



AMERICAN
BANKRUPTCY
INSTITUTE

Central States Bankruptcy Workshop

Skills Track

Trial Skills: Valuation Hearings

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U.S. Bankruptcy Court (N.D. Ind.) | South Bend

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Godfrey & Kahn, S.C. | Madison, Wis.

ABI VALUATION TRIAL FACTS

Debtor

The Debtor is a trucking company based in Whoville and has been in business for approximately 30 years. The company was founded by Joe Doe Sr. as an independent freight hauler particularly focused on the transportation of refrigerated goods. When the Debtor started, it had two drivers (one was Joe Sr.) and two trucks and trailers. Joe Sr. grew the company over the years. At its peak approximately five years ago, the Debtor had 13 employees, including eight drivers, seven trucks, and eleven trailers.

Coincidentally, approximately five years ago, Joe Sr. decided it was time to transition ownership and operations to his son Joe Doe Jr. To that end, Joe Sr. and his son entered into a sale and purchase agreement whereby Joe Jr. purchased all of the assets of the Debtor from Joe Sr. for \$1 million, which was to be paid in equal consecutive monthly payments for 10 years.

For approximately two years, Joe Sr. stayed engaged in the business and things went smoothly. However, after Joe Sr. became less involved and eventually moved to Florida, the Debtor's business started to decline. For example, Joe Jr.'s relationship with several of the drivers quickly deteriorated and the business could not afford to pay competitive wages. As a consequence, six of the drivers left for other employment. Unable to justify the number of idle trucks and trailers, and otherwise struggling to meet the company's debt service obligations, the Debtor found a new lender, Cheap Capital, LLC. The new lender ultimately agreed to refinance three of the trucks and seven of the trailers. The remaining trucks and trailers were sold in an orderly manner and used to pay off the prior lender.

The transportation industry's increasingly competitive environment has proven difficult for the Debtor to navigate. Competition has resulted in the Debtor's loss of certain profitable long-term hauling opportunities and has required the Debtor to accept several less profitable short-term jobs. Additionally, the Debtor has had to increase driver and office staff wages to account for inflation and the current job environment. At the same time, the Debtor's other fixed operating expenses, such as rent and employee health insurance, have significantly increased. The combination of decreased revenues and increased expenses has substantially stressed the company's cash flows.

As a consequence of its cash flow challenges, the Debtor experienced difficulty in fulfilling its obligations to Cheap Capital, LLC. In the year prior to the petition date, the Debtor struggled to timely make required payments. Three months before the petition date, the Debtor ceased making payments to Cheap Capital, LLC. In response, Cheap Capital, LLC issued a notice of default and it commenced a lawsuit against the Debtor, as borrower, and Joe Jr., as guarantor, in state court for breach of contract. The lender also sought to replevin the remaining trucks and trailers that serve as collateral for the Debtor's obligations.

Creditor

Cheap Capital, LLC is a lender historically focused on serving the financing needs of businesses in the transportation industry. Cheap Capital, LLC's typical customer is a mid-market operator with a heightened credit risk profile.

Cheap Capital, LLC did not provide any lending services to the Debtor prior to the refinance two years ago. At the time of the refinance, the underwriters questioned Joe Jr.'s operational acumen and did not believe the Debtor was well-positioned for success. However, Cheap Capital, LLC believed the trucks and trailers were in excellent condition, had been well maintained, and would retain above-average values on the resale market due to the condition of the equipment and the low number of miles and hours on the units. On that basis, Cheap Capital, LLC agreed to finance the remaining trucks and trailers.

Contractual Relationship

The Debtor and Cheap Capital, LLC are parties to a promissory note in the principal amount of \$900,000.00 and a security agreement in which the Debtor pledged the following collateral for the obligations due pursuant to the note:

- Unit 2058 - 2020 Kenworth semi-truck;
- Unit 2059 - 2020 Kenworth semi-truck;
- Unit 860 - 2013 Freightliner semi-truck;
- Unit 330 - 2019 Vanguard refrigerated semi-trailer;
- Unit 328 - 2014 Great Dane refrigerated semi-trailer;
- Unit 323 - 2012 Great Dane refrigerated semi-trailer;
- Unit 327 - 2013 Great Dane refrigerated semi-trailer;
- Unit 325 - 2013 Great Dane refrigerated semi-trailer;
- Unit 326 - 2013 Great Dane refrigerated semi-trailer; and
- Unit 324 - 2012 Great Dane refrigerated semi-trailer.

The Debtor currently owes Cheap Capital, LLC, exclusive of accrued and unpaid interest and expenses and attorneys' fees, the sum of \$775,000.00. The term of the loan expires in three years and has a considerable balloon payment at the end of the term.

Bankruptcy Background and Context

The Debtor filed a petition for relief under Chapter 11 of the United States Bankruptcy Code on or about May 1, 2022. The Debtor and Cheap Capital, LLC agreed to monthly adequate protection payments of \$2,500.00 until plan confirmation, which the Debtor has consistently made.

Presently before the bankruptcy court is the Debtor's Chapter 11 plan of reorganization. The Debtor has reached agreements on all issues with every creditor but Cheap Capital, LLC. The key sticking points between the Debtor and Cheap Capital, LLC include:

1. The value of the collateral which will set the amount of Cheap Capital, LLC's secured and unsecured claims;
2. The interest rate in connection with Cheap Capital, LLC's secured claim (rates have been trending upward since the petition date); and
3. The appropriate timing for the valuation (fluctuating collateral values due to market conditions since the petition date are significant).

Appraisal Issues

Cheap Capital, LLC asserts that the collateral should be valued at its replacement cost since the Debtor seeks to retain it. Cheap Capital, LLC believes the appraised values of the collateral, which should be determined as of the time of the confirmation hearing, are:

- Unit 2058 - 2020 Kenworth semi-truck (\$127,721);
- Unit 2059 - 2020 Kenworth semi-truck (\$127,721);
- Unit 860 - 2013 Freightliner semi-truck (\$37,297);
- Unit 330 - 2019 Vanguard refrigerated semi-trailer (\$61,446);
- Unit 328 - 2014 Great Dane refrigerated semi-trailer (\$42,450);
- Unit 323 - 2012 Great Dane refrigerated semi-trailer (\$32,950);
- Unit 327 - 2013 Great Dane refrigerated semi-trailer (\$39,600);
- Unit 325 - 2013 Great Dane refrigerated semi-trailer (\$39,600);
- Unit 326 - 2013 Great Dane refrigerated semi-trailer (\$39,600); and
- Unit 324 - 2012 Great Dane refrigerated semi-trailer (\$32,950).

Overall, Cheap Capital, LLC believes the collective value of the collateral is approximately \$581,335. It also asserts that the plan interest rate impacting involving its claim should be set at prime (8.25 percent) plus three percent to account for the risk it is taking.

The Debtor argues that the while it is planning to retain the collateral, it has access to acquire trucks and trailers on the auction market, which is much cheaper than purchasing such items at retail. Consequently, the Debtor asserts that auction values should be employed and that the valuation date should be the petition date (values overall have increased since the petition date). The Debtor asserts that the appropriate auction values for the collateral are:

- Unit 2058 - 2020 Kenworth semi-truck (\$76,500);
- Unit 2059 - 2020 Kenworth semi-truck (\$76,500);

- Unit 860 - 2013 Freightliner semi-truck (\$12,000);
- Unit 330 - 2019 Vanguard refrigerated semi-trailer (\$45,500);
- Unit 328 - 2014 Great Dane refrigerated semi-trailer (\$24,500);
- Unit 323 - 2012 Great Dane refrigerated semi-trailer (\$17,830);
- Unit 327 - 2013 Great Dane refrigerated semi-trailer (\$4,495);
- Unit 325 - 2013 Great Dane refrigerated semi-trailer (\$18,500);
- Unit 326 - 2013 Great Dane refrigerated semi-trailer (\$22,000); and
- Unit 324 - 2012 Great Dane refrigerated semi-trailer (\$15,750).

In total, the Debtor believes the collective value of the collateral is approximately \$313,575. It also asserts that the plan interest rate involving the lender's claim should be set at prime (8.25 percent) plus one percent. Despite the contractual maturity date in three years, the plan proposes to stretch out the secured claim payments over five years.

Debtor's Appraiser

The Debtor's appraiser is Marcus Hudson of Bling Auctions. Mr. Hudson has more than 25 years of experience in auctioning trucks and trailers. He is well-known in the auction community and has participated in some of the largest truck and trailer auctions in the region. Mr. Hudson has never worked in a retail vehicle sales environment.

Equipment Appraisal

Effective Appraisal Date — 5/1/2022

Prepared for:
The Debtor

Prepared By:
Marcus Hudson
Bling Auctions

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Subject Vehicle

Unit 2059

VIN — 1XKYDP9X9LU310859

Year 2020

Make Kenworth

Model T680

Type: Tandem Rear Axle 76" Sleeper Tractor

Engine: Paccar PX @ 475 HP

Transmission: Eaton Fuller Automatic (Ultrashift)

Wheels: 22.5" Aluminum

Mileage — 226,328

Additional Features — Carrier Comfort Pro Auxiliary power unit, A/S 5th Wheel, 2.79 Ratio, Red in Color, Engine Brake, CD/XM/Bluetooth, Steering wheel controls, PW/PL/PM, Heated Mirrors, Double Bunk,

Work Station in Sleeper, Dual Hood Mirrors, Diff Lock, Dual Leather Captain's Chairs, Full Gauge Package, Full Wheel to Wheel Fairings, Side Extenders.

Condition — Excellent all around. Ready for use.

Comp #1 — Auction Sale Price \$80,500

- Mileage/use adjustment \$10,000 deduct from subject vehicle.
- Transmission adjustment - \$6,000 addition to subject vehicle.
- Adjustment APU - \$10,000 addition to subject vehicle.
 - Value of subject vehicle with adjustments \$74,500

Comp #2 — Auction Sale Price \$65,500

- Mileage/use adjustment \$8,000 addition to subject vehicle.
- Engine Adjustment - \$10,000 deduction to subject vehicle.
- Adjustment APU - \$10,000 addition to subject vehicle.
 - Value of subject vehicle with adjustments \$73,500

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 2059 to sell at auction for **\$76,500**

Subject Vehicle

Unit 2058

VIN - 1XKYDP9X7U310858

Year 2020

Make Kenworth

Model T680

Type: Tandem Rear Axle 76" Sleeper Tractor

Engine: Paccar PX @ 475 HP

Transmission: Eaton Fuller Automatic (Ultrashift)

Wheels: 22.5" Aluminum

Mileage — 218,346

Additional Features — Carrier Comfort Pro Auxiliary power unit, A/S 5th Wheel, 2.79 Ratio, Red in Color, Engine Brake, CD/XM/Bluetooth, Steering wheel controls, PW/PL/PM, Heated Mirrors, Double Bunk, Work Station in Sleeper, Dual Hood Mirrors, Diff Lock, Dual Leather Captain's Chairs, Full Gauge Package, Full Wheel to Wheel Fairings, Side Extenders.

Condition — Excellent overall, but damage to driver's side of sleeper (recommend getting an estimate from body shop for deduction factor, and filing an insurance claim).

Comp #1— Auction Sale Price \$80,500

- Mileage/use adjustment \$10,000 deduct from subject vehicle.
- Transmission adjustment - \$6,000 addition to subject vehicle.
- Adjustment APU - \$10,000 addition to subject vehicle.
 - Value of subject vehicle with adjustments \$74,500

Comp #2 — Auction Sale Price \$65,500

- Mileage/use adjustment \$8,000 addition to subject vehicle.
- Engine Adjustment - \$10,000 deduction to subject vehicle.
- Adjustment APU - \$10,000 addition to subject vehicle.
 - Value of subject vehicle with adjustments \$73,500

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 2058 to sell at auction for **\$76,500**

Subject Vehicle

Unit 330

VIN — 527SR5325KM017115

Year: 2019

Make: Vanguard

Model: 1RBR5305

Dimensions: 53'L x 102" W

Type: Tandem Axle Refrigerated Semi Trailer

Unit: Carrier 7500 X4

Unit Hours: 4,094 Engine Run Hours

Doors: Stainless Steel, Swing

Wheels: 22.5" Aluminum

Fairings: Skirt package

Brake Type: Air

Floor Type: Aluminum Duct

Additional Features — Interior Ceiling Air Chute

Condition: Excellent overall condition, appears ready for use.

Comp #1— Auction Sale Price \$48,500

- Adjustment - Add \$4,000 to subject item for year.
- Adjustment - Deduct \$1,000 from subject for unit model and hours.
- Value of subject vehicle with adjustments \$45,500

Comp #2 — Auction Sale Price \$40,500

- Adjustment - Deduct \$4,000 from subject item for year.
- Adjustment - Deduct \$1,000 from subject item for unit type.
- Value of subject vehicle with adjustments \$45,500

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 330 to sell at auction for **\$45,500**

Subject Vehicle

Unit: 860

VIN: 1FUJGLDRODSBV3560

Year: 2013

Make: Freightliner

Model: Cascadia

Type: Tandem Sleeper Tractor

Raised Roof Sleeper

Engine: Detroit DD15

Transmission: Eaton Fuller Manual 10 Speed

Wheels: 22.5" Aluminum

Mileage — 970,139

Additional Features: Auxiliary Power Unit, Dual Hood Mirrors, Exterior Visor, Air Slide 5th Wheel, Air Ride Cab, Double Bunk Sleeper Condition: Excellent overall.

Comp #1— Auction Sale Price \$12,000

- Adjustment —Transmission deduct \$1,500 from subject vehicle
- Adjustment — Mileage deduct \$3,500 from subject vehicle
- Adjustment — APU add \$5,000 to subject vehicle
- Value of subject vehicle with adjustments \$12,000

Comp #2 — For Sale Price \$10,500

- Adjustment — Mileage deduct \$6,500 from subject vehicle
- Adjustment — APU add \$5,000 to subject vehicle
- Value of subject vehicle with adjustments \$12,000

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 860 to sell at auction for **\$12,000**

Subject Vehicle

Unit 328

VIN — 1GRAA0621EW70117

Year: 2014

Make: Great Dane

Model:

Dimensions: 53'L x 102" W

Type: Tandem Axle Refrigerated Semi Trailer

Unit: Carrier

Unit Hours:

Doors: Swing

Wheels: 22.5" Aluminum

Fairings: Skirt package

Brake Type: Air

Floor Type:

Condition: Very good to excellent.

Comp #1 — Auction Sale Price \$25,900

- Adjustment — Deduct \$1,000 from subject for Unit MFG
- Value of subject vehicle with adjustments \$24,900

Comp #2 — Auction Sale Price \$28,000

- Adjustment — Deduct \$1,000 from subject for Unit MFG
- Adjustment — No deduction/addition for difference in trailer MFGR
- Value of subject vehicle with adjustments \$27,000

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 328 to sell at auction for **\$24,500**

Subject Vehicle

Unit: 323

VIN — 1GAAO6255CW7O2414

Year: 2012

Make: Great Dane

Model: SUP - 114-31053

Dimensions: 53'L x 102" W

Type: Tandem Axle Refrigerated Semi Trailer

Unit: Carrier 2500A X2

Unit Hours: 13,145 Unit Run Hours

Doors: Stainless Steel, Swing

Wheels: 22.5" Aluminum

Fairings: Skirt package

Brake Type: Air

Floor Type: Aluminum Duct

Additional Features — Last DOT December of 2020 (Current), Air Chute

Condition — Excellent condition for the age. Appears ready for use.

Comp #1— Auction Sale Price \$26,900

- Adjustment - Wheel type — Add \$1,600 to subject unit
- Adjustment — Door type — Add \$1,000 to subject unit
- Adjustment — Unit type — Deduct \$1,000 from subject unit
- Adjustment — Unit hours — Add \$1,000 to subject unit
- Value of subject vehicle with adjustments \$29,500

Comp #2 — Auction Sale Price \$21,000

- Adjustment — Manufacturer — Add \$2,000 to subject unit
- Adjustment — Unit Hours — Deduct \$500 from subject unit
- Value of subject vehicle with adjustments \$22,500

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 323 to sell at auction for **\$17,830**

Subject Vehicle

Unit 327

VIN: 1GRAA0628DW701985

Year: 2013

Make: Great Dane

Model: SUP-1114-31053 (Super Seal)

Dimensions: 53'L x 102" W

Type: Tandem Axle Refrigerated Semi Trailer

Unit: Carrier A2500 "X2 PX"

Unit Hours: 14,071 Unit Run Hours

Doors: Stainless Steel, Swing

Wheels: 22.5" Aluminum

Fairings: Skirt package

Brake Type: Air

Floor Type: Aluminum Duct

Additional Features: March 2021 DOT

Condition: Failed inspection. AC Unit needs repairs. Likely scrap.

Comp #1— Auction Sale Price \$20,000

- Adjustment — Unit MFG deduct \$2,000 from subject vehicle.
- Adjustment - Wheel type add \$1,600 to subject vehicle.
- Value of subject vehicle with adjustments \$19,600

Comp #2 — Auction Sale Price \$22,000

- Adjustment — Wheel type — Add \$1,600 to subject vehicle
- Adjustment — Aerodynamic Pkg — Add \$1,000 to subject vehicle
- Adjustment — Reefer Unit Type — Deduct \$2,000 from subject vehicle
- Value of subject vehicle with adjustments \$22,600

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 327 to sell at auction for **\$4,495**

Subject Vehicle

Unit 325

VIN — 1GRAA0624DW702633

Specifications

Year: 2013

Make: Great Dane

Model:

Dimensions: 53' L x 102" W

Type: Tandem Axle Refrigerated Semi Trailer

Unit: Carrier 2500 APGX

Unit Hours:

Doors: Stainless Steel, Swing

Wheels: 22.5" Aluminum

Fairings: Skirt package

Brake Type: Air

Floor Type:

Condition: Excellent condition. Ready for the road.

Comp #1— Auction Sale Price \$20,000

- Adjustment — Unit MFG deduct \$2,000 from subject vehicle.
- Adjustment - Wheel type add \$1,600 to subject vehicle.
- Value of subject vehicle with adjustments \$19,600

Comp #2 — Auction Sale Price \$22,000

- Adjustment — Wheel type — Add \$1,600 to subject vehicle
- Adjustment — Aerodynamic Pkg — Add \$1,000 to subject vehicle
- Adjustment — Reefer Unit Type — Deduct \$2,000 from subject vehicle
- Value of subject vehicle with adjustments \$22,600

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 325 to sell for **\$18,500**

Subject Vehicle

Unit 326

VIN — 1GRAA0626DW702620

Year: 2013

Make: Great Dane

Model:

Dimensions: 53'L x 102" W

Type: Tandem Axle Refrigerated Semi Trailer

Unit: Carrier 2500 Apex

Unit Hours: 16,788

Doors: Swing

Wheels: 22.5" Aluminum

Fairings: Skirt package

Brake Type: Air

Floor Type:

Condition: Like new condition. Ready for the road.

Comp #1— Auction Sale Price \$28,000

- Adjustment — Unit MFG — Deduct \$2,000 from subject vehicle.
- Adjustment - Wheel type — Add \$1,600 to subject vehicle.
- Value of subject vehicle with adjustments \$27,600

Comp #2 - Auction Sale Price \$20,000

- Adjustment — Wheel type — Add \$1,600 to subject vehicle
- Adjustment — Aerodynamic Pkg — Add \$1,000 to subject vehicle
- Adjustment — Reefer Unit Type — Deduct \$2,000 from subject vehicle
- Value of subject vehicle with adjustments \$20,600

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 326 to sell at auction for **\$22,000**

Subject Vehicle

Unit 324

VIN — 1GRAA0627CW702432

Year: 2012

Make: Great Dane

Model: SUP-1114-31053 (Super Seal)

Dimensions: 53'L x 102" W

Type: Tandem Axle Refrigerated Semi Trailer

Unit: Carrier 2500A

Unit Hours: 15,161

Doors: Swing

Wheels: 22.5" Aluminum

Fairings: Skirt package

Brake Type: Air

Floor Type: Aluminum Duct

Additional Features: Air Chute

Condition: Excellent, road ready. No damage. Recent DOT Sticker December 2022.

Comp #1— Auction Sale Price \$14,900

- Adjustment - Wheel type — Add \$1,600 to subject unit
- Adjustment — Door type — Add \$1,000 to subject unit
- Adjustment — Unit type — Deduct \$1,000 from subject unit
- Adjustment — Unit hours — Add \$1,000 to subject unit
- Value of subject vehicle with adjustments \$17,500

Comp #2 — Auction Sale Price \$20,500

- Adjustment — Manufacturer — Add \$2,000 to subject unit
- Adjustment — Unit Hours — Deduct \$500 from subject unit
- Value of subject vehicle with adjustments \$22,000

Based on extensive research, the above comparable units, adjusting for mileage/use/transmission, it would be reasonable to expect unit 324 to sell at auction for **\$15,750**

Cumulative Values

Unit 2059 - \$76,500 (2020 Kenworth)

Unit 2058 - \$76,500 (2020 Kenworth)

Unit 330 - \$45,500 (2019 Vanguard)

Unit 860 - \$12,000 (2013 Freightliner)

Unit 328 - \$24,500 (2014 Great Dane)

Unit 323 - \$17,830 (2012 Great Dane)

Unit 327 - \$4,495 (2013 Great Dane)

Unit 325 - \$18,500 (2013 Great Dane)

Unit 326 - \$22,000 (2013 Great Dane)

Unit 324 - \$15,750 (2012 Great Dane)

Total Value of all items: **\$313,575**

Based on extensive research of market values and inspecting the equipment as noted, I believe these values to be true, correct, and attainable in the event of an auction sale.

Signed: _____

Date: _____

Resources

Resources used for market research include, but without limitation;

www.50000trucks.com

www.truckpaper.com

www.commercialtrucktrader.com

www.Truckertotrucker.com

www.mylittlesalesman.com

Richie Brothers Auction Company

Penske Truck Leasing

Bling Auction results

ABI VALUATION TRIAL LEGAL STANDARDS

I. Attacking the Ability to Testify as an Expert Witness (Qualification)

- a. In order for a witness to testify regarding an opinion (such as an opinion on the value of vehicles), the witness must be qualified as an expert witness based on training, background, experience, and education, as required by the Federal Rules of Evidence. Challenges to a witness's qualification to testify as an expert are frequently referred to as a "Daubert" challenge, in reference to the U.S. Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 570 (1993), where the Court established the trial court's role in gatekeeping unreliable expert testimony.
- b. Federal Rule of Evidence
 - i. The Federal Rules of Evidence (FRE) are made applicable in bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure (FRBP) 9017 and FRE 1101(b).
 - ii. The FRE cover:
 1. General Provisions (FRE 101 to 106).
 2. Judicial Notice (FRE 201).
 3. Presumptions in Civil Cases (FRE 301, 302).
 4. Relevance and Its Limits (FRE 401 to 415).
 5. Privileges (FRE 501, 502).
 6. Witnesses (FRE 601 to 615).
 7. Opinions and Expert Testimony (FRE 701 to 706).
 8. Hearsay (FRE 801 to 807).
 9. Authentication and Identification (FRE 901 to 903).
 10. Contents of Writings, Recordings, and Photographs (FRE 1001 to 1008).
 11. Miscellaneous Rules (FRE 1101 to 1103).
- c. Rules Applicable to Experts
 - i. Testimony by Expert Witnesses (FRE 702): A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion 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 is the product of reliable principles and methods; and
 - d. the expert has reliably applied the principles and methods to the facts of the case.
- ii. Bases of an Expert’s Opinion Testimony (FRE 703): 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 facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
- iii. Opinion on an Ultimate Issue (FRE 704)
 - a. In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
 - b. Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.
- iv. Disclosing the Facts or Data Underlying an Expert’s Opinion (FRE 705): Unless the court orders otherwise, an expert may state an opinion--and give the 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.
- v. Disclosure of Expert Testimony (FRCP 26(a)(2), applicable in adversary proceedings pursuant to FRBP 7026):
 - a. In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

- b. Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
 - i. a complete statement of all opinions the witness will express and the basis and reasons for them;
 - ii. the facts or data considered by the witness in forming them;
 - iii. any exhibits that will be used to summarize or support them;
 - iv. the witness's qualifications, including a list of all publications authored in the previous 10 years;
 - v. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
 - vi. a statement of the compensation to be paid for the study and testimony in the case.
- c. Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
 - i. the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
 - ii. a summary of the facts and opinions to which the witness is expected to testify.
- d. Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
 - i. at least 90 days before the date set for trial or for the case to be ready for trial; or

- ii. if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.
 - e. Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).
- d. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 570 (1993)
 - i. FRE 702 was amended in 2000 in response to *Daubert*, the U.S. Supreme Court case that charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. In *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999), the Supreme Court clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science.
 - ii. *Daubert* sets forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The non-exclusive factors set forth by the *Daubert* court are:
 - 1. whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
 - 2. whether the technique or theory has been subject to peer review and publication;
 - 3. the known or potential rate of error of the technique or theory when applied;
 - 4. the existence and maintenance of standards and controls; and
 - 5. whether the technique or theory has been generally accepted in the scientific community.
 - iii. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175. "We conclude that *Daubert*'s general holding--setting forth the trial judge's general 'gatekeeping' obligation--applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho*, 119 S.Ct. at 1171.

II. *Attacking the Witness's Opinion*

a. Valuation Methodology: Replacement Value versus Liquidation Value

- i. “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 such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property....” 11 U.S.C. § 506(a).
- ii. In *Assocs. Com. Corp. v. Rash*, 520 U.S. 953 (1997), the U.S. Supreme Court tackled the question of “how” to value collateral, “[a]s we comprehend § 506(a), the “proposed disposition or use” of the collateral is of paramount importance to the valuation question.” 520 U.S. 953, 962. In *Rash*, the Supreme Court differentiated between cases where a debtor chooses to surrender collateral to a creditor on the one hand, or cases where collateral will be retained and used by the debtor, a “cram-down.”
- iii. Replacement Value
 1. Where debtors propose to retain property, courts should use replacement value for determining its value. *See Rash*, 520 U.S. 953, 965. Although the United States Supreme Court in *Rash* left it open for other courts to determine what specific methodologies could be considered to determine replacement value, the Eighth Circuit has adopted retail value as the methodology for automobiles and similar equipment. *See In re Trimble*, 50 F.3d 530, 531–32 (8th Cir. 1995). “[T]he replacement value of an automobile lies in its retail value as of the date of confirmation.” *In re Mitchell*, 320 B.R. 687, 689 (Bankr. E.D. Mo. 2005); *see also In re Dunlap*, 215 B.R. 867, 870 (Bankr. E.D. Ark. 1997) (“First, if a creditor has a claim secured by a lien in a vehicle that is retained by the debtor, [the plan] must propose to pay the value of the vehicle calculated at the retail, not wholesale, market.”).
 2. Bankruptcy Courts in the Seventh Circuit similarly adopt “replacement value” standard, describing the value determination as requiring the court to “ascertain the price this Debtor would pay for the same collateral in the available market.” *In re Castleton Plaza, LP*, No. 10-1444-BHL-11, 2011 WL 4621123, at *3 (Bankr. S.D. Ind. Sept. 30, 2011).
 3. In the Sixth Circuit, Bankruptcy Courts also adopt the *Rash* “replacement value” standard in cram-downs. *In re Murray*

Metallurgical Coal Holdings, LLC, 618 B.R. 220 (Bankr. S.D. Ohio, 2020).

4. Replacement, or Retail value is based on the price a willing buyer in the Debtor's position would pay to purchase similar equipment from a willing seller. *See, e.g., In re Jones*, 219 B.R. 506, 508 (N.D. Ill. 1998); *In re Bryan*, 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004) (The retail value is "the price a willing buyer is willing to pay for any [equipment].").

iv. Liquidation Value

1. Although some courts have considered various markets available to debtors to aid in determining replacement value, *see, e.g., In re McElroy*, 210 B.R. 833, 835 (Bankr. D. Or. 1997) ("In view of the *Rash* decision, I conclude that, in this case, valuation should be based on prices paid in the market that is accessible to the debtors, which includes, without limitation, sales by dealers to the public, auctions open to the public, and sales between private parties."), reliance on pure auction value of property is improper when the debtor intends to retain the property because it is typically synonymous with liquidation value. *See In re Neal*, 314 B.R. 198, 200 (Bankr. N.D. Iowa 2004) ("The liquidation value is what a secured creditor would expect to recover on repossession and sale by auction or other wholesale means."); *In re Bouzek*, 311 B.R. 239, 240 (Bankr. E.D. Wis. 2004) ("'Wholesale value,' used by most courts interchangeably with 'liquidation value,' is 'the secured creditor's expected recovery upon repossession and sale by auction or other wholesale means.'").
2. While a court may consider prices obtained in markets available to the debtor, pure auction values may not be suitable in every case. *See, e.g., McElroy*, 210 B.R. at 827 ("I did not give any weight to the price a dealer had offered to purchase the truck from debtors, because that is a wholesale price and, under *Rash*, should not be used in valuing a vehicle these debtors are going to retain.").

b. Timing of Valuation

- i. The Plan must provide Lender "deferred cash payments totaling at least the allowed amount of such claim, of a value, *as of the effective date of the plan . . .*" 11 U.S.C. § 1129 (emphasis added).
- ii. "[T]he court must simply value the collateral as of the effective date of the debtor's plan in order to determine the allowed amount of the creditor's secured claim." 4 *Collier on Bankruptcy* P 506.03 (16th 2021); *see also In re Fulcher*, 15 B.R. 446, 448 (Bankr. D. Kan. 1981) ("[A]bsent a showing

of bad faith by the debtor ... the collateral should be valued as of the day the plan is confirmed, which is the effective date of the plan”).

- iii. An increase in the value of collateral does not alter the express language of the Bankruptcy Code. The United States Supreme Court has ruled, “[a]ny increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor” *Dewsnup v. Timm*, 502 U.S. 410, 417, 112 S. Ct. 773, 778, 116 L. Ed. 2d 903 (1992). Courts have extended this determination to Chapter 11 cases, ruling that an increase in collateral value does not alter the requirement that collateral is valued as of the effective date of a plan:
 - 1. Under § 1129(a)(7)(A)(ii), commonly referred to as the “best interest test,” each holder of an impaired claim is entitled to “receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.” Since *Dewsnup* mandates that increases in the value of collateral accrue to the benefit of the secured creditor in chapter 7, the best interest test entitles the creditor in chapter 11 to at least the present value of its secured claim, as increased during the pendency of the case. Moreover, there is no apparent reason why increases in value should accrue to the creditor in chapter 7 cases but not in chapter 11 cases. Therefore, the debate over valuation timing has been decided by *Dewsnup* in favor of the effective date of confirmation. *In re Bloomingdale Partners*, 160 B.R. 93, 97 (Bankr. N.D. Ill. 1993).

c. Till Rate Issues

- i. A debtor’s plan may provide for interest to accrue on the secured portion of a lender’s claim at a rate different (lower) than the pre-petition contract rate or amortized over a longer period of time. A creditor may object to the lower interest rate on the basis that it fails to adequately protect the creditor from the risk of loss and depreciation that would be incurred and realized in extending payments.
- ii. According to *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), the proper interest rate in a bankruptcy is the prime interest rate plus one (1) to three (3) percent, depending on the risk taken by the creditor.

Faculty

Benjamin J. Court is a partner with Stinson LLP in Minneapolis and works with equipment finance organizations, secured creditors, statutory and judgment lienholders, banks, asset-buyers, real property lessors, lenders, loan-servicers, receivers, trustees and creditors' committees. His experience includes personal property leasing, bankruptcy and restructuring matters, secured transactions, distressed asset acquisitions and workout scenarios, consensual property lien and judgment-enforcement situations, insolvency proceedings and complex financial services litigation. Mr. Court is particularly focused on representing equipment-leasing and finance organizations, and he is well-versed in Articles 2A and 9 of the Uniform Commercial Code. He has documented numerous lease and loan transactions for captive, bank-affiliated and independent equipment finance companies, and he has successfully enforced their rights in lawsuits, mediations, arbitrations, and bankruptcy and restructuring proceedings. Mr. Court is admitted to practice in Minnesota, North Dakota and Wisconsin, and he routinely advises lenders, creditors and committees in chapter 7, 11 and 12 bankruptcies. He serves as outside counsel for a number of agribusiness lenders in the U.S., providing practical advice regarding workouts, foreclosures, enforcement matters, secured transactions and intercreditor relationships. In addition, he regularly defends lenders and loan-servicers in a wide variety of contested matters, including claims of wrongful foreclosure, fraud, and breach of contract, as well as alleged violations of RESPA, TILA, FCRA, TCPA, FDCPA and other consumer-protection laws. Mr. Court received his B.A. *summa cum laude* from the University of Minnesota and his J.D. from the University of Minnesota Law School.

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