

FTC (Federal Trade Commission) Objects to Sale of Company Assets Based on Potential Breach of Privacy Policy

Article By:

Christopher E. Hoyme

Recently, the [Federal Trade Commission \(“FTC”\) filed a limited objection](#) in bankruptcy court to the proposed sale of assets of ConnectEdu, Inc. (“ConnectEdu”) on the grounds that the company’s privacy policy protecting customer personal information had potentially not been complied with.

Specifically, ConnectEdu, an education technology company that provided interactive tools to assist students, parents and school counselors in career planning sought to sell substantially all of its assets in a Chapter 11 bankruptcy proceeding in the Bankruptcy Court for the Southern District of New York. (In Re ConnectEdu, Inc., et al., Case No. 14-11238 United States Bankruptcy Court for the Southern District of New York.) According to the FTC, ConnectEdu collected a substantial amount of personal information from high school and college student customers including names, dates of birth, addresses, email addresses, telephone numbers and additional information.

ConnectEdu’s privacy policy provided that this personal information would generally not be distributed to third parties except without express written consent and direction of their customers. Interestingly, ConnectEdu’s privacy policy also expressly provided:

In the event of sale or intended sale of the Company, ConnectEdu will give users reasonable notice and an opportunity to remove personally identifiable data from the service.

The FTC filed an objection to the asset sale on the grounds that ConnectEdu had potentially not complied with Section 363(b)(1)(A) of the Bankruptcy Code which requires a debtor not to sell personally identifiable information about an individual subject to a privacy policy unless the sale is consistent with the policy. The FTC took the position that ConnectEdu’s customers may not have been provided notice and an opportunity to remove their personal information upon the potential sale of assets. The FTC alleged that failure to comply with ConnectEdu’s privacy policy in regard to the sale of assets could violate the Bankruptcy Code as well as FTC’s prohibition against “deceptive acts or practices in or affecting commerce” (15 U.S.C. § 45(a)) exposing both the buyer and seller of the assets to liability.

This is not the first time the FTC has addressed the statements in a website privacy policy in the bankruptcy context, [even where a privacy ombudsman had been appointed under Bankruptcy Code section 332](#). Note also that California's California Online Privacy Protection Act regulates website content by requiring operators of commercial websites to conspicuously post a privacy policy if they collect personally identifiable information from Californians. On May 21st, 2014, [California's Attorney General, Kamala D. Harris, provided guidance](#) for complying with the Act and recent amendments to it in 2013, requiring privacy policies to include information on how the operator responds to Do Not Track signals or similar mechanisms.

These cases and the recent activity in California highlight the need for all companies to review their website privacy policies generally, and specifically as they relate to how personal information collected on the sites may be used and disclosed, including in connection with the potential sale of the business. Absent such review, uses and disclosures that may be considered usual and customary, and otherwise permissible, could subject a company to significant legal liability and monetary exposure stemming from the terms of the company's own website policy.

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