

Identifying Unusual Assets & Valuation of Uncommon Assets

Gregory A. Holbus	Steven R. McDonald
926 Willard Dr., Ste. 118	7280 S. 13th. St., Ste. 103
Green Bay, WI 54304	Oak Creek, WI 53154
(920) 490-6160	(414) 226-2200

The debtor shall file a schedule of assets and liabilities (unless the court orders otherwise). 11 U.S.C. § 521(a)(1)(B)(i)

Asset: an item that is owned and has value. *Black's Law Dictionary*

(I) Practice Pointers

- Few laymen have an appreciation for the term “assets”. It has been my personal experience that most clients, upon hearing that I will be inquiring about their assets, have the knee-jerk response that they don’t have any assets. Others believe that the term only applies to real estate or motor vehicles (i.e. things with legal title).
- It is incumbent on the attorney to make sure that the client appreciates the full scope of the term. Merely instructing your client to fill out a packet of forms with no added explanation or guidance is inadequate.
- Clients generally do not volunteer information unless they believe it will help their case (such as sob stories). They don’t understand what is relevant to the bankruptcy process. It is your job to flush information out of the client and to identify potential issues.
- Clients generally do not read the print materials provided to them by their attorneys. Although I strongly advocate giving them plenty of material to read and/or fill out at their own pace, it is also important to review documents with them verbally.
- Repetition is important. Between verbal interviews and printed materials, my clients probably hear/read the same questions 5-7 times before their case is filed, and I do that because often, the client won’t think of something until the 5th or 6th time they have been asked about it.

(II) Identifying Assets / Property of the Estate

- See 11 U.S.C. § 541
- Generally, all legal and equitable interests, interests in community property, interests in inheritances within 180 days of filing, certain property recovered by the trustee, and certain profits and proceeds generated by the estate except for services performed by the debtor after the case is filed.
- Notable exclusions:
 - (b)(5) – funds deposited into an Educational IRA between 1 and 2 years prior to filing (limit of \$6,225) and funds deposited within 1 year of filing if not in excess as described in 26 U.S.C. 4973(e).
 - (b)(7) – funds in an ERISA retirement plan, § 457 deferred compensation plan, or 403(b).
- Real Estate – residences, former residences (that have not yet been foreclosed), business / rental properties, vacant lots, timeshares, hunting land, etc.
- Motor Vehicles – cars, trucks, vans, motorcycles, boats, ATVs, snowmobiles, trailers, campers, RVs, mobile homes, scooters, mopeds, aircraft, etc.
- Liquid Assets – Cash, Bank Account Balances, Prepaid Debit Cards, Paypal Accounts, Whole Life Insurance, Stocks, Bonds, Redeemable Bonuses/Points/Rewards from Credit Cards & Store Cards, etc.
- Other Non-Liquid Assets – Ownership Interests in Corporate Entities, Trusts, Annuities, IP, Licenses, etc.
- Contingent / Future Interests – Potential Inheritances, Pending Lawsuits, Unlitigated Claims, Tax Refunds, Life Estates, etc.

(III) Why Bother with Insignificant Assets?

- Schedule accuracy – § 521 doesn’t make a distinction between valuable and invaluable assets.
In covering § 341 hearings for other lawyers, I’ve seen a wide range of detail in household goods. Some of them are very simplistic (Household Goods: \$5,000). I’ll leave it to the trustees to comment on how much detail they think is appropriate. I certainly don’t think it’s necessary to itemize the number of pens and thumbtacks (and other “junk drawer items”) a debtor has, but I personally feel there should be some reasonable level of detail. Remember that the federal household goods exemption (11 U.S.C. § 522(d)(3)) is limited to individual items worth less than \$575.
- What might commonly be an insignificant asset could – in that one-in-a-million case – be a significant asset that you’re not going to find out about if you don’t ask. Clients rarely volunteer relevant information.
- Covering a wide gamut of potential assets will help your client appreciate how broad the term “asset” is, and it could jog their minds to reveal an asset you might not otherwise have discovered.

(IV) How to Value Certain Assets – What Documents to Request & What Information to Look For

Bear in mind that these are “on paper” valuations. In reality, what something is worth is what someone is willing to pay for it.

- Real Estate & Vehicles
 - Be sure to scrutinize the mortgage and title documents to confirm you have a properly perfected lien.
 - If the recording date was less than 90 days before the date you’re filing bankruptcy, look to the contract to ensure that recording happened within 30 days. (11 U.S.C. § 547(c)(3))
- Stocks
 - Number of Shares x Price per Share
 - Look to stock statements for number of shares.
 - Price per share is as simple as a Google search. You can find the exchange and stock symbol simply by searching for the company name plus “stock”. For example, searching “Wal-Mart stock” will give you NYSE: WMT. You can plug that back in at any time to Google to get the current price per share the day you file the bankruptcy case.
- Savings Bonds
 - Ask for a copy of the bonds themselves.
 - <http://www.treasurydirect.gov/BC/SBCPrice>
 - All you need is the series, face value, serial number, and issue date – and each item is printed on the bond itself.
- Ownership Interest in a Business
 - Sole Proprietorship – no separate business entity; “business assets” are personal.
 - Corporations, LLCs, etc. – total value of corporate assets less total amount of corporate liabilities; remember to ask about accounts receivable and accounts payable; review deeds and titles to verify whether real estate or vehicles are owned personally or by the corporate entity.
- Life Estates
 1. You’ll need a copy of the deed to determine when the life estate was created.
 2. Determine the applicable interest rate under 26 U.S.C. § 7520 based on the month/year the life estate was created.
Current Year: <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Section-7520-Interest-Rates>
Prior Years (to 1997): <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Section-7520-Interest-Rates-for-Prior-Years>
 3. You’ll need the grantors’ (usu. the parents) dates of birth to determine current age.
 4. Single Living Grantor – use IRS Publication 1457; Table S

http://www.irs.gov/pub/irs-tege/sec_1_table_s_2009.xls

Scroll until you find the applicable interest rate determined at step 2.

Locate the age determined at step 3.

The grantor's interest is in the "Life Estate" column, the grantee's interest is in the "Remainder" column.

5. Multiple Living Grantors – use IRS Publication 1457; Table R(2)

You'll have to reference both grantors' ages, but otherwise, the process is similar to step 4.

Multiple R(2) tables, based on the applicable interest rate from step 2.

0.2% - 4%: http://www.irs.gov/file_source/pub/irs-tege/sec_2_1_table_r2_2009.xls

4.2% - 8%: http://www.irs.gov/file_source/pub/irs-tege/sec_2_2_table_r2_2009.xls

8.2% - 12%: http://www.irs.gov/file_source/pub/irs-tege/sec_2_3_table_r2_2009.xls

12.2% - 16%: http://www.irs.gov/file_source/pub/irs-tege/sec_2_4_table_r2_2009.xls

16.2% - 20%: http://www.irs.gov/file_source/pub/irs-tege/sec_2_5_table_r2_2009.xls

6. Take into account any joint interests among grantees, and any valid mortgages or other liens encumbering the property.

- Potential Inheritance
 - Potential benefactor's age and overall health condition.
 - Potential assets and liabilities.
 - Potential number of beneficiaries.
 - Any known details of a will (per capita or per stirpes distribution, specific bequests).
 - Any known life insurance policies or retirement accounts listing the debtor as beneficiary.
- Pending or Unlitigated Claims
 - Cause of action.
 - Whether a lawsuit has been filed, and its status if filed.
 - Potential actual damages and potential punitive awards.
 - Likelihood of favorable judgment, settlement, and collectability.
- Tax Refunds
 - Don't just ask about the current or next year's refunds. Some debtors are waiting on tax refunds from years prior – either because of a late-filed return, an amendment, or re-assessment.
 - Trustees are entitled to a pro rata amount of the current year's refunds (e.g. in a case filed on April 15, 2014, the trustee could recover about 28% of the 2014 refunds. If using wildcard, this amount is usually exempt and the trustee won't hold a case open that long to recover the refund. But if using state exemptions, you'll need to consider this.
- Money in a Lawyer's Trust Account
 - Is your client in the middle of a divorce? Is your client suing someone for personal injury or breach of contract? It's worth asking if the client has retained counsel. If they have, there may be money sitting in that lawyer's trust account for advanced fees or costs that haven't been earned.
- Claim in the Bankruptcy Case of Another
 - Review the debtor's proof of claim.
 - Check PACER to verify that the claim was timely filed and allowed; that there have been no objections.
 - Where available, review the plan (Chapters 11, 12, or 13) or schedules (Chapter 7) to determine likely distribution.
- Equitable Interest (e.g. Land Contract)
 - Amount of down payment + total monthly payments paid in so far.
- Season Tickets
 - License Fee + Face Value of Issued Ticket(s)
- Whole Life Insurance Policies
 - Recent statements will have the current cash surrender value.
 - When using WI state exemptions, if the policy was issued within the last 24 months, only \$4k is exempt.
- Retirement Accounts
 - Most are not property of the estate under § 541(b)(7).
 - If uncertain if the plan qualifies for an exemption, the plan administrator can usually tell the debtor.
 - Monthly balance statements for value.
 - § 522(d)(10)(E) – payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor
 - § 522(d)(12) – exempt from taxation under 26 U.S.C. §§ 401, 403, 408, 408A, 414, 457, or 501(a).
 - § 815.18(3)(j) – Assets held or amounts payable under any retirement, pension, disability, death benefit, stock bonus, profit sharing plan, annuity, individual retirement account, individual retirement annuity, Keogh, 401-K or similar plan or contract providing benefits by reason of age, illness, disability, death or length of service and payments made to the debtor therefrom.
- Residual Income
 - Property of the estate under 11 U.S.C. § 541(a)(6).
 - Would include the pro rata amount of the debtor's next paycheck for work performed pre-petition.
 - More notably, applies to books of business in the insurance industry. Agents are paid money for contract renewals, which is for work performed pre-petition. It is possible to sell these books, and although I've not had the experience of having to sell one, I'm told that the value is generally computed at 24 months of the typical monthly residual payment. <https://www.agencyequity.com/listings/book-of-business-for-sale>
 - If your client is a real estate broker, you'll need to inquire about any commissions due to them prior to filing the bankruptcy case that have not yet been paid.
- Trust Beneficiaries
 - Review the trust documents.
 - Most contain a spendthrift provision that prevents the trustee or creditors from making a claim to the debtor's interest in future payments.
 - In absence of such a provision, the property currently in trust is property of the bankruptcy estate.
- Annuities
 - Many are exempt as retirement accounts. Check the establishment documents for ERISA language.
 - Account statements for value.
- Intellectual Property (copyrights, trademarks, and patents)
 - If the IP has potentially significant value, consider consulting with an IP attorney to discuss valuation.
 - Has the debtor received offers to purchase rights to their IP?

- Has the debtor received any royalties on account of their IP?
- Franchise or License Rights
 - Often have restrictions on alienability.
 - Has the debtor received offers to purchase?
 - Does the agreement contain provisions to sell rights back to the franchisor?
- (V) **Exemption Planning – Factors Affecting the Trustee’s Decision to Pursue or Abandon a Non-Exempt Asset – Steve will add some content.**
 - Nuisance Obstacles
 - Uncertain Markets
 - Non-liquid assets are only as valuable as someone is willing to pay for it. What something is worth on paper is not necessarily what it is worth in real life, given current market conditions (for better or for worse).
 - Unsatisfied Liens
 - Liens reduce the available equity in property. Some liens can be avoided. Others cannot.
 - Joint Ownership Interests
 - Under certain circumstances, a trustee may sell a joint owner’s interest. See 11 U.S.C. § 363(h).
 - Contingent and Future Ownership Interests
 - How long would creditors have to wait on a contingent asset? How likely is the asset to actually be realized?
 - Limitations on Alienability
 - Environmental Hazards
 - Administrative Considerations
 - Cost of Liquidation
 - Total Amount to Distribute to Creditors
 - Meaningful Distribution – Percent Yield to Creditors

§ 527 - Disclosures

- (a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide—
 - (2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that—
 - (B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

§ 506 – Determination of Secured Status

- (a)
 - (1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
 - (2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.
- (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.
- (c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.
- (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--
 - (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
 - (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

§ 541 – Property of the Estate

- (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
 - (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
 - (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--
 - (A) under the sole, equal, or joint management and control of the debtor; or
 - (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
 - (3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.
 - (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.
 - (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--
 - (A) by bequest, devise, or inheritance;
 - (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
 - (C) as a beneficiary of a life insurance policy or of a death benefit plan.
 - (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.
 - (7) Any interest in property that the estate acquires after the commencement of the case.
- (b) Property of the estate does not include--
 - (1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;
 - (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;
 - (3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965, or any accreditation status or State licensure of the debtor as an educational institution;
 - (4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--
 - (A)
 - (i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and
 - (ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or
 - (B)
 - (i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and
 - (ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;
 - (5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986 not later than 365 days before the date of the filing of the petition in a case under this title, but--
 - (A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;
 - (B) only to the extent that such funds--
 - (i) are not pledged or promised to any entity in connection with any extension of credit; and
 - (ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and
 - (C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$ 6,225;

- (6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code not later than 365 days before the date of the filing of the petition in a case under this title, but--
 - (A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;
 - (B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and
 - (C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$ 6,225;
- (7) any amount--
 - (A) withheld by an employer from the wages of employees for payment as contributions--
 - (i) to--
 - (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;
 - (II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or
 - (III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or
 - (ii) to a health insurance plan regulated by State law whether or not subject to such title; or
 - (B) received by an employer from employees for payment as contributions--
 - (i) to--
 - (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;
 - (II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or
 - (III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or
 - (ii) to a health insurance plan regulated by State law whether or not subject to such title;
- (8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--
 - (A) the tangible personal property is in the possession of the pledgee or transferee;
 - (B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and
 - (C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or
- (9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--
 - (A) on or after the date that is 14 days prior to the date on which the petition is filed; and
 - (B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

- (c)
 - (1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--
 - (A) that restricts or conditions transfer of such interest by the debtor; or
 - (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.
 - (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.
- (d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.
- (e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.
- (f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.