"Can You Make a *Rash* Decision?": Valuation Issues in Consumer Cases

Wesley F. Smith, Moderator
Stevens & Brand LLP; Lawrence, Kan.

Andrew J. Nazar
Polsinelli; Kansas City

Hon. Cynthia A. Norton
U.S. Bankruptcy Court (W.D. Mo.); Kansas City

Hon. Dale L. Somers
U.S. Bankruptcy Court (D. Kan.); Wichita

Valuation Cheat Sheet

For bankruptcy practitioners

Presented by:

Hon. Cynthia a. Norton
U.s. Chief bankruptcy judge
W.d. Missouri
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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 I have 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[2]
► ***Stay relief*** under **§ 362(d)(2)(A)** – whether debtor has "equity" in the property[3]

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[1] Materials were originally prepared and presented the Missouri Bar in Spring 2014.

[2] 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.

- ► ***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)**[4]
- ► ***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[5]
- ► ***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 [6]

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[3] 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).

[4] **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).

[5] **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").

[6] **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."[7]

► ***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)**[8]; and, for purposes of whether a creditor received more than it would have received in a chapter 7 liquidation.[9]

► ***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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[7] 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).

[8] **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).

[9] **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"[10]

► ***Recovery of transfer or its value*** under **§ 550**[11] -- 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"[12]

► ***Redemption*** under **§ 722** - paying the holder of the lien the amount of the allowed secured claim (as determined under **§ 506**)[13]

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[10] **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").

[11] **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.

[12] **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).

► ***Denial of Discharge*** under **§ 727(a)(4)(A)** (false oath)[14]

► ***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

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[13] **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**, 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).

[14] **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).

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 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).

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,**[15] 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

[15] **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.[16]

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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[16] 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*[17]

►***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

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

"such 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 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 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[18]

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

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

may not take into account 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[19]

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

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

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 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.