

Property of the Estate

A Lexis Practice Advisor® Practice Note by Ira L. Herman, Blank Rome LLP



Ira L. Herman
Blank Rome LLP

This practice note provides an overview of Section 541 of the Bankruptcy Code, entitled “Property of the Estate.” Understanding whether or not an asset is property of the bankruptcy estate and subject to the jurisdiction of the bankruptcy court when a case is filed is the first step to understanding the bankruptcy risk inherent in any transaction. The inquiry is under state or other applicable non-bankruptcy law. It requires parties to look at the property and property rights at issue and determine whether or not any of part of that bundle of rights would become property of the estate, if one party to the transaction were to become a debtor under the Bankruptcy Code. This gating issue is of paramount importance, since the bankruptcy court presiding over a bankruptcy will have exclusive jurisdiction over any and all property of the estate. 28 U.S.C. § 1334(e). The term property of the estate is defined in Section 541(a) of the Bankruptcy Code.

This practice note also discusses the status of certain intangible property, including social media accounts, goodwill, domain names, and telephone numbers as property of the estate, as well as restrictions on the sale of estate property consisting of personally identifiable information, as follows:

- Property of the Estate
- Tangible and Intangible Property

- Special Intangible Property
- Customer Lists and Personally Identifiable Information

For related content, see [Automatic Stay](#), [Treatment of Claims in Bankruptcy](#), and [Confirmation](#).

Property of the Estate

The definition of property of the estate contained in Section 541(a) is extremely broad. Under Section 541(a), property of the estate is comprised of all the following, “whenever located and by whomever held”:

- All legal and equitable interests of the debtor in property as of the commencement of the case
- Certain interests of the debtor and the debtor’s spouse in community property as of the commencement of the case
- Any interest in property that the trustee recovers under enumerated provisions of the Bankruptcy Code
- Any interest in property preserved for or transferred to the estate under Section 510(c) of the Bankruptcy Code (equitable subordination) or Section 551 of the Bankruptcy Code (preservation of avoided transfer)
- Certain interests in property acquired by the debtor or to which an entitlement arises, within 180 days after filing, by bequest, devise, inheritance, property settlement, divorce decree, life insurance policy, or death benefit plan
- Proceeds of any of the above, except for post-petition wages in a Chapter 7 case – and –
- Property that the estate acquires after commencement of the case.

It is important to note that “wherever held” includes property held in the United States as well as property held in a foreign jurisdiction. The extraterritorial jurisdictional reach of the bankruptcy courts over property of the estate, therefore, is virtually without limit.

The nature and extent of a debtor’s interest in property is determined under applicable non-bankruptcy state and federal law, but most typically by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979). However, whether a property interest falls within the categories included in the estate under Section 541 of the Bankruptcy Code is determined by application of the federal bankruptcy law. *In re Haedo*, 211 B.R. 149 (S.D.N.Y. 1997). Pursuant to Section 541(a)(1), property of the estate includes non-leviable or even non-transferable rights of a debtor. This is true even though these types of rights may not fall within more traditional or common law concepts of property, which usually encompass physical property, claims to property, and causes of action.

As stated above, knowing what is and what is not going to be property of the estate is a gating issue of paramount importance when considering the consequences of a potential bankruptcy filing on the rights of parties involved in almost any transaction.

First, property of the estate is the source of distributions to creditors. A creditor must consider whether the property from which it expects its claim to be satisfied could become part of a bankruptcy estate, i.e., property of the estate, to be distributed ratably to creditors, pursuant to the dictates and priorities governing distributions of assets set forth in the Bankruptcy Code. Section 507 of the Bankruptcy Code, entitled “Priorities” is the key Bankruptcy Code provision addressing the relative priority of payment of the expenses and claims extant in a bankruptcy case. In this instance priority of payment means that certain expenses and claims are to be paid in full, before holders of claims with lower ranked priorities can be paid. For more information, see [Treatment of Claims in Bankruptcy](#).

Second, property that becomes part of the estate is subject to the automatic stay. A creditor relying on its rights against certain property must therefore be aware that its ability to exercise those rights will be limited if there is a bankruptcy filing. For more information about the automatic stay, see [Automatic Stay](#).

Third, a landlord or tenant of a debtor must be aware of the effect of a bankruptcy filing on any lease that

becomes property of the estate. Similarly, a party to a contract that would become an executory contract if a bankruptcy is filed, must be aware that once the contract becomes property of the estate, that contract will be subject to assumption or rejection under Section 365 of the Bankruptcy Code. For more information about executory contracts and unexpired leases, see [Assumption, Assignment, and Rejection of Executory Contracts](#).

Fourth, a creditor must be aware that trust funds held by an entity that files for bankruptcy relief are not property of the estate. One example of trust funds that typically are involved in a bankruptcy case, and which do not constitute property of the estate, are employment taxes withheld by an employer. Similarly, royalties payable on account of an oil and gas lease, are trust funds that may be held by a debtor entity for the benefit of the royalty owners.

Fifth, a creditor must understand the type of expense or claim it holds, i.e., a cost of administering the case, a secured claim, an unsecured with a priority claim, a general unsecured claim, etc. To the extent repayment of a creditor’s claim is secured by the collateral, the creditor needs to understand the nature, extent, validity and priority of its lien or security interest. Also, priorities among secured creditors are governed by applicable non-bankruptcy law and are not addressed by Section 507 of the Bankruptcy Code, which only addresses priorities among expenses and claims that are not secured by a security interest or lien.

Finally, holders of expenses and claims must understand how property leaves the jurisdiction of the bankruptcy court, including: (1) trustee distribution, (2) a confirmed plan under Chapters 11, 12, or 13 of the Bankruptcy Code (see [Confirmation](#)), (3) relief from the automatic stay, thereby allowing a creditor to exercise its rights against certain property (see [Automatic Stay](#)), (4) abandonment by the debtor or trustee, (5) sale or assignment under Section 363 of the Bankruptcy Code (see [Section 363 Sale Procedures, Hearings, Orders, and Appeals](#)), and (6) dismissal of the bankruptcy case (see [Dismissal under Section 1112](#)). Property can also leave the estate by being transferred to a post-confirmation trust to be liquidated before it is actually distributed pursuant to a confirmed Chapter 11 plan (see [Post-confirmation Trusts](#)). Removing property from the estate means that a non-debtor party may receive a cash payment on account of its claim or property that can be sold or otherwise monetized to satisfy an outstanding obligation of a debtor.

Tangible and Intangible Property

Property of the estate is defined broadly to include all tangible and intangible property. Tangible property includes all types of physical property that a debtor owns or has an interest in, such as machinery, equipment, inventory, furniture, and fixtures.

Intangible property interests include a wide variety of nonphysical property and are usually included in the property of the estate. The value of certain intangible property is apparent from the marketplace such as publicly traded stocks and bonds. The value of other intangible property is not as easily measured, including, among others, goodwill and social media. Notwithstanding this, such intangible property is also considered property of the estate.

Special Intangible Property

The analysis of certain intangible property interests, such as telephone numbers and customer lists, is nuanced and requires a fact-intensive inquiry. Few courts have analyzed the status of social media as property of the estate. These items are discussed below.

Telephone Numbers

The circuit courts are split over whether telephone numbers are considered property and, consequently, property of the estate. The Second and Ninth Circuits have found that telephone numbers are not property of the estate because a telephone is a service and not a property interest. *Rothman v. Pacific Tel. & Telegraph Co.*, 453 F.2d 848, 849–50 (9th Cir. 1971); *Slenderella Systems of Berkeley, Inc. v. Pacific Tel. & Tel. Co.*, 286 F.2d 488, 490 (2d Cir. 1961). On the other hand, the First and Fifth Circuits have held that telephone numbers can be considered property of the estate. *Darman v. Metropolitan Alarm Corp.*, 528 F.2d 908, 910 n.1 (1st Cir. 1976); *In re Fontainebleau Hotel Corp.*, 508 F.2d 1056, 1059 (5th Cir. 1975). Outside of bankruptcy the Third and Seventh Circuits have also held that telephone numbers are not property. *Bus. Edge Grp., Inc. v. Champion Mortgage Co., Inc.*, 519 F.3d 150, 154 (3d Cir. 2008); *In re StarNet, Inc.*, 355 F.3d 634, 637 (7th Cir. 2004).

In certain cases, the question of whether a telephone number is considered property or a contractual right for service is not relevant because contractual rights are

also considered property of the estate. However, the determination can be pertinent where the contractual rights have expired or were rejected by the debtor. For instance, in *Alexandria*, the court held that the bankruptcy sale of the debtor's assets did not include the domain name or telephone number because neither was property of the estate, and the underlying contracts had been rejected prior to the sale. *Alexandria Surveys Int'l, LLC v. Alexandria Consulting Grp., LLC*, 500 B.R. 817, 821 (E.D. Va. 2013).

Domain Names

The court in *Alexandria* also held that the domain name was not property of the estate because the use of the domain name was based on contractual rights. *Alexandria*, 500 B.R. at 821. However, the Ninth Circuit (and other courts) has rejected this finding, holding that the right to the domain name was either an intangible or tangible property right. *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (intangible). Thus, most courts find that domain names and the contractual right to use the domain name are both considered property of the estate. *Schott v. McLear (In re Larry Koenig & Assoc., LLC)*, 2004 Bankr. LEXIS 2311, at *21 (Bankr. M.D. La. Mar. 31, 2004).

Goodwill

Intangible property includes a debtor's goodwill, which consists of a business' value that is above the collection of assets. *Cyganowski*, 2015 Bankr. LEXIS 228, at *31–32. Goodwill is generally defined as a business' reputation that creates value due to a customer's continued patronage. *Thomas v. United States (In re Thomas)*, 246 B.R. 500, 505 (E.D. Pa. 2000). A business' goodwill has value and is property of the estate. *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996). However, there can be disputes regarding the value of a debtor's goodwill in the context of a sale or plan of reorganization.

In certain cases, goodwill is broken down between professional goodwill and economic or the business' goodwill. Professional goodwill is attached to an individual's reputation and skills while economic goodwill is entirely associated with the business. Professional goodwill is not part of the estate and belongs to the individual. Courts may be forced to analyze the distinction between professional goodwill and a business' goodwill when dealing with a closely held corporation or a medical or other professional practice where the professional and business goodwill are intertwined. See, e.g., *Paolino v. Brener (In re Paolino)*, 1991 Bankr. LEXIS 2203, at *18 (Bankr. E.D. Pa. Jan. 11, 1991).

Social Media

With the advent of social media, courts may be forced to address whether a debtor's social media is property of the estate. This issue has been addressed by only a few courts. In CTLI, the court was called on to determine whether a corporate debtor or its former majority shareholder owned several social media accounts. In re CTLI, LLC, 528 B.R. 359 (Bankr. S.D. Tex. 2015). The court held that business social media accounts were property of the estate within the meaning of Section 541. The court reasoned that social media accounts were analogous to customer lists that are considered property of the estate.

The court had more difficulty deciding about whether an individual's social media could be considered property of the estate. The court analyzed whether individual social media accounts were actually business accounts. The court also considered the 13th Amendment's prohibition on involuntary servitude and a public figure or celebrity's right to their persona, and decided that an individual's social media accounts were not property of the estate.

The court also considered whether the individual's goodwill generated by social media is business goodwill that belongs to the debtor or professional goodwill that belongs to the individual. The court found that an individual's interest in the debtor's social media accounts is professional goodwill. The court reasoned that the finding that the business social media accounts were property of the estate would not impact the individual's professional goodwill because the professional goodwill would follow the individual upon departure from the debtor. At least one other court has treated social media as property of the estate by approving the sale of social media accounts along with other debtor assets. In re Borders Grp., Inc., 2011 Bankr. LEXIS 4606 at *38 (Bankr. S.D.N.Y. Sept. 27, 2011).

Outside of bankruptcy, one court held that Facebook likes were not property interests in a conversion case. Mattocks v. Black Entm't Television LLC, 43 F.Supp.3d 1311, 1321 (S.D. Fla. 2014). The court reasoned that liking a Facebook page is an expression of approval of content that can be revoked by unliking the page; therefore, it cannot be considered an intangible property interest or goodwill.

Customer Lists and Personally Identifiable Information

Customer lists are another type of intangible property. Customer lists are consistently considered property of the estate because customer lists clearly have value to

a business. In re Alert Holdings, Inc., 148 B.R. 194, 203 (Bankr. S.D.N.Y. 1992). Customer lists may contain customer preferences, pricing agreements, and trade secrets, all of which are valuable estate assets. Togut v. RBC Dain Correspondent Servs. (In re S.W. Bach & Co.), 435 B.R. 866, 890 (Bankr. S.D.N.Y. 2010).

Customer lists may also contain private consumer information. The Bankruptcy Code contains certain provisions to protect this private information if the debtor seeks to sell or lease this information. In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) which, in part, amended the Bankruptcy Code to protect consumers' privacy rights. Section 363(b) was amended to provide that a debtor that has a privacy policy that prohibits the transfer of personally identifiable information may not sell or lease such information unless (1) the sale or lease is consistent with the policy or (2) the court finds, after giving due consideration to the facts, circumstances, and conditions, that the sale or lease would not violate applicable nonbankruptcy law. 11 U.S.C. § 363(b)(1).

The BAPCPA also amended the Bankruptcy Code to include a definition for personally identifiable information, which for an individual obtaining products or services for personal, family, or household use, includes:

- The first and last name of an individual
- Address
- E-mail address
- Social security number
- Credit card number

11 U.S.C. § 101(41). If any of the above list is identified, then the definition also includes (1) a birth date, the number of a certificate of birth or adoption, or a place of birth and (2) any other information that, if disclosed, will result in contacting or identifying such individual. *Id.*

The BAPCPA also added Section 332, which provides for the U.S. Trustee to appoint a consumer privacy ombudsman upon a court order if required under the amended Section 363(b). Bankruptcy Rule 6004(g)(1) requires the party moving to sell personally identifiable information request an order directing the U.S. Trustee to appoint a consumer privacy ombudsman. The U.S. Trustee is required to file a notice of the appointment of a consumer privacy ombudsman at least seven days before the sale hearing if the court orders the appointment of a consumer privacy ombudsman. Fed. R. Bankr. P. 6004(g)(2).

The consumer privacy ombudsman is authorized to appear at the Section 363(b) hearing and provide information to assist the court with its consideration of the privacy issues contained in the amended Section 363(b). Section 332 further states that the consumer privacy ombudsman may provide the following information:

- The debtor's privacy policy
- The potential losses or gains of privacy to consumers if such sale or such lease is approved by the court
- The potential costs or benefits to consumers if such sale or such lease is approved by the court
- The potential alternatives that would mitigate potential privacy losses or potential costs to consumers

11 U.S.C. § 332. The consumer privacy ombudsman is also prohibited from disclosing personally identifiable information.

Although there are few decisions discussing these new consumer privacy protections, counsel should be aware of these requirements and be prepared to address these issues in connection with a Section 363(b) motion. The FTC and state attorney generals will likely become involved when the sale of personally identifiable information is proposed. Counsel should carefully review the debtor's privacy policy and the relevant state and federal law. Examples of cases where the sale of customer lists containing personally identifiable information were proposed include Borders, RadioShack, and Crumbs Bake Shop bankruptcies. For more information, see [Data Privacy and Bankruptcy](#).

Ira L. Herman, Partner, Blank Rome LLP

Ira Herman is a Partner in Blank Rome's New York office. He concentrates his practice on domestic and cross-border insolvency matters, commercial litigation, and related corporate governance issues. He regularly represents buyers of distressed assets and provides counsel concerning troubled commercial real estate, including securitized loans (CMBS). As a mediator, Ira has been able to facilitate the resolution of controversies involving U.S. and non-U.S. parties concerning bankruptcy and commercial law issues. Additionally, Ira works with for-profit and nonprofit entities on data privacy and cybersecurity issues.

Currently he serves as Steering Committee Chair for the New York City Bankruptcy Assistance Project. He is a member of the President's Council for the Food Bank for the City of New York. He is the Editor-in-Chief of the American Bankruptcy Institute's (ABI) Section 363 Asset Sales Databank and Co-Chair of the ABI Assets Sales and Real Estate Committees. Ira is an Adjunct Professor of Law at Pace University School of Law and St. John's School of Law in the Bankruptcy LL.M. Program.

Ira received his J.D. from Boston University School of Law where he graduated cum laude with distinction and was the Editor of the Boston University International Law Journal. He has a B.A. in Political Science from Yeshiva University. Ira is a member of the New York State Bar and New York City Bar Associations.

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