AMERICAN BANKRUPTCY INSTITUTE

2017 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Evidence and Trial Skills in Consumer Bankruptcy Cases

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EVIDENCE AND TRIAL SKILLS

Factual Background

The factual scenario for the presentation is as follows:

- Classic Autos, Inc. ("Classic") is a business that buys, restores, and sells classic cars. Classic filed for Chapter 11 on April 1, 2016 (the "Petition Date").

- On the Petition Date and today, Classic's principal assets include (1) three buildings—a warehouse, a specialized shop for restoring the automobiles, and a showroom; (2) the land on which those buildings are located; and (3) the classic automobiles in the debtor's inventory. Classic previously pledged those assets to secure a bank loan and revolving line of credit.

- Classic recently filed a proposed plan of reorganization, which has the support of Classic's secured creditor, but is opposed by Classic's unsecured creditors.

- A principal issue in dispute is whether and to what extent the value of the secured creditor's collateral has diminished since Classic filed for bankruptcy protection, entitling the lender to an adequate protection claim.

- The debtor and secured creditor contend that after Classic filed for bankruptcy, market conditions changed, and the value of the collateral declined precipitously, entitling the secured creditor to a sizeable adequate protection claim. The unsecured creditors dispute that the value of the collateral has declined as much as the debtor and the secured creditor assert, and argue that they have overstated the amount of any adequate protection claim to which the secured creditor is entitled.

- At the confirmation hearing, the parties will seek to present evidence concerning the valuation of the company's secured assets at the Petition Date and at the anticipated Effective Date.

Relevant Rules and Code Provisions

Federal Rules of Civil Procedure

Fed. R. Civ. P. 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * *

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope And Limits.

* * *

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * *

(e) Supplementing Disclosures And Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect,

and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

Fed. R. Civ. P. 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an order compelling disclosure or discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

* * *

(c) Failure to disclose, to supplement an earlier response, or to admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

Fed. R. Civ. P. 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence,

these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

Federal Rules of Evidence

Fed. R. Evid. 701. Opinion Testimony by Lay Witnesses

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.

Fed. R. Evid. 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 is the product of reliable principles and methods; and

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

Fed. R. Evid. 703. Bases of an Expert

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

* * *

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

Federal Rules of Bankruptcy Procedure

Fed. R. Bankr. P. 3012. Valuation of Security

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.

Fed. R. Bankr. P. 7026. General Provisions Governing Discovery

Rule 26 Fed. R. Civ. P. applies in adversary proceedings.

Fed. R. Bankr. P. 7037. Failure to Make Discovery: Sanctions

Rule 37 Fed. R. Civ. P. applies in adversary proceedings.

Fed. R. Bankr. P. 9014. Contested Matters

(a) Motion. In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

(b) Service. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule 9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.

(c) Application of Part VII Rules. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

(d) Testimony of Witnesses. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

(e) Attendance of Witnesses. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

Fed. R. Bankr. P. 9017. Evidence

The Federal Rules of Evidence and Rules 43, 44 and 44.1 of the Fed. R. Civ. P. apply in cases under the Code.

Title 11, United States Code

11 U.S.C. § 506. Determination of Secured Status

(a) (1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) 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.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title

Case Law Relevant to Presentation

1. Preliminary Evidentiary Issues

(a) Motions for Witness to Appear by Telephone, by Videoconference, or through the Use of Testimony by Deposition

(i) Phone/Video Testimony: Federal Rule of Civil Procedure 43(a) permits testimony in open court by contemporaneous transmission from a different location for "good cause in compelling circumstances and with appropriate safeguards." A 1996 Advisory Committee clarified the language used in Rule 43. The Committee's Notes include:

(1) Note 1: The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

(2) Note 2: The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.

(3) Note 3: Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new

issues during trial or from the unexpected inability to present testimony as planned from a different witness.

(4) Note 4: A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

(5) Note 5: Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony. Fed. R. Civ. P. 11 Advisory Comm. nn. (1996)

(ii) Most courts have followed the Committee's Notes and used stringent guidelines when applying Rule 43. Much of the case law on this topic makes it clear that contemporaneous transmission of testimony is not preferred and its use cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

(1) *Eller v. Trans Union*, LLC, 739 F.3d 467 (10th Cir. 2013):

> Six days before a Colorado trial was scheduled to begin, the movant requested to call certain witnesses to testify by telephone. These witnesses included two medical practitioners with the US Department of Veteran Affairs, a lawyer based in Portland, Oregon and a lawyer based in Dallas, Texas who was scheduled to serve as counsel in a court martial proceeding in Turkey during the trial. The district court stated it would permit the medical practitioners to testify by telephone due to their patient care obligations, but denied the request as to the two

attorneys "for lack of good cause shown." On appeal, the Tenth Circuit agreed with the district court and explained that Rule 43(a) is permissive and not mandatory. The district court was within its power to deny a party's attempt to have a witness testify outside the courtroom when it is not accompanied by an "unexpected reason," and especially when the party knew well in advance of trial of the burden because the party could have made arrangements ahead of time for introducing the testimony, by deposition for instance.

(2) *Air Turbine Tech., Inc. v. Atlas Copco AB*, 217 F.R.D. 545 (S.D. Fla. 2003):

On an expedited motion, the movant sought to have the Court compel the Defendants to produce their employee witnesses to testify at trial via live video conference, despite the witnesses being citizens of a foreign country and thus beyond the subpoena powers of the Court. The Court denied the motion because the party had known from the early stages of the case that witnesses from outside the U.S. would be testifying at trial and the movant did not leave adequate time to perform a deposition. The Court cited the commentary to the 1996 Amendments to Rule 43 in holding that "a party who could reasonably foresee the circumstance offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances." Any desire to transmit testimony should be made as soon as possible, in order for the parties to arrange a deposition, or secure an advance ruling from the Court.

(3) *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529 (2d Cir. 1972):

A pharmaceutical company sued the defendant company for patent infringement, but the lower court held that the patent was invalid and dismissed the complaint. The Plaintiff appealed, and the defendant went bankrupt during this time. The Plaintiff moved to dismiss its own appeal as moot, with the desired result of vacating the lower court's order, but the court denied the motion to dismiss because the

reversal would enable plaintiff to collect money pursuant to plaintiff's infringement claim, which was an administrative bankruptcy expense, entitled to first priority; thus, the appeal was not moot. One issue on appeal was whether the trial was fair to Plaintiff where the judge allowed the admission of certain testimony from a previous action, including that of an unavailable expert witness. Most of the Plaintiff's witnesses appeared in person and gave substantially the same testimony which they had given in the Court of Claims, except for a few instances where they clarified their positions on matters that had been developed on their cross-examination there. But the Defendant was allowed to offer the Government's cross-examination in the Court of Claims as its cross-examination, and to present its entire case-in-chief through the use of the testimony of the Government's witnesses in the Court of Claims action, with the judge often summarizing the testimony into the record and questioning counsel about it. The Second Circuit ruled the admission was fair, but did highlight that the general preference of federal rules, as expressed in Rule 43(a), is for oral testimony so that there will be opportunity for live cross-examination and the observation of the witness's demeanor.

(iii) Some courts, however, have allowed remote testimony based on the great distance of the witness from the court and the resulting difficulty, expense, possible delay and uncertainty resulting from travel, whether to the witness or the forum.

(1) *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000):

The Petitioner sought review of a decision of the Board of Immigration Appeals in a deportation case which denied her relief in the form of registry, suspension of deportation, and voluntary departure. The immigration judge permitted a witness to testify telephonically against the Petitioner and on behalf of the government, which the Petitioner argued was a due process violation. The Ninth Circuit rejected the Petitioner's argument and found that the telephonic testimony was "fair" because plaintiff had an adequate opportunity to cross-examine, the witness lived in Missouri and the

hearing was in San Diego, and the INS appropriately made arrangements in advance.

(2) *FTC v. Swedish Match N. Am.*, 197 F.R.D. 1 (D.D.C. 2000):

> For a hearing in Washington, DC, the Plaintiff moved to allow the live video testimony of a witness who resided in Oklahoma. The court granted the motion because the defendants had adequate notice of the video testimony, and found no material difference between the live testimony that the defendants sought and the live video testimony requested by the plaintiffs. The Court found that good cause was shown by the "serious inconvenience" the witness would incur by traveling from Oklahoma. The use of live video transmission also did not prejudice the defendants because adequate safeguards exist to protect the procedure. In assessing the safeguards of such contemporaneous transmissions, the courts focus on whether the testimony was made in open court, under oath, and whether the opportunity for cross examination was available.

(3) *Dagen v. CFC Group Holdings Ltd.*, 2003 WL 22533425 (S.D.N.Y. 2003):

> The defendants requested the Court to allow five witnesses residing in Hong Kong to testify via telephone during the trial. After noting the cautionary language used in the Advisory Committee's notes, the Court permitted the witnesses to testify via telephone because the reasons for the defendants' request were "considerably broader than mere convenience." Good cause existed due to: (1) the expense involved in flying five individuals from Asia to the United States; (2) the five witnesses comprised a large portion of the defendants' Hong Kong labor force, so bringing them to New York for trial would more or less grind defendants' business to a halt; and (3) the witnesses faced considerable obstacles obtaining travel documents, and in one case, the obstacles were prohibitive.

(4) *Barnes v. Black*, 544 F.3d 807 (7th Cir. 2008):

The Plaintiff was injured in a car accident in Illinois and filed a negligence suit against the defendants, a car driver, and his insurer. While his suit was pending, the Plaintiff was convicted of crimes and incarcerated, so he applied for a *writ of habeas corpus ad testificandum* seeking to be delivered to the district court in Illinois for trial. The district court found that it lacked the power to grant the requested relief, but ordered he could appear in the district court electronically pursuant to Rule 43(a). On appeal, the Seventh Circuit dismissed the case for lack of jurisdiction, but did note that transporting prisoners to a distant court entails cost and even danger, which the district judge deemed compelling circumstances for allowing (with appropriate safeguards) video conferencing as an alternative.

(b) *De Bene Esse* Depositions

(i) A *de bene esse* deposition is a type of deposition taken for the sole purpose of preserving a witness's testimony for use at trial, rather than for discovery. Parties frequently take *de bene esse* depositions after discovery has closed, and when they anticipate that a witness will be unavailable for trial.

(ii) Under a prior federal statute, a *de bene esse* deposition was only available after the facts of a case were at issue for several specific instances: (1) when a witness (party to the case or a third party) lived or planned to travel more than 100 miles from the place of trial; (2) was about to leave the United States; (3) was bound on a voyage to sea; or (4) was aged and infirm. 28 U.S.C. § 639 (1934).

(iii) The Federal Rules of Civil Procedure, and specifically, Rule 30(a) and Rule 30(b)(2) replaced the provision for depositions *de bene esse*. They authorize an early deposition without leave of court where the witness is about to depart and, unless his deposition is promptly taken, (1) it will be impossible or very difficult to depose him before trial, or (2) his deposition can later be taken, but only with substantially increased effort and expense. Courts that have considered requests for *de bene esse* deposition have focused on a variety of factors including the timing of the request in relation to the discovery cutoff, the timing of the request in relation to the trial date, and the facts that precipitated or necessitated the request.

(1) *Markwood Inv. Ltd. v. Neves (In re Neves)*, 2014 Bankr. LEXIS 5021 (U.S. Bankr. S.D. Fla. 2014):

> The Plaintiff filed a Motion for Leave to Take *De Bene Esse* Deposition due to the inability of the Plaintiff's principal to travel from Italy to attend the trial. The Court denied the motion because the Plaintiff had been on notice for almost two years that their key witness had travel issues, and the Plaintiff took no steps to preserve the testimony of their primary witness. The Court ruled that when deciding whether to allow or disallow a deposition to be taken for use at trial, it is appropriate that the district court consider all the circumstances, including fairness to the adverse party and the amount of time remaining before the date set for trial. Courts can set a definite time limit for the taking of depositions, and courts can make that time limit the same as the time limit for discovery depositions. Nothing about this approach to the setting of time limits is inherently unlawful.

2. Expert Witness Issues

(a) Admissibility of Expert Opinion Testimony: FRE 702 and *Daubert*

(i) In assessing the admissibility of expert opinion testimony under *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702, courts consider three main issues:

(1) Whether the expert is qualified to offer the opinion;

(2) Whether the information and methodology on which the expert bases her opinion is reliable; and

(3) Whether the expert's opinion is relevant to an issue before the court.

(ii) Qualifications Requirement

(1) Under FRE 702, an expert must have sufficient "scientific, technical, or other specialized knowledge" to testify competently about the opinion offered. FRE 702(a).

(2) In assessing an expert's qualifications, courts (1) examine "the totality of the witness's background" to determine whether she has sufficient "knowledge, skill, experience, training, or education" in a particular field, and (2) "compare[] the area in which the witness has superior knowledge, education, experience or skill with the subject matter of the proffered testimony." *Washington v. Kellwood*, 105 F. Supp. 3d 293, 304 (S.D.N.Y 2015, quoting *United Sates v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004)).

(iii) Reliability Requirement

(1) To satisfy the reliability requirement under FRE 702 and *Daubert*:

a. The expert testimony must be "based on sufficient facts or data," FRE 702(b);

b. The expert testimony must be "the product of reliable principles and methods," FRE 702(c); and

c. The expert must have "reliably applied the principles and methods to the facts of the case." FRE 702(d).

(2) In *Daubert*, the U.S. Supreme Court presented a non-exhaustive list of four factors courts may consider in assessing the reliability of expert testimony:

a. Whether a theory or technique can be and has been tested;

b. Whether a theory has been subjected to peer review and publication;

c. Whether a "particular scientific technique" has a known or potential rate of error; and

d. Whether the theory or technique is generally accepted within the "relevant scientific community." *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993).

(iv) Relevance Requirement

(1) The expert testimony must "help the trier of fact to understand the evidence or to determine a fact in issue." FRE 702(a).

(2) Question is one of "fit." Fed. R. Evid. 702 advisory committee's note.

(v) *Daubert* is not limited to scientific experts but applies equally to experts in any specialized field. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150-151 (1999).

(vi) Rejection of expert testimony under *Daubert* is the exception, not the rule. Fed. R. Evid. 702 advisory committee's note.

(1) The "trial court's gatekeeping role under *Daubert* is not intended to serve as a replacement for the adversary system," *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002) (citing Fed. R. Evid. 702 advisory committee's note), citing *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996).

(2) "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Fed. R. Evid. 702 advisory committee's note, citing *Daubert*, 509 U.S. at 595.

(3) Moreover, "while *Daubert*'s standards must still be met, the usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial." *Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009).

(b) Expert Qualifications/Reliance on Other Experts

(i) FRE 702 and 703 permit an expert to rely on "facts or data" that is "of a type reasonably relied upon by experts in the particular field."

(ii) *Dura Automotive Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002):

The court affirmed the exclusion of an expert's opinions where the expert relied on certain affiants who did more than

"merely collect data for him," and the expert "himself lack[ed] the necessary expertise to determine whether the techniques" used by the affiants were "appropriately chosen and applied." 285 F.3d at 615. Because the methods used by the affiants "required a host of discretionary expert judgments" on the part of the affiants, the court determined the expert's reliance on the affidavits was improper. *Id.* The court reasoned that "[a] scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty….A theoretical economist, however able, would not be allowed to testify to the findings of an econometric study conducted by another economist if he lacked expertise in econometrics and the study raised questions that only an econometrician could answer. If it were apparent that the study was not cut and dried, the author would have to testify; he could not hide behind the theoretician." *Id.* at 614.

(iii) *Fletcher v. Doig*, No. 13 C 3270, 2016 WL 3940082, at *7 (N.D. Ill. July 21, 2016):

The court denied a motion to exclude the expert testimony of an art appraiser who relied on the opinion of a graphologist to determine whether a signature was authentic, noting that "[the art appraiser's] understanding that [the graphologist] authenticated the signature is merely an aspect of his overarching assuming that the Work is authentic and would be perceived as such in the relevant community."

(iv) *Washington v. Kellwood Co.*, 105 F. Supp. 3d 293, 310 (S.D.N.Y. 2015):

The court precluded an accounting and business valuation expert from testifying about what marketing and promoting efforts would be reasonable, noting that such subjects are "wholly outside of the scope of his expertise."

(v) *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 629-30 (W.D. Wash. 2011):

The court excluded an expert report where the expert relied on data and methodology of another expert without testing the other expert's "data to ensure its reliability." The Court held that, "[t]he rules do not permit an expert to rely upon opinions developed by another expert for purposes of

litigation without independent verification of the underlying expert's work."

(c) Untimely Expert Disclosure

(i) FRCP 37(c)(1):

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(ii) *Nat'l R.R. Passenger Corp. v. Young's Commercial Transfer, Inc.*, No. 1:13-CV-01506-DAD-EPG, 2016 WL 1573262, at *4 (E.D. Cal. Apr. 19, 2016):

> The court struck untimely supplemental expert reports as prejudicial, noting that "if the disclosure had been timely, defendants would have: deposed plaintiff's new experts; reopened the deposition of plaintiff in order to question her about the new issues and claims raised by the most recent expert reports; and retained their own experts to rebut the life care plan recommendations made by plaintiff's newly announced experts."

(iii) *Pac. Indem. Co. v. Nidec Motor Corp.*, No. 2:14-CV-01533-APG-NJK, 2016 WL 4497753, at *3 (D. Nev. Aug. 25, 2016):

> The court did not exclude expert witness who was not timely disclosed where there was no evidence of bad faith and the defendant was aware of the expert's identity, noting that exclusion "is too harsh under the circumstances."

(d) Reliability/Reliance on Records with Minimal Validation

(i) FRE 702 allows an expert to offer opinion testimony if "the testimony is based on sufficient facts or data," the testimony is the product of reliable principles and methods," and "the expert has reliably applied the principles and methods to the facts of the case."

(ii) *Antioch Co. Litig. Tr. v. Morgan*, No. 3:10-CV-156, 2014 WL 1365949, at *4 (S.D. Ohio Apr. 7, 2014), *aff'd,* 633 F. App'x 296 (6th Cir. 2015):

The court excluded expert testimony where the expert's "blind reliance" on the work of others, without any independent verification, rendered his opinion unreliable.

(iii) *In re SemCrude L.P.*, 648 F. App'x 205, 214 (3d Cir. 2016):

The court affirmed the admission of expert testimony where the expert relied on a third party's valuation, noting that the expert "did not simply adopt the [third party's] evaluation as his own," and instead "used his own analysis and judgment" to adjust the report as he saw fit.

3. Non-Expert Evidence on Valuation

(a) Lay Opinion Testimony

(i) FRE 701. Opinion Testimony by Lay Witnesses.

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.

(ii) Advisory Committee Notes to FRE 701 (2000 amd.): "[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis."

(iii) *Lativafter Liquidating Trust v. Clear Channel Comm's, Inc.*, 345 Fed. Appx. 46, 50 (6th Cir. 2009):

Trial court did not abuse its discretion in allowing an investor and board member to testify about what the company's value would be if it had continued its affiliation with the defendant's business. The board member there had testified about the company's value based on the revenue the plaintiff had generated from its past business dealings with the defendant and the plaintiff's revenue projections for several months after those dealings had ended.

(iv) *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929-30 (10th Cir. 2004):

Testimony from company's president about its lost profits could not be admitted under Rule 701, because the witness did more than provide "a straightforward opinion as to lost profits using conventional methods based on LifeWise's actual operating history." The court held that "[i]nstead of limiting [the witness'] testimony to his experience as a businessperson and president of the company, however, [the proponent] had him enter into the realm of rolling averages, S-curves, and compound growth rates that appear to be an amalgam of logic, hope, and economic jargon. . . . Such subject matters fail to be rationally based on [the witness'] perception, and therefore cannot be admissible as lay opinion testimony."

(v) *Compania Administradora de Recuperacion de Activos Administradora de Fondos de Inversion Sociedad Anonima v. Titan Int'l, Inc.*, 533 F.3d 555, 560 (7th Cir. 2008):

Trial court appropriately precluded the testimony of defendant's CEO about the value of certain collateral, both because (1) the witness was not personally familiar with the particular collateral -- he "looked at a list of items," and (2) he "estimated their value based on his extensive experience purchasing and selling the type of goods at issue. This is the kind of testimony traditionally provided by an expert: '[I]t could have been offered by any individual with specialized knowledge of the [] market.'"

(vi) *Downeast Ventures, Ltd. v. Washington County.*, 450 F. Supp. 2d 106, 110–11 (D. Me. 2006) (citations and internal quotation marks omitted):

"Since the line between lay and expert testimony is sometimes blurry and since the same witness may be qualified to give both, *Ayala–Pizarro,* 407 F.3d at 28, prudent counsel will designate such a witness as an expert to avoid the accusation that he has proffered 'an expert in lay witness clothing.' Fed. R. Evid. 701 advisory committee notes. If the proponent of the testimony fails to designate, the party can anticipate that the court will monitor and may restrict the contours of his testimony at trial."

(vii) *United States v. An Easement & Right-of-way Over 6.09 Acres of Land, More or Less, in Madison Cty., Alabama*, 140 F. Supp. 3d 1218, 1242-43 (N.D. Ala. 2015) (citations and internal quotation marks omitted):

"[T]hat Rule 701 may authorize a witness to give a lay opinion on the value of his property does not mean that a landowner has carte blanche to espouse any opinion he pleases on the value of his land, free from the constraints of Rule 702 and *Daubert*. If an owner's testimony on value is based not upon commonly understood considerations of worth flowing from his perceptions and knowledge of his property but instead upon technical or specialized knowledge more broadly, it crosses into expert testimony for purposes of Rule 702 and cannot be admitted under Rule 701(c)."

"[T]he owner's qualification to testify does not change the 'market value' concept and permit him to substitute a 'value to me' standard for the accepted rule [], or to establish a value based entirely upon speculation." (alteration in original)

(viii) *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1215 (10th Cir. 2011) (citations and internal quotation marks omitted):

"[Defendant's principal,] Mr. Miller's calculations were based in part on his professional experience in real estate. Rapid Funding argues that, as a licensed real estate broker, Mr. Miller was better situated than most owners to make this determination. Instead of supporting the admissibility of Mr. Miller's testimony as lay opinion, Rapid Funding's argument

places Mr. Miller's testimony into the category of expert opinion. Knowledge derived from previous professional experience falls squarely within the scope of Rule 702 and thus by definition outside of Rule 701."

(b) Market Reports

(i) FRE 803(17) excludes from hearsay "[m]arket quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations."

(ii) *In re Gonch*, 435 B.R. 857, 862 (Bankr. N.D.N.Y. 2010) (citations and internal quotation marks omitted):

"The public relies on Kelley Blue Book values to make informed car purchase decisions. The publishers of the Kelley Blue Book know that their work will be consulted; if it is inaccurate, the public or the trade will cease consulting their product. The court concludes that the Kelley Blue Book private party value falls squarely within the hearsay exception for commercial publications."

(iii) *In re Penny*, No. 10-55073 SLJ, 2011 WL 204888, at *2 (Bankr. N.D. Cal. Jan. 21, 2011):

"The court agrees that the Kelley Blue Book is an appropriate starting point for a valuation analysis. The values it supplies are based on actual transactions occurring in relevant regional markets. They are admissible under Federal Rule of Evidence 803(17). The Kelley Blue Book is objective, serves the interests of standardization and predictability, and is cost-effective, which benefits the parties."

(iv) *Young v. Camelot Homes, Inc. (In re Young)*, 390 B.R. 480, 492 (Bankr. D. Me. 2008):

"Bradley [lay witness] used the Kelley Blue Book ('Kelley') website to arrive at his opinions. Kelley values may be accepted as reliable market reports or compilations under Federal Rule of Evidence 803(17)."

(v) *In re Robson*, 369 B.R. 377, 380–81 (Bankr. N.D. Ill. 2007) (citations omitted):

"In Chapter 13 cases, opinions generally agree that they can determine the value of a vehicle at a given time using guides

relied upon in the industry. These guides qualify as exceptions to the hearsay rule under Federal Rule of Evidence § 803(17)."

(vi) *In re McElroy*, 339 B.R. 185, 188 (Bankr. C.D. Ill. 2006) (internal quotation marks omitted):

"The Debtors objected to the admissibility of the NADA [car pricing guide] data. However, Rule 803(17) of the Federal Rules of Evidence provides a hearsay exception for market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. The NADA fits well within this hearsay exception."

(vii) *In re Byington*, 197 B.R. 130, 138 (Bankr. D. Kan. 1996):

"Properly, market reports should be used in conjunction with expert testimony based on an actual inspection of the property. However, the use of a market report on its own is not favored. 'In most cases it is difficult to imagine setting a reliable valuation without, for instance, some firsthand testimony as to the condition of the collateral.'"

(viii) *In re Penny*, 2011 WL 204888, at *2-*3 (internal quotation marks omitted):

"[C]ourts have determined that adjusting the Kelley Blue Book or N.A.D.A. Guide retail value for a like vehicle by a reasonable amount in light of any additional evidence presented regarding the condition of the vehicle and any other relevant factors is an appropriate means of reaching retail value."

"[11 U.S.C. § 506(a)(2)] requires the retail value to mean 'the price a retail merchant *would charge* for property of that kind *considering the age and condition* of the property.' (emphasis added) The Kelley Blue Book value therefore must be adjusted for two things. First, it must reflect the actual condition of the car if that condition is not optimal. Second, it must reflect the fact that the Kelley Blue Book value is the asking price for a retail sale, not the final price, as it is reasonable to believe that dealers do not sell vehicles frequently at the asking price."

(ix) *In re Gonch*, 435 B.R. at 866 (citations omitted):

"Finally, the court must determine the reasonable adjustment to the Kelley Blue Book private party value in light of the Vehicle's age and condition as of the petition date.... [Debtors' proposed value] does not reflect a downward adjustment for mileage.... In support of a further downward adjustment, the Debtors point to the need for a replacement air filter and a new carpet. The Debtors, however, offer no competent evidence to quantify these downward adjustments."

(x) *In re McElroy*, 339 B.R. 185, 189 (Bankr. C.D. Ill. 2006) (citations omitted):

"[T]he NADA retail values proffered by Ford may be too high. The NADA values may include warranties, reconditioning, and other services not directly related to the actual value of the vehicle. In the absence of evidence of the markup for services or the profit margin which might be included in the NADA tables for the Debtors' vehicles, the Court finds that a 5% discount from the NADA retail values presented would be appropriate to determine the vehicles' replacement value for purposes of cramdown."

"Replacement value, rather than liquidation value, is the appropriate valuation standard for cramdown in Chapter 13 proceedings.... Where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning."

(c) Insurance Appraisals

(i) FRE 803(6) excludes from hearsay "[a] record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

(ii) *U.S. v. Licavoli,* 604 F.2d 613, 622-23 (9th Cir. 1979):

"In this case, Licavoli failed to alert the district court to specific facts raising any doubt concerning Aranoff's qualifications as an appraiser. Moreover, the insurer's reliance on Aranoff's appraisal is affirmative evidence of the reliability of the appraisal. It was in the interest of the insurance company to pay no more on Charna Signer's claim than the painting was actually worth; had the insurer doubted Aranoff's qualifications or entertained a belief that the Lucretia was worth significantly less than $10,000, it is unlikely that the insurer would have adopted Aranoff's appraisal. The trial judge did not abuse his discretion in admitting the business record into evidence."

(iii) *Selig v. United States*, 740 F.2d 572, 578 (7th Cir. 1984):

"The government attacks the admissibility of these appraisals, claiming that they do not qualify as hearsay exceptions under Federal Rule of Evidence 803(6). We disagree.... The appraisals also satisfy the regularity requirements of Rule 803(6). Most businesses must prepare as a matter of course documents relevant to tax matters. That alone does not disqualify them as business records in a case involving tax issues. The appraisals were prepared in the regular course of the management of the team, and the government points to nothing extraordinary in their preparation. Also, no evidence suggests that the appraisals were prepared in anticipation of litigation."

(iv) *United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007), as amended (Feb. 13, 2008), judgment entered, 264 F. App'x 16 (D.C. Cir. 2008):

> "[S]everal courts have found that a record of which a firm takes custody is thereby 'made' by the firm within the meaning of the rule (and thus is admissible if all the other requirements are satisfied). We join those courts. Thus *United States v. Duncan,* 919 F.2d 981, 986 (5th Cir.1990), found that there was 'no requirement that the [business] records be created by the business having custody of them,' so that insurance company custodians could lay an adequate foundation for admitting records compiled by those companies from the business records of hospitals. To the same effect is *United States v. Childs,* 5 F.3d 1328, 1333 (9th Cir.1993), which accepted documents under Rule 902(11) (such as certificates of title and odometer statements) that were maintained by an automobile dealership in the regular course of business though not originated by the dealership. *See id.* at 1333–34 (reviewing similar cases); *Matter of Ollag Construction Equipment Corporation,* 665 F.2d 43, 46 (2d Cir. 1981) (finding that 'business records are admissible if witnesses testify that the records are integrated into a company's records and relied upon in its day-to-day operations,' and noting that relevant financial statements were completed at bank's request and were of a type that the bank regularly used to make decisions whether to extend credit); *United States v. Carranco,* 551 F.2d 1197, 1200 (10th Cir. 1977) (holding that freight bills, though drafted by other companies, were business records of a shipping company because they were 'adopted and relied upon by' the shipping company)…."

(d) Tax Assessments

(i) FRE 803(8) excludes from hearsay "[a] record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(ii) *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 542 (4th Cir. 2007):

"Phelps & Associates also challenges the admission of a Mecklenburg County tax assessment, offered to prove the value of Galloway's property. It argues that the assessment contained undisclosed expert testimony, i.e., a real estate appraisal, subject to the gatekeeper provisions of Federal Rule of Evidence 702 and [*Daubert*]. We conclude, however, that the assessment could appropriately have been admitted under the agency records exception to the hearsay rule, Fed. R. Evid. 803(8), which holds such documents sufficiently reliable because they represent the outcome of a governmental process and were relied upon for non-judicial purposes."

(iii) *Peter v. Commissioner*, No. 11381-06S, 2008 WL 4977615, at *6 (T.C. Nov. 24, 2008) (citation and internal quotation marks omitted):

"Further and specifically, the Certificate of Assessments is neither inadmissible hearsay evidence nor inadmissible for lack of foundation. Rather, the Certificate of Assessments is admissible under the public records exception of rule 803(8) of the Federal Rules of Evidence because it is the product of systematized data storage and retrieval by a public agency charged with the responsibility of maintaining accurate financial and tax information."

(iv) *In re Slovak*, 489 B.R. 824, 826 (Bankr. D. Minn. 2013):

"Generally, the assessed value of a property for tax purposes is not considered direct evidence of a property's market value. In similar property valuation cases, courts have rejected the estimated market value found in tax assessments, requiring further information about the calculation of the assessed value and additional supporting and reliable evidence of the value of the property."

(v) *In re Digby*, 47 B.R. 614, 618 (Bankr. N.D. Ala. 1985) (adequate protection dispute):

"The tax-assessment returns are, as a whole, 'hearsay,' but Federal Rule of Evidence 803(8) excepts 'public records and reports' which set forth 'the activities of the office.' The debtor's exhibit shows those 'activities' to have been a tax assessment based upon an 'appraised' value of $45,810 but not that the property had a value of $45,810."

(vi) *In re DeRosa*, 442 B.R. 173, 176-77 (Bankr. D. Mass. 2010):

"Wholly apart from the lack of contemporaneousness of the assessor's work product, the valuation process itself cannot be objectively evaluated. While the guidelines contain recommended procedures, they appear to be aspirational only.... While the triennial reassessments are mandatory, as noted above, by definition they do not reflect current market value. Without acceptable evidence as to the methodology and timeliness of the ... tax assessor's valuation of the ... property, that valuation cannot support [relief]."

(vii) *Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 65–66 (D.D.C. 2010):

"The Court agrees with Defendants that tax assessment records alone are unlikely to establish the fair market value of a property."

FEDERAL JUDICIAL CENTER

EVIDENCE AND TRIAL SKILLS PANEL:
IN RE CLASSIC AUTOS, INC.

MARCH 13, 2017

Gabor Balassa
Kirkland & Ellis LLP

Katie Jakola
Kirkland & Ellis LLP

Claire Ann Resop
Steinhilber Swanson LLP

Factual Background

- Classic Autos, Inc. buys, restores, and sells classic cars
- Classic pledged collateral to support loan:
  - Buildings – warehouse, restoration shop, showroom
  - Land where buildings are located
  - Inventory of classic automobiles
- Filed for Chapter 11 on April 1, 2016
- Adequate protection dispute arises at confirmation

PRELIMINARY EVIDENTIARY ISSUES

Phone or Video Deposition?

Expert witness,

Dr. Nancy Mahoney, is overseas doing research.

Preliminary Evidentiary Issues: Question #1

Should the court allow the witness to testify by telephone or video?

1 = Yes

2 = No

5

Motions to Appear by Telephone, Video or Deposition

Fed. R. Civ. P. 43. Taking Testimony

(a) **In Open Court:** Contemporaneous transmission allowed for good cause in compelling circumstances with safeguards

(c) **Evidence on a Motion.** When a **motion** relies on facts outside the record, the court may hear the matter on **affidavits** or may hear it wholly or partly on **oral testimony or on depositions**

6

Motions to Appear by Telephone, Video or Deposition

Advisory Committee Notes to Fed. R. Civ. P. 43:

1) Inconvenience is not enough
2) Unexpected reasons, such as accident or illness, are best
3) Depositions are better
4) Notice ASAP
5) Other safeguards for advance notice

7

Motions to Appear by Telephone, Video or Deposition

Most courts **do not** allow remote testimony:

- Contemporaneous transmission not preferred
- Inconvenience is not enough
- Rule 43(a) is permissive, not mandatory
- No unexpected reason
- Knew well in advance of trial of need
- Could have made other arrangements

8

Motions to Appear by Telephone, Video or Deposition

Some courts **do** allow remote testimony:

- Distance of witness from court and resulting difficulty, expense, possible delay and uncertainty
- Adequate opportunity to cross-examine
- Advance arrangements made
- Lack of prejudice to non-moving party
- Prejudice to moving party

9

De Bene Esse Deposition

- Literally - as well done
- Anticipates witness unavailable for trial
- Used in place of live testimony in court
- Objections made as if at trial
- Video or reading of transcript at trial

10

Preliminary Evidentiary Issues: Question #2

Should the court allow the *de bene esse* deposition?

1 = Yes

2 = No

De Bene Esse Deposition

Factors considered:

- Timing of request relative to discovery cutoff
- Timing of request relative to trial date
- Facts that precipitated or necessitated request
- Amount of advance notice before and after
- Fairness to adverse party
- Ability to cure any prejudice

EXPERTS
Issue #3: Reliance on Other Experts

13

Reliance on Other Experts

- Parties disclose competing valuation experts
- Unsecured creditors' expert (Howe) opines that secured creditor's expert (Mahoney) undervalued rare cars

1957 Ferrari 250 Testa Rossa

14

Reliance on Other Experts

- Howe also opines that improved marketing would increase valuation

15

Reliance on Other Experts

- Howe relied on Steve Opie, a classic car dealer with 35 years of experience
- Howe talked to Opie and reviewed his pricing guide
- Opie has not been disclosed as an expert
- The secured creditor brings a *Daubert* motion against Howe

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Reliance on Other Experts: Question #3

- Should Howe's valuation opinions be excluded, in whole or in part?

1 = Yes

2 = No

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Admissibility of Expert Opinions

- FRE 702 and *Daubert* impose three requirements:
  1. Expert must be **qualified** to offer the opinion
  2. Expert's methodology must be **reliable**
  3. Expert's opinion must be **relevant**

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Reliance on Other Experts

- **FRE 702(a):** Expert must have sufficient "scientific, technical, or other specialized knowledge" in field
- **FRE 703:** Expert may rely on "facts or data" of a type reasonably relied upon by experts in the field

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Reliance on Other Experts

- Expert testimony is limited to area of expertise
- Courts generally allow experts to rely on staff who perform work at her direction
- Most courts do not allow experts to present work and opinions of others in another field
- Expert may treat other's opinion as an assumption

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EXPERTS
Issue #4: Reliability of Expert Opinions

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Reliability of Expert Opinions

- Mahoney relies on debtor's business plan and forecasts
- Spoke with CFO but did not validate the records
- Unsecured creditors bring *Daubert* motion

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Reliability of Expert Opinions: Question #4

- Should Mahoney's valuation opinions be excluded, in whole or in part?

  1 = Yes

  2 = No

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Reliability of Expert Opinions

- **FRE 702(b)**: Opinion must be "based on sufficient facts or data"
- **FRE 702(c)**: Opinion must be "product of reliable principles and methods"
- **FRE 702(d):** Expert must have "reliably applied the principles and methods" to facts of the case

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Reliability of Expert Opinions

- To assess reliability, courts consider whether method:
  1. Can be and has been **tested**
  2. Has been subjected to **peer review and publication**
  3. Has a known or potential **rate of error**
  4. Is **generally accepted** within scientific community

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Reliability of Expert Opinions

- Expert can testify if she performed some validation
- *Daubert* is not a substitute for cross-examination
- Some courts do not apply *Daubert* as strictly in bench trials, where jury confusion is not a concern

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NON-EXPERT EVIDENCE ON VALUATION

Issue #5: Lay Opinion Testimony

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Lay Opinion Testimony

- Albus Goodwrench
  - Classic's CEO and majority shareholder
  - Supervises selection of autos to purchase
  - Involved in determining sale price of refurbished autos
  - Called as a fact witness to opine about autos' value

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Non-Expert Valuation Evidence: Question #5

- Should the Court exclude Mr. Goodwrench's lay opinion testimony?

  1 = Yes

  2 = No

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Business Valuation by Lay Witness

- **FRE 701. Opinion Testimony by Lay Witnesses.**

  Lay opinion testimony admissible if:

  (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 scope of Rule 702

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Business Valuation by Lay Witness

- Advisory Committee Notes to Rule 701 recognize that owner/officer may testify to business value

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Business Valuation by Lay Witness

- Courts generally allow valuation testimony by business owners if the witness:
  - Has **personal knowledge of the factors** relied on to estimate valuation, and
  - Applies **straightforward calculation** within the competence of laypersons

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Business Valuation by Lay Witness

- Concern with parties using lay witnesses to avoid expert disclosure requirements
  - Courts may encourage parties to disclose lay valuation opinions before trial

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NON-EXPERT EVIDENCE ON VALUATION

Issue #6: Market Reports

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Market Reports

- Hemmings Price Guide
  - Relied on by sellers and buyers to price classic car transactions
  - Guides provide price range (high and low) by make, model, year, and condition

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Non-Expert Valuation Evidence: Question #6

- Should the Court exclude the price guides?

1 = Yes

2 = No

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Hearsay Exception – Market Reports

- **FRE 803(17) excludes from hearsay:**
  - "Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations"

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Pricing Guides as Valuation Evidence

- Under FRE 803(17), courts admit pricing guides to value automobiles
- Courts caution against exclusive reliance on pricing guides
  - Application may require expertise (*e.g.*, assessment of property condition)

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NON-EXPERT EVIDENCE ON VALUATION

Issue #7: Insurance Appraisals

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Insurance Appraisals

- Shortly before petition date, Classic renewed an insurance policy on its autos
- Insurance carrier obtained an appraisal
- Classic received a copy and retained it in Classic's files

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Non-Expert Valuation Evidence: Question #7

- Should the Court exclude the insurance appraisals?

  1 = Yes

  2 = No

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Business Records Exception to Hearsay

FRE 803(6) excludes from hearsay:

A record of an act, event, or opinion if:

(A) Record was made contemporaneously by person with knowledge;

(B) Record was kept in the ordinary course of business;

(C) Making the record was a regular practice of business activity;

(D) All conditions are shown by testimony of a qualified witness; and

(E) No indication of lack of trustworthiness

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Insurance Appraisals as Valuation Evidence

- Courts admit personal property or building appraisals that qualify as business records

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Insurance Appraisals as Valuation Evidence

- Many courts allow for "adoptive" business records that the company did not prepare
- Company must have, in the ordinary course of business:
  - Obtained
  - Maintained
  - Relied on the records

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NON-EXPERT EVIDENCE ON VALUATION

Issue #8: Tax Assessments

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Tax Assessments

- Tax assessments of Classic's buildings and land
  - Performed by local tax authorities

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Non-Expert Valuation Evidence: Question #8

- Should the Court exclude the tax assessments?

  1 = Yes

  2 = No

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Public Records Exception to Hearsay

FRE 803(8) excludes from hearsay:

A record or statement of a public office if:

(A) It sets out:

(i) The office's activities;

(ii) A matter observed while under legal duty to report

(B) The opponent does not show the circumstances indicate a lack of trustworthiness

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Tax Assessments as Valuation Evidence

- Courts generally hold municipal tax assessments satisfy public records hearsay exception
- But courts may exclude appraisal reports on relevance grounds
  - May require that offering party show "appraised" value represents the legally relevant measure of value

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Questions

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