyce Bradley-Babin	Little Rock, AR	CBIS	Edwina Dowell	Los Angeles, CA	EPIQ
K Michael Fitzgerald	Seattle, WA	CBIS	Harold Barkley	Jackson, MS	EPIQ
Kathleen McDonald	Las Vegas, NV	CBIS	Howard Hu	Honolulu, HI	EPIQ
Keith Rodriguez	Lafayette, LA	CBIS	Laurie Williams	Wichita, KS	EPIQ
Kelly Skehen	Albuquerque, NM	CBIS	Locke Barkley	Jackson, MS	EPIQ
Kevin Anderson	Salt Lake City, UT	CBIS	Louis Jones	Milwaukee, WI	EPIQ
Laurie Weatherford	Winter Park, FL	CBIS	M. Enmark	Fresno, CA	EPIQ
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Martha Bronitsky	Hayward, CA	CBIS	Edward Sparkman	Philadelphia, PA	Ramapo
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Michael Meyer	Santa Rosa, CA	CBIS	Ann Delaney	Indianapolis, IN	Satori
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Nancy Spencer Gribbs	Bowie, MD	CBIS	Joseph Black	Seymour, IN	Satori
Paul Davidson	Shreveport, LA	CBIS	Ralph McDonald	Phoenix, AZ	Satori
Phyllis Bracher	El Paso, TX	CBIS	Walter O'Cheskey	Lubbock, TX	Satori

For more information regarding providing your Chapter 13 data or subscribing to the National Data Center, please contact the National Data Center's
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