

4. DUTIES OF A TRUSTEE IN THE ADMINISTRATION OF A CASE

A. INTRODUCTION

The principal duty of the trustee is to collect and liquidate the property of the estate and to distribute the proceeds to creditors.

A chapter 7 case must be administered to maximize and expedite dividends to creditors. A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals, or unduly delay the resolution of the case. The trustee must be guided by this fundamental principle when acting as trustee. Accordingly, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to unsecured creditors, including unsecured priority creditors, before administering a case as an asset case. 28 U.S.C. § 586.

The trustee should be aware of the provisions of the “Servicemembers Civil Relief Act”, enacted on December 19, 2003, which provides for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service. The protections provided to servicemembers and their dependents are quite broad and should be carefully reviewed prior to taking actions which may affect the rights of any person who may be a servicemember or a dependent.

B. STATUTORY AND GENERAL DUTIES

The specific statutory duties of a trustee are set forth in section 704(a). The trustee shall:

1. Collect and reduce to money the property of the estate and close the estate as expeditiously as is compatible with the best interests of parties in interest. 11 U.S.C. § 704(a)(1).
2. Be accountable for all property received. 11 U.S.C. § 704(a)(2).
3. Ensure that the debtor performs his or her intentions as to the retention or surrender of property of the estate that secures consumer debts. 11 U.S.C. § 704(a)(3).
4. Investigate the financial affairs of the debtor. 11 U.S.C. § 704(a)(4).
5. If a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper. 11 U.S.C. § 704(a)(5).
6. If advisable, oppose the discharge of the debtor (but not the discharge of a particular debt since only the creditor to whom it is owed may do so). 11 U.S.C. § 704(a)(6).
7. Unless the court orders otherwise, furnish such information concerning the estate and the estate’s administration as is requested by a party in interest. 11 U.S.C. § 704(a)(7).

8. If the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with the responsibility for collection or determination of any tax arising out of such operations, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court or the United States Trustee requires. 11 U.S.C. § 704(a)(8).
9. Make a final report and file a final account of the administration of the estate with the United States Trustee and the court. 11 U.S.C. § 704(a)(9).
10. Provide the applicable notice to the holder of a domestic support obligation. 11 U.S.C. § 704(a)(10).
11. If required, perform the obligations required of an administrator of an employee benefit plan. 11 U.S.C. § 704(a)(11).
12. Use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business. 11 U.S.C. § 704(a)(12).

The chapter 7 trustee is the representative of the estate. 11 U.S.C. § 323(a). The trustee is a fiduciary charged with protecting the interests of all estate beneficiaries – namely, all classes of creditors, including those holding secured, administrative, priority, and non-priority unsecured claims, as well as the debtor’s interest in exemptions and in any possible surplus property. The duties enumerated under section 704 are specific, but not exhaustive. The trustee must assist the United States Trustee in the performance of its civil enforcement duties and refer to the United States Trustee matters that might indicate the commission of a crime. 28 U.S.C. § 586.

C. COLLECTION AND LIQUIDATION OF ASSETS, 11 U.S.C. § 704(a)(1), AND ACCOUNTABILITY OF THE TRUSTEE FOR ALL PROPERTY RECEIVED , 11 U.S.C. § 704(a)(2)

A trustee has a duty to ensure that a debtor files all schedules and statements required under section 521 and Fed. R. Bankr. P. 1007. A trustee must also ensure that a debtor surrenders non-exempt property of the estate and turns over books and records to the trustee. 11 U.S.C. § 704.

The trustee must be familiar with the definition of property of the estate as set forth in section 541. Under section 541, all legal and equitable interests of the debtor, wherever located and by whomever held, are property of the estate. Property of the estate also includes any property that the debtor acquires or becomes entitled to acquire within 180 days after the petition date by way of inheritance, property settlement or divorce decree, or life insurance.

Section 704(a)(2) requires the trustee to be accountable for all property received and Fed. R. Bankr. P. 2015 imposes a duty on a trustee to keep records, make reports, and give notice of a case to persons holding property of the estate.

1) DETERMINATION AND ADMINISTRATION OF ASSET CASES

Prior to administering a case as an asset case, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to unsecured creditors. The trustee must review the bankruptcy schedules to make a preliminary determination as to whether there appears to be assets in the case or areas warranting further inquiry at the meeting of creditors. The trustee should not rely upon any designation by the Clerk of the Bankruptcy Court as to whether the case is an asset or no-asset case. The trustee must conduct an independent investigation to make this determination. 11 U.S.C. § 704.

2) DETERMINATION AND ADMINISTRATION OF NO-ASSET CASES

If the trustee determines after the meeting of creditors that the case is a no-asset case, then the trustee must timely file a report of no distribution (“NDR”). 11 U.S.C. § 704(a)(9).

The trustee shall file the NDR with the court within 60 days after the initial examination of the debtor at the meeting of creditors. Failure to timely file NDRs may result in an appropriate remedial action.

The purpose of the NDR is to close administration of the case. The NDR certifies that the trustee has reviewed the schedules, investigated the facts, and determined that there are no assets to liquidate for the benefit of creditors. It also certifies that the trustee has examined the debtor’s claimed exemptions and concluded that there is no purpose served to object to their allowance, and that all security interests and liens against non-exempt property are properly documented, perfected, and not subject to attack as preferences or otherwise voidable.

If the trustee discovers assets to administer for the benefit of creditors after the NDR is filed, the trustee must: (1) withdraw the NDR in writing to administer the assets and (2) seek to have the case reopened if the case is closed. See Handbook Chapter 4.N.3 for additional procedures concerning reopening closed cases. The trustee should consider a complaint to deny or revoke the debtor’s discharge if the debtor intentionally failed to disclose the assets. See Handbook Chapter 4.G.

3) FURTHER CONSIDERATIONS IN DETERMINING WHETHER TO ADMINISTER ASSETS

a. INVENTORY OF ESTATE PROPERTY

The trustee should inventory the debtor’s property, unless the trustee accepts as that inventory the debtor’s Schedule A - Real Property and Schedule B - Personal Property. Fed. R. Bankr. P. 2015(a)(1). Given the debtor’s duty to cooperate with the trustee in preparation of this inventory, the trustee must verify at the meeting of creditors that the debtor’s inventory, as shown on Schedules A and B or other documents, is complete and satisfactory. There may be instances when Schedules A and B do not provide sufficient detail in order to properly administer the assets. For example, if the debtor has listed Furs and Jewelry at \$10,000, the trustee will need to obtain a detailed list of the items. In addition to a written list, the trustee

should consider using other methods to document the assets, such as videotaping the assets. The inventory must be sufficient to enable a trustee to later verify whether an auctioneer or other liquidator has accounted for all property turned over for sale. The trustee may use an auctioneer or appraiser to conduct an inventory of the debtor's property. This auctioneer or appraiser may not subsequently sell the property, unless the trustee or a designee, such as a staff person, was also present when the auctioneer or appraiser took the inventory. 11 U.S.C. § 704, Fed. R. Bankr. P. 2015.

b. AUTOMATIC STAY

Pursuant to sections 362(c)(3) and (c)(4), the automatic stay terminates or never goes into effect for repeat or serial filers. Depending upon the law in the particular jurisdiction, the trustee may need to take immediate action to request the court to continue the stay until the trustee can determine if there is equity in property of the estate.

If a repeat filer has had an earlier case pending within the preceding year, the automatic stay terminates after 30 days. If a repeat filer has had two or more cases pending within the preceding year, the stay does not go into effect at all. The law is unsettled as to whether, in addition to termination of the stay with respect to the debtor, these provisions also terminate the stay with respect to property of the estate. The trustee should determine the state of the law in the trustee's district.

c. EXEMPTIONS

A debtor must list property claimed as exempt on the schedule of exempt property filed with the court. Fed. R. Bankr. P. 4003 (a). Only individuals may claim exemptions; corporations and partnerships may not.

Specific exemptions are not addressed in depth in this Handbook. Section 522(d) sets forth allowable exemptions under federal bankruptcy law. The trustee must know which states have opted out of the federal exemptions. 28 U.S.C § 586. If a state has opted out, the state property exemptions apply instead of those provided in section 522(d), although other non-bankruptcy federal exemptions will apply. If a state has not "opted out," a debtor may still elect either state or federal exemptions.

The trustee must review the circumstances of the debtor's domicile to ensure that the debtor qualifies for the exemptions scheduled. Generally, a debtor may elect a state's exemptions only if that state was the debtor's domicile for the 730 days immediately before the petition was filed. If the debtor did not have a domicile located in a single state for that 730-day period, then the debtor may elect the exemptions in the state that was the debtor's domicile for 180 days immediately before the 730-day period, or for a longer portion of such 180-day period than in any other place. 11 U.S.C. § 522(b)(3)(A). Trustees must be aware of state exemption statutes that may allow exemptions based on factors other than domicile.

The trustee must object to a claimed exemption if doing so benefits the estate. For example, if allowing the improperly claimed exemption would remove assets from

the estate that should be available for payment of creditor claims, the trustee must object. 11 U.S.C. § 704. The objection must be filed within 30 days after the conclusion of the meeting of creditors or the filing of any amendment to the list or supplemental schedules, whichever is later, unless, within such period, further time is granted by the court. Fed. R. Bankr. P. 4003(b).

The objecting party has the burden of proving that the exemptions are not properly claimed. If the trustee or another party does not file a timely objection to an exemption, it is deemed allowed.

d. VALUATION OF PROPERTY

In determining whether property has value to the estate that would result in a meaningful distribution to creditors, the trustee needs to consider a number of issues, including:

- 1) The fair market value of the property. Value can be determined in various ways. The trustee can consult with the debtor and the debtor's attorney, have the secured party provide documentation as well as the pay-off statement, obtain price lists, conduct physical inspections or appraisals, and use common sense. Other valuation methods include the NADA book for automobiles; information acquired from real estate agents; county records regarding recent sales of comparable real property; Internet searches and web sites; and advertisements for the sale of like goods. The basis for the value must be documented. 28 U.S.C. § 586.
- 2) The amount, validity and perfection of purported security interests against such property. Since the trustee has a duty to use the trustee's avoidance powers under sections 544, 545, 547, and 548, to the extent a purported lien is invalid or could be avoided by the trustee, the property must not be abandoned if the value thereof without the lien would benefit the estate.
- 3) Exemptions, as discussed above.
- 4) Tax considerations, including any section 724(b) issues. The trustee must consider the tax consequences of a sale in determining whether to administer an asset. 11 U.S.C. § 704. When estate property is sold, the estate recognizes a taxable gain or loss. Any resulting tax liability is treated as an administrative expense. The gain on the sale of an individual chapter 7 debtor's residence is excluded from gross income of the debtor's bankruptcy estate to the extent provided by 26 U.S.C. § 121.
- 5) Administrative expenses and litigation costs to be borne by the estate resulting from the recovery and sale of the property.

e. ABANDONMENT OF ESTATE PROPERTY

Abandonment of property of the estate is governed by section 554. Scheduled property that is not administered before the case is closed is deemed abandoned

upon entry of the order closing the estate, absent an order to the contrary. 11 U.S.C. § 554(c). However, the trustee must not rely on the deemed abandonment provisions of section 554(c) where possession of the property will expose the estate to liability. Examples of when the trustee must formally abandon property of the estate in asset cases are:

- 1) The net proceeds from a sale of the asset will be insufficient to pay any tax liability generated by the sale. For example, the estate is liable for any taxable gain upon the sale of property, even if the proceeds are abandoned.
- 2) Failure to abandon the property would expose the estate to additional tax liability. For example, in an individual case, the estate may be liable for any taxable gain from foreclosure after relief from the automatic stay is granted if the property is not abandoned before the foreclosure sale. An order granting relief from stay does not remove property from the estate.
- 3) Possession of the property exposes the estate to a risk of liability which cannot be insured against, and which outweighs its economic value to the estate.

Immediate consideration must be given to property of no value to the estate which may be hazardous to the health or safety of the general public. Such property shall be abandoned after consultation with appropriate federal, state, and local authorities.

The trustee must be able to justify the decision to abandon estate property. Any documentation in support of this decision is to be kept in the estate file. 28 U.S.C. § 586.

f. CONTROL AND PRESERVATION OF ESTATE PROPERTY

In those cases where the property appears to have value for the estate, the trustee must obtain control over the property, which may include changing the locks at the premises, hiring guards, etc. The trustee also must immediately take all other steps which may be reasonably necessary to preserve the assets. It is not always sufficient to wait until after the meeting of creditors to take action to preserve assets. 11 U.S.C. § 704.

With regard to insuring real and personal property (e.g., buildings and vehicles) that has value for the estate, the trustee must either determine that the property is insured by the debtor or obtain insurance for the estate. 11 U.S.C. § 704. If insured by the debtor, the trustee shall request proof of insurance from the debtor and ensure that it is continued for the benefit of the estate. If the debtor does not have insurance, the property is encumbered, and there are no estate funds available, the trustee must contact the secured creditor immediately, so that the secured creditor can obtain insurance or otherwise protect its own interest in the property. The trustee may consider (a) an agreement with the secured creditor to fund the expense of insurance and provide proper safeguarding under section 506(c); or (b) a court order allowing

the trustee to insure or safeguard the property at the expense of the secured creditor pursuant to section 506(c).

When property with value to the estate cannot be insured, the trustee must liquidate the property as quickly as possible in a reasonable manner. Under these circumstances, the trustee is strongly encouraged to file motions to reduce the time within which objections may be filed to the proposed sale.

In asset cases, when the property is fully encumbered and of nominal value to the estate, the trustee must immediately abandon the asset and contact the secured creditor immediately so that the secured creditor can obtain insurance or otherwise protect its own interest in the property. 11 U.S.C. §§ 554, 704. If a loss occurs as a result of the trustee's failure to insure or protect estate property, the trustee could be subject to liability including a surcharge.

g. ENVIRONMENTAL ISSUES

The trustee should take reasonable steps to abate or prevent environmental contamination by or to estate property. If property of the estate has no value and may be hazardous to the health or safety of the general public, the trustee should give immediate consideration to abandoning the property under section 554(a). Before abandoning the property, however, the trustee must take all precautions possible in light of the available assets of the estate, consult with appropriate federal, state and local authorities, and document the actions taken. 11 U.S.C. § 704.

4) CLAIMS BAR DATE

In most districts, a notice of insufficient assets to pay dividends is provided to creditors as part of the section 341(a) meeting notice. Fed. R. Bankr. P. 2002(e). Promptly upon determination that the administration of a case will generate funds to pay creditors, the trustee must ensure that the Clerk of the Bankruptcy Court provides notice to creditors to file proof of claims on or before a certain date. Fed. R. Bankr. P. 3002(c).

In a case reconverted to chapter 7, in most instances a new period for filing claims commences, but see Fed. R. Bankr. P. 1019(2).

5) TAX CONSIDERATIONS IN THE ADMINISTRATION OF ESTATE ASSETS

a. OVERVIEW

The trustee has an obligation to file appropriate tax returns and pay tax liabilities on behalf of the bankruptcy estate. Failure to file or pay taxes could result in penalties and interest which will reduce the amounts paid to creditors and may subject the trustee to personal liability. The trustee must disclose to the debtor all information contained in the estate tax returns. 28 U.S.C. § 586, 11 U.S.C. § 346.

This Handbook contains an abbreviated summary of the tax provisions which may be of most interest to chapter 7 trustees. Trustees should seek professional tax advice on a case-by-case basis when the need arises.

Sections 346 and 505 of the Bankruptcy Code, along with 28 U.S.C. § 960 and 26 U.S.C. §§ 1398 and 1399 (the Internal Revenue Code), set forth special tax provisions with which the trustee should be familiar.³ These sections generally provide that the trustee must prepare and file appropriate income tax returns for the bankruptcy estate and pay post-petition taxes as they become due.

Any taxes incurred by the estate, whether secured or unsecured, including property taxes, are allowable as an administrative expense. The taxing authority is not required to file a request for payment of the expense as a condition of its being allowed an administrative expense claim. See 11 U.S.C. §§ 503(b)(1)(B) and (D).

In a business case, the trustee may defer the payment of taxes incurred by the chapter 7 bankruptcy estate until final distribution is made if, before the due date for the tax, the court enters an order finding that the estate is administratively insolvent. 28 U.S.C. § 960(c)(2).

b. INCOME TAXES

The trustee is responsible for preparing and filing income tax returns on behalf of the bankruptcy estates, and should normally employ a tax professional to assist in preparing the return. In preparing estate tax returns, the trustee will often need to review the debtor's prior year returns. If the debtor is unwilling or unable to provide copies of these returns, the trustee can request copies of the tax returns or a transcript thereof from the IRS using Form 4506 or Form 4506-T. The trustee may wish to contact the local IRS Field Insolvency office to determine if it can obtain the returns more quickly.

(1) Individual Chapter 7 Debtors

For purposes of federal, state, and local tax purposes, the individual debtor and the bankruptcy estate are treated as separate taxable entities. Generally, the individual debtor retains his or her tax identity and must file his or her own personal tax returns, and the trustee must obtain a separate tax identification number for the estate. See generally Sections 346 and 505 of the Bankruptcy Code, along with 28 U.S.C. § 960 and 26 U.S.C. §§ 1398 and 1399 (the Internal Revenue Code). If spouses file a joint petition under section 302, absent substantive consolidation, two separate estates and two separate taxable entities are created and, if tax returns are required, the trustee must obtain a tax identification number and file a tax return for each estate. *Id.*

Generally, the estate succeeds to the individual debtor's tax attributes upon commencement of the case. The trustee must file a federal income tax return in an individual chapter 7 case for any year in which gross income of the estate equals or exceeds the exemption amount plus the basic standard deduction for a taxpayer filing as married filing separately. *Id.* The standard

³ Trustees should also be familiar with IRS Publication No. 908 (Bankruptcy).

deduction can be found at 26 U.S.C. § 63(c)(2)(C). The exemption amount can be found at 26 U.S.C. § 151(d). The threshold for filing state and local income tax returns will be governed by state and local law. The trustee should consult with the tax professional for federal and state filing thresholds.

(2) Partnership and Corporate Chapter 7 Debtors

The filing of a bankruptcy petition by a partnership or corporation does not create a separate taxable entity. 26 U.S.C. § 1399.

There is no break in the accounting period of the partnership or corporation and the return, filed under the debtor's tax identification number, must reflect the pre- and post-petition income and deductions. Limited liability corporations (LLCs) and limited liability partnerships (LLPs) are treated the same as partnerships.

Unless a corporation is exempt from income tax, corporate returns must be filed by the trustee regardless of whether the corporation has income. Upon application to the IRS District Director, the IRS may waive the requirement to file federal returns if the corporate debtor has ceased business operations and has neither assets nor income.⁴ The procedures for requesting a waiver of filing are detailed in Internal Revenue Manual section 5.96.15.1(2).

For partnership cases, the chapter 7 trustee must file the federal and state tax returns regardless of the amount of gross income. 11 U.S.C. § 346.

c. EMPLOYMENT TAXES AND OTHER TAX FORMS

If the debtor was an employer, the trustee must file any Form 941 (Employer's Quarterly Federal Tax Return), for withheld federal income and FICA taxes, and Form 940 (Employer's Annual Federal Unemployment Tax Return), for unemployment taxes, that was not filed by the debtor before commencement of the bankruptcy case. 11 U.S.C. § 346. A failure to file these returns may lead to the imposition of penalties against the trustee or the estate. Further, depending upon the business the debtor conducted, the trustee may need to file sales, excise and other tax returns in order to establish the amount of the taxing authority's claim.

In addition, the trustee must withhold all applicable federal and state income, social security, and Medicare taxes from any wage claims paid by the estate. 11 U.S.C. § 346. The withheld taxes receive the same priority for payment as the claims from which they were withheld. The taxes must be properly and timely remitted to the IRS using the Treasury's Electronic Federal Payment System (EFTPS). Information about this system is available at: <https://www.eftps.gov/eftps>.

⁴ See Rev. Rul. 84-123, 1984-33 I.R.B. 6, 1984-2 C. B. 244; and Rev. Proc. 84-59, 1984-33 I.R.B. 11, 1984-2 C. B. 504.

The trustee may also have to file information returns (Form 1099 series) if certain payments are made. For example, Form 1099-INT must be supplied to the payee and to the IRS when a trustee makes certain interest payments. Similarly, the trustee may be required to issue to payees and to file with the IRS Form 1099-MISC when fees are paid to attorneys, accountants and other professionals for their work in assisting in the administration of the estate. Payments made to an attorney where the attorney's fee cannot be determined (such as payment of a settlement) must also be reported to the IRS and the attorney. The trustee should consult with the tax professional to determine the appropriate threshold amounts required for filing these forms.

d. EMPLOYEE W-2 FORMS

If the trustee pays wages, including pre-petition wage claims, the trustee is responsible for preparing and filing W-2 forms for the wages paid and for sending copies to the employees. For those cases in which the trustee does not pay any wages, but wages were paid by the debtor during the calendar year of the bankruptcy petition, the trustee will receive requests from the employees for wage withholding information in order to complete their personal income tax returns. In these circumstances the trustee may complete W-2 forms to give to the employees based on the corporate records or may make those records available to the former employer or former employees to assist them in reconstructing the information. In any event, if an employee is unable to obtain Form W-2 for wages paid by the debtor pre-petition, the employee should be instructed to secure Form 4852 from the IRS and attach it to the employee's Form 1040 in order to obtain credit for the estimated amount of taxes withheld. For further information, the trustee may consult IRS Circular E (The Employer's Tax Guide).

e. SALES AND ABANDONMENTS

When estate property is sold, the estate recognizes a taxable gain or loss. The trustee must abandon assets that will not generate net proceeds sufficient to pay any tax liability generated by the sale. 28 U.S.C. § 586. The estate may be liable for any taxable gain upon the sale of property, even if the proceeds are abandoned. In an individual case, the estate also may be liable for any taxable gain from foreclosure after relief from the automatic stay is granted if the trustee does not abandon the property before the foreclosure sale.

f. PROPERTY TAXES

As noted above, property taxes incurred by the estate, whether secured or unsecured, are allowable as administrative expenses and the governmental unit is not required to file a request for payment. The trustee may recover the payment of ad valorem property taxes from the property securing the claim, pursuant to section 506(c).

The trustee is generally required to pay property taxes in a business case on or before their due dates, unless the taxes are secured by a lien against property that is abandoned by the trustee within a reasonable period of time after the lien attaches. 28 U.S.C. § 960(b)(1).

g. PROCEDURES FOR DETERMINING ESTATE TAX LIABILITY

Under section 505(b)(2), the trustee may request determination of unpaid estate liabilities for any taxes incurred during the administration of the case by filing the tax return and requesting that determination from the appropriate tax agency. The procedure, which is known as the “prompt determination,” allows the trustee to wind-up the administration of the case expeditiously.

In the case of federal taxes, the trustee must file a written application with the IRS Centralized Insolvency Operation, P.O. Box 7346, Philadelphia, PA, 19101-7346. 11 U.S.C. § 505(b), 28 U.S.C. § 586. The application must be submitted in duplicate and executed under penalty of perjury. The application must be accompanied with an exact copy of the return filed by the trustee and a statement as to where the original return was filed. Any tax shown owing on the return must have been paid. The request and envelope must be marked: “Request for Prompt Determination.”

The agency must give notice within 60 days that the return has been selected for audit and has a total of 180 days to complete the examination unless an extension of time is granted by the court. If the agency does not give notice or complete its examination within the applicable time limits, the trustee is discharged from liability, absent fraud or a material misrepresentation in the return. The trustee and the estate also are discharged upon paying the tax determined to be due by the agency or by the court upon completion of the prompt determination.

The trustee should consult Rev. Proc. 2006-24 and IRS Announcement 2011-77 for the prompt determination procedures applicable to federal taxes.

6) TURNOVER DEMANDS

When the debtor has control or possession of assets that have equity, the trustee must seek to gain control of those assets as soon as possible. 11 U.S.C. § 704. Normally, the assets will be delivered to the trustee voluntarily and without court order. The request for the turnover of property from the debtor can be made on the record at the meeting of creditors. In most cases, requests for turnover are followed up in writing, designating a time limit for compliance.

The procedures for requesting turnover of a federal tax refund are set forth in section 5.9.6.1.3 of the Internal Revenue Manual, found at www.irs.gov. These procedures were agreed upon between the IRS and the Executive Office for United States Trustees. The request must relate to a specific debtor for a specific tax year. The request must be in writing, preferably on the form designated for that purpose called “Application and Authorization for Internal Revenue Service Refund Turnover to Chapter 7 Bankruptcy Trustee Pursuant to 11 U.S.C. § 542” (see the Supplemental Materials). If the form is not used, the trustee’s request must contain the same information as the form. The IRS will honor the turnover request for a period of 180 days from the date of receipt, or for 180 days after the due date of a return (including extensions), whichever is later. If no return is received within these 180 day periods, the turnover request will not be honored.

If the initial requests do not produce results, the trustee must seek a court ruling requiring the debtor or third party to give up possession to the trustee. 11 U.S.C. §§ 542,704.

An action against the debtor is commenced by motion. An action against a third party is brought by adversary proceeding in accordance with Fed. R. Bankr. P. 7001(1). If there is a danger that the assets are wasting in the hands of the debtor or third party, the trustee should request an emergency or expedited hearing or seek a temporary restraining order.

Sections 542 and 543 govern the turnover of property. Subsection 542(a) contains the general requirement that estate property be delivered to the trustee. Subsection 542(e) allows the court to order a person holding papers or other recorded information about the debtor's property or financial affairs to turn over the property rather than just disclose the information. Section 543 addresses the turnover of property by a custodian.

In chapter 11 or chapter 13 cases that are converted to chapter 7, Fed. R. Bankr. P. 1019(4) requires that any debtor or trustee turn over to the chapter 7 trustee all records or property of the estate in his or her possession or control. See Handbook Chapter 4.N.2.

7) EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Section 365 provides that the trustee may assume or reject unexpired leases or executory contracts. This authority is subject to court approval. It is also subject to limitations set forth in sections 365(b), (c) and (d). Assumption of unexpired leases or executory contracts may be desirable for favorable leases or contracts which the trustee can assume and then contemporaneously assign for consideration.

The trustee may encounter a situation in which business property needs to be used for a period of time to secure inventory or provide a sale location. The trustee may negotiate with the landlord for short-term use of the facilities with rental cost to be treated as an administrative expense to be paid from the sale proceeds.

8) AVOIDANCE POWERS

The trustee is provided with various avoiding powers in sections 544 - 553 as tools to be used to avoid unequal treatment among creditors of the same class or other parties in interest. The trustee needs to be familiar with these Bankruptcy Code sections and alert to their application in individual cases.

Generally, any action brought by the trustee to recover money or property pursuant to the trustee's avoiding powers must be brought as an adversary proceeding. Fed. R. Bankr. P. 7001. The trustee does not need court approval to prosecute such an action. Fed. R. Bankr. P. 6009.

The trustee and trustee's counsel must be familiar with the venue provisions in 28 U.S.C. § 1409.

Section 544 - General Power: This section vests the trustee with the powers of a hypothetical judicial lien creditor or bona fide purchaser of real property under state law. The effect is to empower the trustee to avoid unperfected and secret liens, even if the debtor or trustee has knowledge of these liens. This section also allows a trustee to exercise the rights of actual unsecured creditors to avoid liens under state fraudulent and preferential conveyance laws, to avoid defective bulk transfers, and to employ state equitable remedies such as the marshaling of assets.

Section 545 - Statutory Liens: This section empowers the trustee to avoid certain statutory liens, such as landlord liens, against the debtor's property within the terms and conditions set out in the section. Note that "statutory lien" is defined in section 101(53).

Section 546 - Limitations: This section places limitations on the trustee's power. Various limits are specified, including a statute of limitations, which is the later of two years after the entry of the order for relief or one year after the appointment or election of the first trustee, or the time the case is closed or dismissed, whichever occurs first.

Section 547 - Preferences: This section deals with preferential transfers. It is probably the most important and most frequently used avoiding power of the trustee. The trustee may avoid any transfer of property to a creditor for an antecedent debt made while the debtor was insolvent within 90 days of the date the petition was filed.

The 90-day time period is extended to one year if the transfer is to an "insider" as defined in section 101(31). The transfer in question can be the granting or perfection of a lien or security interest as to property of the debtor.

The trustee must be familiar with the provisions of section 547, including section 547(c) which defines transfers that the trustee cannot avoid. 11 U.S.C. § 704, 28 U.S.C. § 586. A transferee will most likely raise a provision of this subsection as a defense to an avoidance action brought by the trustee. One of the transfers that a trustee cannot avoid in a non-consumer case is a transfer of property valued at less than \$5,000 (for cases commenced before April 1, 2007) or \$5,475 (for cases commenced on or after that date).

Section 548 - Fraudulent Transfers: This section allows the trustee to avoid transfers that are fraudulent in fact, or made for less than reasonable consideration. Fraudulent transfers are not the same as preferential transfers described above. While preferential transfers are most often made to creditors, fraudulent transfers are most frequently made to family or friends. Under section 548, the trustee may avoid fraudulent transfers or obligations made or incurred within two years before the date of the filing.

The trustee should also be aware of state fraudulent conveyance laws which may allow avoidance of transfers beyond the one year period, through application of section 544(b).

Section 549 - Post-Petition Transfers: This section recognizes the trustee’s right to avoid any transfer of property made after the commencement of the case that is not specifically authorized by the Bankruptcy Code or by the court. If such a transfer was made voluntarily, the trustee must notify the United States Trustee who will make a referral to the United States Attorney if it appears that there may have been a violation of 18 U.S.C. § 152. If the transfer was involuntary, the trustee may bring contempt proceedings against the transferee for violating the automatic stay and request damages for any diminution of estate funds resulting from the unauthorized transfer.

Section 553 - Setoff: This section recognizes the right to offset for mutual, pre-petition, allowed claims and takes such transactions out of the preference category. The section places limits on the right of the offset as to claims to which the creditor became entitled to within 90 days of the filing of the petition.

Section 724(a) - Fines, Penalties, or Forfeitures: This section allows the trustee to avoid liens that secure claims for fines, penalties, forfeitures, or multiple, exemplary, or punitive damages, to the extent such claims are not compensation for actual pecuniary losses. Section 726(a)(4) contemplates that such claims will be paid only after all other timely and tardy claims are paid.

9) SALE OF ASSETS

a. GENERAL STANDARDS

11 U.S.C. §§ 554, 704; 28 U.S.C. § 586.

A trustee may sell assets only if the sale will result in a meaningful distribution to creditors. In evaluating whether an asset has equity, the trustee must determine whether there are valid liens against the asset and whether the value of the asset exceeds the liens. The trustee may seek a “carve-out” from a secured creditor and sell the property at issue if the “carve-out” will result in a meaningful distribution to creditors. The trustee must also consider whether the cost of administration or tax consequences of any sale would significantly erode or exhaust the estate’s equity interest in the asset. If the sale will not result in a meaningful distribution to creditors, the trustee must abandon the asset. See Handbook Chapter 4.C.3.e regarding abandonments.

Section 363(b) permits a trustee to use, sell or lease property of the estate only after notice to creditors and a hearing. The only exception to the notice requirement is when the contemplated transaction is in the ordinary course of the debtor’s business. The liquidation of estate assets by a chapter 7 trustee rarely falls within the “ordinary course of business exception” because the debtor’s operations cease upon the filing of the chapter 7 case. A trustee, therefore, must comply with the notice and hearing requirements of section 363(b) before liquidating an estate asset.

The notice of a proposed use, sale, or lease of property of the estate must be provided to the Clerk of the Bankruptcy Court, debtor, United States Trustee, and all creditors. The following information must be included in the notice:

- 1) Type of sale (private, auction, etc.);

- 2) Location, date, and time of public sale;
- 3) Description of assets;
- 4) Terms and conditions of sale;
- 5) Factors used to establish value (appraisal, book value, etc.) in a private sale;
- 6) Procedure and time period for filing objections;
- 7) Amount of liens and identity of lien holders; and
- 8) In a private sale, identity of purchaser and relationship, if any, to any creditor or party in interest.

If the sale includes personally identifiable information under sections 363(b)(1)(A) or (B), the notice shall include a statement whether the sale is consistent with a policy prohibiting the transfer of the information. See Handbook Chapter 4.C.9.f. for guidelines that apply for motions for sale of personally identifiable information.

Creditors must receive 20 days' notice of a proposed sale of estate property. Fed. R. Bankr. P. 2002(a)(2) and 6004(a).

The trustee must be familiar with any local rules concerning the requirements for notices, motions, orders, and advertising related to sales of estate property. 11 U.S.C. § 704, 28 U.S.C. § 586.

In general, the trustee begins liquidating estate assets after the meeting of creditors. Exigent circumstances, however, may require liquidation of assets immediately after the case is filed.

As a best practice, all sales should be paid for in cash equivalents, such as certified checks, cashier's or teller's checks, and money orders, and the trustee normally should not accept a promissory note or installment payments. See Handbook Chapter 4.C.9.h for the guidelines that apply when installment payments are accepted.

b. SALE FREE AND CLEAR OF LIENS

A sale of estate property is subject to liens or security interests, unless it is sold free and clear of such interests pursuant to section 363(f). This section allows a trustee to sell property of the estate free and clear of an interest of an entity, such as a lien of a secured creditor, only under certain circumstances.

If the trustee decides to sell property free and clear of liens, the trustee must determine the identity of the lien holders and give them notice of the proposed sale. The notice must tell them how much, if anything, they are to receive from the sale. 11 U.S.C. § 704, 28 U.S.C. § 586.