AMERICAN BANKRUPTCY INSTITUTE

2020 Midwestern Virtual Bankruptcy Institute

Completing the Case: Your Case Is Done; Now What?

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U.S. Bankruptcy Court (W.D. Mo.) | Kansas City

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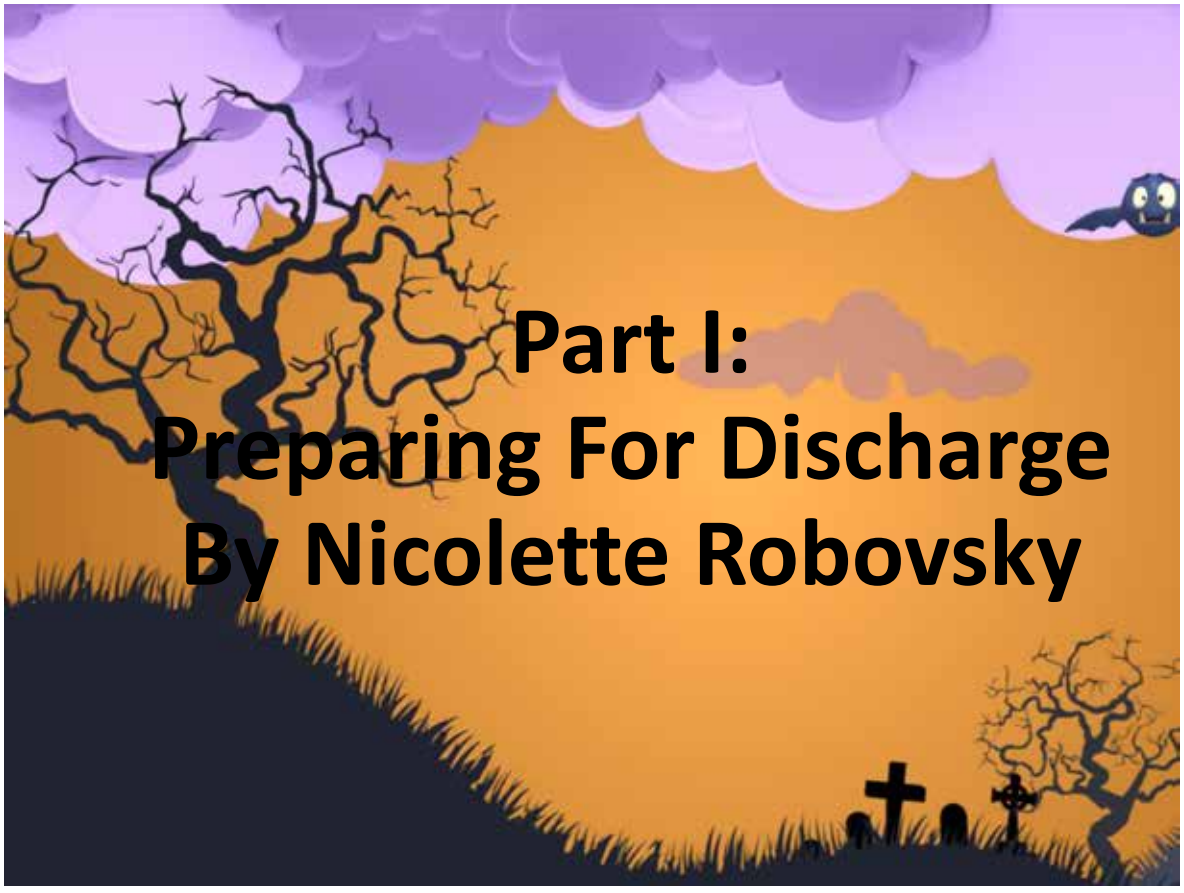
CONCURRENT SESSION

2020


Completing the Case. Your Case is Done, Now What?
By:
Rachel Foley
Michael Rapp
Nicolette Robovsky
Judge Cynthia A. Norton, Moderator


Part I:
Preparing For Discharge
By Nicolette Robovsky

Discharge Preparation Checklist

- FMC done & filed?
- Bad addresses corrected?
- Any amendments?
- Lien avoidances on exempt personal property?
- Judgment liens avoidance?
- Motion declaring judgment void?
- Chapter 7 reaffs?
- Chapter 13 direct pays?
- Chapter 13 R. 5009(d) motion?

Tips for Lien Avoidance Motions

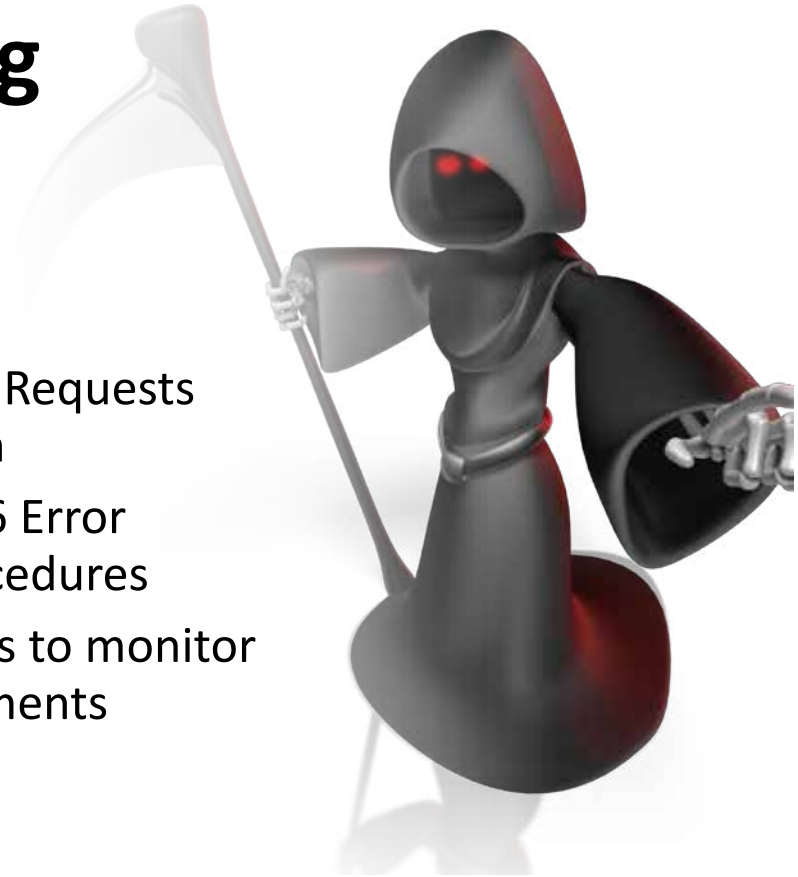
- Include property description, value, lienholder ID, amount of claim, basis for claim exemption, and the § 522(f)(2)(A) formula
- Valuation timing
- Motion timing
- Exemption objection timing
- Service of motion
- TBE issues


CHAPTER 7
Reaffs
Leases

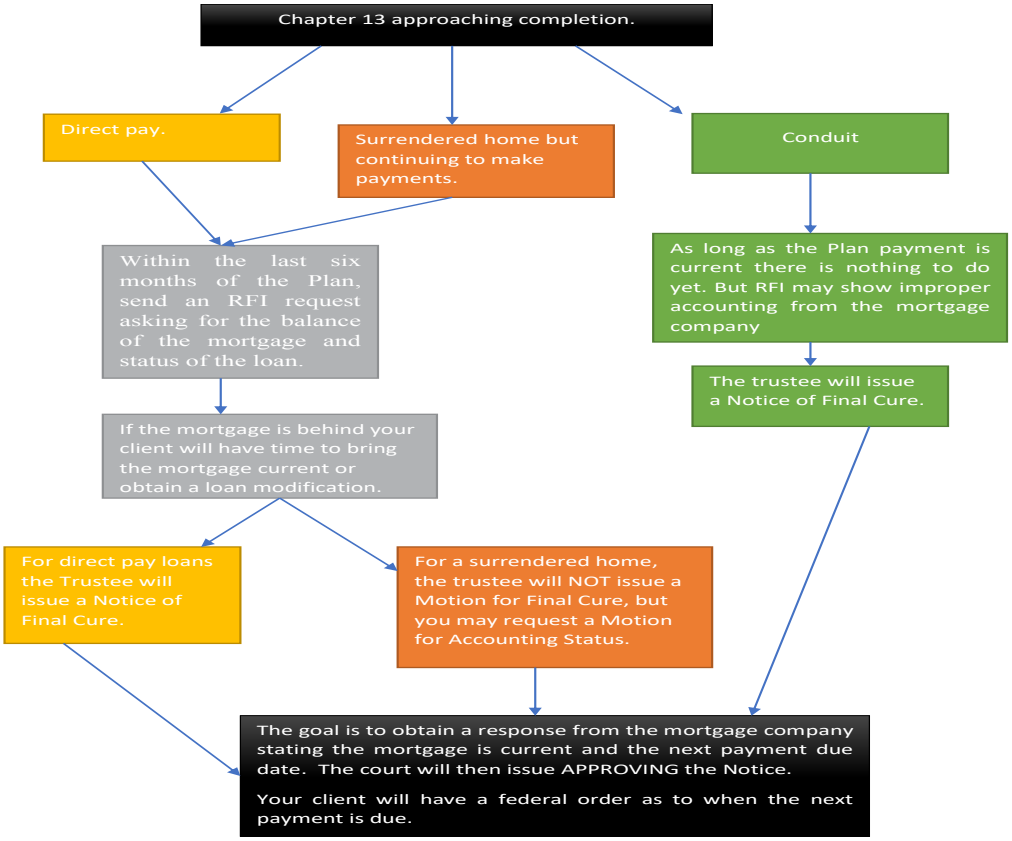

CHAPTER 13
Direct Pays
Rule 5009(d)


Part II:
Mortgages &
Discharge
By Rachel Foley

Enforcing Rule 3002.1



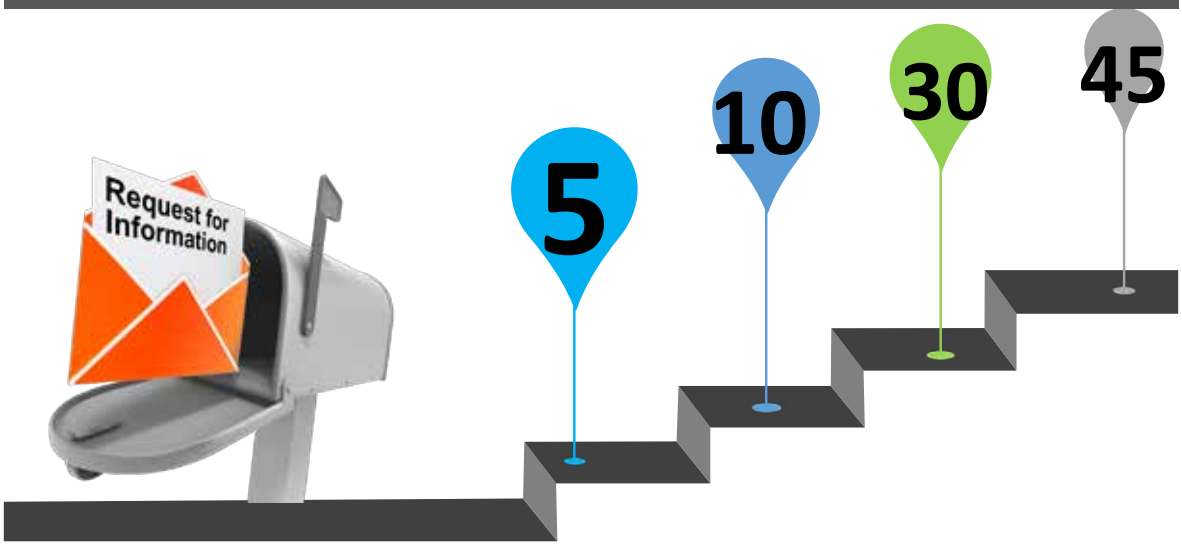
- RFI: § 1024.36 Requests for information
- NOE: §1024.36 Error resolution procedures
- Advising clients to monitor monthly statements



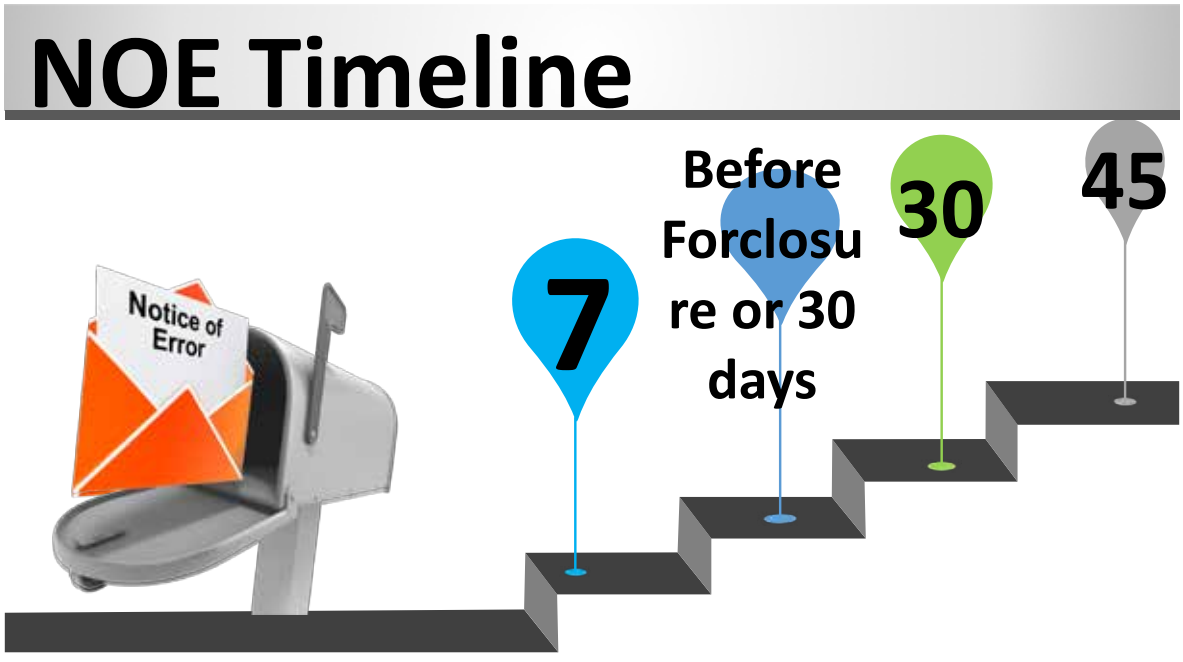
3002.1 Practice Tips

- Very specific
- Check the 180 days carefully
- Rule 3002.1(f), (g) & (h)
- Order binds mortgage company

RFI Timeline



Keep it simple!


NOE Timeline
Notice of Error
7
Before Forclosure or 30 days
30
45

Train your clients!

Client Name

Date Sent	Year	Payment Due Date	Mortgage Company	Payment Address/online/phone	Amount	Chk #	Cleared Date
January							
February							
March							
April							
May							
June							
July							
August							
September							
October							
November							
December							

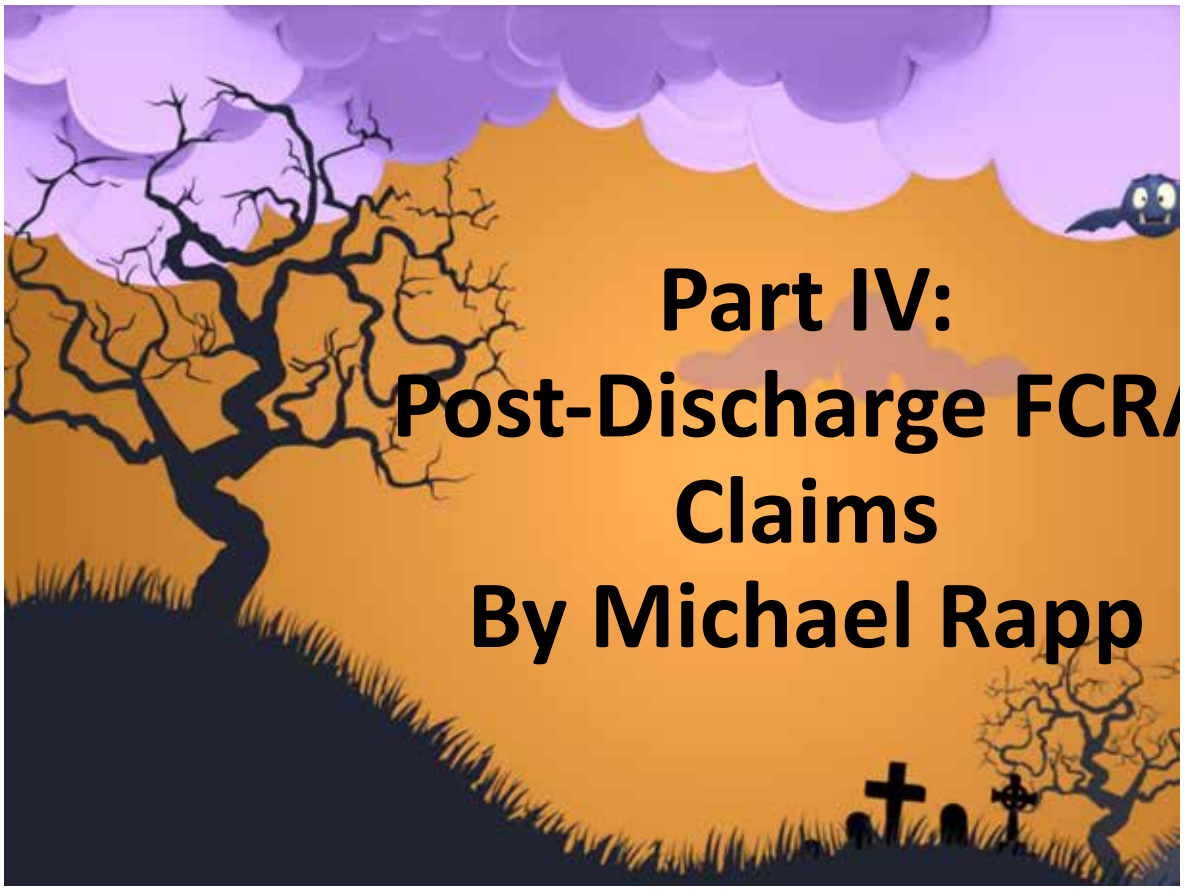
Miscellaneous Mortgage Tips

- Does RESPA apply?
- *See In re Fayne* materials
- Keep record of your time and expenses

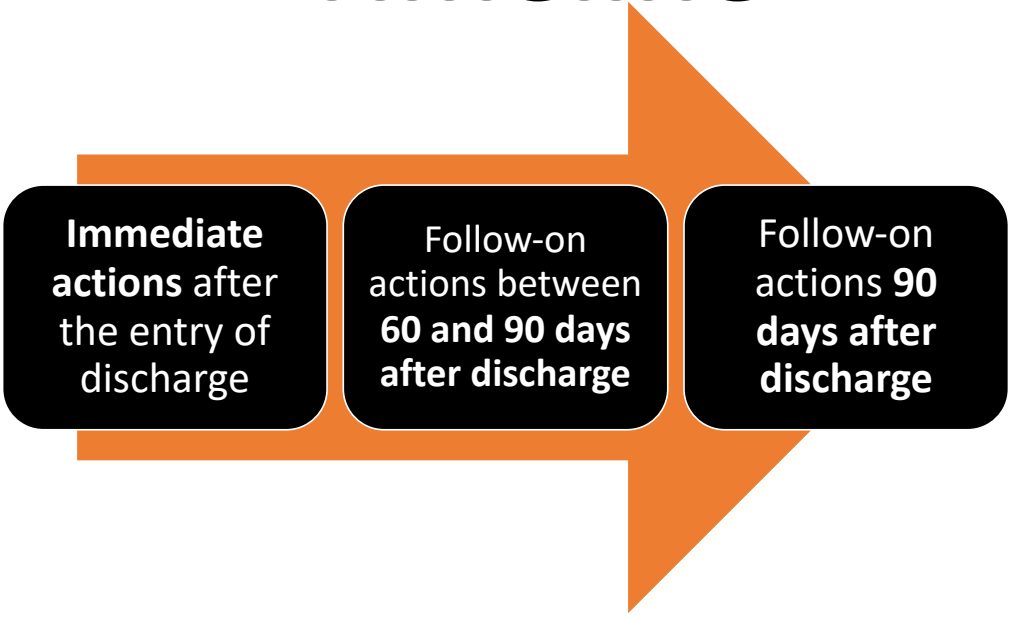
Part III: Terminating the Engagement & Closing the File,

By Judge Cynthia A. Norton

Post-Completion Reminders



Post-discharge Timeline



Immediate Actions

- Inform client of likely errors
- Encourage credit monitoring
- Prepare "Next Steps" communication

Follow-on Actions from 60 to 90 Days

- Maintain communication with client
- Gather/organize post-discharge communications from creditors to clients
- Schedule intake and explain intake process with the goal of obtaining copies of current credit reports

Follow-on Actions 90 Days After Discharge

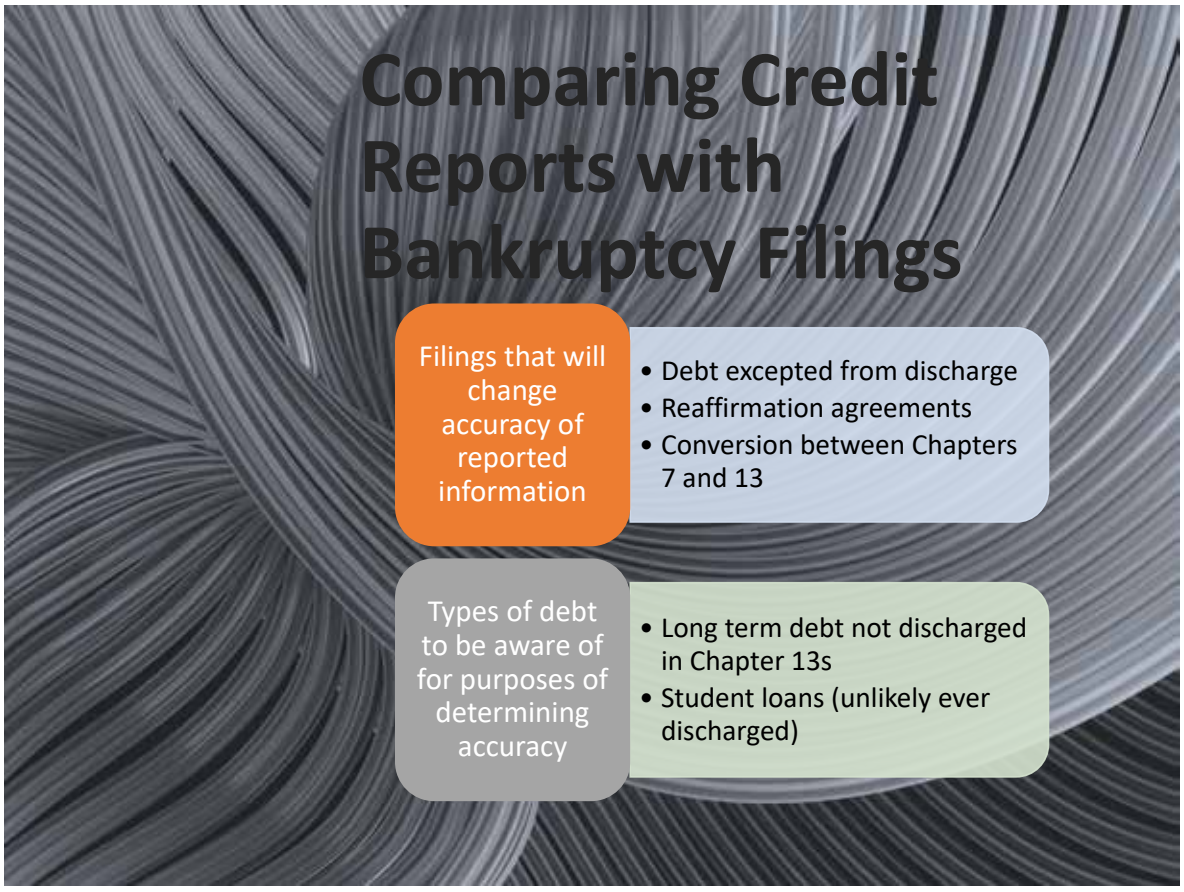
- Continue relationship with client
- If inaccuracies are discovered, determine and execute course of action
- Encourage and motivate client to continue credit monitoring

Intake

- Pull credit reports from each of national consumer reporting agencies
- Request LexisNexis full file disclosure
- Obtain and review bankruptcy filings
- Obtain and review any correspondence from creditors


Reviewing Credit Reports
EQUIFAX
Experian
TransUnion


Discharged accounts showing balances
Continued reporting after discharge
Inquiries fr ged creditors
Late or m nts during
Commo
Errors



Reporting of Discharged Unsecured Debt

- Zero current balance, or
- "Included in bankruptcy," or
- "Discharged in bankruptcy"
- No status updates after the bankruptcy filing
- No "account review" or "hard inquiries," except for promotional inquiries or post-petition application for credit

How It Should Look

TransUnion

[redacted]

Date Opened:	01/30/2007	Balance:		Pay Status:	>Account Included in Bankruptcy<
Responsibility:	Individual Account	Date Updated:	10/15/2014		
Account Type:	Revolving Account	Last Payment Made:	09/25/2014	Date Closed:	04/30/2014
Loan Type:	CREDIT CARD	High Balance:	$4,445		
		Credit Limit:	$4,200		

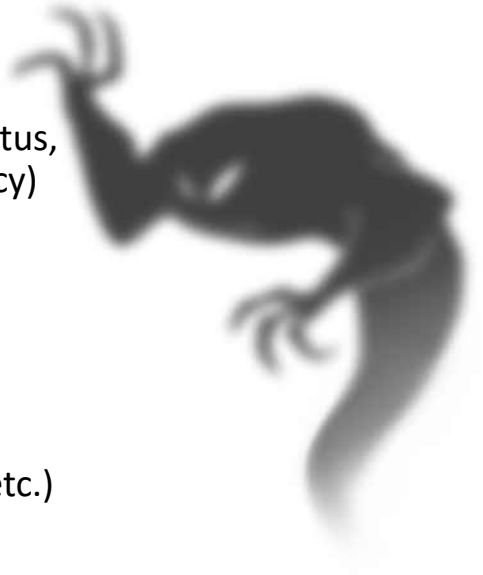
Remarks: >CHAPTER 13 BANKRUPTCY<
Estimated month and year that this item will be removed: 09/2019

Bad Actors: § 1681e(b) Claims

- The CRA(s) is the defendant
- Need publication in most circuits
- Inaccuracies from a failure to conduct a reasonable *Wight-Hernandez* style sweep
- Examples include:
  - not updating balances to conform with discharge
  - not picking up the bankruptcy and reporting its discharge, etc.

Bad Actors: § 1681i & 1681s-2(b)

- Creditor continues to report after discharge
- Reporting errors could include the status, payment history (during the bankruptcy) of the account, or account balance
- Requires a dispute through the CRA
- Sufficiency of the dispute is an issue
- Disputes should include as much supporting documentation as possible (e.g., Petition, Plan, Discharge Order, etc.)



Bad Actors: FDCPA

- Applies only to debt collector tradelines
- Applies only when the debt collector continues to update its reporting after entry of the discharge
- Split among the district courts on whether credit reporting, without more is a debt collection activity under the FDCPA
- State law governs whether a state UDAP claim can apply to debt collectors

Decision Time!

The End!

Completing the Case. Your Case is Done, Now What?

Presenters: Rachel Foley, Michael Rapp, Nicolette Robovsky
Moderator: The Honorable Judge Cynthia Norton

Midwest Bankruptcy Institute. October 29-30, 2020

Sponsored by:
American Bankruptcy Institute
and
University of Missouri at Kansas City

MWBI 2020 Nicolette Robovsky

Discharge Preparation Checklist

1. Debtor Education/ Financial Management class complete?
    a. Certificates filed with the court?
        i. If provider files, Certificate of Debtor Education filed?
        ii. If attorney files, Certificate of Debtor Education and Form 423 Financial Management Course Completion certificate signed by Debtor(s) filed? (Bankruptcy Rule 1007(b)(7))

2. Bad addresses/ Returned Mail?
    a. Get updated addresses from Debtors, Secretary of State website for registered agents, Creditor websites (current?)
    b. If updated address found, file with court (text entry "Address Changed")

3. Amendments filed?
    a. Trustee request amendments?
    b. Debtor need to add/ change anything?
        i. Disclose anything left out
        ii. Creditors need to be added?

4. All Motions to Avoid Lien
    a. Include: description of property subject to lien, property's value, identity of lienholder, amount of cliam, basis for claim exemption, application of formula in 11 USC 522 (f)(2)(A) to case at hand

5. Liens on Non-PMSI Household Goods/ Tools of Trade
    a. Motions filed?
    b. Issues
        i. Have collateral list? (Many lenders will provide if Debtor does not have)
        ii. Does collateral fit definition of household goods in 11 USC 522(f)(4)
            1. More than 1 TV?
            2. Gun is not a household good
                a. Not a household good (*Oswald v. ITT Financial Services,* No. 86-04024, 85 B.R.541, Bankr.W.D. MO (1986).
                b. Can be a household good if found in the home and used by debtor for day-to-day living. (*McGreevy v.ITT Financial Services*, No. 91-02160, 955 F.2d 957 4th Cir. (1992)

6. Judgments pre-BK?
    a. If lien created, File Motion to Avoid Lien ("MTAL")
        i. If no lien, File Motion Declaring Judgment Against Debtor Void As to Debtor's Personal Liability
            1. Case law states that a judgment cannot attach to real property acquired by Debtor after discharge. But Title Companies do not know this and if they see a judgment, will want something in writing to verify this. You could write a letter to title company but that may require digging up a (years) old file. If any possibility that Debtor will acquire real estate in the future, get this "comfort order."

    b. Issues with Motions to Avoid Judgment Liens

        i. Valuation timing
            1. Petition date is valuation date (*In re Sawyers*, 609 B.R. 331 8th Cir. BAP, 2019))(Upon judgment creditor starting a sheriff's execution sale, Debtor reopened BK case and filed motion to avoid judgment lien. Property damaged in a pre-petition fire. Debtor paid insurance proceeds but had not repaired the property. Judgment creditor did not have lien on insurance proceeds but argued that value should be post-restoration value. Court found if debtor sold property, sell as is and would retain the insurance proceeds.
                a. Compare with Redemption Motions where valuation is based on post-restoration value (and at time motion filed). *In re Jackson*, 16-42695, Bankr.W.D.MO (Feb. 3, 2020).

        ii. Motion Timing
            1. Bankruptcy can be reopened to avoid a judgment lien. No time limit in Code or Rules. *In re Sawyers*, 609 B.R. 331 8th Cir. BAP, 2019.

iii. Exemption Objection
    1. Timing
        a. Generally parties have deadline to object to exemptions of 30 days after the 341. BK Rule 4003(b)
        b. But Creditor objecting to the claimed exemption as a defense to the lien avoidance action is not limited by 4003(b)'s 30-day deadline. (Bankruptcy Rule 4003(d) and 2008 Advisory Committee Notes.)
    2. E.g. Homestead exemption improper because debtor abandoned the property and thus there is no exemption to be impaired and motion is not proper

iv. Is the lien a judgment lien?
    1. Tax Lien is not a judgment lien
    2. Mechanics Lien is not a judgment lien (statutory lien)
    3. City of Chicago's ordinance permitting the City to impound a vehicle after 3+ determinations of liability. That determination of liability is a judicial or quasi-judicial procedure and thus City has a judgment lien for lien avoidance purposes.
        a. *In re Mance*, 611 B.R. 857 Bank.N.D. IL (2020). However that case cites *In re Fulton,* 926 F.3d 916 (7th Cir. 2019). The Supreme Court granted cert. to hear this case but postponed arguments scheduled for April until October.

v. Multiple judgment liens
    1. 522(f)(2)(B) excludes prior avoided liens from the calculations in the formula in 522(f)(2)(A)
    2. Liens are avoided one at a time from most junior to most senior. *In re Johnson,* 609 B.R. 728 Bankr. S.D. OH (2019).

vi. Service
    1. Bankruptcy Rule 9014 re contested motions requires service in manner of Rule 7004
    2. Service upon Creditor AND registered agent/ officer
        a. Sufficient to state "Attention to President of X Corp." without naming officer
    3. If creditor is an insured depository institution, must also serve officer of the creditor by certified mail.
        a. Credit Unions are Insured Depository Institutions per 11 U.S.C. 101(35)
            i. But some cases state credit unions are not

vii. Tenancy by the Entireties Issues

1. Judgment creditor recorded a judgment against Husband/ Debtor which "fastened an existing but presently unenforceable lien on the property" (real estate owned by Husband/ Debtor and his wife in tenancy by the entireties) and that recording created a cloud on the title and it is proper for bankruptcy court to grant motion to avoid lien. *In re O'Sullivan*, 914 F.3d 1162, 8th Cir. (2019).

7. Comfort Orders Post *Taggart*
    a. Will there be an increase in comfort orders to prevent creditors from claiming they had a "fair ground of doubt as to the wrongfulness of the defendant's conduct."
    b. A bankruptcy court cannot decline to rule on a request for a comfort order and must tell a creditor if its contemplated action will violate the discharge injunction. *Sterling-Pacific Lending Inc. v. Moser (In re Moser)*, 18-01037 (B.A.P. 9th Cir April 15, 2020)
    c. If order too vague, even if stipulated to, court will decline to find contempt. *Clearent, LLC v. Nacion*, Case No. 4:18-cv-01857-SNLJ, 2019 WL 2503699 (E.D. MO. June 17, 2019)

8. Chapter 7 only
    a. Reaffirmation Agreements
        i. Filing deadline is 60 days after date set for 1st 341 but that date can be extended by motion. (B.R. 4008(a))
        ii. Does Debtor need to refinance debt?
            1. If loan balloons before debt is paid and before Debtor will qualify to finance with another lender, Debtor can only refinance with original lender if a reaffirmation agreement was entered.

    b. Redemption (rare after 2005 when value changed to retail value)

    c. Lease assumption
        i. 365(p)(2) lease assumption by Ch. 7 debtor (Rare for consumer debtors?)
        ii. Lease assumption per 365(p)(2) (even if untimely) survives discharge even if not reaffirmed. *Mather Bobka v. Toyota Motor Credit Corp.*, No. 18-55688 D.C. NO. 3:17-cv-02380-CPC-AGS, (9th Cir. Aug. 3, 2020)

9. Chapter 13 only
    a. Have direct payments been made?
        i. *In re Thornton*, 572 BR 738, Bank. W.D. MO 2017
        ii. Western District of Missouri – Form Motion for Chapter 13 Discharge. Changed December 2017.
            1. Requires Debtor to verify direct payments have been made and if not, explain why not
            2. Issue: Direct payments missed due to COVID forbearance?
                a. Has Creditor/ Debtor filed a Notice of Mortgage Forbearance with the Court?
        iii. Student loan payments
            1. Lenders not collecting during the bankruptcy. Did debtor make those direct payments?
        iv. Domestic Support
            1. Current on post-petition support?
            2. Any disputed support claims arise post-petition?

    b. Bankruptcy Rule 5009(d)
        i. Chapter 13 Debtor can request by motion an order declaring that a secured claim has been satisfied and lien has been released under the terms of a confirmed plan.
            1. New Rule December 2017
        ii. Order should include: owner's name, vehicle year, vehicle make, VIN, lienholder name, lien date, purchase date.
        iii. *See In re Warenski,* 2019 WL 5777657, Case No. 10-32582 Bankr.D. NV, July 31, 2019. Debtors filed a motion for contempt when holder of 2nd mortgage did not file lien release after plan completed. Court noted that Debtors could have avoided much of their emotional distress and 13.30 hours in attorney/ paralegal time if they had filed a motion under this section.

MWBI Rachel Lynn Foley

Mortgages, mortgages, everywhere, But never a servicer accounting seems right.

When you file a Chapter 13 case, more often than not a mortgage will be involved in the case. After all the litigation with the mortgage companies and all the regulations put in place to hold them accountable, trying to pin down a servicer for information about your client's mortgage is like trying to nail jello to a wall. Meaning it is almost next to impossible. Almost but not totally a waste of time an energy if and only if your client cooperates.

Information is key to any bankruptcy case and the same holds true for holding mortgage companies accountable. Clients have a difficult time tracking such items as payment dates, payment amounts, creditor for said payment, and how they made such payments.

Below is sample of the mortgage tracker your client may use to track when, where, how, and how much of a payment was made to the mortgage company. Have your client track the mortgage the minute they enter bankruptcy if it is a non-conduit case.

Client Name

Date Sent	Year	Payment Due Date	Mortgage Company	Payment Address/online/phone	Amount	Chk #	Cleared Date
January							
February							
March							
April							
May							
June							
July							
August							
September							
October							
November							
December							
Date Sent	Year	Payment Due Date	Mortgage Company	Payment Address/online/phone	Amount	Chk #	Cleared Date
January							
February							
March							
April							
May							
June							
July							
August							
September							
October							
November							
December							

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If the trustee makes the payments, then train your client to review their case on 13datacenter.com. The ledger will show them which month the trustee thinks his or her payment should be credited.

Additionally, have your client keep all communications from the mortgage company in a safe place. You may need the communication as evidence if you have to proceed to litigation.

Once you begin working in the mortgage world you may feel as though you fell into a bowl of alphabet soup. CFPB, RFI, NOE, RESPA, FDCPA, FCRA, TILA, etc…

Let's break this out. As a result of the Consumer Financial Protection Bureau's (CFPB) amendments to the Real Estate Settlement Procedures Act (RESPA), consumers are entitled to send written Requests for Information (RFI) and Notices of Error (NOE) to their mortgage servicer. The servicer's failure to respond in a timely manner or to correct errors may result in violations providing consumers actual damages, statutory damages, attorney's fees and costs.

Read John Rao of the National Consumer Law Center article: **Making the Most of NOEs and RFIs** at *https://www.nclc.org/images/pdf/conferences_and_webinars/mortgage-conference/2016/material/MakingMostofNOEs-and-RFIs.pdf*

Timing is everything, right? So, when you should send these RFIs and NOEs? Ideally, the RFI should be sent at the outset of the case, each Notice of Payment Change, Notice of Completion of the case, the discharge, and thirty days post discharge/

The reality? If nothing else send an RFI at the Notice of Competition, the discharge, and thirty days post.

What do you ask for? You may see the sample in John Rao's materials or email me. The letter may simply request the principal due and owing, any fees charged to the account since the date of filing, and what month and year is the account due for.

NOE, when the heck do you use this? This is one of my favorite tools in my toolbox. The servicer through their attorney files a response in agreement for the Trustee's Notice of Final Cure. The servicer who used their attorney AGREES with the trustee accounting but mysteriously claim to have a different accounting thirty days post discharge or sometimes at the time of Response in Agreement.

If this happens, you should take the Order on the Notice of Final Cure with the Response in Agreement and send a NOE letter stating the servicer has the accounting wrong and they need to immediately correct the account.

DANGER WILL ROBINSON! If you fail to send the RFI or NOE to the correct address you will lose any RESPA cause of action against the servicer. Be sure to verify the current NOE address on the latest mortgage statement or the servicer website. It is also a good idea to scan each letter with the attachments and place it in the client file, so you know exactly what was sent. Then email the copy of letter and attachments to either the attorney that filed the response to the Notice of Final Cure or to the servicer who filed the response directly. It is not very often the servicer files a response directly but if they do, their email will be on the response, the Proof of Claim, or the transfer of claim.

It is a good idea to carbon copy the CEO at the corporate address via certified mail. This is just one more way you can tell the judge you attempted to mitigate the damages by not only complying with RESPA but you included the CEO and the attorney in the loop and the servicer was afforded every opportunity to resolve the dispute.

MWBI 2020 Judge Cynthia A. Norton

Reopening Bankruptcy Cases[1]

Statutes and Rules

Rule 5009(a): "(a) *Closing of Cases Under Chapters 7, 12, and 13*. If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered."

Section 350(b): "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

Rule 5010: " A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case."

Rule 4007(b): "A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule."

Standards for Reopening Under Eighth Circuit Law, Generally

The Eighth Circuit held in ***In re Apex Oil Co., Inc.*, 406 F.3d 538 (8th Cir. 2005):**

(1) Reopening a case under § 350(b) is "permissive" and is reviewed for an abuse of discretion based on the particular circumstances and equities of each case; (2) The act of reopening a closed bankruptcy case is typically ministerial and presents a limited range of issues, including whether further administration of the estate appears to be warranted; (3) The longer the time between the closing of the estate and the motion reopen the more compelling the reason for reopening should be; and (4) A debtor's desire to adjudicate an issue in bankruptcy court, rather than in an alternative forum, constitutes insufficient grounds on which to reopen a bankruptcy case.

Similarly, according to the Eighth Circuit BAP in ***In re Skyline Woods County Club, LLC*, 431 B.R. 830, 835 (B.A.P. 8th Cir. 2010)**:

> A motion to reopen a bankruptcy case should be granted only where a compelling reason for reopening the case is demonstrated. And the longer the time between the closing of the estate and the motion to reopen the more compelling the reason for reopening the estate should be. The availability of relief in an alternative forum is a permissible factor on which to base a decision not to reopen a closed bankruptcy case. A case should not be reopened to relieve a party of its own neglect or mistake.

[1] Materials prepared by Erica Garrett, Law Clerk to Judge Cynthia A. Norton, United States Bankruptcy Court, Western District of Missouri, for the Midwestern Bankruptcy Institute, October 29-30, 2020.

(Citations and internal quotation marks omitted.)

Standards for Reopening Under Tenth Circuit Law, Generally

According to the Tenth Circuit BAP:

> Bankruptcy Code § 350(b) provides "[a] case may be reopened ... to administer assets, to accord relief to the debtor, or for other cause." Federal Rule of Bankruptcy Procedure 5010 states "[a] case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b)." The phrase "or for other cause" is a broad term which gives the bankruptcy court discretion to reopen a closed case or proceeding when cause for such reopening has been shown.
>
> The party moving to reopen a bankruptcy case has the burden of proof. A motion to reopen should be liberally granted. The decision whether to reopen should emphasize substance over technical considerations. Reopening a closed bankruptcy case is a ministerial act that does not grant any substantive relief.

***In re MacIntyre*, 2019 WL 1035683 at *3 (B.A.P. 10th Cir. March 5, 2019) (unpublished) (citing *Williams v. Lemons*, 1992 WL 279885 (10th Cir. Oct. 8, 1992) (unpublished)) (additional citations omitted).**

However, "[w]hile the decision to reopen remains within the broad discretion of the bankruptcy court . . . it must be tethered to the parameters of § 350(b), or it is an abuse of discretion." ***In re Alpex Computer Corp.*, 71 F.3d 353, 356 (10th Cir. 1995).**

"As a practical matter, motions to reopen a case should only be granted if the underlying relief requested can be granted by the bankruptcy court." ***In re Combs*, 2015 WL 3778030 at *4 (Bankr. D. Kan. June 16, 2015)**

Reopening to Remedy Violation of the Discharge Injunction

Bankruptcy court erred in refusing to reopen case to pursue claims against a secured creditor for alleged violations of the discharge injunction. *In re MacIntyre*, 2019 WL 1035683 (B.A.P. 10th Cir. March 5, 2019)

After the debtor received her chapter 7 discharge, the debtor's mortgage lender judicially foreclosed on her home. Prior to the sale, the lender asked for attorney fees for defending the debtor's appeal of the foreclosure judgment. The debtor moved to reopen her bankruptcy case, alleging that the lender violated the discharge injunction by pursuing the attorney fees on appeal. The lender did not respond to the motion to reopen, but the bankruptcy court denied it anyway without a hearing. The Tenth Circuit BAP reversed and remanded, concluding that the bankruptcy court erred by considering whether reopening would benefit creditors. According to the BAP: "While this may be relevant to whether a case should be reopened for other reasons, it is not relevant to whether a case should be reopened to enable a debtor to seek redress for an alleged violation of the discharge injunction." The BAP said:

> In deciding whether to reopen a case to allow a debtor to seek sanctions for an alleged violation of the discharge injunction, the bankruptcy court may deny the motion if: (1) it is clear at the outset that reopening the case could

> not afford the movant any relief such that reopening would be futile and a waste of judicial resources; or (2) the debtor has unduly delayed filing the motion to reopen to the prejudice of the creditor. The bankruptcy court may also be guided by other equitable considerations, such as whether the debtor has acted in bad faith or engaged in other inequitable conduct. But the bankruptcy court ordinarily should not require the movant to prove the matter for which reopening is sought twice, once to reopen the case and then again at the hearing on the merits.

2019 WL 1035683 at *3 (citations omitted). In addition, in assessing a debtor's delay in filing a motion to reopen to seek relief for violating the discharge injunction, the court should consider the time between the alleged violation and the filing of the motion, not how long the alleged violation occurred after the case was closed.

Length of time between case closing and motion to reopen is a factor considered for permissive abstention. *In re Pursell Holdings, LLC*, 605 B.R. 914 (Bankr. W.D. Mo. 2019)

The reorganized chapter 11 debtor moved to reopen its case, which had been closed six years prior, so that it could file a motion to enforce the discharge injunction against parties who had been involved in litigation alleging that other members of a limited liability company had stripped the debtor of its interest in an LLC. Although the court reopened the case to hear the motion to enforce the discharge injunction, the court abstained from hearing the matter pursuant to 28 U.S.C. § 1334(c)(1). One of the factors the court considered in abstaining was the length of time between the closing of the bankruptcy estate and the filing of the motion to reopen. *See Apex Oil Co., Inc.*, 406 F.3d 538 (8th Cir. 2005).

Reopening to Avoid Judicial Liens

The petition date is the proper date for assessing a homestead's value for judicial lien avoidance purposes, and value did not include insurance proceeds. *In re Sawyers*, 609 B.R. 331 (B.A.P. 8th Cir. 2019)

The chapter 7 debtor's residence, which was subject to a judicial lien, had sustained significant damage from a prepetition fire. Although the debtor had received insurance proceeds prepetition, she had not yet repaired the damage prior to filing. The chapter 7 trustee made no distributions to creditors and abandoned all assets. Post-discharge, and after the debtor used the insurance proceeds to restore the property, she received a notice of sheriff's sale on the property by the judicial lienholder. The debtor then moved to reopen her case to have the judicial lien avoided as impairing her homestead exemption. According to the court, the property was worth approximately $100,000 in fully-restored condition, as opposed to between $3,000 and $6,000 on the petition date. Affirming the bankruptcy court, the Eighth Circuit BAP ruled that: (1) the petition date was the proper date for assessing the property's value, even though the property had increased significantly in value due to the repairs: (2) the fact that the debtor converted the insurance proceeds to equity did not contravene Missouri's equitable principle against double recovery; (3) avoiding the lien was not a windfall; (4) laches did not bar the avoidance action; and (5) payment of the creditor's fees and expenses in connection with the sheriff's sale was not a prerequisite to opening the case.

Note that the debtor filed her original motions to reopen and avoid the lien on the day prior to the sheriff's sale, which took place at the scheduled time, and the motion to reopen wasn't granted until a couple of weeks later. As a result, the debtor did not actually own the property when she proceeded with the avoidance action. However, because no party raised any issue as to the effect of the sale on the debtor's ability to avoid the lien, the BAP declined to address it.

Reopening to Add Omitted Creditor

Motion to reopen to add omitted general unsecured creditor denied as "legally irrelevant." *In re Corn*, 2018 WL 6930389 (Bankr. W.D. Ark. Aug. 30, 2018)

According to this court, reopening a case "presents a limited range of issues, including whether further administration of the estate appears to be warranted." *In re Apex Oil Co.*, 406 F.3d 538, 542 (8th Cir. 2005). "Further administration could include, for instance, a motion to avoid a late-discovered lien not otherwise avoidable under non-bankruptcy law or the court's determination of whether repayment of a student loan presents an undue hardship on the debtor under § 523(a)(8)." In this case, however, reopening to add an omitted creditor would serve no purpose since the debt was non-dischargeable as a matter of law.

Reopening to Determine Dischargeability

Rule 4007 allows reopening to adjudicate student loan dischargeability; three year gap did not, in and of itself, warrant laches defense. *In re Walker*, 427 B.R. 471 (B.A.P. 8th Cir. 2010)

Rule 4007 expressly provides on-going authority for bankruptcy courts to adjudicate student loan dischargeability actions after a discharge order is entered and, in fact, waives the reopening fee to do so. A debtor thus need not rely on Rules 59 and 60 to obtain an adjudication of undue hardship. Moreover, filing a student loan dischargeability action is not a collateral attack on a previously-entered discharge order. And, when a chapter 7 debtor seeks to discharge student loan debt post-discharge, the bankruptcy court is not limited to consideration of the circumstances existing at the time of the discharge, but may consider the circumstances existing at the time of trial. Note that, although the student loan creditor had raised a laches defense since the bankruptcy case had been filed three years prior to the student loan dischargeability action – which the bankruptcy court had rejected – but it did not raise the argument on appeal to the BAP. Even so, the BAP noted that the debtor's waiting three years did not, in and of itself, support a laches defense. In order to prevail on a laches argument, the creditor had the burden to demonstrate equitable circumstances beyond the mere lapse of time, including the reasons for the delay, its effect on the creditor, and the overall fairness of permitting the debtor to assert her cause of action.

Reopening of a closed chapter 7 case is not a prerequisite to a creditor's filing a nondischargeability complaint. *In re Diamond*, 509 B.R. 219 (B.A.P. 8th Cir. 2014)

Two weeks prior to the deadline for filing a nondischargeability complaint in the debtor's case, a creditor filed a "motion to extend" the deadline, alleging that he had not received proper notice of the case and that he intended to challenge the dischargeability of the case. The Bankruptcy Court for the Eastern District of Missouri interpreted the motion as a

request for "abatement of the case" and denied it. The creditor then filed a § 523(a)(4) action (alleging fraud or defalcation while acting in a fiduciary capacity) in the Bankruptcy Court for the Eastern District of Pennsylvania, which transferred the adversary to the Eastern District of Missouri Bankruptcy Court, which refused to docket it and directed the creditor to reopen the bankruptcy case. The Eighth Circuit BAP reversed, holding that a nondischargeability suit does not affect the administration of a bankruptcy case, but was an entirely separate matter. Reopening is little more than a managerial act and has no immediate impact on the substance of the underlying case. As a result, the court erred in rejecting it. Note that the BAP expressly distinguished its ruling in this case from its prior decisions affirming bankruptcy courts who did not reopen cases.

Reopening to Adjudicate "Related To" Matters; Jurisdiction

Bankruptcy court recommended withdrawal of the reference in adversary proceeding by debtor and non-filing co-borrower against mortgagor and credit reporting agency. *Hairabedian v. Bank of America* (*In re Sinn*, 2014 WL 7689811 (Bankr. W.D. Mo. Oct. 7, 2014)

This chapter 13 debtor proposed to make his ongoing mortgage payments "though the plan," even though he was current on the mortgage payments when he filed the case. However, the mortgage lender never filed proofs of claim in the case. Because of that, although the debtor was making his plan payments, the trustee was not disbursing to the mortgage lender. The debtor himself ultimately filed a claim on the bank's behalf, but by then the lender was threatening foreclosure and had negatively reported on the non-debtor co-borrower's credit report (the debtor's fiancé). The debtor and his fiancé filed an adversary proceeding in the bankruptcy court seeking damages from the lender and its servicer for contempt of the automatic stay and confirmation order and against Trans Union for violation of the FDCPA. The bankruptcy court recommended that the district court withdraw the reference because the co-borrower's FDCPA claim, in particular, was not "related to" the debtor's bankruptcy case under the Third Circuit's *Pacor* test, which had been adopted by the Eighth Circuit. *See Specialty Mills v. Citizens State Bank*, 51 F.3d 770, 773 (8th Cir. 1995) (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984)). Under *Pacor,* a matter is considered "related to" a bankruptcy case if it could "conceivably have an effect on the estate being administered in bankruptcy." Put another way, the court said, an "action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action ... and which in any way impacts the handling and administration of the bankruptcy estate." Moreover, the court recommended that since the reference should be withdrawn as to the FDCPA count, it should be withdrawn as to the entire case due to the intertwined nature of the claims.

Bankruptcy court dismissed abandoned TILA adversary proceeding brought by debtor for lack of subject matter jurisdiction. *Keever v. Cash-2-Go of Kansas, Inc.* (*In re Keever*), 2020 WL 1286331 (Bankr. D. Kan. March 13, 2020)

This chapter 7 debtor borrowed money from defendant Cash-2-Go of Kansas which was secured by her vehicle. She disclosed in her schedules a possible TILA action against Cash-2-Go, in an "unknown" amount, based on failing to receive required TILA disclosures. After the chapter 7 trustee abandoned the assets, certified the estate had been fully administered, and filed a no-asset report, and after the discharge was entered (but before the case was closed), the debtor filed an adversary proceeding against Cash-2-Go alleging the TILA violations. The bankruptcy court dismissed the proceeding, holding that the TILA claim became property of the estate when the debtor filed bankruptcy, and that, if *the trustee* had filed the TILA action, it would have been within the court's "related to" jurisdiction, but abandonment removed the claim from the estate and returned it to the debtor. Since the case had been fully administered, recovery by the debtor would have no effect on the bankruptcy case and, therefore, it was not within the court's "related to" jurisdiction. Note that the Tenth Circuit has likewise adopted the *Pacor* test on "related to" jurisdiction. *See In re Gardner*, 913 F.2d 1515, 1517 (10th Cir. 1990).

Bankruptcy court had no authority to vacate discharge for failure to surrender property pursuant to statement of intention. *In re Gregory*, 572 B.R. 220 (Bankr. W.D. Mo. 2017)

Debtor stated her intention to surrender certain real property to the mortgagor. Post-discharge (and post-case-closing), various things happened with regard to the mortgage on the property and adjacent property, with the mortgagor mistakenly recording a deed of release on one of the parcels. This all culminated with the debtor filing a state court petition against the lender, Wells Fargo, alleging that it improperly broke into the home, changed the locks, and damaged the property. Wells Fargo answered, counterclaimed, and asserted third-party claims against the debtor's daughter, who was also an owner of the property. Several months into the state court litigation, and more than four years after the bankruptcy case had been closed, Wells Fargo filed a motion to reopen the bankruptcy case for the purpose of filing a motion to compel the debtor to, among other things, dismiss the state court action and to either enforce her "sworn promise" to surrender or require her to reaffirm or redeem. Holding that it lacked subject matter jurisdiction or authority to do any of these things, the bankruptcy court dismissed the adversary proceeding.

Bankruptcy court erred in failing to determine whether fraudulent transfer claims belonged to the bankruptcy estate in reopened case. *In re Hafen*, 616 B.R. 570 (B.A.P. 10th Cir. 2020)

Post-discharge, investors in a prepetition business venture with the debtor (which turned out to be a Ponzi scheme run by the debtor) filed a state court lawsuit against the debtor and others, alleging that the debtor had fraudulent transferred property and failed to disclose certain assets in the bankruptcy case. The debtor reopened the bankruptcy case and filed a motion for sanctions for the creditors' alleged violation of the discharge injunction, challenging the creditors' standing to bring the claims. The bankruptcy court denied the motion for sanctions. The BAP reversed, holding that the bankruptcy eourt erred when it failed to determine whether the fraudulent transfer claims asserted by the creditors belonged to the bankruptcy estate and left the question of standing to the state court. Rather, the issue of the creditors' standing to pursue fraudulent transfer claims arising from prepetition transfers was totally dependent upon and inescapably intertwined with the issue

of whether such claims contained in the complaint constituted property of the bankruptcy estate, an issue over which the bankruptcy court had exclusive jurisdiction and as to which it could not defer ruling.

Reopening to Address Reaffirmation Agreements

Debtor could not reopen a closed case to rescind reaffirmation agreement. *In re Saunders*, 169 B.R. 192 (Bankr. W.D. Mo. 1994)

Section 524(c)(4) provides that a reaffirmation agreement is enforceable post-discharge if, among other things, "the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim." In this case, the debtors moved under § 350(b) to reopen their case to rescind a reaffirmation agreement more than 60 days after both of those events, alleging that the creditor had made a misrepresentation in connection with the agreement. The court acknowledged the various protections the Code affords to reaffirming debtors, but held that reopening a case to grant a discharge on a debt which the debtors reaffirmed and failed to timely rescind would be unfair to creditors who are entitled to rely on the reaffirmation agreement. Since debtors can only rescind a valid reaffirmation agreement pursuant to § 524, the court "is powerless to provide a remedy after the time lapses." Note that BAPCPA made many changes to the provisions regarding reaffirmation agreements, but § 524(c)(4) was not one of them, and courts continue to disallow rescission outside the time permitted. *See, e.g., In re Galloway-O'Connor*, 539 B.R. 404 (Bankr. E.D. N.Y. 2015).

Court lacked ability to retroactively set aside discharge order so debtor could enter reaffirmation agreement. *In re Kirk*, 2014 WL 1248040 (Bankr. D. N.M. March 25, 2014)

Debtor moved to reopen her bankruptcy case to file a reaffirmation agreement she intended to enter with her car lender. The court held that the language of § 524 requires reaffirmations to be filed, and in some cases approved, prior to discharge. Rule 60 permits courts to set aside a discharge order, but not retroactively unless (unlike in this case) there were serious due process rights involved. *Accord*, *In re Smith*, 2015 WL 3455356 (Bankr. N.D. Ohio May 28, 2015) (holding that neither Rule 4004 (allowing for delaying the entry of a discharge), 4008(a) (permitting the time for reaffirmation agreements to be "enlarged"), Rule 60, or § 105 can be used to reopen a case for filing a reaffirmation out of time).

** Note that some courts, including the Western District of Missouri, do allow debtors to set aside a discharge order for the purpose of filing a reaffirmation agreement.

Reopening to Add an Omitted Asset

Debtor was permitted to reopen case to add potential discrimination claim. *In re Combs*, 2015 WL 3778030 (Bankr. D. Kan. June 16, 2015)

After the debtor received his discharge, he filed a lawsuit in the District Court for the Western District of Missouri, alleging three incidents of discrimination against him by establishments in the Kansas City Power and Light District. At least one of the alleged incidents had occurred prior to the bankruptcy filing, and one occurred while the bankruptcy case was pending, but he did not list the potential claims as assets in his schedules. When he later filed the discrimination suit, the defendants argued he could not pursue the claims because, by failing to list the claims in his bankruptcy case, he should be judicially estopped from proceeding. The debtor then sought to reopen his bankruptcy case to list the unscheduled claims. The bankruptcy court allowed the reopening to do so, finding the debtor credible that he had not "connected the dots" between the prepetition incident and the later-filed lawsuit at the time he filed his schedules. Therefore, he did not know he was taking a potentially inconsistent position in his bankruptcy case and his federal court lawsuit, and there was no evidence that he had been attempting to hide the facts.

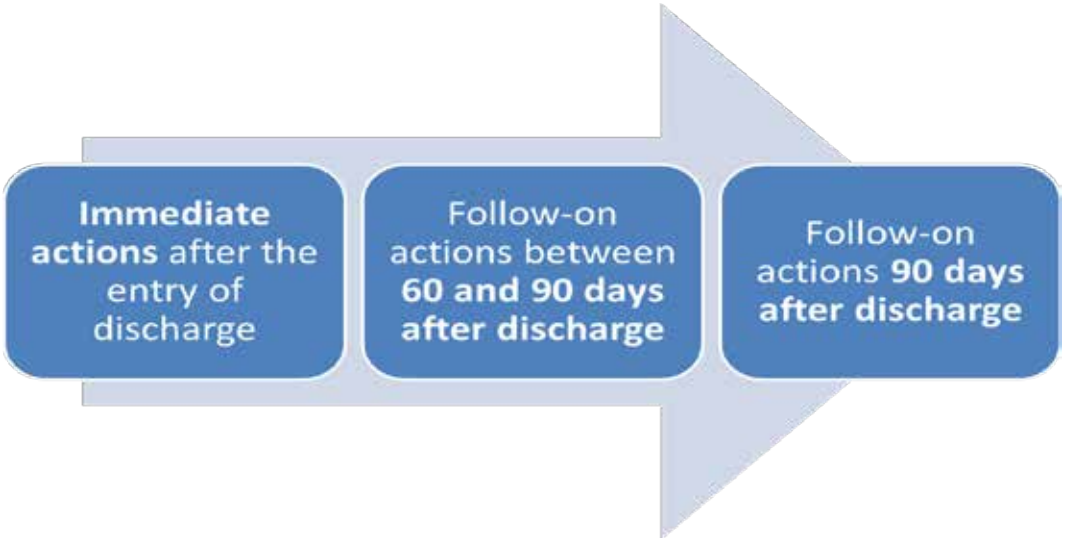
MWBI 2020 Michael H. Rapp

Post-Discharge FCRA Claims: Issue Spotting and Intake

The Bankruptcy "Fresh Start"

- Bankruptcy is supposed to be a reorganization of the debtor's finances through:
  - liquidation of the debtor's assets or
  - through a payment plan supervised by the trustee
- The discharge creates an injunction prohibiting attempts to collect debts that were (properly) included in bankruptcy
- The continued reporting of debts included in the bankruptcy as due and owing either inaccurate or misleading

Timeline following the entry of discharge generally follows this path:



Immediate Actions:

- **Inform** the potential client of the likelihood that information appearing on a credit report will not be presented as guaranteed by their discharge
- Encourage the client to enroll in some form of **credit monitoring**

- Prepare "Next Steps" communication explaining that you'll be in contact over the **next several months**

Follow-on Actions from 60 to 90 Days:

- Maintain communication with client
- Gather and organize post-discharge communications from creditors to clients
- Schedule intake and explain intake process with the goal of obtaining copies of current credit reports

Follow-on Actions 90 Days After Discharge:

- Continue relationship with Client
- If inaccuracies were discovered, determine and execute course of action
- Encourage and motivate client to continue to monitor their credit

Intake:

- Pull consumer reports from **each** of the national consumer reporting agencies
- Request **LexisNexis** full file disclosure
- Obtain and review bankruptcy **filings**
- Obtain and review any correspondence from **creditors**

Reviewing the Consumer Reports:

- Make sure you're reviewing the reports directly from the consumer reporting agency – **NO reseller consumer reports** (e.g. CreditKarma, etc.)
- Obtain reports from all three bureaus as reporting may differ between consumer reporting agencies

Reviewing Consumer Reports:
Common Reporting Errors

- Discharged accounts showing balances
- Debt collectors continue to report after discharge
  - look for date of status update or date last reported
- Inquiries after discharge from creditors who were included in the bankruptcy
- Late or missed payment notations during the pendency of the bankruptcy
  - esp. with student loans and **mortgages !**

Reviewing Consumer Reports:
Comparison with Bankruptcy Filings

- Filings that will change accuracy of reported information

- Exempted debt
- Reaffirmation agreements (can be common on automobile and debts secured by real property)
- Conversion between chapters 7 and 13
  - By them or a spouse

Reviewing Consumer Reports :
Comparison with Bankruptcy Filings

- Types of debt to be aware of for purposes of determining accuracy
  - Long term debt (e.g., mortgages) not discharged in Chapter 13s
  - Student loans (unlikely ever discharged)

Reviewing Consumer Reports:
Example Account: How it should look

- Unsecured credit card debt
  - listed in bankruptcy schedules and
  - creditor received notice of the bankruptcy
  - Debt collector or Collection/Charge Off account
- Not exempted from discharge
- Reporting should show zero current balance, "included in bankruptcy" or "discharged in bankruptcy" notation, and no status updates after filing of the bankruptcy petition
- Absent promotional inquiry or post-petition application for credit, should not have account review or hard inquiries

Identification of Bad Actors:
Section 1681e(b) Claims

- The CRAs alone is the defendant
- Need publication in most circuits
- Inaccuracies from a failure to conduct a reasonable Wight-Acosta style sweep
- Examples include:
  - not updating balances to conform with the discharge;
  - not picking up the bankruptcy and reporting its discharge, etc.

Identification of Bad Actors:
Section 1681i & 1681s-2(b)

- Creditor continues to report after entry of the bankruptcy discharge

- Reporting errors could include the status, payment history (during the bankruptcy) of the account, or account balance).
- Requires a dispute through the CRA
- Sufficiency of your client's disputes an issue
- Disputes should include as much supporting documentation as possible, including bankruptcy filings (e.g., Petition, Plan, Discharge Order, etc.)

Identification of Bad Actors: FDCPA

- Applies only to debt collector tradelines
- Applies only when the debt collector continues to update its reporting after entry of the discharge
- Split among the district courts on whether
  - credit reporting, without more, is a debt collection activity as contemplated in the FDCPA
- State law governs whether a state UDAP claim can apply to debt collectors

Cases

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Valuation Cheat Sheet

For bankruptcy practitioners

Presented by:

Hon. Cynthia a. Norton
U.s. Chief bankruptcy judge
W.d. Missouri

August 31, 2018

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Introduction

An essential skill of a bankruptcy lawyer is the ability to assess whether evidence of value is needed to represent your client effectively in some aspect of the case. When necessary, that skill may also call for presenting expert and lay opinion testimony as to value. The following is an attempt to summarize the literally hundreds of valuation cases and provide a quick guide to get started. Although every attempt has been made every attempt to be comprehensive, please be aware that approaches to value vary; that the value of property may be different for different purposes and at different times during the life of a bankruptcy case; and therefore this "cheat sheet" should not substitute for independent legal research and analysis.

I. Valuation Issues Pervade the Bankruptcy Code: A Partial List

► ***Adequate Protection*** under **§ 361** – requiring payments or replacement liens to protect the creditor against a decrease in the value of its interest[1]

[1] Adequate protection is to be determined by the value of the creditor's interest in property during the administration of the Chapter 11 case. If that interest is declining, then a secured creditor is entitled to cash or other security in the amount of the decline in value of its collateral during the course of the Chapter 11 case. **In re Apex Oil**, 85 B.R. 538, 541 (Bankr. E.D. Mo. 1988) (Schermer, J.*), citing* **United Savings Association v. Timbers of Inwood Forest**, 484 U.S. 365, 108 S.Ct. 626, 629-30, 98 L.Ed.2d 740 (1988); no evidence was presented that the value of the debtor's service station would diminish during the course of this Chapter 11 proceeding.

- ***Stay relief*** under **§ 362(d)(2)(A)** – whether debtor has "equity" in the property[2]
- ***Sales of property*** under **§ 363(f)(3)** free and clear of liens – whether the price of the property to be sold is greater than the aggregate value of all liens on such property and for purposes of whether the buyer is a good faith buyer under **§ 363(m)**[3]
- ***Determination of Secured Status*** under **§ 506** (discussed below)
- ***Scheduling of Assets***/Disclosure of Transfers under **§ 521 –** schedules and statements require a debtor to disclose under penalty of perjury the "current value" of the asset, and the "value" of the transfer[4]
- ***Exemptions*** under **§ 522(a)(2) –**"In this section…value" means "fair market value as of the date of the filing of the petition, or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate [5]

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[2] Test for determining whether debtor has any equity in property, for purpose of determining whether stay should be lifted to allow creditor to pursue its rights therein, involves comparison between total liens against property and property's current value; all encumbrances must be considered, whether or not all lienholders have requested relief from stay. **In re Bowman**, 253 B.R. 233 (8th Cir. BAP 2000); **In re Gindi**, 642 F.3d 865 (10th Cir. 2011). This is the majority view. *But see* **In re Cote**, 27 B.R. 510 (Bankr. D. Ore. 1983) (equity determined by comparison of value of property to amount owed to senior lienholder; liens of junior lienholders not considered).

[3] **In re Abbotts Dairies of Pennsylvania, Inc.**, 788 F.2d 143, 149 (3rd Cir. 1986) (in determining whether the purchaser was in good faith, courts consider that whether fair and valuable consideration is given in a bankruptcy sale is when the purchaser pays 75% of the appraised value of the assets). **In re Adam Aircraft Industries, Inc**., 2013 WL 773044 (Bankr. D. Colo. Feb. 28, 2013) (bankruptcy court properly applied replacement and not liquidation value standard in valuing assets sold by a Chapter 7 Trustee at a **§ 363** sale, since the business was being sold as a going concern).

[4] **Fed.R.Bankr.P. 1007(b)(1)** requires the filing of schedules of assets and liabilities prepared as prescribed by the appropriate Official Forms. The current forms were revised in December 2007, and require a disclosure of "current value." At some point in the past, however, the official forms required the debtor to list the "current market value" of the debtor's interest in the property – this author was unable to determine when this changed. But, as recently as 2004, the court in **Harker v. West (In re West),** 328 B.R. 736, 749 (Bankr. S.D. Ohio 2004) noted the requirement that debtors value assets at "market value" in the forms. In **West**, the court noted that the phrase "market value" was not defined in the Code or Rules and that there were surprisingly few cases addressing the definition. The court noted that, with only two exceptions, the courts that had considered the question concluded that property should be listed in schedules and valued for exemption purposes at its "fair market value," defined as the price that a willing seller not under compulsion to sell and a willing buyer not under compulsion to buy agree upon "after the property has been exposed to the market for a reasonable amount of time" (cites omitted). Two courts had considered that items such as household goods should be listed at liquidation value. In considering whether debtor's discharge should be denied for valuing jewelry purchased at retail for $30,000 which debtor scheduled as worth $2,000, in reliance on her counsel's advice to use a pawnshop value, the court believed reliance on advice of counsel was reasonable, such there was limited support for that valuation approach and debtor could not reasonably have been expected to know that she should have used fair market, rather than liquidation, values in completing her Schedule B. *See* **Zitwer v. Kelly (In re Kelly),** 135 B.R. 459, 462 (Bankr. S.D.N.Y. 1992) ("The defense of reliance on counsel is not available when it is transparently plain that the advice is improper").

[5] **In re Valentine,** 2009 WL 3336081,*7 (Bankr.D.N.H. Oct 14, 2009) (rejecting trustee's objection to jewelry exemption on grounds of debtor's alleged bad faith in valuing jewelry; finding debtor's testimony that she relied on counsel's advice to value jewelry purchased for $5,520 at $1,000 liquidation value was not bad faith); **In re Orton,** 687 F.3d 612 (3rd Cir. 2012) (Debtor limited to the $1.00 exemption in oil and gas lease, even though $1.00 was the fair market value at the time of the petition; estate entitled to the postpetition appreciation in value, rejecting Debtor's argument that **Schwab v. Reilly**, 130 S.Ct. 2652 (2010) applies only to bad faith undervaluation).

- ***Lien Avoidance*** under **§ 522(f) –** avoidance of liens to the extent they impair an exemption; under **§ 522(f)(2)(A)**, a lien shall be considered to impair an exemption to the extent that the sum of (i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value of that the debtor's interest in the property would have in the absence of any liens."[6]
- ***Exceptions to discharge*** under **§ 523**, *e.g.,* value of property for purposes of determining fraud, damages
- ***Preferential Transfers*** under **§ 547** for purposes of determining insolvency, defined as when the sum of the debts is great than all the property, at a "fair valuation" under **§ 101(32)**[7]; and, for purposes of whether a creditor received more than it would have received in a chapter 7 liquidation.[8]
- ***Fraudulent Conveyances*** under **§ 548(a)(1)(B)(i)** – avoidance of transfers where debtor received less than "reasonably equivalent value"; "value" is defined in **§ 548(d)(2)(A)** as "property, or satisfaction or securing of a present or

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[6] The majority view is that fair market value is the appropriate valuation standard for purposes of lien avoidance, and that costs of liquidation should not be deducted. *E.g.,* **In re Wolmer**, 494 B.R. 783 (Bankr. D. Conn. 2013). *But see* **In re Walsh**, 5 B.R. 239 (Bankr. D. C. 1980). There is also a split of authority on the issue of whether a judicial lien's priority under state law is relevant in determining whether a debtor may avoid such lien, and whether a debtor may use **§ 522(f)** to avoid a judicial lien that has priority even over the first mortgage. See **In re Moltisanti,** 2012 WL 5246509 (Bankr. E.D.N.Y. 2012) (collecting the cases); *See* **In re Kolich**, 328 F.3d 406, 410 (8th Cir. 2003); **In re Moore,** 495 B.R. 1(8th Cir.BAP 2013) (holding that Missouri state law exception to a debtor's homestead exemption rights did not prevent debtor from asserting her state law homestead exemption rights to avoid a judgment lien that creditor obtained after debtor acquired homestead property).

[7] **In re Trans World Airlines, Inc**., 134 F.3d 188 (3rd Cir. 1998) (fair valuation of assets contemplates a conversion of assets into cash during a reasonable period of time, in this case, 12 to 18 months; rejecting the preference defendant's argument that fair value implies a hypothetical sale for the highest and best price, with no time pressure, *citing* **American Nat'l Bank & Trust Co. v. Bone**, 333 F.2d 984, 987 (8th Cir. 1964); "[T]he reasonable time should be an estimate of the time a typical creditor would find optimal: not short a period that the value of the goods is substantially impaired via a forced sale, but not so long that a typical creditor would receive less satisfaction of its claim, as a result of the time value of money and typical business needs, by waiting for the possibility of a higher price;" also rejecting the defendant's argument that the fair valuation standard applies to liabilities; the Court determines that it should use the face value of debt, rather than market value, in light of the fact the business is being valued as a going concern); **In re Heilig-Meyers Company,** 328 B.R. (E.D. Va. 2005) (balance sheet test of insolvency applies; however, at the threshold, the court must determine whether, on the date of the transfers, the debtor operated as a going concern or was on its deathbed – on deathbed means the valuation should be a liquidation value); **In re Golden Mane Acquisitions, Inc**., 221 B.R. 963 (Bankr. N.D. Ala. 1997) ("Fair value, in the context of a going concern, is determined by the fair market price of the debtor's assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor's debts).

[8] **In re Nguyen,** 2014 WL 61410 (Bankr. S.D. Tex. Jan. 7. 2014) (denying plaintiff's complaint to avoid foreclosure of property on ground foreclosing creditor received more than it would have received in a chapter 7 case; Wells Fargo bid the amount of its debt; plaintiff asserted that, based on the tax assessed value, which was more than the debt, Wells Fargo had received in excess; plaintiff failed to designate an expert or submit a report in response to Wells Fargo's motion for summary judgment; court accepted Wells Fargo's expert appraisal report opining that value was less than the debt); **In re Lewis W. Shurtleff, Inc.**, 778 F.2d 1416, 1422 (9th Cir. 1985) (we are unsure whether the bankruptcy court should have deducted the transaction costs of a sale in computing the value of the property transferred. **Section 547(b)** itself does not address the method by which transferred property should be appraised. Nor does the Code appear to authorize a uniform method for valuation).

antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor"[9]

- ► ***Recovery of transfer or its value*** under **§ 550**[10] -- not defined by the Code; nor does the Code indicate at what time "value" is determined
- ►***Abandonment*** under **§ 554** of property "of inconsequential value and benefit to the estate"[11]
- ► ***Redemption*** under **§ 722** - paying the holder of the lien the amount of the allowed secured claim (as determined under **§ 506**)[12]

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[9] **BFP v. Resolution Trust Corp**., 114 S.Ct. 1757 (1994) (We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with; rejecting an argument that "reasonably equivalent value" constitutes "fair market value"; the term "fair market value," though it is a well-established concept, does not appear in **§ 548)**; *see also* **In re Russell-Polk,** 200 B.R. 218 (Bankr. E.D. Mo. 1996) (Schermer, J.) (Chapter 13 debtor sought to avoid real property tax sale of her property to tax sale purchaser as a fraudulent transfer; held, that proceeds received from properly conducted real property tax sales in Missouri conclusively satisfied requirement that transfers of property by debtor in year prior to petition filing be in exchange for reasonably equivalent value; "[t]he Court is sensitive to the fact that most, if not all, forced tax sales yield a purchase price much lower than the "fair market value" of the property. The Supreme Court also recognized this fact in the mortgage foreclosure sale context, yet it did not control their analysis. **BFP v. Resolution Trust Corp** 114 S.Ct. 1757, 1762. Similarly, the consideration received at a tax sale should not control the analysis in this case").

[10] **In re Hecker**, 459 B.R. 6, 14-15 (8th Cir. BAP. 2011); **In re American Furniture Outlet USA, Inc**., 209 B.R. 49, 52 (Bankr. M.D. N.C. 1997) (when chapter 11 debtor-retailer returned furniture to supplier within 90 days prepetition, fair market value of transferred goods, the value of the preference, was properly reflected in the amount netted by the supplier in liquidation sales after costs and expenses, not amount grossed at those sales, since supplier acted in a commercially reasonable manner and absent bankruptcy would have been entitled to collect costs and expenses associated with sales under North Carolina law; noting that the Code's failure to prescribe a valuation formula for **§ 550(a)** has engendered some case law; the purpose and thrust of **§ 550** is to restore the debtor's financial condition to the state it would have been had the transfer not occurred; where debtor returned goods to supplier in return for the supplier's full credit of the account, the court holds that the term "value" connotes "market value" or the amount the trustee would receive if he offered the items for sale; the credit memo is not relevant); *But see* **In re First Software Corp**., 84 B.R. 278 (Bankr. D. Mass. 1988), *aff'd* 107 B.R. 417 (D. Mass. 1989) (value that the trade creditor ascribed in a credit memo for returned goods was evidence of the market value of the goods at the time of the transfer); distinguishing those cases because the credit memo was the only evidence of value; return of furniture from Debtor to its supplier was not reflective of arms-length transaction between a willing seller and a willing buyer; amount netted by supplier after its liquidation sale of the furniture was the best evidence of value.

[11] **In re Thornton**, 269 B.R. 682 (Bankr. W.D. Mo. 2001) (Federman, J.) (Chapter 7 trustee would be directed to abandon 15.2-acre parcel of homestead property to debtors, as being of inconsequential value, where property's fair market value of $27,000, as reduced by encumbrances thereon, costs of sale, debtor's homestead and other exemptions thereon, and trustee's 25% fee for distributing the remainder, would result in total distribution of only $1,119.51 (or less than 2%) on general unsecured debt of $66,784.64; benefits to estate of administering property were de minimis); **In re Nelson,** 251 B.R. 857 (8th Cir.BAP 2000) (evidence supported bankruptcy court's determination that the two parcels were of inconsequential value or benefit to the estate, despite trustee's contentions that the parcels had value as rental property, and that equity of redemption in the property provided a source of value for the estate; court rejected trustee's argument that the parcels could be rented; argument was speculative at best; trustee did not demonstrate any effort to rent the parcels, and lienholders had assignment of rents clause; court need not consider speculative factors); **In re Weiss**, 111 F.3d 1159 (4th Cir. 1997) (before bankruptcy court may abandon property of estate, trustee must ascertain property's fair market value as well as amount and validity of outstanding liens against property).

[12] **In re Bryan,** 318 B.R. 708 (Bankr. W.D. MO. 2004) (Federman, J.) (trade-in value, as defined by the National Automobile Dealers Association Guide (NADA), is generally the most appropriate starting point for value, and is the applicable value in this case). *Accord* **In re Weber** 332 B.R. 432 (10th Cir. BAP 2005). *But see* **In re Smith**,

► ***Denial of Discharge*** under **§ 727(a)(4)(A)** (false oath)[13]

► ***Cramdown & Strip Offs***: Determination of allowed secured claims in Chapters 11, 12 and 13 **(§§ 506(a), 1129, 1225, 1325(a)(5))** (discussed below)

► ***Liquidation analysis*** or "best interests of creditors" tests in Chapters 11, 12 and 13 (**§§ 1129(a)(7), 1225(a)(4), 1325(a)(4))** – unsecured creditors to receive value, as of the effective date of the plan, that is not less than the amount that such holder would receive if the debtor were liquidated under chapter 7

II. General Valuation Principles

►***Many meanings of value*****:** Justice Brandeis observed, "[v]alue is a word of many meanings." **Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n**, 262 U.S. 276, 310 (1923) (Brandeis, J., concurring)

► ***Not defined***: With limited exceptions (secured claims under and exemptions, discussed below), "value" is not a defined term in the Bankruptcy Code or Rules or the Official Forms, and, where not defined, is therefore left to case law

► ***A determination of value inherently incorporates a consideration of time*****:** "Logic and common sense inform us that the amount that can be realized from the sale of an asset varies as a function of the time period over which the asset must be sold." **In re Trans World Airlines, Inc.,** 134 F.3d 188, 194 (3rd Cir. 1998). *See also* **BFP v. Resolution Trust Corp**., 114 S.Ct. 1757, 1762 (1994) (discussing value for purposes of whether value received at a foreclosure sales constitutes reasonably equivalent value for purposes of § 548; "An appraiser's reconstruction of "fair market value" could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that *must* be sold within those strictures is simply *worth less.* No one would pay as much to own such property as

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307 B.R. 912 (Bankr.N.D.Ill. 2004) (determining retail, or replacement value), *rev'd* **Smith v. Household Automotive Finance Corp.**, 313 B.R. 267 (N.D.Ill. Aug 19, 2004). **NOTE**: These are pre-BAPCPA cases; see now **§ 506(a)(2)** (discussed below).

[13] **Harker v. West (In re West)**, 328 B.R. 736, 749 (Bankr. S.D. Ohio 2004) (debtor's undervaluation of jewelry was a false oath; representations in schedules relate to the existence of and disposition of assets of the estate and are therefore material; debtor had purchased jewelry for approximately $30,000 but scheduled the "market value" as $2,000; testimony was that appraised value was nearly $4,000; however, reliance on counsel's advice was a defense); **In re Charles**, 2013 WL 436441 (Bankr. D. N.D. 2013) (Debtor denied a discharge for undervaluation of real estate; debtor scheduled value of real estate at $225,000, the tax assessed value, but had listed the property for $274,900, and received a written offer of $249,900, and had countered at $274,900; the debtor had no evidence to support his contention that he had valued the property based on an oral offer of $225,000); **In re Edwards**, 2011 WL 2619193, *5 (Bankr.E.D.Ky. Jul 01, 2011) (debtor's discharge denied; debtor was sophisticated business person who knowingly scheduled real estate at values thousands of dollars below their appraised value and valued listed in financial statement given to bank within 6 months of filing bankruptcy in attempt to show no equity; not reasonable for debtor to rely on tax values when debtor knew those values were not fair value); **In re Ferebee**, 2012 WL 506740, *13 (Bankr.E.D.Va. Feb 15, 2012) (valuation of jewelry in schedules at $50 but that had been purchased for $32,000 warranted denial of discharge).

he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques.") (emphasis in original).

► ***The date/time for determining value is not specified:*** With limited exceptions, the Code does not specify the date as to which the court should determine value; relevant valuation points in time include the date the creditor acquired its interest in the collateral (prepetition); the date of the petition; the date of the motion; and the date of the hearing or final judgment, or some other point.

- **For Purposes of Value of Exemptions--Date of Petition: § 522(a)(2) –**"In this section…value" means "fair market value as of the date of the filing of the petition, or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate." **In re Polis,** 217 F.3d 899 (7th Cir. 2000) (Assuming that Chapter 7 debtor's TILA claim was not assignable and so could not be the subject of a "market" transaction in the literal sense, that was irrelevant to its status as property of bankruptcy estate, which could be valued for exemption purposes on basis of its fair market value on the date the petition was filed; error for district court to determine exemption had no value due to later events and to dismiss the claim for lack of standing). *But see* **Fitzgerald v. Davis**, 729 F.2d 306 (4th Cir. 1984) (although recognizing that **§ 522(a)(2)** requires the court to determine value of exemption as of the petition date, the , a bankruptcy court should not disregard the price obtained from a sale of the property during the pendency of the bankruptcy proceedings. Under these circumstances, a sale price greatly in excess of an estimate is the more reliable evidence of the "value" defined in **§ 522(a)(2)).**

- **For Purposes of Preference -- Date of Petition: In re Hecker**, 459 B.R. 6, 11 (8th Cir. BAP 2011) (whether the transfer enabled a creditor to receive more than they would have received in a hypothetical liquidation for purposes of **§ 547** is conducted as of the petition date.no preferential transfer because there was no equity in the property as of that date; reversed and remanded for determination of trustee's recovery under **§ 550**).

- **For Purposes of Property of the Estate –Not limited to value as of date of petition:** *In re Potter*, 228 B.R. 422 (8th Cir. BAP 1999) (value of contingent interest in trust; postpetition appreciation belongs to the estate).

- **For Purposes of Redemption: Pre-BAPCPA Split of Authority**: **In re Podnar**, 307 B.R. 667, 673 (Bankr. W.D. Mo. 2003 (Venters, J.) (Redemption value is determined as of the date of the motion to redeem or, if the motion is contested, the date of the redemption hearing; valuing the property as of the date of the petition would place the creditor in a better position than it would be if it were allowed to repossess in the ordinary course of events; but, if the creditor can show undue delay by the debtor, gross negligence, or other acts by which the debtor has unreasonably diminished the value of the collateral between the date of the bankruptcy filing and the redemption hearing, the valuation made be made as of

the date of the bankruptcy filing); *but see* **In re Smith**, 313 B.R. 785 (Bankr. N.D. Ind. 2004) (date of petition). NOTE: BAPCPA redemption is discussed below.

- **For Purposes of Lien Avoidance in Chapter 7**: **In re Wade**, 354 B.R. 876 (Bankr. N.D. Ia. 2006) (When the purpose of the valuation is to determine the amount of the lien surviving discharge in a Chapter 7, petition date is appropriate, since postpetition appreciations in value of the property inure to the benefit of the debtor under the fresh start principle).

- **For Purposes of Cramdown: Valuation of Secured Creditor's Claim at Confirmation: Split of Authority: In re Roach**, 2010 WL 234959, *5 (Bankr. W.D. Mo. Jan. 15, 2010) (Dow, J.) (For purposes of Chapter 13 modification of mortgage, Court concludes date of confirmation is date for valuation of the home, notwithstanding delay in getting to confirmation and the fact that value had declined; creditor should have asked for adequate protection); **In the Matter of Heritage Highgate, Inc**., 449 B.R. 451 (D. N. J. 2011), *aff'd* 679 F.3d 132 (3rd Cir. 2012) (When value is for purposes of confirming a plan, it should be determined as of the confirmation date); *but see* **In re Johnson**, 165 B.R. 524 (Bankr. S.D. Ga. 1994) (date of petition).

- **For Purposes of Strip-Off & Anti-Modification Provisions: Split of Authority: TD Bank, N.A. v. Landry**, 479 B.R. 1 (D. Mass. 2012) (reversing the bankruptcy court and finding that valuation date was petition date; since the purpose of the valuation was whether the bank's claim was entitled to protection of **§1322(b)(2)** and therefore whether the bank is entitled to relief from stay; **In re Abdelgadir**, 455 B.R. 896, 902 (9th Cir. BAP 2011) (While it might be entirely appropriate to value secured claim of junior deed of trust lender whose lien the individual Chapter 11 debtors were seeking to strip as of time of confirmation of their lien-stripping plan, determination as to whether real property that secured lender's claim was debtors' primary residence, as required for lender to be protected by antimodification provision of Chapter 11, **§ 1123(b)(5)**, had to be made not as of time of plan confirmation, or as of earlier date when debtors entered into loan, but as of petition date); **In re Marsh**, 475 B.R. 892 (N.D. Ill. 2012) (date of petition or date of entry of final judgment resolving adversary);
  But see **In re Proctor**, 494 B.R. 833 (Bankr.E.D.N.C. 2013) (date of the loan documents).

Note that valuation of property for one purpose may not be binding in another bankruptcy context. (See SW Boston Hotel Venture, LLC, 748 F.3d 393 (1st Cir. 2014).

PRACTICE TIP: You must parse these cases very carefully and make sure you understand what date the court is going to use for purposes of determining value. A failure to present evidence as of the correct date for determination, when the value has increased or decreased significantly, for example, may result in the court finding no credible evidence to support your proffered value. Since the proper date to value is a legal question, it is

reviewed de novo on appeal, and may result in reversal if the bankruptcy court applies – at your urging -- the wrong date.

► ***Numerous Valuation Standards/Approaches***: There are numerous valuation standards used in the Code, in case law, as well as in common parlance. One court has expressed it this way: "Wholesale," "foreclosure," "liquidation," or "quick sale" values describe a proposed disposition of property by surrender to the creditor and prompt conversion of the property by the creditor to cash, usually in accordance with State foreclosure law. "Retail," "going concern," "replacement cost," or "rehabilitation" values describe a proposed retention and use of property in the debtor's ongoing financial reorganization." **In re Johnson**, 145 B.R. 108, 115, n.10 (Bankr. S.D. Ga. 1992), *cited with approval*, pre-**Rash** by **In re Gallup**, 194 B.R. 851, 853, n.2 (Bankr. W.D. Mo. 1996) (Koger, J.).

Terms used to denote the lowest types of value:

- **"Liquidation Value"**: At least one court has observed, "[w]e do not know of an accepted standard or definition for a liquidation value. It is thought to be a distress sale and less than market value, but that may not always be the case." **In re Yoder**, 32 B.R. 77 (Bankr.W.D.Pa. Aug 16, 1983), *rev'd on other grounds* 48 B.R. 744 (W.D. Pa. 1984).
- **"Pawnshop Value"**: "Simply a different manner of expressing liquidation, or distressed sale value." **In re West**, 328 B.R. 736, 752, n.8 (Bankr. S.D. Ohio 2004).
- **"Foreclosure Value"** or **"Distress Value"** (or **"Distressed Value"):** "What the secured creditor could obtain through foreclosure sale of the property." **Rash,**[14] 520 U.S. at 955-56.
- **"Wholesale Value":** Considered to be synonymous with foreclosure value. **In re Perez,** 318 B.R. 742, 743 (Bankr. M.D. Fla. 2005); what secured creditor could expect to recover by repossessing vehicle and selling it at auction or by other wholesale means. **In re Bouzek**, 311 B.R. 239, 428 (Bankr. E.D. Wis. 2004) (value of vehicle for **§ 722** redemption purposes).

Terms Used to Denote the Highest Value:

- **"Fair Market Value"**: Generally understood as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction" (*Black's Law Dictionary* (Westlaw 9th ed. 2009)), but considered synonymous with "replacement value" under **Rash.** *But see* In re Walsh, 5 B.R. 239 (Bankr. D.C. 1980) (notwithstanding § 522(a) definition of value as fair market value, exemptions must be interpreted in the liquidation context of a Chapter 7 case, and thus, in such a case, "fair market value" is the equivalent of "liquidation value." **NOTE: Walsh** has been soundly criticized. *E.g.*, **In re Wolmer**, 494 B.R. 783 (Bankr.D.Conn. Jun 25, 2013).

- **"Replacement Value"**: What the debtor would have to pay for comparable property, defined by the Supreme Court in **Rash** for purposes of **§§ 506** and **1325(a)(5)(B)** and cramdown of a vehicle; **"[**b]y replacement value, we mean the price a willing buyer in the

[14] **Associates Commercial Corp. v. Rash**, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997).

debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition." **Rash**, 520 U.S. at 959 n.2.[15]

Terms Used For Something in the Middle:

- "Split-the-difference value" or "midpoint between foreclosure and replacement value": rejected by **Rash**; *but see* **In re Tripplett**, 256 B.R. 594 (Bankr. N.D. Ill. 2000) (appropriate when debtor was proposing to redeem vehicle at midpoint between the vehicle's retail and wholesale value).

Terms Used In Connection With Vehicle Valuations:

- There are three approaches for valuing a vehicle -- retail, replacement and wholesale, liquidation or foreclosure. In some instances, some variation or departure might be appropriate in the court's equitable discretion. **In re Podnar***,* 307 B.R. 667, 670 (Bankr. W.D. Mo. 2003 (Venters, J.). **NOTE:** This is pre BAPCPA and **§ 506(a)(2).**

- **"Retail Value":** The price a willing buyer is willing to pay for any car. **In re Bryan**, 318 B.R. 708, 710-11 (Bankr. W.D. Mo. 2004) (Federman, J.).

- **"Replacement Value":** The price a willing buyer is willing to pay for a similar car minus the cost of sale. **In re Bryan**, 318 B.R. 708, 710-11 (Bankr. W.D. Mo. 2004) (Federman, J.).

- **"Wholesale, Liquidation or Foreclosure Value":** "For the most part, though there are subtle differences, courts use the terms liquidation, wholesale, trade-in and foreclosure value interchangeably. In general, the values contained in these terms are defined as either the amount a secured creditor would receive if it repossessed the collateral and sold it in the most beneficial manner it could – foreclosure or liquidation value – or the amount a consumer might expect a dealer to offer when asking the dealer to take a vehicle in trade – trade-in or wholesale value. **In re Bryan**, 318 B.R. 708, 710-11 (Bankr. W.D. Mo. 2004) (Federman, J.).

- **"Trade-in Value"**: "The retail price of the car minus the costs to recondition and repair the car, the interest paid to finance the care until it is sold, the cost of storing the car, and any profit." **In re Bryan**, 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004) (Federman, J.).

- "**Private Party Value**": What a buyer can expect to pay when buying a used car from a private party. It assumes the vehicle is sold "as is" and carries no warranty (other than the continuing factory warranty). The final sale price may vary depending on the vehicle's actual condition and local market conditions. **In re Weber** 332 B.R. 432 (10th Cir. BAP 2005) (quoting from Kelley Blue Book definition).

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[15] The 9th Circuit in **In re Taffi**, 96 F.3d 1190 (9th Cir. 1190) had distinguished between fair market value and replacement value; post-**Rash**, these terms are considered to be synonymous for purposes of value under **§ 506(a)**, since, as the Supreme Court explained, "replacement value" does not mean what it would cost the debtor purchase the collateral brand new."**Rash**, 520 U.S. at 959 n.2.

- "**Gross sales price**": The gross amount received at the sale. **In re Bryan**, 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004) (Federman, J.).

- "**Net to seller price**": The amount received at the sale, less the costs of sale, which include costs of repossession, transportation, storage and sales commission. **In re Bryan,** 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004) (Federman, J.) (noting that this was not appropriate for redemption value, since there was no sale or repossession).

PRACTICE TIP:

There are three accepted sources or market guides: (1) the Black Book; (2) the Kelley Blue Book; and (3) the National Automobile Dealers Association (NADA) Guide. **In re Bryan**, 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004) (Federman, J.).

Terms Used In Connection With Asset Sales:

- **"Open Market Value"** or **"Market Value":** The price the assets would bring on the open market; the value a prudent business person can obtain from the sale of an asset when there is a willing buyer and a willing seller; under this approach, it is not appropriate to deduct the costs and expenses associated with the sale, such as real estate transfer taxes, since this method focuses on what a willing buyer would pay, not necessarily what a willing seller would receive; value may be reduced by factors regarding the difficulty of the sale, or if the asset is the subject of extended litigation or where there is no ready market; such factors affect the market price of the asset, not the costs of sale; it is appropriate to adjust the market value by the net cost of making the asset marketable. **In re Golden Mane Acquisitions, Inc**., 221 B.R. 963, 968 (Bankr. N.D. Ala. 1997).

- **"Going Concern Value"**: "The term going concern is commonly understood to refer to "[a] commercial enterprise actively engaging in business with the expectation of indefinite continuance (citing Black's Law Dictionary). In the valuation context, it is generally used in contradistinction to a business that will be liquidated. Essentially, it requires an appraisal to assume the continued operation of the same type and size of business … and to exclude consideration of any merger or liquidation." **In re Adam Aircraft Industries, Inc.**, 2013 WL 773044, n.4 (Bankr. D. Colo. Feb. 28, 2013).

Other Valuation Terms:

- "As Is"
- "Face Value"
- "Book Value"
- "Appraised Value"
- "Value for insurance purposes"
- "Tax-assessed Value"
- "Clean Retail Value"

III. Section 506(a) Value Determinations & *Rash*[16]

►***Secured Claim Valuations: Governed by* § 506(a)**:

§ 506(a)(1): An allowed claim of a creditor secured by a lien on property in which the estate has an interest…is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property… and is an unsecured claim to the extent that the value of such creditor's interest … is less than the amount of the secured 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.***

(emphasis added).

***Personal Property Exception*: § 506(a)(2)** - Personal Property Valuations in Individual Chapter 7/13 Cases:

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.

(emphasis added)

►***Replacement Value, Not Wholesale or Midpoint for Chapter 13 Cramdown***: For purposes of cramdown value of a vehicle, bankruptcy court should use replacement, not wholesale value, or the value in between, to determine the amount of the secured creditor's claim. **Associates Commercial Corp. v. Rash**, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997).

►***Definition of Replacement Value:* "**By replacement value, we mean the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition." **Rash**, 520 U.S. at 959 n.2.

► ***Rationale:*** Under the cramdown option, the creditor is exposed to "double risks" in that the debtor keeps the collateral under a court-imposed "crammed down" financing arrangement, with the risk the debtor may again default and the property may deteriorate further. **Rash**, 520 U.S. at 962-63. Because the creditor is receiving back neither its collateral nor its proceeds, liquidation value is not relevant to the debtor's intended use or disposition in the context of a cram down under chapter 13. *Id*.

► ***Two-Step Process*:** In valuing property under **§ 506(a)(1)**, a court must engage in a two-step process: First, a court must compare the creditor's claim to the value of the "such

[16] **Associates Commercial Corp. v. Rash**, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997).

property" – the collateral. This determination necessarily requires the court to ascertain the "creditor's interest in the estate's interest in" the property. The second step is the valuation process requires the court to determine how to value the collateral.

► ***But, beware the footnotes***: Bankruptcy Courts, as triers of fact, must determine whether the replacement value is the equivalent of retail, wholesale, or some other value based on the type of debtor and the nature of the property. Adjustments are necessary, where appropriate, to account for the absence of warranties, inventory, storage and reconditioning charges." **Rash**, 520 U.S. at 965, n 6. Courts are to consider the purpose of the valuation, but are not allowed to use different valuation standards based on the facts and circumstances of individual cases. **Rash**, 520 U.S. at 965, n. 5.

►***Rash applies in other contexts besides Chapter 13***: *E.g.,* **In re Adam Aircraft Industries, Inc.**, 2013 WL 773044 (Bankr. D. Colo. Feb. 28, 2013) (applying **Rash** principles in context of a Chapter 7 **§ 363** sale); **Rash**-type analysis applies to Chapter 11 valuation. **In re Inter-City Beverage Co., Inc.,** 209 B.R. 931 (Bankr. W.D. MO. 1997) (Koger, C.J.) (decided before the Supreme Court handed down **Rash**).

IV. Applying *Rash* in the Real World (or, can you make a *Rash* decision?)

►***Flexible Standard:*** Section **506(a)** does not specify the appropriate valuation standard. Rather, Congress envisioned a flexible approach to valuation whereby bankruptcy courts would choose the standard that best fits the circumstances of a particular case. **In re Heritage Highgate, Inc.,** 679 F.3d 132, 141 (3rd Cir. 2012).

► But, what about fn.5 "As our reading of **§ 506(a)** makes plain, we also reject a ruleless approach allowing use of different valuation standards based on the facts and circumstances of individual cases." **Rash,** 520 U.S. at 965, n. 5.

Redemption Examples:

Rash required the chapter 13 debtor who proposed to keep the vehicle to pay the secured creditor replacement value, rather than liquidation value, on account of debtor's "proposed use and disposition" of the vehicle under **§ 506(a)** and the risks to the secured creditor of default and depreciation. Pre- BAPCPA, most courts had determined that redemption in a lump sum carried less risk and that a wholesale or trade in value, as of the time of the redemption, was the correct value. **In re Bryan,** 318 B.R.708 (Bankr. W.D. MO. 2004) (Federman, J.) (trade-in value, as defined by the NADA, is generally the most appropriate starting point for value, and is the applicable value in this case, noting the difference between "retail value" and "replacement value." *Accord* **In re Weber,** 332 B.R. 432 (10th Cir. BAP 2005).

BAPCPA added **§ 506(a)(2),** specifying that value of personal property for an individual chapter 7 or 13 debtor would be "replacement value" as of the petition date, and further defined "replacement value" – in the case of property held for personal, family, or household purposes – as the price a retail merchant would charge for property of that kind considering the age and condition at the time value is determined. **NOTE**: In the same way that Rash equated fair market value with replacement value, Congress has

seemingly chosen to equate "replacement value" with "retail value" – for purposes of certain personal property valuations. **In re Pearsall,** 441 B.R. 267, 270 n.2 (Bankr. N.D. Ohio2010).

QUERY: What value does **Rash --** in light of **§ 506(a)(2) --** require the chapter 7 debtor to pay to redeem the vehicle? And when is it determined in light of the arguably contradictory language in the first and second sentences of **§ 506(a)(2)** – "replacement value as of the date of the petition" and "age and condition of the property at the time value is determined."

ANSWER: There is no consensus. *See* **In re Labostrie**, 2012 WL 6554727 (9th Cir. BAP. 2012) (not error for bankruptcy court to reply on NADA retail, minus adjustments for condition and mileage); **In re Perales,** 2012 WL 902790 (6th Cir. BAP 2012) (no error for bankruptcy court to accept Debtor's Edmunds.com private party value in absence of any evidence adduced by creditor and where creditor did not request an evidentiary hearing); **In re Meredith**, 2013 WL 4602966, Bkrtcy.M.D.Pa. (August 29, 2013) (retail value of mobile home determined by comparable sales and NADA guide for mobile home values); **In re Griffin**, 2013 WL 781141 (Bankr. M.D.N.C. Mar. 1, 2013) (90% of NADA retail unless the debtor is prepared to offer evidence of a different value); *but see* **In re Nance**, 2013 WL 2897527 (Bankr. M.D.N.C. June 12, 2013) (in Chapter 13 case converted to Chapter 7, where debtor had paid more than 90% of the NADA retail value as of the petition date, court rejected debtor's argument that redemption amount was $0; debtor had to pay balance of contract price); **In re Pottinger,** 2012 WL 3561966 (Bankr. M.D.N.C. 2012) (denying unopposed motion to redeem for NADA trade in value.); **In re Pearsall**, 441 B.R. 267 (Bankr. N.D. Ohio 2010) (concluding that the "most probative evidence of the value of the vehicle for redemption purposes ... is the actual circumstances of its acquisition" which occurred less than one month before filing, minus adjustments); **In re Gehring**, 2011 WL 2619552 (Bankr. N.D. Ohio July 1, 2011) (rejecting 722.Redemption's appraisal where it didn't specify the trim on the vehicle and was unclear whether vehicle had even been inspected; noting that the most helpful and necessary information is: (1) year, (2) model, (3) trim, (4) options, (5) mileage, (6) condition, and (7) the basis, e.g. inspection or third party report, upon which the person makes the evaluation. This may be supplemented with arguments and evidence concerning variations or adjustments from retail price relating for conditioning expenses and the like).

Vehicle Cramdown Examples:

QUERY: What is the appropriate value for chapter 13 cramdown in light of **§ 506(a)(2)?**

ANSWER: There is no consensus. **In re Nance,** 477 B.R. 638 (Bankr. E.D. La. 2012) (Among the who utilize the NADA Guide in determining the retail value of a vehicle under § 506(a)(2), four basic approaches have emerged.

(1) Under the first, courts establish a presumptive retail value for the vehicle by deducting a certain percentage from the NADA Clean Retail value, *citing* **In re Cheatham,** 2007 WL 2428046, *3 (Bankr. W.D. Mo. 2007); U.S. Bankr.Ct. Rules E.D. Mo., L.R. 3015–2 and Proc Manual.

(2) Under the second, courts set the presumptive value of the vehicle at the full NADA Clean Retail value.

(3) Under the third, courts make use of NADA (or Kelley Blue Book (KBB)) values as starting points but hold that the facts of each case determine which value (Clean Retail, Private–Party, etc.) should be used.

(4) Finally, under the fourth approach, the one that the court has settled on, courts average the NADA Clean Retail and Clean Trade–In values for a vehicle of the same make, model, and year as the vehicle in question).

Missouri/Kansas Mobile Home Cramdown Examples

Missouri Mobile Home: **In re Coleman**, 373 B.R. 907 (Bankr. W.D. MO 2007) (Federman, J.) (mobile home that secured creditor's claim, which was not permanently affixed to real property on which it sat, but simply rested on bricks and was tied to the land with "standard tie-downs," and which was not shown to be attached to well, to septic system, or to any other permanent type of fixture, was not "real property," such that creditor was not protected by antimodification provision; value of mobile home which secured creditor's claim would be set, for purpose of determining creditor's allowed secured claim, at price estimated in dealer's handbook (NADA) for mobile home of that type and year, without any downward adjustment; NADA for mobile homes is considered a depreciated replacement cost in retail dollars; therefore, NADA is starting point with no 5% deduction as there is for cars; presumes an average condition; burden on debtor to show what it would cost to bring the mobile home to an average condition).

Kansas Mobile Home: In re Kollmorgen, 2012 WL 195200 (Bankr. D. Kan. Jan. 20, 2012) (Nugent, J.) (For purposes of the amount of the secured creditor's claim in a chapter 13, Court rejected Debtor's appraiser's valuation of mobile home at $5,000; NADA value for manufactured home more closely approximated replacement value; value determined to be $16,700; Debtors used a "provisional licensed appraiser" whose appraisals had to be reviewed by a certified appraiser; appraiser had no training or certification specific to mobile homes and employed a market approach based on comparable sales but could give no specifics about adjustments except he relied on professional judgment. The creditor's appraiser was a certified mobile home appraiser, used a cost analysis with adjustments for condition).

Kansas mobile home: **In re Patricia Ann Little**, Case No. 12-12650 (Bankr. D. Kan. Sept. 24, 2013) (Nugent, C.J.)

Missouri/Kansas Vehicle Cramdown Examples

Missouri Motor Vehicle: In re Cheatham, 2007 WL 2428046 (Bankr. W.D. MO June 19, 2007) (Federman, J.) (NADA for vehicles still the starting point, unless it is shown that NADA is not useful in the area or appropriate; NADA may be adjusted to account for the expense need to bring the vehicle to a clean condition as described in NADA; since Debtor has superior access to the property, Debtor bears burden of offering evidence as to adjustments; then, adjustment for fact that NADA is dealer asking price; presumed to be discount of 5% in the absence of other evidence; valuation can be considered as part of the confirmation process when parties are in agreement).

Kansas Motor Vehicle: In re Cook, 415 B.R. 529 (Bankr. D. Kan. 2009) (Nugent, C.J.)
(1) Appropriate date for valuing the motor vehicle that secured the claim of a non-910 motor vehicle lender, for purpose of determining what treatment lender had to receive under debtor's proposed Chapter 13 plan in order to be assured of receiving a stream of payments whose present value was at least equal to amount of creditor's "allowed secured claim" as specified in cramdown provision, was date of valuation hearing, **§ 506(a)(2)** appears to contain two temporal benchmarks. Personal property that was *not* acquired for personal, family or household purposes is to be valued "as of the date of the filing of the petition." In the second sentence of the subsection, however, property acquired for personal, family or household purposes is to be valued "at the time value is determined,"
(2) Best approximation of value of motor vehicle was clean retail value of vehicle in motor vehicle dealers' handbook, adjusted for needed mechanical, body and interior repairs, as well as for other items, like reconditioning or detailing, that debtor would not receive in retaining vehicle and cramming down plan over lender's objection.

Kansas Motor Vehicle: In re Feagans, 2006 W.L. 6654576 (Bankr. D. Kan. Oct. 18, 2008 (Berger, J.) (value of vehicle for purposes of cramdown in Chapter 13; Debtor failed to appear; creditor presented retail merchant in car sales; Court notes that NADA and Kelly Blue Book don't necessarily determine retail value; witness referred to NADA, but testified she would sell the car off her lot for less; court used that value ($3,000 less than NADA), and deducted costs of repairs and reconditioning).

In re De Anda-Ramirez, 359 B.R. 794 (10th Cir.BAP 2007) (not error for court to rely on KBB private party instead of KBB retail)

Sale of Asset Examples:

QUERY: Does **Rash** require liquidation or replacement value when a Chapter 7 trustee sells assets at a **§ 363** sale?

ANSWER*:* Bankruptcy court properly applied replacement and not liquidation value standard in valuing assets sold by a Chapter 7 Trustee at a **§ 363** sale, since the business was being sold as a going concern. **In re Adam Aircraft Industries, Inc.**, 2013 WL 773044 (Bankr. D. Colo. Feb. 28, 2013).

QUERY: How do you allocate value when assets are not sold as part of one sale?

> **ANSWER:** In determining whether a compromise over the amount of creditor's superpriority claim, based on a sale of assets, was reasonable, district court affirms the bankruptcy court's approval; bankruptcy court had valued the assets that were sold at a **§ 363** sale as a going concern value with respect to the portion of the business that was being sold as a going concern, and had valued the remainder of the assets, that were liquidated, at the appropriate liquidate value; rejecting the objecting parties' argument on appeal that, as a matter of law, the bankruptcy court should have considered liquidation value only in valuing the assets. **In re SK Foods, L.P.,** 487 B.R. 257 (E.D. Cal. 2013).

Real Estate Examples:

QUERY: For purposes of Chapter 12 confirmation, does **Rash** require farmland to be valued as farmland or at its more valuable use as vacant development property?

> **ANSWER:** District court affirmed bankruptcy court's refusal to give bank's appraiser's testimony any weight, when appraiser valued farmland at its highest and best use as vacant development land; under **Rash**, the appraisal did not take into account "the proposed disposition and use" of the property as farmland, given that the Chapter 12 debtor intended to continue farming it. **In re Southall, III**, 475 B.R. 275 (M.D. Georgia 2012).

QUERY: For purposes of determining extent of judgment creditor's lien in single family homes Debtor used as residential care facilities, does **Rash** require valuation of the homes as residences or as residential care facilities?

> **ANSWER: Rash** says that the first step is to determine the creditor's interest in the estate's interest before valuing that interest; a judgment lien creditor had no interest in the stream of income or business generated on the property -- therefore, the lien was just on the real estate; so valuation as single family residences, rather than as higher- valued, income generating residential care facilities was more appropriate, particularly where the homes had not been improved as residential care facilities and the license was not transferable. **In re De Leon**, 2013 WL 3805733 (Bankr. N.D. Cal. July 18, 2013).

QUERY: In context of Chapter 11 confirmation, does **Rash** require consideration of the value of low income housing credits in valuing the real estate, when the Debtor asserts the creditor doesn't have a lien in tax credits?

> **ANSWER: In re Lewis and Clark Apartments, L.P**., 479 B.R. 47, 52-53 (8th Cir. BAP 2012); legal error for bankruptcy court not to have considered tax credits in valuing property; ultimately, both the benefits and burdens associated with property ownership are relevant in valuing the real property. **In re Creekside Senior Apartments, L.P.**, 477 B.R. 40, 58 (6th Cir. B.A.P. 2012).

QUERY: Debtor's Chapter 11 plan proposes to pay the EPA and relieve the debtor of the clean up liability. Does **Rash** require the court to value the property as though it is still contaminated?

> **ANSWER:** The court has to value the property as it exists in the debtor's hands and for the debtor's use; appropriate to discount the value on account of its environmental contamination. **In re Arden Properties, Inc**., 248 B.R. 164 (D. Ariz. 2000).

QUERY: For purposes of stripping of IRS lien attached to debtor's TBE interest in house owned with nonfiling spouse who doesn't owe taxes, does **Rash** require a $0 value since no willing buyer would buy the debtor's interest?

> **ANSWER:** Broker testimony that debtor would have limited ability to sell his interest in the house doesn't render his interest worthless; **Rash** focuses on a willing buyer in the debtor's situation; the debtor's situation is as an owner of a TBE property, not a third party purchaser; his marriage is sound; his actual use, rather than what he could sell his interest for, is the measure of value. **In re Basher,** 291 B.R. 357 (Bankr. E.D. Pa. 2003).

V. Now That You Understand *Rash*, How Do You Put on Value Evidence? -- The FREs

FRE 104(a) – Preliminary Questions

The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

In valuation context: court must be satisfied both that such items are of the type actually relied upon by experts in the field AND that such items are sufficiently trustworthy to much such reliance sufficiently trustworthy – cross reference to **FRE 703**

FRE 403 – Excluding Relevant Evidence

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FRE 701 – Opinion Testimony by Lay Witness

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FRE 702 – Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony if the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case

FRE 703 – Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of fact or date in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

-this is a preliminary question for the Court under Rule 104(a). In determining whether reliance by the expert is reasonable, the court must be satisfied both that such items are of the type actually relied upon by the experts in the field AND that such items are inherently trustworthy to make such reliance reasonable. Russell, Rule 703.
-can rely on hearsay, but it is not substantive evidence

FRE 705 – Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion – and give reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

FRE 706 – Court-Appointed Expert Witnesses

On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed…

FRE 803(17)- excepts from the hearsay rule market compilations generally used and relied upon by the public

Rule 26(a)(2)(A) –party must disclose the identity of any witness it may use at trial to present evidence under **FRE 702, 703** or **704**; **(a)(2)(B)** – the disclosure must be accompanied by a written report if the witness is retained or specially employed to provide expert testimony or whose duties as the party's employee regularly involve giving expert testimony.

In sum:

FRE 104: preliminary question: whether expert testimony could assist the trier of fact in understanding the evidence or determining a fact in issue.

Second, whether the witness called is properly qualified to give the testimony sought.

Expert Testimony subject to exclusion under **FRE 403** on grounds of unfair prejudice or waste of time

Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 570, 597, 113 S.CT. 2786, 125 L.Ed.2d 469 (1993)**:** under **FRE 104**, must make a preliminary assessment of whether the testimony's underlying methodology is scientifically valid and properly can be applied to the facts of the case

VI. Practical Strategic, Evidentiary, & Other Considerations

►***Motion v. Adversary? Fed.R.Bankr.P. 3012:*** "The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct." Valuation of collateral may be established through the confirmation process if proper notice is given to creditors. **Bennett v. Springleaf Fin. Serv**., 466 B.R. 422 (Bankr. S.D. Ohio). *Compare* **Fed.R.Bankr.Proc. 7001(2)** (a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under **Rule 4003(d**)).

►***Burden of Proof -***Neither the Code nor the Federal Rules of Bankruptcy Procedure allocates the burden of proof as to the value of secured claims under **§ 506(a).** There are three approaches to the burden of proof: (1) secured creditor bears the burden of proof; **In re Sneijder**, 407 B.R. 46, 55 (Bankr. S.D.N.Y. 2009); (2) the party challenging the value of a claim, usually the debtor, bears the burden of proof; and (3) burden-shifting analysis, e.g., the debtor bears the initial burden of proof to overcome the presumed validity and amount of the creditor's secured claim, but the ultimate burden of persuasion is upon the creditor to demonstrate by a preponderance of the evidence both the extent of its lien and the value of the collateral securing its claim. The circumstances will dictate the assignment of the burden of proof on the question of value. **In re Herrara**, 454 B.R. 559 (Bankr. E.D.N.Y. 2011) (adopting the burden shifting approach) (debtor had burden of proof on redemption to prove it more likely than not that the value of vehicle was $6500 as proposed; debtor's evidence not credible, where it consisted of NADA guide for a different model)

► ***Standard of Review*** – is a mixed question of law and fact. *E.g.*, **In re Lewis and Clark Apartments, L.P**., 479 B.R. 47, 50 (8th Cir. BAP 2012); **In re Abbotts Dairies of Pennsylvania, Inc.**,788 F.2d 143, 149 (3rd Cir. 1986).

► ***Finality for Purpose of Appeal*** **-** An order determining the value of property pursuant to **11 U.S.C. § 506(a)** is a final order for purposes of appeal if the valuation was made for purposes of plan confirmation. **In re Creekside Senior Apartments, LP**, 477 B.R. 40, 45 (6th Cir. BAP 2012); Since the determination of value was not needed for the stay relief motion, and since the court had

not yet ruled on confirmation, the determination as to value was not a final order; granting leave for the appeal to proceed on an interlocutory basis. **In re Lewis and Clark Apartments, L.P**., 479 B.R. 47, 5-52 (8th Cir. BAP 2012).

►***Local Rules/Continuances:*** Emergency motion to continue valuation hearing denied. Valuation hearing could continue without the debtors because they had scheduled an expert witness to testify. **In re Cumella,** 2013 WL 4441588 (Bankr. M.D. Fla. Aug. 19, 2013); *compare* **McCarron** (Venters, J.) (continuance denied); expert reports not admitted when not filed or presented in accordance with local rules. **In re Cocreham**, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013)

► ***Weight Given to Expert Testimony -*** The determination of the weight to be given expert testimony or evidence is a matter within the discretion of the trier of fact – which in a nonjury proceeding like the instant case is the bankruptcy court. **Fox v. Dannenberg**, 906 F.2d 1253, 1256 (8th Cir. 1990). Valuation is ultimately the opinion of a particular appraiser and, as such, the weight to be accorded the opinion rests upon a number of factors frequently used by courts in evaluating appraisal testimony. A nonexclusive listing of these factors includes: The appraiser's education, training, experience, familiarity with the subject of the appraisal, matter of conducting the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented. **In re Creekside Senior Apartments, LP**, 477 B.R. 40, 61 (6th Cir. B.A.P. 2012).

► ***Considerations For Assessing Conflicting Expert Testimony*:** The valuation of property is an inexact science and whatever method is used will only be an approximation and variance of opinion by two individuals does not establish a mistake in either. **Boyle v. Wells (In re Gustav Schaefer Co.)**, 103 F.2d 237, 242 (6th Cir. 1939). "Because the valuation process often involves the analysis of conflicting appraisal testimony, a court must necessarily assign weight to the opinion testimony received based on its view of the qualifications and credibility of the parties' expert witnesses. **In re Smith**, 267 B.R. 568, 572 (Bankr. S.D. Ohio 2001).

►***Court Not Bound By Either Appraisal*** --A bankruptcy court is not bound to accept the values contained in the parties' appraisals; rather, it may form its own opinion of the value of the subject property after considering the appraisals and expert testimony. **In re Smith**, 267 B.R. 568, 572-73 (Bankr. S.D. Ohio 2001). *But see* **In re Byington,** 197 B.R. 130, 138 (Bankr. D. Kan. 1996) (Pearson, J.)The court believes that it must review the testimony, the credibility of the witnesses and all supporting evidence, and accept one of the proffered values. It recognizes that a number of courts typically hear all the experts and then arrive at a value somewhere in the range offered. Logically, this approach makes no sense. In effect, the court is believing both (or all) of the experts testifying. Logically, the court should determine which of the experts is most credible and accept that value. .. No court hears experts on causation and finds that the defendant "sort of" caused the injury. Recognizing that the averaging approach is unassailable on appeal as long as the valuation "found" by the trial court is within the range of evidence.; also, a discussion of use of market guides, such as NADA, which is admissible under **FRE 803(17).**

► ***Owner Testifying As To Value***: Debtor as owner competent to offer a lay opinion of value **FRE 701**, where the debtor is shown to be familiar with the property or its value; the owner of real property has the benefit of a presumption that he is familiar with or has knowledge of, the property and its value, but the presumption is rebuttable. But, unless the debtor is qualified as an expert, the

debtor cannot testify as to the types of information that an appraiser would rely on, such as what others have told him concerning the value of his or comparable properties. **In re Cocreham**, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013). When an expert offers an opinion of value, the lay opinion of the debtor is typically found to be less credible. **In re Wilson**, 378 B.R. 862 (Bankr. D. Mont. 2007). *But see* **In re Cocreham**, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013) (court found creditor's real estate broker's testimony not credible, where he was only familiar with an urban area, and had no experience in the remote, rural area where debtor's property was located; methodology was suspect, because he simply looked for residential property near the subject property, and made no adjustments to account for the differences in the property; and his comparable sales including listings, not actual sales; in the court's experiences, sellers are frequently willing to accept less than asking price).

► ***Corporate Representative Not Qualified as Owner*** **--**the presumption that an owner of property is qualified to give his opinion as to its value does not extend to officers of corporate owners of land. **DiPietro v. Boynton**, 628 A.2d. 1019 (Me. 1993); ***Southern Missouri Dist. Council of Assemblies of God v. Hendricks***, 807 S.W. 2d 141 (Mo. Ct. App. 1991).

►***Nonowner, non expert may not testify as to value under FRE 701, 702.*** **In re Cocreham**, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013).

► ***Zillow.com or Internet Evidence*** **- Z**illow.com and other similar internet based sources are hearsay, **FRE 801**. Zillow.com is not a market compilation under **FRE 803(17)**; it is a participatory site; a homeowner with no technical skill beyond the ability to surf the web can log in to Zillow and add or subtract data that will change the value of his property; therefore, it is inherently unreliable. **In re Slovak**, 489 B.R. 824 (Bankr. D. Minn. 2013); In **re Cocreham**, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013), *citing* **In re Darosa**, 442 B.R. 173, 177 (Bankr. D. Mass. 2010); **In re Phillips**, 491 B.R. 255, 260, n. 7 (Bankr. D. Nev. 2013); Zillow.com and other internet based sources not admissible; no foundation that these are market compilations generally used and relied upon by the public. **In re Cocreham**, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013);

► ***Tax Assessment Evidence*** **-** *In re Slovak*, 489 B.R. 824 (Bankr. D. Minn. 2013); *In re Sweeney,* 556 B.R. 208 (Bankr. E.D. N.C. 2016); *In re McCarron*, 242 B.R. 479, 482 (Bankr. W.D. Mo. 2000) (Venters, J.) (for purposes of strip off of lien in Chapter 13; court accepted testimony of property manager who exhibited a thorough knowledge of the Debtor's property, the market for single family residences in the inner city of KC where the house was located; discounted the testimony of the County tax assessor because his valuation was prepared for tax assessment purposes only, not for the purpose of determining present market value; he had not inspected the house and was not aware of its actual condition).

►***Value in Schedules***: Court will accept a lender's unopposed allegation that a property lacks equity based on the value of that property set forth in a debtor's schedules; based on the fact that it is under oath and that an owner is competent to testify as to value. **In re Darosa**, 442 B.R. 173, 177 (Bankr. D. Mass. 2010), *citing* **Klapmeier v. Telecheck Intern, Inc**., 482 F.2d 247, 253 (8th Cir. 1973).

►***Auction*** - Generally speaking, an auction may be sufficient to establish that one has paid value but not if the bidding was collusive or notice inadequate. **In re Abbotts Dairies of Pennsylvania, Inc.,** 788 F.2d 143, 149 (3rd Cir. 1986)

►***Unaccepted Offer Not Evidence of Market Value***. "It is well settled that a mere offer, unaccepted, to buy or sell is inadmissible to establish market value." **Missouri Baptist Hosp. v. U.S.,** 213 Ct.Cl. 505, 555 F.2d 290, 298 (1977).

►***Summary Judgment:*** **In re Roach**, 2010 WL 234959 (Bankr. W.D. Mo. Jan. 15, 2010) (Dow, J.) For purposes of Chapter 13 modification of mortgage, Court concludes date of confirmation is date for valuation of the home, notwithstanding delay in getting to confirmation and the fact that value had declined; creditor should have asked for adequate protection. Debtor's evidence of written appraisal report and Bank's evidence of tax assessment value present conflicting evidence which renders summary judgment on the issue of value not warranted.

►***An unverified statement of an appraiser is hearsay*** and is not competent evidence as to the value of real property. **In re Light**, 2006 WL 3832810 (Bankr. E.D. Mo. Dec. 28, 2006) (McDonald, J.), citing **FRE 801(c).**

►***Fair & Equitable/Chapter 11***: For purposes of extinguishing debtor's equity interests; bankruptcy court did not err in relying on appraisal compiled by a recognized expert according to accepted professional standards and used an accepted valuation method – income capitalization – that incorporated anticipated future profits and the anticipated reversion value into the final present going concern value of the estate. **In re Westpointe, L.P**., 241 F.3d 1005, 1008 (8th Cir. 2001)

► ***Budget Not Evidence of Value in Chapter 11*** **-- In the Matter of Heritage Highgate, Inc**., 449 B.R. 451 (D. N. Jersey 2011), *aff'd* 679 F.3d 132 (3rd Cir. 2012) (confirmation of plan did not automatically transform budget, which was intended to establish feasibility, into valuation of debtor's assets; budget projected future sales from anticipated completion of real estate project; value as of a future date is inconsistent with Rash; creditor argued that its claims should be deemed wholly secured because projections that accompanied the plan estimated that Debtor would generate enough income to pay them in full; also rejecting the "wait and see" approach to value -- it would effectively do away with the bankruptcy court's obligation to determine value under **§ 506(a)**).

ADDENDUM I:
Eight, Ninth, and Tenth Circuit Update[17]

I. General Valuation Principles

► ***The date/time for determining value is not specified:***

- **For Purposes of Lien Avoidance After Conversion**: **In re Martinez**, 2015 WL 3814935, No. 7-10-11101 (Bankr. D. N.M. June 18, 2015). Pursuant to the plain language of § 522, exemptions are determined as of the date of filing, which likewise governs lien avoidances under § 522(f). The conversion of the case from a chapter 13 to a chapter 7 did not change the date of the order for relief under § 348(a). Therefore, when the debtor converted her case from a chapter 13 to a chapter 7, she could not rely on the depreciated, current value of the property as of the date of conversion to avoid a judgment lien. The court rejected, however, the judgment lien creditor's argument that a stipulation of value for purposes of the chapter 13 confirmation was binding in the chapter 7; the plain language of § 348(f)(1)(B) provides that valuations in chapter 13 do not apply in a case converted to chapter 7. Debtor did not waive her right to rely on § 348(f)(1)(B) even though the stipulation said it was binding "for all purposes in this bankruptcy case" since the reference to the "case" was ambiguous, and waivers of rights must be intentional and knowing. The property had never been valued by the court. The bankruptcy court thus denied the parties' cross-motions for summary judgment and set a scheduling conference, noting that the burden of proof to prove the value of the property at the chapter 13 filing date would be on the debtor. *But see* **In re Goins**, 539 B.R. 510 (Bankr. E.D. Va. 2015) (chapter 7 trustee entitled to the appreciation of the property when the case converted from chapter 13).

- **For Purposes of Cramdown: Valuation of Secured Creditor's Claim at Confirmation: Split of Authority: In re Gensler**, 2015 WL 6443513, No. 15-10407 (Bankr. D. N.M. Oct. 23, 2015) (noting the split of authority with respect to valuation of personal property; but since there was no indication that the value had changed between the petition date and the date of the valuation hearing, the court would not rule on the issue).

II. Applying § 506(a) Value Determinations & *Rash*

Mobile Home Example: **In re Gensler**, 2015 WL 6443513, (Bankr. D. N.M. Oct. 23, 2015) (value should not be reduced by the cost to remove and relocate a manufactured home to a dealer lot for resale, since to do so would result in the wholesale value that **Rash** rejected, particularly where the debtor was not proposing that the home be repossessed; conversely, the court rejects the creditor's argument that the costs to move and set up a replacement house should be added to the value of the "replacement value" value of the home; for the same reasons, creditors cannot add delivery and setup costs to the value of their collateral since the increase would be based on a hypothetical replacement "that will not take place," citing **Rash**, 520 U.S. at 963; also noting problems with using NADA; NADA uses a "depreciated replacement cost in retail dollars" and may not take into account

[17] Prepared by the Hon. Cynthia A. Norton, Bankr. W.D. Mo. as of March 2016.

facts related to the debtor's property; comparable sales also pose difficulties since they often involve the simultaneous sale of real property, and it is difficult to allocate the values, and because the reflect the moving and set-up costs, which the creditor usually cannot realize; therefore, appropriate to use NADA as a starting point).

VI. Practical Strategic, Evidentiary, & Other Considerations

- ***Valuation Motion Not Too Late Even When Brought After Discharge.*** **In re Chagolla,** 544 B.R. 676 (9th Cir. BAP 2016) (in the absence of prejudicial delay, a motion to value and avoid the lien of a junior lienholder may be brought after discharge if the confirmed plan called for its avoidance and treated it as unsecured, and if no prejudice to the junior lienholder will occur; no practical difference between avoidance motions filed under § 506(a) and those filed under § 522 (f), noting that neither § 506(a) nor Rule 3012 has a time limit for filing a valuation motion; the language of § 506(a) is disjunctive; the hearing could in fact be in conjunction with "the disposition or use' it is not limited only to confirmation of the plan, and does not necessarily mean a "simultaneous occurrence").

- ***Burden of Proof:*** **In re Sandrin**, 536 B.R. 309 (Bankr. D. Colo. 2015) (for purposes of debtor's motion to determine value and creditor's objection to confirmation, court would adopt the shifting burden of proof as articulated by the Third Circuit in **In re Heritage Highgate, Inc.**, 679 F.3d 132 (3d. Cir. 2012)).

- ***Internet Evidence.*** **In re DeBilio**, 2014 WL 4476585, BAP No. CC-13-1441 (B.A.P. 9th Cir. Sept. 11, 2014) (analyzing value for purposes of whether the court should have approved a § 363 sale, and noting that value in the form of a printout from zillow does not constitute credible evidence of value).

- ***Comparison of Commercial Appraiser v. Residential Appraiser in Chapter 12 Confirmation:*** **In re Tucker Brothers, LLC**, 2014 WL 6435817, No. 13-22462 (Bankr. D. Kan. Nov. 13, 2014) (In considering value of debtor's farmland and outbuildings for purposes of chapter 12 confirmation, the court found that the bank's appraiser was more credible, except with one respect. Bank's appraiser was a licensed commercial appraiser who used two methods, both the sales comparison and direct capitalization approaches; used more recent comparable sales; and made adjustments for the differing uses of the land. The debtor's appraiser was a residential real estate appraiser who relied exclusively on older comparable sales. The court agreed with the bank's appraiser that the debtor's appraiser should not have deducted for lack of mineral rights since there was no gas, oil, or mining in the area. The court disagreed with the bank's appraisal for the improvements, however, and instead adopting the value of the county appraiser).

- ***Court Not Bound by Either Appraisal***: **In re Quevedo**, 2015 WL 6150602, No. 14-15563 (Bankr. C.D. Cal. Oct. 19, 2015) (where both the debtor's and lender's appraisals were flawed, in that each excluded certain relevant sales and included unreliable comparisons, the court's own assessment of value, utilizing comparables from both appraisals, was a reasonable and appropriate means of correcting for the problems with the appraisals).

- ***Court adopted Debtor's Business Valuation Expert's Opinion of $0 Value for Purposes of Chapter 11 confirmation:*** **In re Experient Corp**, 535 B.R. 386 (Bankr. D. Colo. 2015) (In determining the value of the debtor, a small company that developed emergency services software, the court found persuasive an expert's business valuation of $0. The valuation expert based her opinion on four different valuation methods—capitalized after-tax earnings, relief from royalty, recurring revenue, and discounted future earnings. The court found the expert's valuation persuasive in part because the expert provided evidence that the debtor did not have any projected future earnings, and a market approach did not provide reliable information given that there was not a comparable business in the market similar to the debtor. The objecting creditors offered no rebuttal expert, and presented only lay testimony that reflected a lack of understanding of business operations and valuations.

ADDENDUM II[18]

VEHICLE VALUATION

In re Pembleton, 2016 WL 3963709 (Bankr. D. Kan. July 15, 2016) (Somers, J.)

In *Pembleton*, a secured creditor filed a proof of claim for $11,856.42. It claimed $8,700 was secured by the value of the underlying vehicle. The debtors' Chapter 13 plan valued the vehicle at $4,939. The debtors objected to the claim and the creditor objected to the plan.

At an evidentiary hearing, the debtor relied on Kelley Blue Book private party sale value to assert that the value of the vehicle was $5,027. The creditor obtained an appraisal that valued the vehicle at $8,981.67. The creditor's expert witness was an auto damage appraiser who worked for a company that mainly dealt with insurance companies. The expert inspected the exterior of the vehicle and then ran Internet searches of NADA publications and Autotrader.com. The Autotrader website lists dealers' offers to sell vehicles, stating an asking price for each listing. The expert found three similar vehicles on Autotrader with similar mileage, and all were located within 100 miles. The expert then averaged the asking price of the three vehicles to arrive at $8,981.67.

The court found that the expert witness was credible, and that he was an expert in evaluating vehicle damage and determining the cost of making repairs for insurance purposes. The court noted, however, that neither the expert nor the company he worked for was in the business of selling vehicles in the retail market, or otherwise determining current retail value of vehicles.

The court held that the Kelly Blue Book private party value of $5,027 was the most accurate evidence presented regarding the vehicle's value for purposes of § 506(a)(2) and § 1325(a)(5). Even if the expert was properly qualified as an expert at determining the retail value of vehicles, the court was not convinced that his approach to valuing the debtor's minivan in this case arrived at the price a retail merchant would charge for the vehicle considering the age and condition of the vehicle, as required by § 506(a)(2). Thus, the court held that the debtors' Chapter 13 plan must propose to make payments to the creditor equal to the present value of $5,027 to be confirmable.

In re Brown, 2016 WL 3414816 (Bankr. N.D. Ohio June 14, 2016)

In *Brown*, a secured creditor filed a proof of claim for $10,528.49. It claimed $4,650 was secured by the value of the underlying vehicle, and the remaining amount was unsecured. The debtor filed an objection to the proof of claim, valuing the collateral at $2,133. The debtor's proposed value of the vehicle was based on Kelly Blue Book private party value and NADA values. The debtor alleged that the vehicle had approximately 87,000 miles and that it was in good operating condition, but had some cosmetic damage and required some maintenance.

The court noted that pursuant to 11 U.S.C. § 506(b), adjustments to value may be appropriate. Adjustments include, but are not limited to, the age and mileage of the vehicle. Such adjustments are only permissible if they are supported by evidence. Additionally, the court noted that the debtor provided evidence of published trade-in values, clean retail values, and private party sale values, which, "absent specific evidence justifying an alternative valuation method, the values of a private

[18] Prepared by Zachary Fairlie, Law Clerk to the Hon. Cynthia A. Norton.

party sale or a trade-in are not consistent with the valuation methods Congress has chosen for valuing personal property for personal, family, or household purposes in Chapter 7 or 13 cases." In determining the value of the vehicle, the court relied on the Kelly Blue Book "fair purchase price," which was defined as "the price people are typically paying a dealer for a used car with typical mileage in good condition or better. This price is based on actual used car transactions and adjusted regularly as market conditions change." The Kelly Blue Book fair purchase price for the vehicle was $3,536. Thus, the court sustained in part the debtor's objection to claim as to the reduction in the value of the vehicle.

MOBILE HOME VALUATION

In re Jude, 2016 WL 3582133 (Bankr. E.D. Ky. June 24, 2016)

In *Jude*, a secured creditor objected to the debtor's Chapter 13 plan based on the plan's valuation of the creditor's claim, which was secured by a mobile home. The plan valued the mobile home at $18,468.77. The debtor's valuation was based on his own personal opinion and that of is experts, who used a sales-comparison approach. The creditor's expert valued the mobile home at $40,100. The creditor's expert reached this value after first determining the base value using NADAguides.com, and then applying several adjustments to account for the home's age, condition, accessories, and installed components.

The court noted that while a sales-comparison approach could provide a fair valuation, the debtor's evidence was not reliable given that the experts' comparable sales differed materially from those of the actual mobile home. Instead, the court found the creditor's expert credible and his valuation reliable. Thus, the court sustained the creditor's objection, found that the mobile home had a valuation of $40,100, and ordered the debtor to file an amended plan.

MANUFACTURED HOME VALUATION

In re Hardy, 2016 WL 3549078 (Bankr. E.D. N.C. June 21, 2016)

In *Hardy*, a secured creditor filed a proof of claim in the amount of $50,644.02, claiming the entire balance as fully secured by a manufactured home. The debtor's Chapter 13 plan valued the manufactured home at $24,089.51. The creditor filed an objection to the Chapter 13 plan.

At an evidentiary hearing, the creditor relied on a written appraisal by its expert that valued the manufactured home at $33,100. The debtor relied on the NADA Appraisal Guide, which valued the manufactured home at $29,811.98. The court noted that while in a typical case the NADA Guide listing prevails, the general average value is subject to further adjustment based upon evidence concerning actual condition and need for repairs. The court also noted that "where value is contested, a court is called upon to assess the retail value of the property at issue based upon the testimony, exhibits, and other evidence presented at an evidentiary hearing." The court reasoned that because the creditor had a detailed written appraisal and presented testimony from a credible expert witness, the creditor's valuation provided the most accurate starting point of present value of the manufactured home. The court then reduced the creditor's valuation by $2,040 based on a handful of line items.

Thus, the court sustained in part and denied in part the objection to confirmation and directed the debtor to amend the proposed plan to reflect a secured value of the manufactured home in the amount of $31,060.

In re Prewitt, 2015 WL 8306422 (Bankr. E.D. Tex. December 8, 2015)

In *Prewitt*, a creditor whose claim was secured by the Chapter 13 debtor's manufactured home moved for valuation of the collateral. The secured creditor filed a proof of claim for $31,752.75. In the motion for valuation, the secured creditor asserted a value of "at least $24,104." The debtor objected to the motion for valuation.

The creditor had two experts appraise the manufactured home. The first expert appraised the home at $24,104, which included upward adjustments for delivery and setup that would be charged by a retail dealer. The creditor's second expert appraised the home at $18,600 and did not include an upward adjustment for delivery and setup costs. The debtor's expert appraised the manufactured home at $13,898.

The court did not find the debtor's appraisal to be credible, citing the expert's comparison of dissimilar manufactured homes for his comparable sales analysis and his rejection of NADA sales information. Instead, the court found that the creditor's second expert's appraisal was generally the most reliable and credible in assessing the value of the manufactured home. The court denied the creditor's request that the replacement value of the debtor's manufactured home include hypothetical delivery and setup costs. The court noted that "when the proposed disposition is to keep a mobile home at its current location, *Rash*'s rationale indicates that all moving costs, whether increasing or reducing value, should be disregarded." The court reasoned that these upward adjustments reflected services that the debtor would not actually receive and costs that the creditor would not actually incur. Thus, the court found that the replacement value of the manufactured home was $18,600.

In re Thornton, 2016 WL 3092280 (Bankr. S.D. Ind. May 23, 2016)

In *Thornton*, a creditor whose claim was secured by the Chapter 13 debtors' manufactured home objected to the debtors' Chapter 13 plan based on the valuation of the creditor's secured claim.

The debtors' expert, using a combination of the cost comparison approach and the sales comparison approach, valued the collateral at $20,000. The debtors' expert downgraded the property's condition to "fair," because the debtors' did not own the real estate where the manufactured home sat so a buyer would have to pay to remove the property from its current location.

The creditor's expert, using a cost comparison approach, valued the collateral at $41,017. The court found that the comparable sales used by the debtors' expert were not sufficiently comparable to give a credible opinion as to value. Instead, the court found the creditor's appraisal more credible because it substantially complied with the NADA guide's use of the National Appraisal System. In addition, the court noted that the debtors' expert's downward adjustment for the cost of removal is not appropriate. The court reasoned that "removal of personal property from its seller's existing location to the buyer's intended location is inherent in personal property sales transactions. The costs incurred by the buyer in getting the property to its intended location is a cost of sale. Section

506(a)(2) expressly provides that costs of sale are not to be deducted in determining replacement value of personal property." Thus, the court sustained the creditor's objection to confirmation.

RESTRICTIVE COVENANTS AND COLLATERAL VALUATION IN CHAPTER 11 CRAMDOWN

In re Sunnylope Housing, Ltd., 818 F.3d 937 (9th Cir. 2016)

In *Sunnyslope*, the debtor developed and operated an apartment complex in Phoenix, Arizona for the purpose of providing affordable housing. The primary financing for the project came from an $8.5 million loan from Capstone Advisors, LLC ("Capstone"), which the Department of Housing and Urban Development ("HUD") guaranteed. As part of that guarantee, the debtor had to enter into and record a regulatory agreement that required that the project be operated as affordable housing and that limited rents that tenants could be charged to amounts within levels set by HUD.

The debtor defaulted on its loan with Capstone, and HUD stepped in and took over the loan. HUD then sold a package of loans to First Southern National Bank ("First Southern"), which included the Capstone loan. The loan sale agreement provided that the deed of trust was a valid and enforceable lien on the property and that HUD released the HUD regulatory agreement. First Southern then moved to foreclose on the loan, however, before a sale could occur, the debtor's general partner filed a petition for involuntary bankruptcy. The court later converted the involuntary bankruptcy to a voluntary Chapter 11 bankruptcy.

Exercising the cram-down power under 11 U.S.C. § 1129(b), the debtor valued the creditor's secured claim at $2.5 million. The creditor filed a motion to determine the amount of its secured claim under § 506(a), valuing the collateral at $7.5 million. The creditor premised its valuation on the release of the affordable housing covenants, alleging that foreclosure would extinguish the covenants. The creditor argued that with the covenants, the collateral was worth approximately $4.885 million. The debtor argued that the collateral was worth $7 million without the covenants, and $2.6 million with the covenants. The debtor argued that the covenants still applied, limiting the amount of rental income that could be realized from the apartments and substantially reducing the value of the project. The bankruptcy court and district court agreed with the debtor, concluding that the secured value of the collateral was $2.6 million.

The Ninth Circuit reversed. The Ninth Circuit explained that the "starting point is that First Southern as a secured creditor stands in the first position. It obtained the rights of the senior lender from HUD. HUD acquired the Capstone Loan after it fell into default, sold it to First Southern, and released First Southern from the requirements of the HUD Regulatory Agreement." The Ninth Circuit went on to explain that "all of the restrictive covenants and other provisions that [the debtor] seeks to invoke . . . are derived from positions that were junior and expressly subordinated to the Capstone Loan." The Ninth Circuit reasoned that *Rash* does not support assigning a value to First Southern's secured interest based on the income that can be generated when used in the specific way that the debtor elects to use the collateral. Instead, *Rash* requires the replacement value standard, which in this case was the cost to either build or purchase a similar apartment complex. The Ninth Circuit reversed and remanded.

COLLATERAL VALUATION REQUIRED TO REDEEM AFTER CONVERSION

In re Maynard, 2016 WL 3135069 (Bankr. N.D. Ohio May 25, 2016)

In *Maynard*, the debtors owned two vehicles at the time they filed for Chapter 13 relief. After paying the secured portion of the claims in full, the debtors converted their case to Chapter 7. The debtors then moved to redeem their vehicles for the amount that they paid through their Chapter 13 plan. The court considered whether the valuation made for cramdown purposes in a Chapter 13 survives conversion and governs redemption payments under 11 U.S.C. § 722.

The court held that the debtors were not entitled to redeem the vehicles based on payment of the allowed secured portion of a bifurcated claim while the case proceeded under Chapter 13 unless the lien was fully paid. The court reasoned that when a debtor seeks to redeem collateral after converting from Chapter 13 to Chapter 7, the collateral must be valued to determine the extent of the creditor's allowed secured claim under 11 U.S.C. § 506(a). Thus, the court denied the debtors' motions to redeem their vehicles.

ADDENDUM III TO VALUATION CHEAT SHEET[19]

Court Has Flexibility in Determining Appropriate Valuation Date for Chapter 11 Cramdown. ***In re Houston Regional Sports Network, L.P.*****, 886 F.3d 523 (5th Cir. 2018).**

The debtor, Houston Regional Sports Network, L.P. (the Network), is a television network that was formed by the Houston Astros and the Houston Rockets teams to televise their respective games. The Network entered into media-rights agreements with each of the teams which granted the Network exclusive rights to broadcast games in exchange for fees. The Network also entered into an Affiliation Agreement with Comcast Cable Communications, LLC, pursuant to which Comcast would carry the Network on its cable system through 2032, in exchange for a monthly fee based on the number of Comcast subscribers. In 2010, a Comcast affiliate gave a $100 million loan to the Network, secured by a lien on substantially all of the Network's assets, including the Affiliation Agreement, but not the teams' media rights. In July 2013, the Network defaulted on its payments to the Astros, and the Astros sent a notice of default threatening to terminate its agreement with the Network.

In September 2013, Comcast and its affiliates filed an involuntary chapter 11 petition against the Network. The teams then entered into an agreement with AT&T and DirecTV in which AT&T and DirecTV would acquire all of the equity in the Network and enter into separate agreement to pay the Network for the right to broadcast the Network's content. The sale agreement was incorporated into a chapter 11 plan, which the bankruptcy court confirmed. Under the plan, the teams agreed to waive their rights to $107 million in postpetition media-rights fees owed by the Network.

Before the plan was confirmed, Comcast made a § 1111(b) election, which permits an undersecured creditor to elect to have its claim treated as fully secured. This meant that Comcast would receive a stream of payments equal to the value of its collateral. However, under the plan, the Network's "tangible collateral" – consisting of cash, accounts receivable, furniture, fixtures, and equipment – was to be sold, and so Comcast's § 1111(b) election did not apply to that collateral. (Section 1111(b)(1)(B)(ii) provides that a creditor may not make the election if the creditor has recourse against the debtor and the property is to be sold under the plan.)

To value the "intangible collateral," to which the § 1111(b) election applied, the bankruptcy court projected the Network's net income through 2032, discounted it to present value, and apportioned it among the Network's intangible assets in proportion to the revenue that each would generate. Because the court valued the assets as of the petition date, it apportioned income to agreements that did not exist as of the petition date based on the probability that such agreements

[19] Materials prepared by Erica Garrett, Law Clerk to Chief Judge Cynthia A. Norton, United States Bankruptcy Court, Western District of Missouri. Presented to All-Iowa Bankruptcy Conference, September 27, 2018.

would come to fruition. The experts disagreed as to how the $107 million in waived media-rights fees should be included in the calculation. The court concluded that the value of the Affiliation Agreement would be $54.3 million on the effective date of the plan, but then subtracted the waived media-rights fees, yielding large net losses for that period. That meant that the Affiliation Agreement's value as of the petition date was zero. Since § 1111(b) prohibits a creditor from making the election as to collateral of "inconsequential value," Comcast was unable to elect to have its claim treated as fully secured. The district court affirmed.

Comcast appealed to the Fifth Circuit, arguing that the court should have valued the intangibles as of the petition date, not the effective date of the plan. The Fifth Circuit said that § 1129(b)(2)(A)(i)(II) provides for the value of the collateral to be discounted to present value when considering whether the proposed plan provides adequate payment to the creditor. However, the court said, it is § 506 that instructs the court on how to make the initial valuation, before the collateral's present value is calculated for purposes of § 1129. "Accordingly, whatever the valuation date, the language of § 1129 is not superfluous, as § 1129 presumes the collateral has been assigned value. Section 1129 merely uses that value to set a floor for what sum the creditor must receive in deferred cash payments while the debtor retains possession of the collateral. It does not provide any guidance as to how the initial valuation should be made. That is left to § 506."

The Fifth Circuit pointed out that § 506(a) provides that, in chapter 7 and 13 bankruptcies involving claims of personal property, the valuation shall be as of the date of the petition and based on replacement value. But the Code provides no similar guidance for Chapter 11 reorganization cases. Instead, § 506(a)(1) directs courts to consider: "(1) 'the purpose of the valuation;' (2) 'the proposed disposition or use of [the] property;' and to do so (3) 'in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.'" The Fifth Circuit pointed out that the Third and Eighth Circuits have held that valuation for Chapter 11 cram-down purposes should be done as of the confirmation date. *Heritage Highgate, Inc.*, 679 F.3d 132 (3d Cir. 2012); *In re Ahlers*, 794 F.2d 388 (8th Cir. 1986). But, rather than adopting the confirmation date as a rigid date, the Fifth Circuit adopted a flexible approach, saying:

> That § 506(a) valuations may be made at different times under different circumstances does not lessen the force of the Third and Eighth Circuit holdings that the appropriate valuation date is the date of plan confirmation in the Chapter 11 cram-down context. When a court values collateral to confirm a cram-down plan under § 1129(b)(2)(A)(i), the proposed use or disposition of the property under the plan of reorganization is critical, precisely because the debtor is choosing to retain the collateral, rather than sell it or return it to the creditor. Yet the bankruptcy court can determine the appropriate date of valuation on a case-by-case basis and we need not adopt a bright-line rule.

The Fifth Circuit noted that this flexible approach allows the court to take into account the development of the proceedings, inasmuch as the value may vary dramatically based on its proposed use under any given plan. In so holding, the Fifth Circuit held that its previous decision in *Stembridge*, 394 F.3d 383 (5th Cir. 2004), did not compel a rigid petition-date valuation in chapter 11 cram-downs, since that case dealt with a chapter 13 cram-down and Congress implicitly rejected such an extension to chapter 11 when it codified § 506(a)(2) for personal property in Chapter 7 and 13 cases only.

The Fifth Circuit remanded the case to the bankruptcy court for revaluation.

Value of Mobile Home Does Not Include Delivery and Setup Costs. *In re Glenn*, 2018 WL 3846202 (5th Cir. Aug. 13, 2018).

21st Mortgage Corporation financed the debtor's purchase of a used mobile home for the "base price" of $29,910. This price included the cost of delivering, blocking, leveling, and anchoring the mobile home to the land, which was required by Mississippi law. 21st Mortgage held a purchase-money security interest in the mobile home, and had a secured claim of $27,714. The Chapter 13 debtor filed a plan providing to pay 21st Mortgage the value of the home plus 5% interest. Although the parties had stipulated to the value of the actual home itself, 21st Century objected to the proposed valuation, arguing that it should include $4,000 for the cost of the delivery and setup costs, despite the fact that the debtor was retaining and living in the home and would not incur those costs.

21st Mortgage argued that § 506(a)(2) requires replacement value "without deduction for costs of sale or marketing." Further, it argued, a mobile home's "replacement value," which is defined in § 506(a)(2) as "the price a retail merchant would charge for property of that kind," necessarily included delivery and setup costs. It also argued that the "proposed disposition or use" standard from *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 117 S.Ct. 1879 (1997), did not apply because § 506(a)(2)'s language was added after *Rash* and applies regardless of whether a debtor retains the property. 21st Mortgage submitted an amicus brief stating that the price a retail merchant would charge includes delivery and setup costs.

Turning first to the statutory language, the Fifth Circuit held that § 506(a)(2) should not be construed to the exclusion of § 506(a)(1) when the two clauses can be read consistently. Nothing in § 506(a)(2) prohibits considering the "proposed disposition or use" of the property in valuation. Moreover, in considering the language of what is now § 506(a)(1), the Supreme Court in *Rash* stated that "the 'proposed disposition or use' of the collateral is of paramount importance to the valuation question." Section 506(a) requires a replacement value standard when a debtor exercises the "cram down" option under § 1325(a)(5)(B) and seeks to retain and use the creditor's collateral. "Considering the property at issue under § 506(a)(2)'s specific replacement-value standard and in light of the property's 'proposed disposition or use,' we hold that delivery and setup costs of a

mobile home retained by a debtor must be excluded from the mobile home's valuation under § 506(a) of the Bankruptcy Code."

Moreover, the Fifth Circuit held, § 506(a)(2)'s definition of replacement value as including the costs of sale or marketing did not undermine this conclusion. Unlike sale and marketing costs, which are repeat costs of doing business, delivery and setup costs for a retained mobile home are not repeated. In other words, they are not costs of sale being deducted from the home's retail value but are instead additional costs like taxes and service agreements separate and apart from that value. Therefore, the bankruptcy court's decision was affirmed.

Replacement Value Used to Value Manufactured Home for Plan Confirmation Purposes. *In re Rucker*, 2018 WL 3244458 (Bankr. S.D. Miss. July 3, 2018).

In another case involving 21st Mortgage Corporation (see *In re Glenn* above), the debtors purchased a manufactured home which was financed by 21st Mortgage. The debtors scheduled 21st Mortgage as having a secured claim of $30,000 and an unsecured claim of $27,135.30. 21st Mortgage filed a proof of claim asserting a claim in the amount of $56,226.65, fully secured. The debtors invoked the cram-down option under § 1325(a)(5)(B), proposing a plan providing to pay 21st Mortgage's $30,000 secured claim and a very small dividend to unsecured creditors. 21st Mortgage objected to confirmation.

Section 506(a)(2) requires courts to determine the value of an allowed secured claim based on the replacement value of the personal property securing that claim. "Replacement" value is defined in § 506(a)(2) as "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. *Assoc. Commercial Corp. v. Rash*, 520 U.S. 953, 963 (1997). Because the Code doesn't articulate a method for determining "replacement value" courts determine valuation by reviewing the facts and circumstances of each case. "Importantly," the court said, "the bankruptcy court is not bound by valuation opinions or reports submitted by appraisers, and may form its own opinion as to the value of property in bankruptcy proceedings." (Citation omitted.) While the bankruptcy court may accept an appraisal in its entirety, it is not required to do so, and may choose to give weight only to those portions that are helpful in determining value.

According to the court, courts have routinely approved the use of the National Appraisal System with the NADA Manufactured Housing Appraisal Guide for determining the replacement value of manufactured homes. Under this NADA Guide, "the home's make, model, age and estimated remaining physical life are considered in arriving at the value of the home's base structure." This base value is multiplied by a location adjustment percentage and a condition adjustment percentage, which is determined from a "standard form worksheet and assigning a point value to the standard items listed on the worksheet which are typically found within or on the exterior of a manufactured home." The value is further adjusted by taking into account the cost of repairs and add-on components.

21st Mortgage submitted the testimony of a certified manufactured home appraiser who testified that the NADA value (using the above-described formula) was $65,500. The debtors asserted that the court should not use the NADA approach, and offered the testimony of a Mississippi certified real estate appraiser who used a comparable sales/market approach. He determined that the home's condition was "poor" to "average" and valued it at $22,000. However, despite the fact that the home was not attached to the land and could easily be moved, he testified that its location in a small rural town affected its valuation.

The court rejected the debtors' appraiser's methodology and accepted 21st Mortgage's NADA value.

However, the court found, on its own accord, that the debtors' appraiser's testimony about the condition of the home and the needed repairs mandated a reduction in the NADA value by $2,500. Thus, the adjusted replacement value of the home was $63,000. In denying confirmation of the plan, the court also rejected the debtors' equitable argument that using NADA value made the five-year plan unworkable.

Bankruptcy Court Improperly Excluded Declaration of Debtor's Sole Proprietor Under "Sham Affidavit Rule." ***In re EPD Investment Co., LLC*****, 2018 WL 3344243 (C.D. Cal. June 25, 2018).**

Jerrold Pressman was the sole proprietor of involuntary debtor EPD Investment Co., LLC. Jason Rund was appointed as the chapter 7 trustee in the involuntary case. According to the trustee, EPD had operated as a Ponzi scheme since 2003, using new investments it received to pay existing creditors. John Kirkland served as Pressman's lawyer for his various ventures and invested money in EPD. The trustee filed an adversary proceeding against Kirkland and his wife, Poshow Kirkland, as trustee of the Bright Conscience Trust, seeking relief on claims for subordination and avoidance of fraudulent transfers. The trustee moved for summary adjudication on the issue of whether the defendants made fraudulent transfers with actual intent.

The bankruptcy court made a report and recommendation (R&R) to the district court, apparently because at least one of the defendants had not consented to the bankruptcy court entering final judgment. In making its R&R, the bankruptcy court found there was no dispute of material fact, and concluded that EPD operated as a Ponzi scheme. In reaching this decision, the court excluded a Declaration by Jerrold Pressman and a Declaration and Report of the defendant's expert. Because the court concluded EPD was a Ponzi scheme, it applied the "Ponzi presumption" that the defendants were liable for fraudulent transfers. The court also concluded that the defendants had engaged in fraudulent conduct based on the "badges of fraud" test.

At the outset, the plaintiff-trustee conceded to the district court that review of the R&R as to John Kirkland should be *de novo*, but argued that the R&R as to Poshow Kirkland should be reviewed for clear error because she had consented to bankruptcy court jurisdiction. The district

court rejected that argument because there was no evidence that she had so consented. Review, therefore, was *de novo*, as to the entire matter.

As to the merits, the defendants argued that the bankruptcy court improperly excluded Jerrold Pressman's affidavit under the "sham affidavit rule."

> "[The] sham affidavit rule prevents a party who has been examined at length on deposition from raising an issue of fact simply by submitting an affidavit contradicting his own prior testimony, which would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact. But the sham affidavit rule should be applied with caution because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment. In order to trigger the sham affidavit rule, the district court must make a factual determination that the contradiction is a sham, and the inconsistency between a party's [earlier statement] and subsequent affidavit must be clear and unambiguous to justify striking the affidavit."

(Citation omitted.) Because tax returns must be filed under penalty of perjury, the district court said that courts sometimes strike declarations that conflict with a declarant's tax return under the sham affidavit rule.

In his affidavit, Pressman had declared: "EPD was a legitimate, ongoing, sustainable, revenue-producing, business operation." The bankruptcy court had concluded that this statement conflicted with Pressman's 2010 tax return, in which he attested that EPD had $70 million in liabilities and no realized assets that year. In addition, the bankruptcy court also found that Pressman could not opine on whether EPD operated as a Ponzi scheme because he is not an accountant and his statements were vague and self-serving.

The district court held this was error because plaintiff alleged that EPD's illegal conduct took place between 2003 and 2009, and so Pressman's declaration that EPD was a legitimate business did not necessarily conflict with EPD's 2010 tax return: EPD may have financially collapsed in 2010 as result of the "Great Recession." Nor did Pressman need to be an accountant to testify that EPD didn't operate as a Ponzi scheme; rather he could so testify because a Ponzi scheme requires the participant to know that the scheme is unsustainable, and Pressman testified to that effect in detail.

The district court also disagreed with the bankruptcy court's exclusion of the defendants' expert report. First, the district court held that the report met the requirements of Federal Rule of Evidence 702, and rejected the bankruptcy court's conclusions that the expert had relied on insufficient facts and used improper methodology.

In addition, the bankruptcy court erred in excluding the expert report as a sham. In so doing, the district court disagreed with the bankruptcy court's conclusion that it "clearly and

unambiguously" contradicted prior testimony. Moreover, in excluding the expert report, the bankruptcy court had improperly resolved a disputed issue of fact (at the summary judgment stage) when it concluded "there is simply too great an analytical gap between the data and the opinion proffered."

Finally, the bankruptcy court erred in concluding, at the summary judgment stage, that the badges of fraud were present when it relied almost exclusively on one email showing that John Kirkland was an EPD insider.

Bankruptcy Court Did Not Err in Refusing to Accept an Offer as the True Value of Property. *Midstate Finance Co., Inc. v. Peoples*, 2018 WL 1586138 (E.D. Tenn. March 31, 2018).

In their initial chapter 7 schedules, the debtors listed a "Mobile Home/24x28 Shop/5 Acre Lot," and assigned a value of $43,000 to it. They claimed a $20,000 homestead exemption. It was later discovered that the property actually consisted of two parcels: (1) a one-third acre tract on which the mobile home and shop sat; and (2) an adjacent unimproved lot of approximately five acres. The trustee applied the homestead exemption to the one-third acre tract, which left the five-acre tract available for unsecured creditors. An appraisal valued the real property at $21,000, or $3,500 per acre. The chapter 7 trustee stated she intended to accept the debtors' offer of $18,000, or $3,000 per acre, to buy the five-acre parcel.

Midstate Finance Co., a large unsecured creditor, objected to the trustee's motion to sell the property to the debtors. Midstate made an offer to purchase the unimproved lot for $21,000. The debtors obtained financing and matched the $21,000 offer. At this point, the court authorized the trustee to conduct an auction of the unimproved lot. Midstate made a new offer of $31,000, contingent on an inspection of the property. The debtors responded by matching the offer, but with no contingencies. Midstate then offered $66,000 for the entire property, including the one-third acre with the improvements, again contingent on an inspection.

At the hearing on matter, the trustee stated that, in light of the much lower appraisal she had gotten, she was concerned that Midstate was artificially inflating the values of the lots, inasmuch as, as the holder of 80% of the unsecured claims, it would significantly benefit from the sale of the property. The court then ordered "a more formal auction to sell the whole Property." Midstate again requested access to the property for inspection.

Just days before the scheduled auction, the debtors moved to convert their case from chapter 7 to chapter 13. Their plan (and amended plan) proposed to pay $30,500 to general unsecured creditors, for a dividend of about 22%. Midstate objected, arguing it did not satisfy the "best interests of creditors test" under § 1325(a)(4).

At the hearing on confirmation, Midstate's president testified that Midstate would amend its $66,000 offer to remove the inspection contingency. On cross examination, he was asked if he would still offer the $66,000 if it turned out that there was a meth lab in the mobile home. He

hesitated, but then testified that he would because the offer was "based primarily on the land, rather than the structures." When asked why an inspection had been necessary to begin with if that were the case, he responded that "they just wanted to know what they were buying."

The bankruptcy court overruled Midstate's objection to confirmation. First, the court found the testimony of Midstate's president to be lacking credibility due to the response to the meth lab question. The court then valued the property at $60,000 and deducted $10,000 in auctioneer, trustee, and legal fees, leaving $50,000. After deducting the $20,000 homestead, $30,000 remained for unsecured creditors. Since the plan proposed to pay that much to unsecureds, it was confirmable. The bankruptcy court explained that it did not accept Midstate's $66,000 offer because: (1) there was no written offer; (2) the offer was made at a time when there was no one to accept it; (3) the offer was not based on any independent analysis of the property; (4) the offer was made by a creditor who held about 80% of the debt—meaning it would only be out of pocket about 20% of the price it was offering to pay; and (5) Midstate's president was not credible.

The district court affirmed the bankruptcy court's valuation. According to the district court, "value" under § 1325(a)(4)'s "best interests of creditors test" is not expressly defined, but it is generally taken to mean "fair market value." Fair market value has been described in a number of different ways, according to the court, but most courts tend to define the concept as the price arrived at in an "arm's length transaction." "Or, to put it another way, 'the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably, and assuming the price is not affected by undue stimulus.'" (Citation omitted.)

Further, courts generally agree that assessment of fair market value is "more art than science," and a variety of factors are to be considered. These include appraisals of property, witness testimony, offers made for the property, and comparable arm's length sales, with no single factor being dispositive. Ultimately, according to the district court, it is the court's job "to filter and evaluate, from all the evidence offered, the admitted evidence which most persuasively focuses on the ultimate issue of valuation."

Here, the two factors of particular relevance were the appraisals and offers. Courts are to consider a number of factors in assessing appraisal evidence, but, the district court said, the court is not required to accept an appraiser's calculations and may instead form its own opinion. Similarly, although courts are not to ignore offers made for the property, they are not required to accept an offer as the measure of valuation. Since the bankruptcy court considered all the evidence of value, and articulated its reasoning in rejecting Midstate's offer as determinative evidence, its valuation was not error.

Finally, however, the district court held that Sixth Circuit precedent requires that, when considering the best interests of creditors test, the payments to be made under a chapter 13 plan must be discounted to present value. *Hardy v. Reynolds & Reynolds Co.*, 311 Fed. Appx. 759 (6th

Cir. 2009). Pointing out that Midstate's offer had been for cash, the district court held that the bankruptcy court should have accounted for a discount to present value, which it did not do. Accordingly, the district court remanded the case for further proceedings.

Attorney's Affidavit and Oral Argument Regarding Value was not "Substantial Evidence" of Value to Overcome Claim's Presumptive Validity. *In re Austin*, 583 B.R. 480 (B.A.P. 8th Cir. 2018).

Chapter 13 debtors scheduled two pending worker's compensation claims as contingent and unliquidated exempt property. They valued them at $0 or an "unknown value." They also listed the IRS as a secured creditor. The IRS filed a proof of claim, asserting part of it was priority, and part was secured as a result of a tax lien. The debtors objected to the respective amounts of the priority and secured portions. They also argued that, since there were neither settlement offers nor a basis to determine the value of the worker's comp claims, the present value of those claims should be zero and did not support the IRS's liens.

No evidence was presented at the hearing on the objection to the IRS's claim, and so the bankruptcy court overruled it, holding that the debtors failed to meet their burden to produce substantial evidence to rebut the IRS's claim. The court also disagreed with the debtors' assertion that the worker's comp claims had no value because they were actively pursuing them.

Meanwhile, the debtors negotiated a settlement of the worker's comp claims and, after attorney fees, they received a net settlement of $15,661.60. The IRS learned of the settlement and filed an amended claim which included $15,661.60 as part of its secured claim. The debtors again objected to the IRS's claim. In support of their objection, they filed an affidavit by their worker's comp attorney who opined that the claims had a "nuisance" value of $3,000 on the petition date.

At the hearing on the objection to claim, the debtors offered only oral argument; they offered no evidence or testimony to support the objection, other than their attorney's affidavit. The bankruptcy court ruled that the affidavit was "substantial evidence" of value, sufficient to rebut the prima facie validity of the IRS's claim, since it was from the attorney who litigated the matter. The bankruptcy court also stated that the "IRS has not provided additional evidence to prove why it believes the true value of the claim should be the actual settlement amount." The court thus sustained the objection and valued the worker's comp claims at $3,000, reducing the IRS's secured claim by $12,661.

The Eighth Circuit BAP reversed. Rule 3001(f) provides that a proof of claim that comports with the requirements the rule constitutes prima facie evidence of the validity and amount of the claim. The filing of an objection does not deprive the claim of presumptive validity unless the objection is supported by "substantial evidence." Further, since the claim is secured only to the extent of the value of the collateral under § 506, the BAP said: "as part of its burden of producing substantial evidence to rebut the presumptive validity, the objecting party bears the

burden of producing substantial evidence as to the value of the collateral securing any portion of the claim."

According to the BAP, "[s]ubstantial evidence means 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (Citation omitted.) It requires financial information and factual arguments, the BAP said. The BAP held that the affidavit did not contain financial or factual information to support the attorney's opinion of value. In addition, the affidavit was the attorney's personal opinion of value, and he admitted in the affidavit that at the time of the filing of the petition, he did not know the full extent of the debtor's injuries. He also opined that continuing to pursue the claims postpetition increased the value of the claims from the $3,000 nuisance value to the final settlement amount. However, there was nothing in the affidavit showing what he did to increase the value. In addition, the BAP noted that, although the affidavit said there had been no offers made at the time of the petition, it did not say whether *demands* had been made, which would be relevant in determining value. Finally, the IRS had not had an opportunity to cross examine the attorney since there was no evidence presented at the hearing.

The debtors had the burden of producing substantial evidence to rebut the claim, which evidence must have had a reasonable, objective basis for valuation. The BAP noted that this might have included such things as lost wages, medical bills, or worker's comp schedules. "Allowing a valuation of a tort claim without a reasonable factual basis encourages abuse," the BAP said. Since they did not do that, their objection to the IRS's claim should have been overruled.

Retail Value Under NADA, Rather Than Trade-In Value, Governs Valuation of Car Under § 506(a)(2). *In re Burton*, 2018 WL 2246568 (Bankr. D. Del. May 16, 2018).

Ally Financial held a perfected security interest in the Chapter 13 debtor's 2013 Ford Fusion. Debtor proposed to pay Ally $7,800 plus interest at 5% for a total of $8,832. Ally objected to the proposed plan, arguing that NADA retail value, $11,105, should be used.

Ally submitted a detailed NADA valuation report that accounted for a $1,450 high mileage deduction and a $1,255 increase for leather seats, power sunroof, and fog lights. The debtor submitted an appraisal conducted by a car salesman who asserted the car was worth only $5,000 after accounting for a heavy smoke smell in the interior, a burn hole in the headliner, and $400 in damage to the passenger side door. The appraisal also listed a cost of $800 for reconditioning. The appraisal report included a voucher good for purchase of the vehicle by the dealership for $5,000.

Noting at the outset that the debtor bore the burden of proof, the court found Ally's evidence to be more reliable and persuasive. Further, the court held, case law construing *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), did not support the debtor's arguments regarding wholesale or trade-in value. Rather, § 506(a)(2) defines "replacement value" as 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." The NADA value met that definition, whereas the debtor's value was trade-in, not retail. In addition, the court said, courts have routinely looked to NADA value as being a neutral and independent source for valuation based on the perspective of a retail merchant. However, the court did deduct $1,200 for the exterior damage and reconditioning costs, resulting in a value of $9,905.

The court was also called upon to decide the appropriate interest rate. On this issue, Ally bore the burden of proof. Under *Till v. SCS Credit Corp.*, 541 U.S. 465, 479 (2004), because bankruptcy debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, "the approach ... requires a bankruptcy court to adjust the prime rate accordingly. The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan." The "general consensus among courts is that a one to three percent adjustment to the prime rate is appropriate, with a 1,00% adjustment representing the low risk debtor and a 3.00% adjustment representing a high risk debtor."

The bankruptcy court rejected Ally's argument that a 3% adjustment was necessary due to the rapid depreciation rate of cars. Rather, the standard centers on the degree of risk the particular debtor represents. The court approved a 2% adjustment in this particular case.

Chapter 13 Plan Not Confirmable Due to Valuation of Manufactured Home. *In re Blackwell*, 2018 WL 1189257 (Bankr. S.D. W.V. March 5, 2018).

Chapter 13 debtors were indebted to Vanderbilt Mortgage, secured by a lien on the certificate of title to a 2009 manufactured home and a deed of trust on the land on which it sat. At the time of filing, the outstanding indebtedness was approximately $68,000, and the debtors were in arrears nearly $14,000. They proposed a plan which valued the manufactured home at $5,000 and the real estate at $6,000. Vanderbilt objected.

At hearing, the debtors stipulated to Vanderbilt's land appraisal which valued the real estate at $18,000. Vanderbilt and the Debtors offered dueling appraisals on the manufactured home, valuing it at $16,800 and $5,000, respectively.

The bankruptcy court said that, in determining what "the value a retail merchant would charge" under § 506(a)(2), courts "must hear and evaluate testimony in accordance with the qualification and credibility of expert witnesses." "[W]hen two appraisal reports conflict, a court must determine the value based on the credibility of the appraisers, the logic of their analysis[es] and the persuasiveness of their subjective reasoning." (Citation omitted). According to the court, factors to consider in weighing conflicting appraisal testimony include: "the appraiser's education, training, experience, familiarity with the subject of the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented." However, the court said, "it is important to note that a court need not wholly accept the value of one appraiser over another – it can arrive at its own conclusion as to value based on its own interpretation of the evidence." And, according to the court, a property owner's testimony is admissible, but it must be persuasive in order to "sway the Court."

Both appraisers in this case had inspected the home. They testified that the manufactured home had many animals in it, was missing a door and window, and needed extensive repairs to the roof, furnace, underpinning, walls, and floor coverings. The debtor's appraiser testified that the home was not livable and was essentially a salvage unit. Vanderbilt's appraiser, in contrast, described it as being in "fair" condition despite the damage.

The court found the debtor's appraisal to be more credible, in part because the debtor had testified that the home had no heat and that his daughter and grandchild had been removed by Child Protective Services because that agency had deemed the home to be uninhabitable under the West Virginia Code.

Based on that, the court found the land to be valued at the agreed $18,000 and the home at $5,000. Because the proposed plan had only valued the land at $6,000, confirmation had to be denied.

For Constructive Fraudulent Transfer Purposes, Assets Cannot be Valued with Benefit of Hindsight. *In re Palm Beach Finance Partners, L.P.*, 2018 WL 1916177 (Bankr. S.D. Fla. April 20, 2018).

This case stemmed from the infamous Petters cases, one of the larges Ponzi schemes in United States history.

The plaintiff in this case is the liquidating trustee of the debtors' chapter 11 case. The debtors in this case, Palm Beach Finance Partners, L.P. and Palm Beach Finance II, L.P., were formed to facilitate investments with the Petters enterprise. Nearly all of the money raised by the

debtors was used to purchase notes issued by Petters. However, the entire Petters financing scheme was a fiction and was instead part of the Petters multi-billion dollar Ponzi scheme.

The principals of the debtors were introduced to Petters by Frank Vennes. Mr. Vennes and his company, Metro Gem, Inc. (MGI), had invested in Petters transactions for many years. The plaintiff-trustee alleged that the debtors were creditors of MGI because MGI and Vennes made material representations relating to the Petters investments and because they breached their fiduciary duties to the debtors, causing the debtors damage. The plaintiff-trustee obtained a judgment against MGI and Vennes for $90.4 million and $6 million, respectively.

The plaintiff-trustee asserted that the bankruptcy estates, as creditors of MGI, could avoid fraudulent transfers made by MGI to the defendant, the National Christian Charitable Foundation, Inc., under Georgia law.

MGI's solvency was a central issue in the litigation. Under Georgia's fraudulent transfer law, a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets "at fair valuation." During the period of the transfers at issue (2006), MGI's balance sheet showed significant net assets and, if the balance sheet during that period had been an accurate depiction of MGI's assets and liabilities, at a fair valuation, MGI Was solvent. The dispute focused on a single category of assets which represented the majority of the assets on MGI's balance sheet, namely, the so-called finance receivables. Over 80% of that category was attributable to MGI's investments with Petters. The plaintiff-trustee argued that the Petters receivables should be valued at zero because Petters was not actually conducting any underlying business to pay receivables and there was no collateral for them. In other words, due to the Petters Ponzi scheme, there was no way for Petters to make payments without taking them from new Ponzi scheme victims. The defendant, on the other hand, argued that because it did not know about the scheme, the balance sheet values should be used.

The bankruptcy court held that it did not matter that MGI was ignorant of the Ponzi scheme when it was making transfers to the defendant. According to the court, purely subjective knowledge of facts which may impact the value of one's assets is rarely relevant to valuation because such a standard would cause the court to value the same assets differently when owned by different parties, resulting in arbitrariness not supported by the law. It also didn't matter that MGI actually received payment on the receivables through the Ponzi scheme because Petters never had the legal ability to pay MGI.

Under a commonly-used hypothetical sale concept, the court assumes a transaction involving a willing seller and a willing buyer with all relevant knowledge. Under this rationale, the court is not constrained by what was known at the time of valuation, but may apply facts in existence at the time of valuation even if they didn't come to light until later. "In other words," the court said, "the hypothetical buyer is assumed to be omniscient." Moreover, the court may consider facts that were purposely concealed at the time of valuation. This view does not implicate

improper hindsight, the court said, because it involves applying current awareness of facts actually in existence at the time of valuation rather than application of facts that did not exist at the time of valuation.

In this case, assuming a willing buyer with all relevant knowledge, including the fact that the Petters receivables were not backed by collateral and could only be paid by new victims, it was obvious that most of MGI's receivables had no value at the times relevant to the case. In addition, the court held, the Petters Ponzi scheme was discoverable by potential investors exercising reasonable diligence, even though no one actually discovered it until years later.

However, the void on MGI's balance sheet should not be viewed in a vacuum, the court said. Rather, the void left open MGI's claim for return of its principal investment, whether that claim was based in contract, tort, or equity. Because there was no evidence with regard to the value of MGI's claims against Petters as of the transfer dates, neither party was entitled to summary judgment on the issue of insolvency.

Priority Tax Claim Could Not Be Deducted from Assets to Arrive at Liquidation Value. *In re Phan*, Case No. 17-44563, 2018 Bankr. LEXIS 666 (Bankr. W.D. Wash. March 9, 2018).

Chapter 13 debtors listed a bank account with non-exempt value of $4,208.91. In calculating chapter 7 liquidation value for plan confirmation purposes, the debtors deducted $1,052 in hypothetical liquidation costs, plus $2,561.11 representing a priority unsecured IRS tax claim, leaving a liquidation value of $595. The chapter 13 trustee objected, arguing that although the hypothetical liquidation deduction was correct, the debtors should not be permitted to deduct the priority tax claim. The trustee calculated the liquidation value as $4,208.91, less the $1,052 hypothetical liquidation costs, leaving $3,156.91. The trustee would distribute payments first toward the priority unsecured claims and then pro rata to nonpriority unsecured claims. Under the debtor's calculations, the liquidation value would only be distributed to nonpriority claims. Presumably, the debtors had intended to pay the priority claim from the amount it had deducted, and so, although the calculations were different, the result would be the same under both proposals. Nevertheless, the trustee objected to confirmation.

Section 1325(a)(4) of the Bankruptcy Code – the "best interests of creditors test" – provides that the court shall confirm a plan if "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date." The Ninth Circuit BAP described the calculations a bankruptcy court must perform under the best interests of creditors test:

> Two separate calculations must be performed in order to determine whether a debtor's plan satisfies the best interests of creditors test under § 1325(a)(4). First, the bankruptcy court must measure the value, as of the effective date of the plan, of

> property to be distributed under the plan an account of each allowed unsecured claim . . . .
>
> The second calculation under § 1325(a)(4) focuses on "the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date." This measurement computes the sum that would be available to each unsecured creditor if a hypothetical chapter 7 liquidation of the debtor's assets were completed on the effective date of the plan. This sum is then compared to the first calculation. In order for the plan to be confirmed, the first sum – the chapter 13 plan amount – must be "not less" than the second sum – the chapter 7 liquidation amount – as to each specific unsecured creditor. This methodology insures the unsecured creditors will fare no worse under chapter 13 than under chapter 7.

(Citation omitted.) Here, the court held that the debtors' interpretation would require the court to limit the phrase "allowed unsecured claims" to determine *only* the amount of value to be distributed to nonpriority unsecured claims, rather than to "each allowed unsecured claim" which includes priority unsecured claims.

As stated, in reality, the debtors' calculations in this case resulted in the same payout to nonpriority unsecured creditors because, despite the fact that they used different calculations, both the debtors and the trustee proposed to pay the priority tax claim in full, with $595 going to nonpriority creditors. However, the court said, it does not always work out that way because priority debt listed in schedules is an estimate and IRS claims often come in different than listed in the schedules. Plans are often confirmed before government claims come in. If the IRS claim were to come in lower than estimated by the debtors, then "allowed unsecured claims" would not receive what they are entitled to under § 1325(a)(4). As a result, the debtors' plan could not be confirmed.