



AMERICAN
BANKRUPTCY
INSTITUTE

2017 Annual Spring Meeting

Consumer

How to Litigate the Value of a Single-Family Home

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How to Litigate the Value of a Single Family Home

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Hypothetical and Appraisal of 1 Adams Street, Any-Town, State of Euphoria, USA

Value effective as of December 16, 2016

Sally Sympathetic bought her single-family home at 1 Adams Street, Any-Town, State of Euphoria, USA in May of 2004. Sally paid \$860,000.00 for the home located in a posh suburb of downtown Shawmut, the largest city in Euphoria and home to several, major hospitals and universities. She financed her acquisition of the home with a purchase-money first mortgage loan to Always First Credit Union (“Always First”) in the amount of \$750,000.00. The loan is secured by a mortgage for the same amount given by Sally in favor of Always First and duly recorded with the local land recorder’s office. In 2006, Sally realized she had become over-extended with her credit card purchases and took out a \$100,000.00 HELOC loan to Harboring Second Thoughts Bank (“HSTB”) to retire all of her credit card debt. The HELOC mortgage executed by Sally to secure the HELOC loan was also duly recorded in the land recorder’s office.

Sally lost her high-paying job with New Wave Pharmaceuticals in June of 2015 after the FDA denied New Wave’s application for an exclusive, 20-year patent on what New Wave had hoped would be a ground-breaking, weight-loss pill they dubbed as the “Churn and Burn” sensation. Sally depleted much of her hard-earned savings trying to keep both mortgages afloat, but alas, she was forced to file a Chapter 13 bankruptcy petition on December 16, 2016 on the eve of Always First’s foreclosure sale scheduled for the following day. Sally, having held out hope that she would be able to find a better paying job or some other resolution to her financial plight before the grim reaper arrived at her doorstep to foreclose, had not reached out for an attorney’s advice prior to filing the petition. Instead, she went to the bankruptcy court, talked to the not-so-helpful lady behind the counter who kept telling her she couldn’t give Sally any legal advice, and filled out the petition and schedules as best she could.

As of the petition filing date Sally owed \$655,000.00 on the Always First mortgage and \$83,000.00 on the HSTB HELOC mortgage. Property values in the area had plummeted in the wake of the mortgage crisis in 2007 but had shown a significant rebound since. Still, values in Any-Town have yet to reach the great heights of the pre-crisis era. Sally listed both mortgage creditors as secured creditors in her Schedules but also listed the value of her Property at \$670,000.00.

When Sally got one of those strange looking Show-Cause orders that said she had to file her plan within 14 days or her case was going to be dismissed she retained an attorney. The attorney filed a chapter 13 plan and a Motion to Determine the Secured Status of and Void as Wholly Unsecured the HSTB HELOC mortgage. The motion now asserted that the value of the property was \$625,000.00. HSTB filed an objection to the Motion to Determine supported by an appraisal valuing the Property at \$660,000.00 as of the filing date of the petition.

Controlling law in the circuit holds that a junior mortgage may only be avoided on a debtor’s single-family residence if there is no equity in the property above and beyond what is

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owed on senior encumbrances. If the junior lien creditor can establish that even a dollar of equity in the property exists above and beyond what is owed on senior encumbrances, no portion of the junior lien may be avoided.

Summoned out of retirement the Hon. Eugene Wedoff has scheduled an evidentiary hearing on the Debtor's Motion to Determine for April 21, 2017 at 10:30 a.m. In the parties' Joint Pre-Trial Memorandum, Sally Sympathetic is the lone witness listed for the Debtor; the bank lists Sean, "Get-the-Value-U-Need," Maloney, licensed appraiser by the State of Euphoria, as its only witness.

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Maloney Appraisal Services

File No. "Redacted"

Loan No.

Uniform Residential Appraisal Report

The purpose of this appraisal report is to provide the lender/client with an accurate, and adequately supported, opinion of the market value of the subject property.

Property Address **Adams Street** City **Anytown** State **CA** Zip Code **92111**

Borrower **Owner of Public Record** County **San Diego**

Legal Description **Reg of Deeds Last Sale Book Page / SMSA**

Assessor's Parcel # **Map Lot 1** Tax Year **2016** R.E. Taxes \$ **6,873**

Neighborhood Name **Map Reference Page** Census Tract **3543.00**

Occupant ☐ Owner ☐ Tenant ☒ Vacant Special Assessments \$ **0** PUD ☐ HOA \$ **0** per year ☐ per month

Property Rights Appraised ☒ Fee Simple ☐ Leasehold ☐ Other (describe)

Assignment Type ☐ Purchase Transaction ☐ Refinance Transaction ☒ Other (describe) **Bankruptcy**

Lender/Client **Address**

Is the subject property currently offered for sale or has it been offered for sale in the twelve months prior to the effective date of this appraisal? ☐ Yes ☒ No

Report data source(s) used, offerings price(s), and date(s). **The subject has not been listed for sale in the past 12 months. The subject last sold new on 12/11/2000 for \$650,000 as per B&T & Reg of Deeds.**

I ☐ did ☐ did not analyze the contract for sale for the subject purchase transaction. Explain the results of the analysis of the contract for sale or why the analysis was not performed.

Contract Price \$ **Date of Contract** Is the property seller the owner of public record? ☐ Yes ☐ No Data Source(s)

Is there any financial assistance (loan charges, sale concessions, gift or downpayment assistance, etc.) to be paid by any party on behalf of the borrower? ☐ Yes ☐ No

If Yes, report the total dollar amount and describe the items to be paid.

Note: Race and the racial composition of the neighborhood are not appraisal factors.

Neighborhood Characteristics				One-Unit Housing Trends				One-Unit Housing		Present Land Use %	
Location	<input checked="" type="checkbox"/> Urban	<input type="checkbox"/> Suburban	<input type="checkbox"/> Rural	Property Values	<input type="checkbox"/> Increasing	<input checked="" type="checkbox"/> Stable	<input type="checkbox"/> Declining	PRICE	AGE	One-Unit	20 %
Built-Up	<input checked="" type="checkbox"/> Over 75%	<input type="checkbox"/> 25-75%	<input type="checkbox"/> Under 25%	Demand/Supply	<input type="checkbox"/> Shortage	<input checked="" type="checkbox"/> In Balance	<input type="checkbox"/> Over Supply	\$ (000)	(yrs)	2-4 Unit	40 %
Growth	<input type="checkbox"/> Rapid	<input checked="" type="checkbox"/> Stable	<input type="checkbox"/> Slow	Marketing Time	<input checked="" type="checkbox"/> Under 3 mths	<input type="checkbox"/> 3-6 mths	<input type="checkbox"/> Over 6 mths	500	Low	Multi-Family	10 %
Neighborhood Boundaries	Boundaries run Pond & Rte 1 to north; Ave & Rts 1 & 2 to south & St & Rte 1 to west.			750	Pred.	15	Other	Condo	20 %		

Neighborhood Description **The subject area offers a variety of mixed housing units in overall average to good condition. The City of is located directly on Rts 1 & 2 & 3 near 90 and next to the city of Commercial influences along St in the form of light retail, offices and education facilities and not adverse. There were no factors that would detract from value noted during the inspection.**

Market Conditions (including support for the above conclusions) **The subject market appears to have stabilized recently with the number of listings decreasing. This after long periods of appreciation thru 2004 & decreases from mid 2005 into 2016. Interest rates have recently dropped to historic lows & still remain attractive. The average marketing time for similar property in this market is 1 to 3 months. No changes anticipated.**

Dimensions **Approximately 10' Frontage** Area **4,676** Shape **Irregular** View **Avg/Nbhd**

Specific Zoning Classification **Res B** Zoning Description **Res B Minimum Requirements 5,000 sf / 50' Frontage**

Zoning Compliance ☐ Legal ☒ Legal Nonconforming (Grandfathered Use) ☐ No Zoning ☐ Illegal (describe)

Is the highest and best use of subject property as improved (or as proposed per plans and specifications) the present use? ☒ Yes ☐ No If No, describe.

Utilities	Public	Other (describe)	Public	Other (describe)	Off-site Improvements--Type	Public	Private
Electricity	<input checked="" type="checkbox"/>	<input type="checkbox"/> 200 Amp Circuit Br	Water	<input checked="" type="checkbox"/>	Street	Asphalt	<input checked="" type="checkbox"/>
Gas	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Sanitary Sewer	<input checked="" type="checkbox"/>	Alley		

FEMA Special Flood Hazard Area ☐ Yes ☒ No FEMA Flood Zone **X** FEMA Map # **06/04/2010**

Are the utilities and/or off-site improvements typical for the market area? ☒ Yes ☐ No If No, describe.

Are there any adverse site conditions or external factors (easements, encroachments, environmental conditions, land uses, etc.)? ☐ Yes ☒ No If Yes, describe.

The subject lot predates current city zoning bylaws & is legal non-conforming. This is common for area & not adverse. The subject may be rebuilt to original footprint if destroyed per city of . The subject is an attached single family dwelling. The subject has some utility easements; also not adverse. No adverse easements or encroachments noted. The subject is not located in flood zone. See attached flood map.

General Description		Foundation		Exterior Description		materials/condition		Interior		materials/condition	
Units	<input checked="" type="checkbox"/> One <input type="checkbox"/> One with Accessory Unit	Concrete Slab	<input type="checkbox"/> Crawl Space	Foundation Walls	PConc/Avg/Good	Floors	Hrdwd/Poor				
# of Stories	2.5	<input checked="" type="checkbox"/> Full Basement	<input type="checkbox"/> Partial Basement	Exterior Walls	Wood Clpbd&Sh/Avg	Walls	Wd/Dryw/Plast/Poor				
Type	<input type="checkbox"/> Det. <input checked="" type="checkbox"/> Att. <input checked="" type="checkbox"/> S-Det/End Unit	Basement Area	718 sq. ft.	Roof Surface	AsphaltSh/Avg	Trim/Finish	Wood/Paint/Poor				
<input checked="" type="checkbox"/> Existing <input type="checkbox"/> Proposed <input type="checkbox"/> Under Const.		Basement Finish	0 %	Gutters & Downspouts	Yes/Alum	Bath Floor	Ceramic/Average				
Design (Style)	Colonial	<input checked="" type="checkbox"/> Outside Entry/Exit	<input type="checkbox"/> Sump Pump	Window Type	DH/Thermal/Avg	Bath Wainscot	Ceramic/Average				
Year Built	2000	Evidence of	<input type="checkbox"/> Infestation <input type="checkbox"/> None	Storm Sash/Insulated	None Insulated	Car Storage	<input type="checkbox"/> None				
Effective Age (Yrs)	15	<input type="checkbox"/> Dampness <input type="checkbox"/> Settlement		Screens	Yes/Avg	<input checked="" type="checkbox"/> Driveway	# of Cars 2				
Attic	<input checked="" type="checkbox"/> None	Heating	<input checked="" type="checkbox"/> FWA <input type="checkbox"/> HWB <input type="checkbox"/> Radiant	Amenities	<input type="checkbox"/> Woodstove(s) #	Driveway Surface	Paved				
<input type="checkbox"/> Drop Stair	<input type="checkbox"/> Stairs	<input type="checkbox"/> Other	<input type="checkbox"/> Fuel <input type="checkbox"/> Gas	Fireplace(s) #	0 <input checked="" type="checkbox"/> Fence	Wood	<input type="checkbox"/> Garage	# of Cars 0			
<input type="checkbox"/> Floor	<input type="checkbox"/> Scuttle	Cooling	<input checked="" type="checkbox"/> Central Air Conditioning	<input checked="" type="checkbox"/> Patio/Deck	Deck	<input checked="" type="checkbox"/> Porch	Fr Encl	<input type="checkbox"/> Carport	# of Cars 0		
<input type="checkbox"/> Finished	<input type="checkbox"/> Heated	<input type="checkbox"/> Individual	<input type="checkbox"/> Other	Pool	None	<input type="checkbox"/> Other	<input type="checkbox"/> Att.	<input type="checkbox"/> Det.	<input type="checkbox"/> Built-in		

Appliances ☒ Refrigerator ☒ Range/Oven ☒ Dishwasher ☐ Disposal ☐ Microwave ☒ Washer/Dryer ☐ Other (describe)

Finished area **above** grade contains: **7** Rooms **3** Bedrooms **2.1** Bath(s) **Square Feet of Gross Living Area Above Grade**

Additional features (special energy efficient items, etc.) **The subject is a attached 16 yr old colonial in poor condition consisting of 7 rooms, 3 bedrooms & 2.1 baths & 1,886 sf of GLA, 2 deeded parking spaces, rear deck, front enclosed porch & 4,676 sf lot.**

Describe the condition of the property (including needed repairs, deterioration, renovations, remodeling, etc.). **The subject is in need of a complete gut as all drywall is moldy in both walls & ceilings, hardwood floors have heaved due to frozen pipes, hot & cold water plumbing is in need of replacement & insulation damaged. The roof shows no signs of leakage. Windows appear undamaged. External doors are in need of replacement. The heating system is FHA/gas in average condition and AC condensers outside in need of replacement. The foundation is poured concrete in good condition & wood exterior is average. Deck needs updating. The subject is however only 16 years old & has good structural integrity.**

Are there any physical deficiencies or adverse conditions that affect the livability, soundness, or structural integrity of the property? ☐ Yes ☒ No If Yes, describe

No functional or external obsolescence noted. Depreciation is not normal as dwelling has been neglected.

Does the property generally conform to the neighborhood (functional utility, style, condition, use, construction, etc.)? ☒ Yes ☐ No If No, describe

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There are 5 comparable properties currently offered for sale in the subject neighborhood ranging in price from \$ 679,900 to \$ 799,000	
There are 17 comparable sales in the subject neighborhood within the past twelve months ranging in sale price from \$ 460,000 to \$ 830,000	
FEATURE	SUBJECT
Address	1 Adams Street Anytown, 02111
Proximity to Subject	2.59 miles E
Sale Price	\$ 711,500
Sale Price/Gross Liv. Area	\$ 552.41 sq. ft.
Data Source(s)	MLS# "Redacted" DOM 3
Verification Source(s)	B&T & Assessor
VALUE ADJUSTMENTS	DESCRIPTION
Sale or Financing	ArmLth
Concessions	Conv:0
Date of Sale/Time	s05/16;c02/16
Location	Average
Leasehold/Fee Simple	Fee Simple
Site	4,676
View	Avg/Nbhd
Design (Style)	Attached Colonial
Quality of Construction	Avg/Good
Actual Age	16 yrs
Condition	Poor
Above Grade	Total Bdrms. Baths
Room Count	7 3 2.1
Gross Living Area	sq. ft. 1,288
Basement & Finished	Full
Rooms Below Grade	Unfinished
Functional Utility	Average
Heating/Cooling	FHA/Central
Energy Efficient Items	Standard
Garage/Carport	Off Street
Porch/Patio/Deck	EPorch/Deck
Fireplaces	No Fireplace
Pool	None
Net Adjustment (Total)	\$ 14,000
Adjusted Sale Price	Net Adj: 2%
of Comparables	Gross Adj: 2%
I <input checked="" type="checkbox"/> did not research the sale or transfer history of the subject property and comparable sales. If not, explain	
My research <input type="checkbox"/> did <input checked="" type="checkbox"/> did not reveal any prior sales or transfers of the subject property for the three years prior to the effective date of this appraisal.	
Data source(s) B&T & Deed	
My research <input type="checkbox"/> did <input checked="" type="checkbox"/> did not reveal any prior sales or transfers of the comparable sales for the year prior to the date of sale of the comparable sale.	
Data source(s) B&T	
Report the results of the research and analysis of the prior sale or transfer history of the subject property and comparable sales (report additional prior sales on page 3).	
ITEM	SUBJECT
Date of Prior Sale/Transfer	
Price of Prior Sale/Transfer	
Data Source(s)	as per B&T & Deed
Effective Date of Data Source(s)	12/16/2016
Analysis of prior sale or transfer history of the subject property and comparable sales The subject has not sold in the past 36 months and has not been listed for sale in the past 12 months as per B&T, Reg of Deeds & MLS. The subject last sold new on 12/11/2000 for \$650,000 as per B&T & Reg of Deeds. The comparable sales have no prior 12 month sales history as per B&T.	
Summary of Sales Comparison Approach GLA adjusted @ \$40 per sf, rounded over 100 sf. All comparable sales considered in final analysis. Other adjustments are considered reliable and are based on Marshall & Swift Cost Manual & local contractors. All comparable sales have sold in the past 7 months and are located within 2.5 miles in . Sales used are considered most similar to the subject in style, room count, features and locational appeal in the competing marketplace. After an extensive market search, the best available comparables were utilized in preparing this report. No lot, style or bedroom adjustments for the comparable sales as they offer similar land utility and appeal. Comp #2 and #3 adjusted for superior condition as per MLS listing, adjusted for no basement and adjusted for garage parking.	
Indicated Value by Sales Comparison Approach \$ 660,000	
Indicated Value by: Sales Comparison Approach \$ 660,000 Cost Approach (if developed) \$ 0 Income Approach (if developed) \$ 0	
The sales comparison approach is the primary indicator of the estimated market value. The cost approach is not developed. The income approach was not developed.	
This appraisal is made <input checked="" type="checkbox"/> "as is," <input type="checkbox"/> subject to completion per plans and specifications on the basis of a hypothetical condition that the improvements have been completed, <input type="checkbox"/> subject to the following repairs or alterations on the basis of a hypothetical condition that the repairs or alterations have been completed, or <input type="checkbox"/> subject to the following required inspection based on the extraordinary assumption that the condition or deficiency does not require alteration or repair. This appraisal is written 'as is'. The subject is in poor overall condition with extensive need of repairs.	
Based on a complete visual inspection of the interior and exterior areas of the subject property, defined scope of work, statement of assumptions and limiting conditions, and appraiser's certification, my (our) opinion of the market value, as defined, of the real property that is the subject of this report is \$ 660,000, as of 12/16/2016, which is the date of inspection and the effective date of this appraisal.	

Freddie Mac Form 70 March 2005

Produced by ClickFORMS Software 800-622-8727

Fannie Mae Form 1004 March 2005

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ADDITIONAL COMMENTS	The use of any file photos is not adverse due to photo being taken closer to actual sales date.			
	The subject may be rebuilt "as is" on it's original footprint if destroyed, according to the building department.			
	The market is considered stable in this price range for this market segment based on: Current supply and demand, DOM for all sales provided and current marketing time (1-3 months)			
	The subject lot predates current zoning by-laws and property is legal non-conforming. This is common for area & not adverse.			
	Digital Signatures: This report contains "digital signatures". It can be used to ensure that the original content of the message or document that has been conveyed is unchanged. Digital signatures are easily transportable, can not be easily repudiated, cannot be imitated by someone else, and can be automatically time-stamped. The signatures in this appraisal are password protected from unauthorized use and only the appraiser or supervisor has access to their own digital signature.			
COST APPROACH	COST APPROACH TO VALUE (not required by Fannie Mae.)			
	Provide adequate information for the lender/client to replicate your cost figures and calculations.			
	Support for the opinion of site value (summary of comparable land sales or other methods for estimating site value)			
	ESTIMATED <input type="checkbox"/> REPRODUCTION OR <input type="checkbox"/> REPLACEMENT COST NEW		OPINION OF SITE VALUE	
	Source of cost data		Dwelling	
	Quality rating from cost service		Sq. Ft. @ \$	
	Effective date of cost data		Sq. Ft. @ \$	
	Comments on Cost Approach (gross living area calculations, depreciation, etc.)		= \$ 0	
			Garage/Carport 0 Sq. Ft. @ \$ 0.00 = \$ 0	
			Total Estimate of Cost-new = \$ 0	
			Less Physical Functional 0 External 0	
			Depreciation 0 0 0 = \$ (0)	
			Depreciated Cost of Improvements = \$ 0	
			"As-is" Value of Site Improvements = \$	
Estimated Remaining Economic Life (HUD and VA only) 50 Years		Indicated Value By Cost Approach = \$ 0		
INCOME	INCOME APPROACH TO VALUE (not required by Fannie Mae.)			
	Estimated Monthly Market Rent \$		X Gross Multiplier = \$	
	Summary of Income Approach (including support for market rent and GRM)		Indicated Value by Income Approach	
PUD INFORMATION	PROJECT INFORMATION FOR PUDs (if applicable)			
	Is the developer/builder in control of the Homeowner's Association (HOA)? <input type="checkbox"/> Yes <input type="checkbox"/> No Unit type(s) <input type="checkbox"/> Detached <input type="checkbox"/> Attached			
	Provide the following information for PUDs ONLY if the developer/builder is in control of the HOA and the subject property is an attached dwelling unit.			
	Legal Name of Project			
	Total number of phases		Total number of units	
	Total number of units rented		Total number of units for sale	
			Data source(s)	
	Was the project created by the conversion of existing building(s) into a PUD? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, date of conversion.			
	Does the project contain any multi-dwelling units? <input type="checkbox"/> Yes <input type="checkbox"/> No Data source.			
	Are the units, common elements, and recreation facilities complete? <input type="checkbox"/> Yes <input type="checkbox"/> No If No, describe the status of completion.			
	Are the common elements leased to or by the Homeowner's Association? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, describe the rental terms and options.			
	Describe common elements and recreational facilities.			

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File No. [Redacted]
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This report form is designed to report an appraisal of a one-unit property or a one-unit property with an accessory unit; including a unit in a planned unit development (PUD). This report form is not designed to report an appraisal of a manufactured home or a unit in a condominium or cooperative project.

This appraisal report is subject to the following scope of work, intended use, intended user, definition of market value, statement of assumptions and limiting conditions, and certifications. Modifications, additions, or deletions to the intended use, intended user, definition of market value, or assumptions and limiting conditions are not permitted. The appraiser may expand the scope of work to include any additional research or analysis necessary based on the complexity of this appraisal assignment. Modifications or deletions to the certifications are also not permitted. However, additional certifications that do not constitute material alterations to this appraisal report, such as those required by law or those related to the appraiser's continuing education or membership in an appraisal organization, are permitted.

SCOPE OF WORK: The scope of work for this appraisal is defined by the complexity of this appraisal assignment and the reporting requirements of this appraisal report form, including the following definition of market value, statement of assumptions and limiting conditions, and certifications. The appraiser must, at a minimum: (1) perform a complete visual inspection of the interior and exterior areas of the subject property, (2) inspect the neighborhood, (3) inspect each of the comparable sales from at least the street, (4) research, verify, and analyze data from reliable public and/or private sources, and (5) report his or her analysis, opinions, and conclusions in this appraisal report.

INTENDED USE: The intended use of this appraisal report is for the lender/client to evaluate the property that is the subject of this appraisal for a mortgage finance transaction.

INTENDED USER: The intended user of this appraisal report is the lender/client.

DEFINITION OF MARKET VALUE: The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and each acting in what he or she considers his or her own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in U. S. dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions* granted by anyone associated with the sale.

*Adjustments to the comparables must be made for special or creative financing or sales concessions. No adjustments are necessary for those costs which are normally paid by sellers as a result of tradition or law in a market area; these costs are readily identifiable since the seller pays these costs in virtually all sales transactions. Special or creative financing adjustments can be made to the comparable property by comparisons to financing terms offered by a third party institutional lender that is not already involved in the property or transaction. Any adjustment should not be calculated on a mechanical dollar for dollar cost of the financing or concession but the dollar amount of any adjustment should approximate the market's reaction to the financing or concessions based on the appraiser's judgment.

STATEMENT OF ASSUMPTIONS AND LIMITING CONDITIONS: The appraiser's certification in this report is subject to the following assumptions and limiting conditions:

1. The appraiser will not be responsible for matters of a legal nature that affect either the property being appraised or the title to it, except for information that he or she became aware of during the research involved in performing this appraisal. The appraiser assumes that the title is good and marketable and will not render any opinions about the title.
2. The appraiser has provided a sketch in this appraisal report to show the approximate dimensions of the improvements. The sketch is included only to assist the reader in visualizing the property and understanding the appraiser's determination of its size.
3. The appraiser has examined the available flood maps that are provided by the Federal Emergency Management Agency (or other data sources) and has noted in this appraisal report whether any portion of the subject site is located in an identified Special Flood Hazard Area. Because the appraiser is not a surveyor, he or she makes no guarantees, express or implied, regarding this determination.
4. The appraiser will not give testimony or appear in court because he or she made an appraisal of the property in question, unless specific arrangements to do so have been made beforehand, or as otherwise required by law.
5. The appraiser has noted in this appraisal report any adverse conditions (such as needed repairs, deterioration, the presence of hazardous wastes, toxic substances, etc.) observed during the inspection of the subject property or that he or she became aware of during the research involved in performing this appraisal. Unless otherwise stated in this appraisal report, the appraiser has no knowledge of any hidden or unapparent physical deficiencies or adverse conditions of the property (such as, but not limited to, needed repairs, deterioration, the presence of hazardous wastes, toxic substances, adverse environmental conditions, etc.) that would make the property less valuable, and has assumed that there are no such conditions and makes no guarantees or warranties, express or implied. The appraiser will not be responsible for any such conditions that do exist or for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, this appraisal report must not be considered as an environmental assessment of the property.
6. The appraiser has based his or her appraisal report and valuation conclusion for an appraisal that is subject to satisfactory completion, repairs, or alterations on the assumption that the completion, repairs, or alterations of the subject property will be performed in a professional manner.

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APPRAISER'S CERTIFICATION: The Appraiser certifies and agrees that:

1. I have, at a minimum, developed and reported this appraisal in accordance with the scope of work requirements stated in this appraisal report.
2. I performed a complete visual inspection of the interior and exterior areas of the subject property. I reported the condition of the improvements in factual, specific terms. I identified and reported the physical deficiencies that could affect the livability, soundness, or structural integrity of the property.
3. I performed this appraisal in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place at the time this appraisal report was prepared.
4. I developed my opinion of the market value of the real property that is the subject of this report based on the sales comparison approach to value. I have adequate comparable market data to develop a reliable sales comparison approach for this appraisal assignment. I further certify that I considered the cost and income approaches to value but did not develop them, unless otherwise indicated in this report.
5. I researched, verified, analyzed, and reported on any current agreement for sale for the subject property, any offering for sale of the subject property in the twelve months prior to the effective date of this appraisal, and the prior sales of the subject property for a minimum of three years prior to the effective date of this appraisal, unless otherwise indicated in this report.
6. I researched, verified, analyzed, and reported on the prior sales of the comparable sales for a minimum of one year prior to the date of sale of the comparable sale, unless otherwise indicated in this report.
7. I selected and used comparable sales that are locationally, physically, and functionally the most similar to the subject property.
8. I have not used comparable sales that were the result of combining a land sale with the contract purchase price of a home that has been built or will be built on the land.
9. I have reported adjustments to the comparable sales that reflect the market's reaction to the differences between the subject property and the comparable sales.
10. I verified, from a disinterested source, all information in this report that was provided by parties who have a financial interest in the sale or financing of the subject property.
11. I have knowledge and experience in appraising this type of property in this market area.
12. I am aware of, and have access to, the necessary and appropriate public and private data sources, such as multiple listing services, tax assessment records, public land records and other such data sources for the area in which the property is located.
13. I obtained the information, estimates, and opinions furnished by other parties and expressed in this appraisal report from reliable sources that I believe to be true and correct.
14. I have taken into consideration the factors that have an impact on value with respect to the subject neighborhood, subject property, and the proximity of the subject property to adverse influences in the development of my opinion of market value. I have noted in this appraisal report any adverse conditions (such as, but not limited to, needed repairs, deterioration, the presence of hazardous wastes, toxic substances, adverse environmental conditions, etc.) observed during the inspection of the subject property or that I became aware of during the research involved in performing this appraisal. I have considered these adverse conditions in my analysis of the property value, and have reported on the effect of the conditions on the value and marketability of the subject property.
15. I have not knowingly withheld any significant information from this appraisal report and, to the best of my knowledge, all statements and information in this appraisal report are true and correct.
16. I stated in this appraisal report my own personal, unbiased, and professional analysis, opinions, and conclusions, which are subject only to the assumptions and limiting conditions in this appraisal report.
17. I have no present or prospective interest in the property that is the subject of this report, and I have no present or prospective personal interest or bias with respect to the participants in the transaction. I did not base, either partially or completely, my analysis and/or opinion of market value in this appraisal report on the race, color, religion, sex, age, marital status, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property or of the present owners or occupants of the properties in the vicinity of the subject property or on any other basis prohibited by law.
18. My employment and/or compensation for performing this appraisal or any future or anticipated appraisals was not conditioned on any agreement or understanding, written or otherwise, that I would report (or present analysis supporting) a predetermined specific value, a predetermined minimum value, a range or direction in value, a value that favors the cause of any party, or the attainment of a specific result or occurrence of a specific subsequent event (such as approval of a pending mortgage loan application).
19. I personally prepared all conclusions and opinions about the real estate that were set forth in this appraisal report. If I relied on significant real property appraisal assistance from any individual or individuals in the performance of this appraisal or the preparation of this appraisal report, I have named such individual(s) and disclosed the specific tasks performed in this appraisal report. I certify that any individual so named is qualified to perform the tasks. I have not authorized anyone to make a change to any item in this appraisal report; therefore, any change made to this appraisal is unauthorized and I will take no responsibility for it.
20. I identified the lender/client in this appraisal report who is the individual, organization, or agent for the organization that ordered and will receive this appraisal report.

2017 ANNUAL SPRING MEETING

Maloney Appraisal Services

File No. "Redacted"

Loan No.

Uniform Residential Appraisal Report

21. The lender/client may disclose or distribute this appraisal report to: the borrower; another lender at the request of the borrower; the mortgagee or its successors and assigns; mortgage insurers; government sponsored enterprises; other secondary market participants; data collection or reporting services; professional appraisal organizations; any department, agency, or instrumentality of the United States; and any state, the District of Columbia, or other jurisdictions; without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent. Such consent must be obtained before this appraisal report may be disclosed or distributed to any other party (including, but not limited to, the public through advertising, public relations, news, sales, or other media).

22. I am aware that any disclosure or distribution of this appraisal report by me or the lender/client may be subject to certain laws and regulations. Further, I am also subject to the provisions of the Uniform Standards of Professional Appraisal Practice that pertain to disclosure or distribution by me.

23. The borrower, another lender at the request of the borrower, the mortgagee or its successors and assigns, mortgage insurers, government sponsored enterprises, and other secondary market participants may rely on this appraisal report as part of any mortgage finance transaction that involves any one or more of these parties.

24. If this appraisal report was transmitted as an "electronic record" containing my "electronic signature," as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or a facsimile transmission of this appraisal report containing a copy or representation of my signature, the appraisal report shall be as effective, enforceable and valid as if a paper version of this appraisal report were delivered containing my original hand written signature.

25. Any intentional or negligent misrepresentation(s) contained in this appraisal report may result in civil liability and/or criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Section 1001, et seq., or similar state laws.

SUPERVISORY APPRAISER'S CERTIFICATION: The Supervisory Appraiser certifies and agrees that:

1. I directly supervised the appraiser for this appraisal assignment, have read the appraisal report, and agree with the appraiser's analysis, opinions, statements, conclusions, and the appraiser's certification.









2. I accept full responsibility for the contents of this appraisal report including, but not limited to, the appraiser's analysis, opinions, statements, conclusions, and the appraiser's certification.

3. The appraiser identified in this appraisal report is either a sub-contractor or an employee of the supervisory appraiser (or the appraisal firm), is qualified to perform this appraisal, and is acceptable to perform this appraisal under the applicable state law.



4. This appraisal report complies with the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place at the time this appraisal report was prepared.

5. If this appraisal report was transmitted as an "electronic record" containing my "electronic signature," as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or a facsimile transmission of this appraisal report containing a copy or representation of my signature, the appraisal report shall be as effective, enforceable and valid as if a paper version of this appraisal report were delivered containing my original hand written signature.

APPRAISER

Signature 
Name 
Company Name 
Company Address 
Telephone Number 
Email Address 
Date of Signature and Report 12/29/2016
Effective Date of Appraisal 12/16/2016
State Certification # 
or State License # _____
or Other (describe) _____ State # _____
State 
Expiration Date of Certification or License 08/20/2017

ADDRESS OF PROPERTY APPRAISED

APPRAISED VALUE OF SUBJECT PROPERTY \$ 660,000

LENDER/CLIENT

Name 
Company Name 
Company Address 
Email Address 

SUPERVISORY APPRAISER (ONLY IF REQUIRED)

Signature _____
Name _____
Company Name _____
Company Address _____
Telephone Number _____
Email Address _____
Date of Signature _____
State Certification # _____
or State License # _____
State _____
Expiration Date of Certification or License _____

SUBJECT PROPERTY

☐ Did not inspect subject property
☐ Did inspect exterior of subject property from street
Date of Inspection _____
☐ Did inspect interior and exterior of subject property
Date of Inspection _____

COMPARABLE SALES

☐ Did not inspect exterior of comparable sales from street
☐ Did inspect exterior of comparable sales from street
Date of Inspection _____

AMERICAN BANKRUPTCY INSTITUTE

Maloney Appraisal Services

File No. "Redacted"
Loan No.

Borrower [REDACTED]
Property Address [REDACTED]
City [REDACTED] County [REDACTED] State [REDACTED] Zip Code [REDACTED]
Lender/Client [REDACTED] Address [REDACTED]

The subject has not sold in the past 36 months and has not been listed for sale in the past 12 months as per B&T, Reg of Deeds & MLS. The subject last sold new on 12/11/2000 for \$650,000 as per B&T & Reg of Deeds.

The subject is a attached 16 year old colonial style dwelling in poor condition consisting of 7 rooms, 3 bedrooms & 2.1 baths & 1,886 sf of GLA, 2 deeded parking spaces, rear deck, front enclosed porch & 4,676 sf lot. The subject is in need of a complete gut as all drywall is moldy in both walls & ceilings, hardwood floors have heaved due to frozen pipes, hot & cold water plumbing is in need of replacement & insulation damaged. The roof shows no signs of leakage. Windows appear undamaged. External doors are in need of replacement. The heating system is FHA/gas in average condition and AC condensers outside in need of replacement. The foundation is poured concrete in good condition & wood exterior is average. Deck needs updating. The subject is however only 16 years old & has good structural integrity.

The conclusion of value in this report is based upon an exposure time of 1-3 months.

The appraiser's company address is within 5 miles of the subject property.

The subject lot predates current city zoning bylaws & is legal non-conforming. This is common for area & not adverse. The subject may be rebuilt to original footprint if destroyed per city of [REDACTED]. The subject is an attached single family dwelling. The subject has some utility easements; also not adverse. No adverse easements or encroachments noted. The subject is not located in flood zone. See attached flood map.

All utilities were NOT on and NOT operational at time of inspection.

Any differences in GLA are accounted for in the GLA adjustment in the sales comparison grid. The comparables were chosen as they are strong indicators of value.

Land values typically exceed the 30% ratio established by FNMA. This is primarily due to the limited buildable land remaining in the market area. This condition bears no negative impact on market value stated in report.

The appraiser that completed this report confirms that they have adequate competency to complete appraisal assignments in the subject's market area.

My Comparable Search and Results :

****The appraiser utilized the city of [REDACTED] recent sales of similar homes ranging in size from 1,288 sf to 1,940 sf of gross living area which feature similar style, lot size, utility, room count and locational appeal. No newly constructed homes were used as comparables in this report. The subject's GLA has been bracketed within the sales comparable grid. The appraiser's opinion of market value stated in report is reasonable, credible and is well supported by the comparables chosen. No additional comparables can be provided at this time.****

Last Sale Date: 12/11/2000 Last Sale Price: \$650,000.

Last Sale Book: [REDACTED] Last Sale Page: [REDACTED]

Map Ref.: M:00 [REDACTED] L:00 [REDACTED] Tax Rate (Res): 6.99

Total Assessed Value: [REDACTED] Estimated Tax: \$6,872.57

THE TAX ASSESSMENT

By: Richard J. Cole, III¹

I. Is a Tax Assessment Hearsay?

Fed. R. Evid. 803(8) – the public records exception:

Exception to the hearsay rule if it is the record or statement of a public office that sets out the office's activities, matters observed while under a legal duty to report, and the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness. Courts are split on where it is admissible over a hearsay objection but most modern cases find a hearsay exception. Under this exception, you can avoid having someone from the tax assessor's office testify.

II. Cases:

Inadmissible:

***In re Digby*, 47 B.R. 614 (N.D.Ala. 1985)**

Holding that tax assessor's returns were hearsay and not admissible to establish value of debtor's property.

***McDuffie v. West (In re West)*, 2016 U.S. Dist. LEXIS 109237 (E.D.N.C. July 15, 2016)**

Bankruptcy court's ruling allowing debtor to testify to fair market value of realty based solely on a tax assessment was arbitrary and irrational and must be reversed.

Admissible:

***In re Sweeney*, 556 B.R. 208 (Bankr.E.D.N.C. 2016)**

Court discounted debtor's testimony because it was based almost entirely on tax assessment.

***Khan v. Chen (In re Chen)*, 2009 Bankr. LEXIS 3587 (Bankr.E.D.Va. Nov. 3, 2009)**

Tax assessments are admissible regarding value under the agency records exception to Fed.R.Evid. 803.

¹ Partner, Cole & Cole Law, P.A., Sarasota, FL

***Hammond v. Allegheny County Treasurer (In re Hammond)*, 420 B.R. 633 (Bankr.W.D.Pa. 2009)**

Debtor's use of tax assessed value in her schedules is evidence of her opinion of value and a debtor is competent to testify to the value of her realty.

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

Records of real estate tax assessments are admissible to prove the value of the assessed property under the agency records exception to the hearsay rule in Fed.R.Evid. 803(8).

***Williams v. Montclair Prop. Owners Ass'n (In re Cook)*, 2010 Bankr. LEXIS 4372 (Bankr.E.D.Va. Nov. 9, 2010)**

Admitting a tax assessment.

***In re To*, 2010 Bankr. LEXIS 1114 (Bankr.E.D.Va. April 12, 2010)**

Admitting a tax assessment but finding that it was likely to overstate rather than understate the value of the property in a falling market.

***Gray v. Bank of Am., N.A. (In re Gray)*, 2010 Bankr. LEXIS 181 (Bankr.E.D.Va. Jan. 15, 2010)**

There are difficulties in relying on tax assessments without additional analysis.

***Govea v. JPMorgan Chase Bank, N.A.*, 2010 U.S. Dist. LEXIS 130940 (S.D.Tex. Dec. 10, 2010)**

Tax assessment is an exception to hearsay under Fed.R.Evid. 803(8) and record did not contain evidence indicating it lacks trustworthiness.

***Miller v. Popovich (In re Hunt)*, 2015 Bankr. LEXIS 3319 (Bankr.C.D.Cal. Sep. 30, 2015)**

Tax assessment admissible.

***United States v. Iverson*, 818 F.3d 1015 (10th Cir. Mar. 16, 2016)**

Tax assessment satisfies Fed.R.Evid. 803(8).

Fed. R. Evid. 803(6) – the business records exception:

Under this exception, you will need someone from the tax assessor's office to provide foundational testimony.

Fed.R.Evid. 803(6)(D) – The Federal Rules of Evidence contain a self-authentication provision which provides that extrinsic evidence of authenticity is not required for an original or copy of a business record if it is accompanied by a certification from the custodian of the records or "another qualified person" declaring that the record was made at or near the time by (or from information transmitted by) someone with knowledge, that the record was kept in the ordinary course of the company's regularly conducted business, and that making the record was a regular practice of the company. Fed.R.Evid. 902(11).

Cases:

***Savage & Assocs., P.C. v. County of Fairfax (In re Teligent, Inc.)*, 2006 Bankr. LEXIS 5162 (Bankr.S.D.N.Y. April 13, 2006)**

Custodian of tax assessor's office testified at trial providing foundation for receipt of tax records under business records exception of Fed.R.Evid. 803(6).

***Karaksa v. Bank of New York (In re Karakas)*, 2007 Bankr. LEXIS 1578 (Bankr.N.D.N.Y. May 3, 2007)**

Tax assessor allowed to testify as lay witness.

III. General Tips

Even if you can get the assessment in, you still may want to call the tax assessor--a judge has a hard time determining what weight to give a paper that can't be cross-examined or fleshed out.

***In re Sweeney*, 556 B.R. 208 (Bankr.E.D.N.C. 2016)**

Court discounted debtor's testimony because it was based almost entirely on tax assessment.

***Gray v. Bank of Am., N.A. (In re Gray)*, 2010 Bankr. LEXIS 181 (Bankr.E.D.Va. Jan. 15, 2010)**

There are difficulties in relying on tax assessments without additional analysis.

IV. Will the Judge Credit the Tax Assessment?

Know your community

Know your judge

Know why a tax assessment is created – it is NOT to assess sale value, or fire sale value

ONLINE REAL ESTATE VALUATIONS

By: Hon. Eugene R. Wedoff¹

I. Is a Zillow valuation hearsay?

Fed. R. Evid. 803(17) – the market report exception:

(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.

II. Cases:

Inadmissible:

***Martin v. Bank of New York Mellon (In re Martin)*, 2017 Bankr. LEXIS 365, *4 (Bankr. M.D. Pa. Feb. 9, 2017)**

Debtor offered information about the Property's value obtained from Zillow.com, however such information is not admissible as evidence in establishing value of property, and the Court will disregard it. *In re Cocreham*, 2013 Bankr. LEXIS 3537, 2013 WL 4510694 (Bankr. E.D. Cal. 2013) (“[R]eports such as Zillow are not compilations made admissible by Fed. R. Evid. 803(17).”).

***In re Bartonik*, 2015 Bankr. LEXIS 1193, *4-5 (Bankr. E.D.N.Y. Apr. 10, 2015)**

Here, Debtor has not established his entitlement to relief under § 522(f). The only evidence of fair market value as of the petition date proffered by Debtor is the Zillow.com estimate. Courts presented with this type of value evidence have rejected it, noting that Zillow.com is “inherently unreliable”, because “it is a participatory [s]ite almost like Wikipedia. Whereas Wikipedia allows anyone to input or change specific entries, Zillow allows homeowners to do so”. *In re DaRosa*, 442 B.R. 173, 177 (Bankr. D. Mass. 2010); see *Debilio v. Golden (In re Debilio)*, 2014 Bankr. LEXIS 3886, at *19 (B.A.P. 9th Cir. Sept. 11, 2014) (citing *In re Phillips*, 491 B.R. 255, 260 n.7 (Bankr. D. Nev. 2013)); *In re Cocreham*, 2013 Bankr. LEXIS 3537, at *8-9 (Bankr. E.D. Cal. Aug. 23, 2013); *In re Slovak*, 489 B.R. 824, 826 (D. Minn. 2013) (In declining to consider the debtor's estimates of the value of his property obtained from Zillow.com and Appraisal.com, the court stated that “[i]nternet searches are insufficient evidence of property value because they are at best questionable and at worst evidence of nothing.”). Zillow allows “[a] homeowner with no technical skill beyond the ability to surf the web [to] log in to Zillow and add or subtract data that will change the value of his property.” *DaRosa*, 442 B.R. at 177. Because a Zillow estimate is inherently unreliable, it does not satisfy Rule 401 of the Federal Rules of Evidence as relevant evidence; such an estimate does not tend to make the fact of the value

¹ Ret. United States Bankruptcy Court Judge, Oak Park, IL

ascribed by Debtor more or less probable. Fed. R. Evid. 401; *see generally* Russell, *Bankruptcy Evidence Manual*, Vol. 2, § 401:1 (West 2014-15). As such, it would not be admissible under Rule 402. Fed. R. Evid. 402.

***In re Cocreham*, 2013 Bankr. LEXIS 3537, *8-9, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013):**

Both [parties] attempted to introduce valuation evidence based on reports from “zillow.com” and other similar Internet based sources. This evidence was not admissible. It is hearsay. *See* Fed. R. Evid. 801.

And, while Fed. R. Evid. 803(17) excepts from the hearsay rule market compilations generally used and relied upon by the public, no foundation was laid establishing that the values reported by these Internet sites meet this criteria.

The court doubts that such a foundation could be laid. As courts have noted, zillow.com is “inherently unreliable.” “Zillow is a participatory site almost like Wikipedia. Whereas Wikipedia allows anyone to input or change specific entries, Zillow allows homeowners to do so. 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.” 442 B.R. 173, 177 (Bankr. D. Mass. 2010). *See also In re Phillips*, 491 B.R. 255, *See In re Darosa*, 260 (Bankr. D. Nev. 2013). For this reason, reports such as Zillow are not compilations made admissible by Fed. R. Evid. 803(17). *Id.*

Cindy Perusse, GPSolo eReport (Nov. 2013)

(www.americanbar.org/publications/gpsolo_ereport/2013/november_2013/evidence_without_experts_property_issues.html):

Avoid websites such as www.Zillow.com or www.Trulia.com. These sites are third-party listing portals. They are not members of the Multiple Listing Service. Zillow and Trulia do not get information directly from Realtors® or sellers, but piece together information from individual brokerages or real estate agents, resulting in incomplete or inaccurate listing data.

Admissible:

None.

III. General Tips

It’s very unlikely that a Zillow valuation (which Zillow.com calls a “Zestimate”) will ever overcome a hearsay objection. The problem is that a Zillow value is not a market report, as demonstrated by the explanation set out in the Zillow website (www.zillow.com/zestimate):

The Zestimate's accuracy depends on location and availability of data in an area. Some counties have deeply detailed information on homes such as number of

bedrooms, bathrooms and square footage and others do not. The more data available, the more accurate the Zestimate. . . .

Nationally, the Zestimate has a median error rate of 5%, which means half of the Zestimates in an area are closer than the error percentage and half are farther off. For example, in Seattle, Zestimates for half of the homes are within 4.9% of the selling price, and half are off by more than 4.9%.

To improve Zestimate accuracy, we allow homeowners to edit their home facts and then we incorporate this information into our Zestimate calculations.

IV. Data Coverage and Zestimate Accuracy

Nationally, the Zestimate has a median error rate of 5%, which means half of the Zestimates in an area are closer than the error percentage and half are farther off. For example, in Seattle, Zestimates for half of the homes are within 4.9% of the selling price, and half are off by more than 4.9%.

To improve Zestimate accuracy, we allow homeowners to edit their home facts and then we incorporate this information into our Zestimate calculations.

THE DEBTOR

By: Richard J. Cole, III¹

I. Valuation Date:

***Putman v. AM Sols., LLC (In re Putman)*, 519 B.R. 491, 498 (Bankr.N.D.Miss. 2014)**

"Courts have not reached a consensus on the proper valuation date of property when the debtor attempts to strip off a wholly unsecured lien. *Dean*, 319 B.R. at 477. This Court is more persuaded by the cases that use the petition date as the appropriate date to value both the collateral and, necessarily, the first lienholder's claim, for the purpose of determining whether any value over the first claim exists in the collateral to support the second lien. The Court's independent review of relevant caselaw reveals that the majority of courts considering this issue have also settled on the petition date as the proper date for valuation in this and other contexts. *See, e.g., Marsh v. U.S. Dep't of Housing and Urban Dev. (In re Marsh)*, 929 F.Supp2d 852, 855 (N.D.Ill. 2013); *In re Gilpin*, 479 B.R. 905, 908 (Bankr.M.D.Fla. 2011) (holding the petition date is the appropriate date to value the collateral when the debtors intend to remain in the home); *In re Levitt & Sons, LLC*, 384 B.R. 630, 644 (Bankr.S.D.Fla. 2008) (chapter 11 case); *In re Sanders*, 202 B.R. 986 (Bankr.D.Neb. 1996); *In re Dinsmore*, 141 B.R. 499 (Bankr.W.D.Mich. 1992); *Riley v. Wisconsin Dep't of Rev. (In re Riley)*, 88 B.R. 906, 912 (Bankr.W.D.Wis. 1987); *In re Richardson*, 82 B.R. 872, 873 n.1 (Bankr.S.D.Ohio 1987); and *Brager v. Blumb (In re Brager)*, 39 B.R. 441, 443 (Bankr.E.D.Pa. 1984)."

II. Debtors generally may testify to the value of their own homes:

***In re Levitt & Sons, LLC*, 384 B.R. 630 (Bankr.S.D.Fla. 2008)**

Finding that it is settled law that the owner of personal property is qualified by his ownership alone to testify to its value and that rule is extended to real property valuations.

***In re Deep River Warehouse, Inc.*, 2005 Bankr. LEXIS 1090 at *30 (Bankr.M.D.N.C. 2005)**

Pursuant to Fed. R. Evid. 701, an opinion of a lay witness is admissible if the opinion is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [expert testimony]." If the requirements of Rule 701 are met, then the general rule is that an owner of real property may give his or her opinion as to its value without having to qualify the owner as an expert.

¹ Partner, Cole & Cole Law, P.A., Sarasota, FL

***Hidden Oaks v. City of Austin*, 138 F.3d 1036 (5th Cir. 1998)**

“We adhere to the general rule that an owner [of real property] always may testify as to value, whether assessed as of the time of trial, or at some definitive point in the past.”

***In re Petrella*, 230 B.R. 829, 834 n.5 (Bankr.N.D Ohio 1999)**

“An owner is competent to give his opinion as to the value of his property, often by stating the conclusion without stating a reason.”

***United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966)**

“It is the general rule that an owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value. *A & A Tool & Supply Co. v. C.I.R.*, 10 Cir., 182 F.2d 300; *Baltimore American Ins. Co. of New York v. Pecos Mercantile Co.*, 10 Cir., 122 F.2d 143; *Kinter v. United States*, 3 Cir., 156 F.2d 5; *Bateman v. Donovan*, 9 Cir., 131 F.2d 759; *United States v. 443.6 Acres of Land*, (D.C.N.D., W.D.), 77 F. Supp. 84; Nichols on Eminent Domain, 3d Ed. Vol. 5, § 18.4(2), p. 198; 32 C.J.S. Evidence § 546(116); 20 Am.Jur. Evidence, § 892. But the 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. We do not imply that in a proper case the testimony of a property owner may not alone be sufficient to support a verdict; we merely hold that under the circumstances of this case, where the presumption of the owner's special knowledge is negated by his own testimony, his opinion has no probative value and is insufficient to sustain the award.”

III. Lay Witness

Debtors are lay witnesses under Fed.R.Evid. 701 so their testimony is limited to what they know from their personal knowledge or experience (contrast with Fed.R.Evid. 702 where experts can use hearsay, etc.)

What CAN debtors testify to?

- i. What they paid for their own home
- ii. How long ago they paid it
- iii. What improvements they've made, and what they paid for those improvements
- iv. Events that have damaged the house/lessened its value (termites, floods, fire, radon, cement rot, etc.)
- v. How similar their house is to neighbors' houses they've been in
- vi. What they listed the house for when they tried to sell it – not likely

***In re Hock*, 1993 Bankr. LEXIS 2372 (Bankr.S.D.Ga. 1993)**

Debtor testified to value based on his costs and his insurance on improvements.

***S. Cent. Livestock Dealers, Inc. v. Sec. State Bank*, 614 F.2d 1056, 1061 (5th Cir. 1980)**

“Mr. Clubb was the financial officer of the Feedlot. The Bank objected to his testimony that the Feedlot's assets exceeded its liabilities by around \$ 100,000 at the time of the offset. The Bank objected on the grounds that Mr. Clubb's testimony to that effect was unreliable opinion evidence of a layman. ‘(A)n owner is competent to give his opinion on the value of his property (under the Federal Rules of Evidence).’ *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975). In *Kestenbaum*, a beer distributor testified about the value of his business's goodwill. The district court admitted this testimony, and the Fifth Circuit affirmed, reasoning that Rule 702 of the Federal Rules of Evidence allowed the testimony. Rule 702 provides that, ‘(A) witness qualified as an expert by knowledge, skill, experience, training or education, may testify in the form of opinion or otherwise.’ The Court in *Kestenbaum* noted that an opposing party can attack an owner's opinion on value through cross-examination or independent evidence refuting the owner's estimate. *Id.* at 699.”

What CAN'T debtors testify to?

- i. What they were told – by neighbors, by realtors, by friends
- ii. What they found on-line – sales records, tax appraisals, Zillow
- iii. What they've learned in media – newspaper stories on declining home values, sales reports or listings in papers or magazines.

***In re Syed*, 238 B.R. 133 (Bankr.N.D.Ill. 1999)**

A lay witness's opinion testimony as to value “not based upon personal knowledge, but based upon a variety of different sources” is inadmissible.

***United States v. Smith*, 355 F.2d 807 (5th Cir. 1966)**

An unaccepted offer to buy or sell is inadmissible to establish value.

***Sharp v. United States*, 191 U.S. 341 (1903)**

Oral offer not admissible to establish value.

***Snowbank Enterprises, Inc. v. United States*, 6 Cl. Ct. 476, 1984 U.S. Cl. Ct. LEXIS 1276 (Cl. Ct. 1984)**

“Although an owner of real property frequently has special knowledge about his land and is, therefore, deemed competent to offer an opinion as to its value, his opinion must be founded upon evidence in the record, rather than upon conjecture, speculation or unwarranted assumptions. *United States v. Sowards*, *supra*, 370 F.2d at 92.”

APPRAISER'S TESTIMONY AND REPORT
EVIDENTIARY and SUBSTANTIVE GUIDELINES

By: John S. McNicholas, Esq.¹

I. Appraiser Qualifications

Appraiser must be qualified as an expert under Fed. R. Evid. 702

Essential elements of a real estate appraiser's competency include:

- (1) Appraiser's knowledge of the subject property;
- (2) Appraiser's knowledge of the real estate market in which the subject property is located;
- (3) His evaluating skill and experience as an appraiser

Whitehouse Hotel Ltd. Partnership v. C.I.R., 615 F.3d 321 (5th Cir. 2010)

Relevant Inquiries:

- (1) Is the appraiser licensed and if so by whom (State?);
- (2) Years of experience;
- (3) Experience appraising property types in same category as subject (residential/commercial; single-family/multi-family; contemporary/historic; if commercial, type: retail/office/hotel etc.;
- (4) Experience in appraising properties in the subject's locale (state/city/neighborhood)

Abuse of Discretion Standard applies to appellate review of trial court's admissibility of expert testimony.

Trial court's determination on the admissibility of expert testimony will not be overturned on appeal unless "manifestly erroneous" (i.e., abuse of discretion standard applies). The same standard applies to the trial court's assessment of the witness' qualifications and for reliability determinations. *Whitehorse*, at 330.

II. Appraiser's Report Must Come in Through Appraiser's Testimony or by Stipulation

Report of debtor's appraiser not admissible as direct evidence of value when (a) appraiser was not present in court to testify on the day of the valuation hearing; (b) debtor's counsel said he had just received the report that morning but court noted that report was dated three weeks prior giving counsel plenty of time to provide bank's counsel and the court with a copy of same; (c) report was not provided in time mandated by the Court's Pre-trial

¹ Partner, Korde & Associates, P.C., Lowell, MA

Scheduling Order. *S & T Bank v. Garbinski*, Memorandum Opinion and Order dated July 26, 2011, Case No. 11-21160-TPA (Bankr. W.D. PA 2011)

III. Appraisal as Business Records Exception to Hearsay Rule – Fed. R. Evid. 803(6)

***In re CGR Investors Limited Partnership*, 464 B.R. 678 (E.D. PA 2010)**

In this chapter 11 case the bank moved for relief from the automatic stay to foreclose its mortgage on a multimillion dollar tract of 640 acres of undeveloped land owned by the debtor. The bank introduced evidence reflecting that the land was worth \$4.2 million dollars. The debtor, through the testimony of a partner, sought to introduce a 2008 appraisal valuing the tract at \$5.7 million which the partner testified was provided to him by a predecessor-in-interest of the bank (Wells Fargo Bank, N.A. was the successor by merger to Wachovia Bank, N.A. – the partner testified that a former employee of Wachovia Bank had provided him with the appraisal). A person seeking to admit a document under the business records exception to the hearsay rule [Rule 803(6)] must provide “foundation testimony” by “the custodian or other qualified witness” that:

- (1) the declarant in the records had personal knowledge to make accurate statements;
- (2) the declarant recorded the statements contemporaneously with the actions that were the subject of the reports;
- (3) the declarant made the record in the regular course of the business activity; and
- (4) such records were regularly kept by the business.

***CGR Investors*, supra citing *United States v. Pellulo*, 964 F.2d 193, 200 (3rd Cir. 1992)**

Appraisal held inadmissible as a business records exception to the hearsay rule where the partners who testified on the part of the debtor did not profess personal knowledge of who exactly performed the appraisal or whether such a filing was standard practice for the Lender; and where the debtor otherwise failed to provide any of the requisite foundational testimony, namely, that the declarant had knowledge of the property, that the appraisal was conducted in a timely and proper manner, that the appraisal was made in the regular course of Wells Fargo’s business activity, and that such documents were part of the Lender’s regular business activity.

Appraisal also held inadmissible as an admission against interest pursuant to Fed. R. Evid. 801(d)(2) where the report is not Wells Fargo’s own statement; there was no evidence that Wells Fargo had manifested an adoption or belief in the truth of the report; that the report was a statement by a person authorized by Wells Fargo or that the report was produced by Wells Fargo’s agent or servant.

IV. Methodology – How was Final Valuation Derived?

In Chapter 13 cram-down case involving the value of Debtor’s mobile home for purposes of plan confirmation, Debtor’s testimony as owner and present occupant regarding the home’s

interior condition deemed helpful and admissible but ultimately not persuasive where debtor's estimate of value at \$9,000.00 appeared to be a guess. Conversely, the Court was persuaded by the creditor's appraiser who testified that he was familiar with the property and had thoroughly examined it during the appraisal process, the appraiser testified that he started with "a base price of \$11,600.00 then add[ed] \$5,084.00 for listed 'components' and \$3,083.00 for 'accessories' totaling \$19,767.00 which he then rounded to \$19,800.00." *In re Tucker*, Order dated January 25, 2013, Case No. 12-05872-HB (Bankr. S.C. 2013).

***In re Radewald*, Memorandum on Motions of Citizens National Bank for Summary Judgment, March 30, 2015, Case No. 14-33542 (E.D. Tenn. 2015)**

In this contested action to determine the amount of the bank's post-foreclosure deficiency claim, the bank moved for summary judgment supported by its appraiser's affidavit with his appraisal report annexed attesting to value as of the date of the foreclosure sale coupled with evidence of a lower sale price obtained by the bank in an arms-length sale of the property 22 days after the foreclosure sale. The debtor countered with his own testimony of value and a certified property tax assessment. In granting summary judgment for the bank, the bankruptcy court observed (1) "[a]lthough an 'owner' of real property is deemed to have special knowledge about his property to offer an opinion as to its value, the owner's opinion will be given little weight when founded on pure speculation (emphasis added). There must be some evidence, apart from mere ownership, that this 'value' is the product of reasoned analysis (emphasis added).]" [citing *Airline Const. Inc. v. Barr*, 807 S.W.2d 247, 256 (Tenn. Ct. App. 1990)].

V. Comparable Sales Data

Can your appraiser explain "the manner in which percentage adjustments were made"?

"Alleged 'gaps' between comparable sale data and the conclusions from it may go to the weight of an appraiser's testimony but not to its admissibility. We nevertheless review the adjustments to determine whether too great an analytical gap exists from the data to the adjustment." *In re Thomas*, Findings of Fact and Conclusions of Law, March 26, 2014, Case No. 11-10997 (W.D. TX 2014) citing *Williams v. Texas*, 406 S.W. 3d 273, 286 (Tex. App. – San Antonio, 2013, pet. Denied)(citation omitted). "But while the Court admitted and considered the experts' opinions (including their adjustments), some of the comparables and some of the adjustments, as explained below, were too dramatic and ill-explained for the Court as fact-finder to give them much weight (emphasis added)."

Factors influencing weight to be afforded comparable sales data:

1. Similarity in property type (two-family, ranch, split-level, etc.);
2. Similarity in age of construction;
3. Similarity in neighborhood
4. Proximity in space (# of miles from subject) to subject;
5. Proximity in time of comparable sale data to effective date of valuation of subject;
6. Arms-length transaction versus distressed sale (i.e., foreclosure)

7. Has the “sale” actually been consummated? (see *In re Old Colony, LLC*, 476 B.R. 1 (Bankr. D. Mass. 2012) (court noted that while pending sales of properties other than the property being appraised may be admitted in connection with a valuation hearing, pending sales used in comparable sales data were afforded little weight were (a) the “pending sales,” ultimately, were never consummated and (b) there were no comparable closed sales data to support the conclusion that the pending prices could accurately be used to determine the market value of the Debtor’s property).

In *Gugino v. Kastera, LLC (In re Ricks)*, 433 B.R. 806 (Bankr. Idaho 2010)

An appraiser testifying in a breach of contract action brought by the debtor testified to on-line data he had obtained from the real estate multiple listing service (“MLS”) to identify comparable real estate developments and properties. Although he heavily relied on such data in formulating various assumptions and opinions articulated in his report, he failed to include the underlying comparable sales data in the report itself and the debtor, as the party offering the report, failed to otherwise enter the comparable sale data into evidence. “Although the Court has no reason to doubt that Pooley [expert retained by the debtor to quantify amount of damages suffered by debtor when defendant backed out of deal to purchase real estate development] consulted some information in the MLS databases and other resources, it must speculate as to the quality, quantity and relevancy of that information. The Court is unwilling to engage in such speculation.”

VI. Competent Appraiser May Rely on Otherwise Inadmissible Hearsay to Formulate His Opinion of Value

[A]n expert witness may rely on otherwise inadmissible facts or data in support of opinion testimony if other ‘experts in the particular field would reasonably rely on those kinds of facts or data in supporting an opinion on the subject.’”

***In re Jude*, Memorandum Opinion and Order, Case No. 15-10330, June 24, 2016 (Bankr. E.D. KY 2016).**

Debtor objected to testimony of bank’s appraiser by affidavit at chapter 13 confirmation hearing involving proposed cram-down of bank’s consensual lien on the debtor’s mobile home, where such testimony relied (a) on portion of N.A.D.A. database which consolidates information on comparable sales of mobile homes in various regions of the country and (b) on additional information about the model number and model type he obtained in speaking with a representative of the mobile home’s manufacturer. Citing Fed. R. Evid. 703, the Court overruled the Debtor’s objection. Also citing *Engelbrechtsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir. 1994) (“Rule 703 allows a testifying expert to rely on materials, including inadmissible hearsay, in forming the basis of his opinion.”)

***In re Gonch*, 435 B.R. 857 (Bankr. N.D. N.Y. 2010)**

In chapter 13 cramdown case involving valuation of debtor's car, car lender objected to debtor's introduction of Kelley Blue Book Private Party Value of the car. The Court overruled the lender's objection, citing Fed. R. Evid. 803(17) which provides an exception to the hearsay rule 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 basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate." *Gonch*, supra, citing Fed.R.Evid. 803 advisory committee's notes.

VII. Opinions of Other Experts

***Am. Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985)**

"Expert opinions ordinarily cannot be based on the opinions of others whether those opinions are in evidence or not."

But see:

***Ohio Environmental Development Limited P'ship v. Envirotech Society Corp.*, 478 F.Supp.2d 963, 975 (N.D. Ohio 2007)**

District court held that a real estate appraiser offered as an expert could reasonably rely on calculations made by an architect because such data would be normally relied on by "experts in [the] field of appraisal in forming opinions on the diminution of the market value of property resulting from deferred maintenance" (court found that appraiser had personally checked the architect's work)(related professions) Compare *Clear-View Techs, Inc. v. Rasnick*, Order dated June 3, 2015 (N.D. Cal. 2015)(opinion of specialist in wireless communications and radio frequency technology may not be introduced as an "appendix" to the expert report of a certified public accountant).

VIII. Battle of the Appraisals

"When two appraisal reports conflict, a court 'must determine the value based on the credibility of the appraisers, the logic of their analys[es], and the persuasiveness of their subjective reasoning.'" *In re Atlanta S. Bus. Park, Ltd.*, 173 B.R. 444 (Bank. N.D. Ga. 1994) (citing *In re Park Ave. Partners*, 95 B.R. 605, 610 (Bankr. E.D. Wis. 1988)

***In re Webb Mtn., LLC*, 420 B.R. 418 (Bankr.E.D. Tenn. 2009)**

Where there are vastly discordant appraisals (plaintiff-debtor brought an adversary proceeding to challenge its voluntary, pre-petition transfer of a mountain track of land containing more than 1000 acres for 9 million dollars as a fraudulent conveyance; plaintiff's appraiser valued the tract at just under 17.5 million dollars whereas the transferee valued the

tract at 6 million dollars), “the court possesses wide discretion,” and “may largely accept the opinion of one party’s expert over that of the other party’s expert, [and] may be selective in determining what portions of each expert’s opinion, if any, to accept (emphasis added).”

IX. Importance of Your Appraiser Scrutinizing the Opponent’s Appraisal Report

In re Wood, Memorandum Opinion, February 10, 2017, Case No. 16-10671-JMD (Bankr. D. N.H. 2017)

Debtor filed motion to determine secured status and void the second mortgage on his home as wholly unsecured. In the First Circuit, wholly unsecured second mortgages (meaning there is not at least \$1.00 of equity in the home above and beyond what is owed on the first mortgage) encumbering a debtor’s single-family residence can be avoided in a chapter 13 case. Both the debtor and the second mortgage holder had appraisers who qualified as experts and who the court determined testified competently. The parties’ appraisals on the single-family home (4 bedrooms, two baths) situated on just under an acre of land were \$65,000.00 apart with the creditor coming in at \$340,000.00 (the first mortgage balance was approximately \$335,000.00) and the debtor coming in at \$275,000.00.

Ultimately, the Court determined that the property was worth much closer to the debtor’s valuation and in any event not worth more than the balance owed on the first mortgage for the following reasons:

1. The debtor’s appraisal had the only comparable sale that resembled the subject property in one important aspect: both properties had no basement (observing that the comparable sales in the creditor’s report, all of which had basements, were 26% higher than the comparable sales used in the debtor’s report) – leading the Court to believe that properties of subject’s type were more valuable to buyers if they had a basement than if they did not;
2. The debtor’s expert, while finding the report of the creditor’s expert to be largely credible, did point out that (a) two of the comparable sales used in the creditor’s report were in better neighborhoods than the subject and that homes in those neighborhoods generally sold for higher prices than comparable properties in the subject’s neighborhood; and that (b) one of the comparable sales used by the creditor’s expert appeared to be an “outlier,” selling for much higher than all other properties in the same neighborhood;
3. Conversely, the creditor’s expert did not identify any particular issues with the report of the debtor’s expert either with respect to methodology or with respect to particular comparable sales or adjustments.

X. Know your Circuit's Controlling Law, if any, on What the Effective Date of Valuation Is? Is the Petition Date? Is it a Date at or Near Confirmation?

***In re Sarno*, 109 A.F.T.R. 2d 2012, 463 B.R. 163 (Bankr. D. Mass. 2011)**

In another Chapter 13 case involving the debtors' attempt through the plan to strip off a second mortgage on his single family home, the debtors and the second mortgagee stipulated that the first lien payoff as of the petition date was \$333,599.40.

The debtors initially scheduled the property as worth \$339,000.00. Curiously, they later moved to amend the scheduled value to \$335,000.00.

At the evidentiary hearing held on confirmation of the plan the debtors put on testimony of their appraiser and of the appraiser's report which valued the property at \$315,000.00 as of a date nearly six months *after* the filing date of the petition. The second mortgagee introduced its own appraiser and his report which valued the property at \$339,000.00 as of a date only three weeks after the petition filing date.

The debtors argued that the plan confirmation date is the appropriate date of valuation while the second mortgagee claimed that the petition date was the more appropriate benchmark for valuation. The court in *Sarno*, while observing the absence of binding precedent in the First Circuit concluded that "the bankruptcy petition date is the only reasonable reference point for establishing claims in bankruptcy."

Settling on the petition filing date as the operative date for determining value the court went on to completely disregard the debtor's appraiser and his report finding that the report "[was] not probative of value of as the petition date." The court also observed that the debtor's appraisal was "further undercut[]" by the debtors' original and amended schedules both of which valued the property for more than the amount of the senior lien payoff. The court found the creditor's appraisal performed only weeks after the petition date as far more probative of the home's value on the petition date. Consequently, the court sustained the second mortgagee's objection to the plan.

COMPARATIVE MARKET ANALYSIS (“CMA”)

By Jay S. Geller¹ and Kaitlyn Husar²

I. When is a CMA admissible?

***In re Brooks*, No. 07-41941-MSH, 2010 WL 2024509 (Bankr. D. Mass. May 19, 2010)**

Trustee sought to sell single family residence pursuant to § 363. Debtor filed a motion in which he sought an evidentiary hearing on the FMV of the property. Trustee introduced the following evidence to prove FMV: testimony of real estate broker who testified that after extensive marketing, only one binding offer to buy the property was made. Debtor introduced the following evidence to establish a higher value for the property: unsigned documents entitled “Comparative Market Analysis.” The Court held that the CMA document was inadmissible hearsay. Court granted motion to sell.

***In re DeRosa – Ruquet*, No. BR 14-17571, 2014 WL 6685949 (Bankr. D.N.J. Nov. 25, 2014)**

Debtor sought to avoid a junior lien on a principal residence. Debtor submitted a CMA, but did not present a witness to be examined regarding the CMA. Because there was no party with personal knowledge of the facts in the CMA available to be cross-examined, the Court declined to admit CMA into evidence. Debtor testified as to value (debtor’s testimony is permissible given the broad standard of relevancy - see FRE 401). Interestingly, debtor acknowledged that her valuation testimony was based partially on the comparative market analysis, yet Court accepted the testimony. Lender presented an appraisal and presented a certified real estate appraiser who was admitted as an expert witness. Although the Court found for the debtor on separate grounds, the Court found the appraisal to be “significantly better evidence” and concluded that the specificity of an appraisal may be necessary when comparative home prices might be in flux (in this case, Hurricane Sandy had recently affected home prices).

***In re Jennings*, No. BKR. 09-13097-JMD, 2010 WL 757341 (Bank. D.N.H. Feb 25, 2010)**

Debtor filed motion requesting authorization to incur lien on various real properties for the benefit of his bankruptcy professionals. Debtor presented evidence he had sufficient equity in real property, including a residential lot and a large tract of unimproved land.

Debtor submitted a real estate broker’s affidavit in support of his valuation of the parcels. Broker’s value opinion was based upon a CMA conducted by or for broker. Court noted the affidavit “is not a formal appraisal and would not be admissible as an expert report or opinion.” at *4.

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II. What factors have courts considered to determine the probative value of a CMA?

***Boresek v. U.S. Dept. of Agriculture*, 109 F. Supp. 3d 1338 (D. Or. 2015)**

Lender loaned money to owner of 10.5 acre parcel with a home and a cranberry bog. Lender bought out two first-position liens, but did not realize Farm Service Agency had second priority lien. Lender brought an equitable subrogation claim arguing that it was unaware of existence of FSA lien and that its ignorance was not the result of inexcusable neglect.

Court found that mortgage broker failed to conduct adequate due diligence for loan. When making loan, Lender relied upon a Comparative Market Analysis. Lender never established expertise of agent who produced CMA, CMA was based on asking prices rather than closed sales, and supposedly comparable properties had little resemblance to property in question other than being in same geographic area. Court found that the CMA was “nearly worthless.” 109 F. Supp. 3d at 1341.

***In re Ramirez*, No. 14-35967-H3-13, 2015 WL 1906109 (Bankr. S.D. Tax Apr. 24, 2015)**

Debtor proposed to strip second lien on debtor’s homestead and creditor objected to confirmation of plan, asserting that value of property exceeded debt secured by first lien.

Real estate broker testified that he conducted comparative market analysis (CMA was not offered into evidence at hearing). Broker testified that he found properties similar in type of construction, square footage, and lot size within same neighborhood to arrive at an average value per square foot in area, which he then applied to debtor’s property. Debtor testified that house needed significant repairs, but broker countered that adjustments to price should be less than 50% of cost of renovation. While Court generally approved of value per square foot approach, it found that CMA did not adequately account for renovations. Ultimately, Court determined that FMV was midpoint between debtor’s and creditor’s proposed values.

***In re Smith*, No. 6:07-BK-05041-ABB, 2008 WL 4572393 (Bankr. M.D. Fla. Feb. 21, 2008)**

In 2008 debtors filed for Chapter 13 relief. Debtors filed motion to strip creditor’s junior lien. Creditor presented CMA prepared by real estate agent that provided three figures: (1) market value, (2) quick sale value, and (3) suggested list price. These figures were based on sales that occurred in November 2006 through July 2007. Court concluded that CMA is entitled to minimal weight because it is not a formal appraisal conducted by a licensed residential property appraiser and “[t]he real estate market has taken a substantial downturn since the July 2007 sale comparable.” At *1.

Also, see the standard applied in *In re Dore*, described more fully in part III.

III. What are limitations of CMAs and how have Courts found they “stack up” against other value indicators?

***Prowse v. Nwankwo*, No. CIV.A. 14-1270 SDW, 2014 WL 1767590 (D.N.J May 2, 2014)**

Chapter 7 trustee recommended that bankruptcy court allow for certain real property to be abandoned under § 554. Creditor appealed bankruptcy court’s decision allowing abandonment, claiming that creditor had put a lien on property prepetition. In determining property’s value, trustee relied upon a CMA which valued the property at \$485,000. Liens on the property totaled \$983,872.95. In a footnote, Court acknowledged limitations of a CMA: “This analysis, specifically prepared for [the Debtor] ...] was researched from reliable information currently available from the Multiple Listing Service. This comparative market analysis is not an appraisal and should not be considered the equivalent of an appraisal. The analysis however help[s] ... establish a parameter of value.” See footnote 2.

***In re Dore*, No. 99-10642 – JMD, 1999 WL 33457771 (Bankr. D.N.H. Aug. 5, 1999)**

“Appraisals, comparative market analyses, and property assessment records all are designed, to some extent, to determine the price a willing buyer and seller would agree to, based upon prevailing market conditions. The Court finds, however, that the different pieces of evidence offered by the parties are not equally valuable from an evidentiary perspective. The question thus becomes how each should be treated in arriving at the fair market value of the Debtor’s residence.” (at *2)

Two part standard to apply when considering a piece of evidence to compute fair market value:

- (1) the proffered evidence must be sufficiently reliable and credible to be used in determining the value of the subject property as of the petition date.
- (2) If there are multiple pieces of evidence, it must be determined whether they should be weighted equally and, if not, how they should be weighted.

The Court weighed the following:

Town’s Tax Assessment – It is computed for property tax purposes and reflects a value at an unknown point in the past rather than a current value. It cannot be used in the fair market value calculus without adjustment using the town’s equalization ratio established by the New Hampshire Department of Revenue Administration, a ratio that reflects assessment values through the lens of recent market conditions.

Creditor’s CMA: uses three properties that the Creditor alleges are comparable to the subject property and dated close in time to the petition date.

Debtor’s single instance of comparative sale: Debtor offered the sale price at a single sale that occurred within the 60-day period preceding the petition date. This evidence was weighted equally to the Creditor’s CMA.

10 year old appraisal – due to age, the appraisal is weighted less than the other evidence.

** Court determined FMV by assigning each piece of evidence a certain weight and adding them together (tax assessment with appropriate adjustment, creditor CMA, and debtor comparative sale all 30%, and 10% for the 10 year old appraisal. The court used the “Weighted Final Value” to determine FMV.

***In re Dickey*, No. 13-10318-WCH, 2015 WL 225392 (Bankr. D. Mass. Jan 15, 2015)**

Debtor sought to avoid five judicial liens under § 522(f). Debtor’s residence was considered “luxury” beachfront home located on Nantucket Sound.

Debtor, a licensed real estate broker, attached a CMA to her affidavit expressing her opinion on FMV. One lienholder submitted appraisal prepared within weeks of petition date. Appraisal employed comparable sales approach and analyzed three comparable single family properties. Court held that both FMV estimates were flawed. Appraisal looked only to three comparative properties and assumed erosion was not a significant danger to property, and appraiser did not inspect interior of property. Debtor’s CMA analyzed sales from over a year after petition date, none of Debtor’s comparable properties were located on Nantucket Sound, and Debtor did not expressly apply discount adjustments based on dissimilar features. Court found neither opinion adequate, performed its own analysis from available evidence, and independently estimated FMV.

Court summarized its role in determining value of property and futility of exercise: “From the outset, I note that determining the value of real property is more art than science. In the absence of a competitive buyer willing to hand over a check, and thus definitively establish fair market value, the valuation process is inherently speculative and rarely produces a value that is precisely accurate. A court must simply make the best educated guess based on the evidence before it. Even the opinions of experienced and licensed experts, such as the ones in this case, are only as good as the assumptions upon which their opinions are built. Where an analysis relies on an inappropriate factor or otherwise fails to consider an important one, the court must assign less weight to that opinion. Ultimately, if both opinions are fatally flawed, the court may be required to reach an independent conclusion of value based upon all of the available evidence.” At *5.

IV. Miscellaneous

A. Issue regarding Schedule A amendments

***In re Garcia*. 532 B.R. 173 (1st Cir. BAP June 24, 2015)**

Debtor filed chapter 7 petition and listed value of his residential property on Schedule A. Value was based on a CMA completed by a broker on June 8, 2013. Debtor filed lien avoidance motion with Court. Fifteen months after petition date, Trustee requested his own CMA and Debtor procured a formal appraisal, both of which valued property for significantly less than Debtor had originally valued property in his schedules (and the June 2013 CMA). Based on new figures,

Debtor filed motion to amend Schedule A and his lien avoidance motion. Bankruptcy court entered separate order granting motion to amend lien avoidance motion and motion to amend Schedule A. Creditor asked for reconsideration of motion to amend Schedule A, which court denied. Creditor appealed order granting lien avoidance motion and order denying reconsideration.

BAP affirmed lower court, reasoning that although appraisal was obtained 15 months post-petition, it is most probative piece of evidence of actual value of property on petition date. Additionally, there was nothing in record to refute debtor's representation that condition of property was essentially same on petition date as on date of appraisal.

V. **Zillow and Hearsay**

***In re Nielsen*, 526 B.R. 351 (Bankr. D. Haw. 2015)**

Issue before Court was whether property of self-settled trust was part of debtor's bankruptcy estate. Although Bankruptcy Court did not actually reach question of valuation of property in trust, Court notes that Zillow valuation "is not particularly persuasive and may not even be admissible." 526 B.R. at 361. In footnote, Court notes that Zillow itself recommends additional property research:

The Zestimate® home valuation is Zillow's estimated market value, computed using a proprietary formula. It is not an appraisal. It is a starting point in determining a home's value. The Zestimate is calculated from public and user submitted data; your real estate agent or appraiser physically inspects the home and takes special features, location, and market conditions into account. We encourage buyers, sellers, and homeowners to supplement Zillow's information by doing other research such as:

- Getting a comparative market analysis (CMA) from a real estate agent
- Getting an appraisal from a professional appraiser
- Visiting the house (whenever possible)

www.zillow.com/zestimate (last visited March 4, 2015) (see footnote no. 58).

Zillow.com valuation reports are inadmissible hearsay **Fed. R. Evid. 801**. Court notes that "while **Fed. R. Evid. 803(17)** excepts from hearsay market compilations generally used and relied on by the public, no foundation was laid establishing that the values reported by [Zillow] meet this criteria" The Court goes on to note,

"The court doubts that such a foundation could be laid. As courts have noted, *zillow.com* is "inherently unreliable." "Zillow is a participatory site almost like Wikipedia. Whereas Wikipedia allows anyone to input or change specific entries, Zillow allows homeowners to do so. 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." *See In re*

Darosa 442 B.R. 173, 177 (Bankr.D.Mass.2010). *See also In re Phillips*, 491 B.R. 255, 260 (Bankr.D.Nev.2013). For this reason, reports such as Zillow are not compilations made admissible by Fed.R.Evid. 803(17).”

See *In re Cocreham*, No. 13-26465-A-13J, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013).

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See also *In re Gray*, No. 09-14004-RGM, 2010 WL 276179, at *3 (Bankr. E.D. Va. Jan. 15, 2010)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); Fed.R.Evid. 702

“The problem with the internet valuation is that the court has no idea how the valuation was made or the information upon which it was based. Property valuation is, except for the owner of the property, generally testimony that requires an expert witness. The court cannot evaluate the internet company's expertise. The court cannot evaluate the facts or data upon which the valuation is based. The court cannot determine the principles or methods used to derive the valuation. The court cannot determine whether the internet company applied the principles and methods reliably to the facts”.

The court can reasonably conclude that the internet company did not individually appraise the [...] home and that the valuation is based on data that is subject to a statistical analysis or the application of an algorithm. However, the data set is unknown. The type of statistical analysis is unknown. The algorithm, if any, is unknown. What is known, is that this is a different methodology than used by real estate appraisers. Appraisers do not use statistical analysis or algorithms to value individual residential properties. They compare actual sales of comparable properties and make appropriate adjustments to determine the value of the property being valued. They may also use a construction costs analysis and an income analysis. For residential real estate, the comparable sales methodology is the most common. Without the underlying facts or an understanding of the statistical analysis or the algorithm used, the anonymous internet valuation is of limited utility.”

Tax Assessments and hearsay

Fed. R. Evid. 803(8) – Real Estate Tax Assessments is admissible to prove value of a partially completed home pursuant to the agency records exception to hearsay. “Such documents sufficiently reliable because they represent the outcome of a governmental process and were relied upon for non-judicial purposes.” See *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 542 (4th Cir. 2007).

Can a debtor rely on comparable market data to testify about value as a lay witness?

At least one case says no.

Fed. R. Evid. 701 – Debtor is competent to offer lay opinion regarding property value.

Fed R. Evid. 701 & 702 – Debtor is not an expert, and therefore cannot testify “as to the types of information an appraiser would rely upon to determine value”

Barry Russell, *Bankruptcy Evidence Manual*, Vol. II, § 701.2, p. 784–85 (2012–13).

“For example, the average debtor-homeowner who testifies in opposition to a motion for relief from the § 362 automatic stay, should be limited to giving his opinion as to the value of his home, but should not be allowed to testify concerning what others have told him concerning the value of his or comparable properties, unless the debtor truly qualifies as an expert under Rule 702 such as being a real estate broker, etc.”

See *In re Cocreham*, No. 13-26465-A-13J, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013).

When is information recited in a Deed admissible?

Advisory’s committee note on rule **Fed. R. Evid. 803(15)**

“Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one.” See Uniform Rule 63(29), Comment.

Take-away: **Recites in deeds are excluded from the hearsay rule when they are germane to the purpose of the document**

See *Compton v. WWV Enterprises*, 679 S.W.2d 668, 671 (Tex. App. 1984) (hearsay exception 15 under Rule 803 must be construed to relate to recitals or statements made in deeds, leases, and mortgages and other such “documents affecting an interest in property”) (Case does not address individual home valuations).

SELECTED FEDERAL RULES OF EVIDENCE

Rule 104. Preliminary Questions

(a) In General. 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.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

- (1) the hearing involves the admissibility of a confession;
- (2) a defendant in a criminal case is a witness and so requests; or
- (3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Notes

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1930; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

- (a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b)** the fact is of consequence in determining the action.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1931; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

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.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1932; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 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.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 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.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

The following definitions apply under this article:

- (a) **Statement.** “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- (b) **Declarant.** “Declarant” means the person who made the statement.
- (c) **Hearsay.** “Hearsay” means a statement that:
 - (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
- (d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
 - (1) ***A Declarant-Witness’s Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
 - (A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1938; Pub. L. 94–113, §1, Oct. 16, 1975, 89 Stat. 576; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 25, 2014, eff. Dec. 1, 2014.)

Rule 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:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of

memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(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.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances 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.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(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.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the judgment; and
- (B) could be proved by evidence of reputation.

(24) [Other Exceptions .] [Transferred to Rule 807.]

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1939; Pub. L. 94–149, §1(11), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 16, 2013, eff. Dec. 1, 2013; Apr. 25, 2014, eff. Dec. 1, 2014.)

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial Paper and Related Documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions Under a Federal Statute.* A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1944; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1946; Apr. 26, 2011, eff. Dec. 1, 2011.)

The Debtor

Valuation Date:

"Courts have not reached a consensus on the proper valuation date of property when the debtor attempts to strip off a wholly unsecured lien. Dean, 319 B.R. at 477. This Court is more persuaded by the cases that use the petition date as the appropriate date to value both the collateral and, necessarily, the first lienholder's claim, for the purpose of determining whether any value over the first claim exists in the collateral to support the second lien. The Court's independent review of relevant caselaw reveals that the majority of courts considering this issue have also settled on the petition date as the proper date for valuation in this and other contexts. See, e.g., *Marsh v. U.S. Dep't of Housing and Urban Dev. (In re Marsh)*, 929 F.Supp2d 852, 855 (N.D.Ill. 2013); *In re Gilpin*, 479 B.R. 905, 908 (Bankr.M.D.Fla. 2011) (holding the petition date is the appropriate date to value the collateral when the debtors intend to remain in the home); *In re Levitt & Sons, LLC*, 384 B.R. 630, 644 (Bankr.S.D.Fla. 2008) (chapter 11 case); *In re Sanders*, 202 B.R. 986 (Bankr.D.Neb. 1996); *In re Dinsmore*, 141 B.R. 499 (Bankr.W.D.Mich. 1992); *Riley v. Wisconsin Dep't of Rev. (In re Riley)*, 88 B.R. 906, 912 (Bankr.W.D.Wis. 1987); *In re Richardson*, 82 B.R. 872, 873 n.1 (Bankr.S.D.Ohio 1987); and *Brager v. Blumb (In re Brager)*, 39 B.R. 441, 443 (Bankr.E.D.Pa. 1984)."

--*Putman v. AM Sols., LLC (In re Putman)*, 519 B.R. 491, 498 (Bankr.N.D.Miss. 2014).

Debtors generally may testify to the value of their own homes:

In re Levitt & Sons, LLC, 384 B.R. 630 (Bankr.S.D.Fla. 2008) (finding that it is settled law that the owner of personal property is qualified by his ownership alone to testify to its value and that rule is extended to real property valuations).

In re Deep River Warehouse, Inc., 2005 Bankr. LEXIS 1090 at *30 (Bankr.M.D.N.C. 2005) (Pursuant to Fed. R. Evid. 701, an opinion of a lay witness is admissible if the opinion is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [expert testimony]." If the requirements of Rule 701 are met, then the general rule is that an owner of real property may give his or her opinion as to its value without having to qualify the owner as an expert.).

Hidden Oaks v. City of Austin, 138 F.3d 1036 (5th Cir. 1998) ("We adhere to the general rule that an owner [of real property] always may testify as to value, whether assessed as of the time of trial, or at some definitive point in the past.").

In re Petrella, 230 B.R. 829, 834 n.5 (Bankr.N.D Ohio 1999) ("An owner is competent to give his opinion as to the value of his property, often by stating the conclusion without stating a reason.").

"It is the general rule that an owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value. *A & A Tool & Supply Co. v. C.I.R.*, 10 Cir., 182 F.2d 300; *Baltimore American Ins. Co. of New York v. Pecos Mercantile Co.*, 10 Cir.,

122 F.2d 143; *Kinter v. United States*, 3 Cir., 156 F.2d 5; *Bateman v. Donovan*, 9 Cir., 131 F.2d 759; *United States v. 443.6 Acres of Land*, (D.C.N.D., W.D.), 77 F. Supp. 84; Nichols on Eminent Domain, 3d Ed. Vol. 5, § 18.4(2), p. 198; 32 C.J.S. Evidence § 546(116); 20 Am.Jur. Evidence, § 892. But the 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. We do not imply that in a proper case the testimony of a property owner may not alone be sufficient to support a verdict; we merely hold that under the circumstances of this case, where the presumption of the owner’s special knowledge is negated by his own testimony, his opinion has no probative value and is insufficient to sustain the award.”

--*United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966).

Lay Witness

Debtors are lay witnesses under Fed.R.Evid. 701 so their testimony is limited to what they know from their personal knowledge or experience (contrast with Fed.R.Evid. 702 where experts can use hearsay, etc.)

What CAN debtors testify to?

- i. What they paid for their own home
- ii. How long ago they paid it
- iii. What improvements they've made, and what they paid for those improvements
- iv. Events that have damaged the house/lessened its value (termites, floods, fire, radon, cement rot, etc.)
- v. How similar their house is to neighbors' houses they've been in
- vi. What they listed the house for when they tried to sell it – not likely

In re Hock, 1993 Bankr. LEXIS 2372 (Bankr.S.D.Ga. 1993) (debtor testified to value based on his costs and his insurance on improvements).

“Mr. Clubb was the financial officer of the Feedlot. The Bank objected to his testimony that the Feedlot's assets exceeded its liabilities by around \$ 100,000 at the time of the offset. The Bank objected on the grounds that Mr. Clubb's testimony to that effect was unreliable opinion evidence of a layman. ‘(A)n owner is competent to give his opinion on the value of his property (under the Federal Rules of Evidence).’ *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975). In *Kestenbaum*, a beer distributor testified about the value of his business's goodwill. The district court admitted this testimony, and the Fifth Circuit affirmed, reasoning that Rule 702 of the Federal Rules of Evidence allowed the testimony. Rule 702 provides that, ‘(A) witness qualified as an expert by knowledge, skill, experience, training or education, may testify in the form of opinion or otherwise.’ The Court in *Kestenbaum* noted that an opposing party can attack an owner's opinion on value through cross-examination or independent evidence refuting the owner's estimate. *Id.* at 699.”

--*S. Cent. Livestock Dealers, Inc. v. Sec. State Bank*, 614 F.2d 1056, 1061 (5th Cir. 1980)

The Debtor's testimony, however, may be insufficient on its own. Some courts will not give credence to valuation opinions of lay witnesses like a debtor without a detailed explanation and analysis of how they arrived at the valuation with the support of market data.

--*In re Andrey Yengoyan*, Case No. 2:11-bk-40230-RK (Bankr.C.D.Cal. Mar. 17, 2017) (Doc. No. 29)

What CAN'T debtors testify to?

- i. What they were told--by neighbors, by realtors, by friends
- ii. What they found on-line--sales records, tax appraisals, Zillow
- iii. What they've learned in media--newspaper stories on declining home values, sales reports or listings in papers or magazines.

In re Syed, 238 B.R. 133 (Bankr.N.D.Ill. 1999) (a lay witness's opinion testimony as to value "not based upon personal knowledge, but based upon a variety of different sources" is inadmissible).

United States v. Smith, 355 F.2d 807 (5th Cir. 1966) (an unaccepted offer to buy or sell is inadmissible to establish value).

Sharp v. United States, 191 U.S. 341 (1903) (oral offer not admissible to establish value).

"Although an owner of real property frequently has special knowledge about his land and is, therefore, deemed competent to offer an opinion as to its value, his opinion must be founded upon evidence in the record, rather than upon conjecture, speculation or unwarranted assumptions. *United States v. Sowards*, *supra*, 370 F.2d at 92."

--*Snowbank Enterprises, Inc. v. United States*, 6 Cl. Ct. 476, 1984 U.S. Cl. Ct. LEXIS 1276 (Cl. Ct. 1984).

Link for Practical Evidence Guide (from Judge Michael Williamson, Chief Bankruptcy Judge, Middle District of Florida):

http://www.flmb.uscourts.gov/judges/tampa/williamson/practical_evidence.pdf