Just How Much Is My Junk Worth? Proper Valuation under §§ 522 and 506

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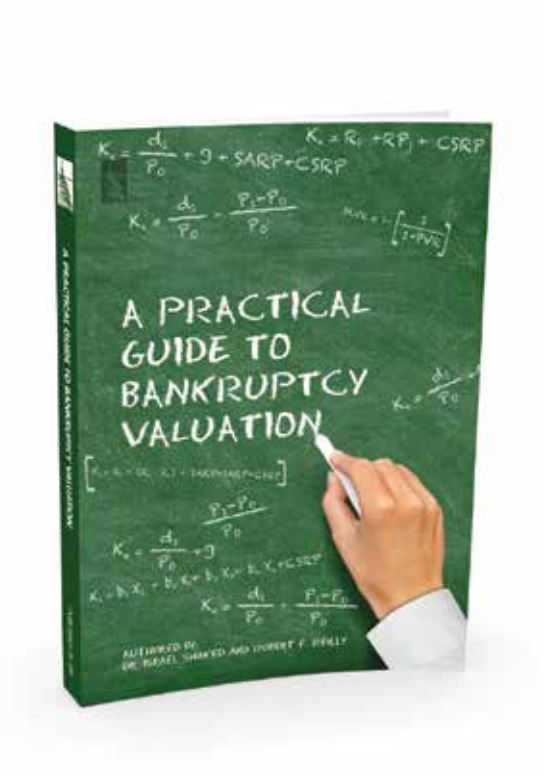

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Valuation Issues under 11 U.S.C. § 506(a)

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Introduction: Valuation disputes arise frequently in Chapter 7, 11, and 13 cases. Such disputes often arise in the context of a contested plan confirmation, equity and adequate protection disputes under 11 U.S.C. §§ 361 and 362, and contested lien stripping. As the language of 11 U.S.C. § 506(a) allows for different interpretations of valuation standards, courts have been left to analyze the issue on a case-by-case basis.

Hypothetical #1: A business Chapter 11 debtor files a proposed plan of reorganization which is conditioned on paying a creditor 100% on account of its secured interest in the debtor's real estate and would allow the balance as an unsecured claim. The real property is indisputably undersecured, however the amount the creditor is to be paid is dependent on the valuation of the real property. The debtor seeks to retain the real property in its reorganization. How should it be valued? Does the valuation standard change if the debtor is seeking to surrender the real property?

- 11 U.S.C. § 506(a)(1) provides as follows:

> (1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title [11 USCS § 553], is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. **Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property** [emphasis added], and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

- Unlike other sections of the Code, Section 506(a) does *not* specify a valuation standard and Courts have been left with attempting to interpret what it means. In *Rash,* the United States Supreme Court analyzed the language of 506(a) in the context of a Chapter 13 debtor's attempt to cram down a lien on a vehicle. [1] *Assocs. Commer. Corp v. Rash,* 520 U.S. 953 (US 1997). Although *Rash* was decided in the context of a Chapter 13 case and personal property, many courts have extended the holding to the valuation of retained real property under § 506(a)(1).
    a. In the event the Debtor seeks to retain the property at issue, the value should be determined in accordance with "its proposed disposition or use" and valued according to its "replacement value" or "fair market value"[2]
        i. Fair market value means "the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition". *Id* at 959 n.2. The valuation should take into account the proposed distribution and use, "not the various dispositions or uses that might have been proposed". *Id* at 964.
        ii. In analyzing the issue with respect to a Chapter 11 case, courts in both the Sixth Circuit and Seventh Circuit have adopted the *Rash* holding. *In re Heritage Highgate, Inc.,* 679 F. 3d 132 (6th Cir. B.A.P. 2012); *In re Mayslake Village-Plainfield Campus, Inc.,* 441 B.R. 309 (Bankr. N.D. Ill. 2010).
    b. What valuation method is used in disputes over real property's equity and adequate protection in context of a relief from stay request?

[1] *Rash* was decided before BAPCPA's addition of Section 506(a)(2).
[2] The terms are used synonymously in *Rash.* See *Rash* at 959 n.2.

i. In general, it appears that most courts have adopted the *Rash* standard and analyzed the issue in relation to the debtor's retention (fair-market valuation) or surrender (foreclosure valuation) of the real property. *In re Deep River Warehouse, Inc.,* 2005 Bankr. LEXIS 1090, 2005 WL 1287987 (Bankr. M.D.N.C. Mar. 14, 2005) (analysis of valuation standards under § 362(d)(1) and (2), also analyzing date of valuation).

c. Does the foreclosure valuation method set forth in *Rash* apply to surrendered real property?

i. It likely depends on the context the property is being surrendered and the chapter of the bankruptcy case. In the context of Chapter 11, courts have held that a fair market valuation should be used in a "dirt-for debt" surrender. *In re Immanuel LLC*, 2011 Bankr. LEXIS 1015, 54 Bankr. Ct. Dec. 130, 2011 WL 938410 (Bankr. W.D. Mich. Mar. 14, 2011) (analyzing in the context of a valuation hearing).

- At what date should the valuation be determined? Section 506(a) is silent as to timing and courts have been left to interpret the meaning of 506(a) in connection with other relevant Code sections. In general, courts generally hold that the appropriate time to value property *varies* and should be determined on the purpose of the valuation and how the property is to be used.

a. In the context of lien stripping, there is some divergence of opinion

i. Some courts have held that valuation should be determined as of the petition date. *In re Hegeduis,* 525 B.R. 74, 86 (Bank. N.D. Ind. 2015) (citing the language of §§ 1325(a)(4), 1325(a)(5)(B(ii) and applying

the language of § 506(a)(2) as to real property in the context of a Chapter 13 case); *In re Richards,* 506 B.R. 326, 331 (Bank. E.D. Mich. 2013) (the petition date is the appropriate valuation date in the context of a Chapter 13 lien strip)

ii. *In re Cahill*, 2013 Bankr. LEXIS 5055, 72013 WL 6229144 (Bankr. D.N.H. Dec. 2, 2013) (a date close to the valuation hearing is the proper valuation date in the context of a Chapter 11 lien strip); *In re Kelly*, 2013 Bankr. LEXIS 5219, 2013 WL 6536539 (Bankr. D. Mass. Dec. 13, 2013) (the appropriate date of valuation for a Chapter 13 lien strip is the confirmation hearing date)

Hypothetical #2: A Chapter 7 debtor seeks to redeem an exempt vehicle pursuant to 11 U.S.C. § 722, or a Chapter 13 debtor attempts to retain exempt vehicle by paying the secured creditor the amount of its allowed secured claim. The amount the debtor must pay is dependent on valuation of the vehicle and the creditor challenges the debtor's valuation. How should the value of the vehicle be determined?

- 11 U.S.C. § 506(a)(2) provides as follows:

  (2)If the debtor is an individual in a case under chapter 7 or 13, such value with respect to **personal property** [emphasis added] securing an allowed claim shall be determined based on the **replacement value of such property** [emphasis added] as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, **replacement value shall mean the price a retail merchant**

would charge for property of that kind considering the age and condition of the property at the time value is determined [emphasis added].

- Section 506(a)(2) was added in 2005 with BAPCA and codifies the replacement value standard set forth in *Rash* but courts have been left with determining *how* to calculate replacement value as defined and have come to varying conclusions as to the appropriate valuation standard:
    a. 95% of the NADA retail value. *In re McElroy,* 339 B.R. 185, 189 (Bankr. C.D. Ill. 2006) (in the context of a Chapter 13 cramdown).
    b. Midpoint between two proffered NADA retail values. *In re Clark,* 2007 Bankr. LEXIS 765, 2007 WL 671346 (Bankr. N.D. Ohio. Feb.27, 2007) (in the context of Chapter 13 debtor's motion to redeem)
    c. Bankruptcy court's use of Kelley Blue Book private party value instead of retail value was not a reversible error. *In re De Anda- Ramierez,* 359 B.R. 794, 796 (10th Cir. B.A.P. 2007) (in the context of Chapter 13 plan confirmation)
    d. Value should be calculated by adjusting Kelley Blue Book or NADA retail valuation by a reasonable amount based on evidence presented regarding the vehicle's condition and other relevant factors. *In re Morales,* 387 B.R. 36, 45 (Bankr. C.D. Cal. 2008) (in the context of Chapter 13 debtor's motion to redeem)
    e. Neither the Sixth Circuit nor Seventh Circuit have established a uniformed method. *In re Perales,* 2012 Bankr. LEXIS 1001 (6th Cir. B.A.P. Mar. 12, 2012) (regarding the lack of uniform method in the 6th Circuit).

f. Most courts hold that it should be determined on "case by case" basis and that the usage of Kelley Blue Book or NADA as a starting point, is acceptable. However, courts put more weight in the testimony of a qualified independent appraiser. *In re Redpath,* 2009 Bankr. LEXIS 3118, 2009 WL 3242107 (Bankr. C.D. Ill. Sept. 30, 2009).

- What about the valuation of surrendered personal property in the context of bifurcation of claims in a Chapter 7 or Chapter 13 context? *Rash* provided for the "foreclosure value" standard in such a situation, but it was decided prior to the Section 506(a)(2) makes no distinction as to retained property versus surrendered property.

  a. In *Santander,* the creditor sought to have the *Rash* "foreclosure value" standard applied to a surrendered vehicle notwithstanding the language of § 506(a)(2). *Santander Consumer USA, Inc. v. Brown,* 746 F. 3d 1236 (11th Cir. 2014). Specifically, the creditor alleged that § 506(a)(2) should *only* apply when the Debtor is retaining the vehicle. *Id* at 1241. The court rejected the argument and held that the "replacement value" standard set forth in § 506(a)(2) applies to vehicles to be surrendered. *Id.*

- At what date should valuation be determined?

  a. The language in § 506(a)(2) leaves open two different interpretations of the appropriate valuation date. There is also very little case law as the section is moderately new.

  b. The first sentence of §506(a)(2) seemingly provides for a valuation to be determined as of the petition date; however the second sentence provides that

if the property was acquired for personal, family, or household purposes, then "replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property *at the time value is determined"* [emphasis added].

i. Some courts have held that the valuation date must be the petition date as the clause "at the time value is determined" is "best understood within the meaning of § 506(a)(2) *as a whole* to mean at the time of which value is determined, *i.e.*, at the petition date". *Morales* at 47.

ii. Other courts have said that value is determined at a time close to the valuation hearing, but there is less case law in support of this differing analysis.

- What about valuation of debtor's personal property in a corporate Chapter 7 case? Section 506(a)(2) only addresses "individual" chapter 7 debtors.

  a. At least one court has applied the "replacement value" standard pertaining to personal property of a corporate Chapter 7 debtor. *In re Pelham Enters.,* 376 B.R. 684, 692 (Bank. N.D. Ill. 2007) (analyzing in the context of a disputed relief from stay request).

- Who has the burden of proof in a valuation dispute under 506(a)? There are different approaches and it often depends on the context in which the dispute arises. Generally, it is the party that creates the need for the valuation determination that bears the burden.

  a. Creditor has burden of proof. *In re Sneijder,* 407 B.R. 46, 55 (Bankr. S.D. N.Y. 2009) (analyzing in context of a disputed claim in a Chapter 13 case); 11

U.S.C. 362(g)(1) (creditor has burden of proof on the issue of debtor's equity in property as related to stay relief)

b. Debtor has burden of proof. *In re Wcislak,* 417 B.R. 24, 28 (Bankr. N.D. Ohio. 2009) (analyzing in context of a disputed claim in a Chapter 13 case); *In re Perales*, *In re Perales*, 2012 Bankr. LEXIS 1001 (B.A.P. 6th Cir. Mar. 12, 2012) (analyzing in context of Chapter 7 debtor's motion to redeem vehicle); *In re Immanuel LLC,* 2011 Bankr. LEXIS 1015, 2011 WL 938410 (Bankr. W.D. Mich. Mar. 14, 2011) (analyzing in context of debtor's Chapter 11 plan confirmation); In re Fort Wayne Telsat, Inc., 2009 Bankr. LEXIS 283 (Bankr. N.D. Ind. Feb. 12, 2009) (analyzing in context of disputed claim)

c. Burden shifting analysis: the initial burden falls upon the party challenging the valuation. If the movant establishes with evidence to overcome the presumed validity of the claim, then the burden shifts to the creditor to demonstrate the extent of its lien and the value of the collateral securing the claim. *In re Heritage Highgate, Inc.,* 679 F. 3d 132, 140 (3rd Cir. 2012) (analyzing in the context debtor's chapter 11 plan of reorganization).

MATERIALS RELATED TO REVOCATION OF DISCHARGE, STANDING AND PROSECUTORIAL NATURE OF 727 COMPLAINTS

LAWRENCE FRIEDMAN
ABI Central States Meeting
June 11-14, 2015
Traverse City, Michigan

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN – FLINT DIVISION

In re: Gina Papia Render	Case No: 10-34091 Chapter: 7
Capital Recovery IV, LLC as Successors in Interest to GE Capital and Art Van, Plaintiff, v. Gina Papia Render[1], Defendant.	Hon. Daniel S. Opperman Adversary Case No: 11-03414

First Amended Complaint

Creditor Capital Recovery IV, LLC as Successors in Interest to GE Capital and Art Van, through counsel Lawrence A. Friedman and Wm Paul Slough, state the following as its complaint against Debtor Gina Papia Render:

Jurisdiction

1. Jurisdiction is conferred on this Court by 28 U.S.C. § 1334 in that this proceeding arises under Title 11 of the United States Code. This proceeding arises and is related to the above captioned Chapter 7 case under Title 11, and concerns the discharge of the debtor in that case. This proceeding is a core proceeding pursuant to 28 U.S.C. § 157. Venue is proper in this Court under 28 U.S.C. § 1409. This action is in the form of a complaint under Fed.R.Bank.P. 7001.

[1] f/k/a Gina Lynn Render, Gina Lynn Papia-Render, Gina Lynn Papia

Parties

2. Creditor Capital Recovery IV, LLC as Successors in Interest to GE Capital and Art Van, is a limited liability company that holds claims as a creditor in the above captioned chapter 7 proceeding.
3. Debtor Gina Render is the individual debtor in the above captioned chapter 7 proceeding.

General Allegations

4. Debtor Gina Render filed the above captioned case on July 27, 2010, and was granted a discharge on November 2, 2010.
5. On March 18, 2011, Debtor testified at an examination under Fed. R. Bankr. P. 2004 that she gave certain jewelry to her mother pre-petition to hold during the bankruptcy process. *Exhibit 1 – 2004 Exam Transcript (Excerpts).* This jewelry and transfer was not disclosed in Debtor's initially filed petition and schedules.
6. On August 18, 2011, the chapter 7 trustee motioned to sell the discovered jewelry, valuing it at approximately $14,000.00 (Docket No. 28).
7. Debtor further testified that she became engaged in August 2008; that she received an engagement ring; and that she returned the ring to her fiancé Mr. Evans in the summer of 2010 prior to filing the petition. *Id.*
8. Debtor did not disclose the engagement ring in her schedules filed with the petition, and continues to maintain that she does not own the ring.

9. Debtor testified that she and Mr. Evans broke off the engagement because of the "uncertainty of [their] future together" and that as of the date of the examination the uncertainty still existed. *Id.*
10. Even so, Debtor testified that she has "probably" told others that she is still engaged, including her own children. *Id.*
11. Debtor also admitted at the examination that she continues to live with Mr. Evans and drive his vehicles. *Id.*
12. Debtor then testified in a state court on May 31, 2011, that Mr. Evans was her boyfriend, that she was deeply in love, and that their relationship was "committed and stable." *Exhibit 2 – Friend of the Court Transcript (Excerpts).*

Revocation of Discharge

13. Plaintiff restates the proceeding and preceding paragraphs.
14. Debtor conveyed the jewelry to her mother and engagement ring to Mr. Evans with intent to hinder, delay, or defraud her creditors, and she transferred, removed, and concealed her property within one year before filing her petition.
15. The jewelry's value was well in excess of Debtor's allowed exemptions under 11 U.S.C. § 522.
16. Debtor knowingly and fraudulently made a false oath or account regarding her relationship with Mr. Evans and interest in her engagement ring.
17. Debtor has failed to explain satisfactorily the loss of her engagement ring.
18. Plaintiff did not become aware of the above fraudulent acts until after Debtor was granted her discharge.

19. Plaintiff brings this proceeding within one year after the discharge was granted, and while the case remains open.

Plaintiff therefore requests this court grant a judgment in its favor revoking Debtor's discharge under 11 U.S.C. § 727(d)(1).

Date: October 2, 2012

/s/ Wm Paul Slough

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION-FLINT

IN RE:

GINA PAPIA RENDER,

Debtor.

Case No. 10-34091
Chapter 7

TOMMEE E. RENDER, JR.,

Plaintiff,

Hon. Daniel S. Opperman

Adversary Case No. 11-03414

v

GINA PAPIA RENDER,

Defendant.
_____/

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED UNDER 11 U.S.C. §727(B)(1)

The Debtor and Defendant Gina Render and the Plaintiff Tommee Render are divorced. Their divorce judgment entered on or about May 9, 2007. A copy of the divorce judgment is attached as Exhibit A. The Defendant Gina render filed a petition for relief under Chapter 7 of the Bankruptcy Court with this court on July 27, 2010 and was granted a discharge on November 2, 2010.

The Plaintiff has filed two proofs of claim in this action. The proofs of claim are attached as Exhibits B and C. Exhibit B is a claim in the amount of $1,449.81. It recites that the basis for the claim is a "court ordered joint debt". Attached to the claim is a copy of an order of the Livingston County Circuit Court which recites that "Plaintiff shall reimburse Defendant 50% of all garnishments he has paid to National City on the joint debt (totaling approximately $1,449.81) within fourteen (14) days from the entry of this Order."

The second proof of claim, attached as Exhibit C, was filed in the amount of 1,108.41. Attached to the claim is a computer printout. The printout was apparently generated by the Michigan Child Support Enforcement System, and says that it is for the period 8/1/10 through 11/4/10. The attachment to the Exhibit C claim goes on to list as the docket number 2007039190DM, which is the Livingston County divorce case number for Mr. and Mrs. Render. The attachment goes on to say that there is a balance owed for "child support" in the amount of $1,108.41, and that the payee of the child support is the Defendant Gina Render.

Taking the claims facially, both appear to be nondischargeable. The Exhibit B claim appears to be a joint money debt for which the Plaintiff and ex-husband Tommee Render was garnished, and for which he has an order from the Livingston County Circuit Court compelling the Defendant to pay 50% of the garnished amount. This is a claim that falls under 11 U.S.C. §523(a)(15). Section 523(a)(15) says that a debt is not dischargeable if it is a debt:

> "to a spouse, former spouse or child of the debtor and not of a kind described in paragraph 5 that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record...".

This particular order, although not a part of the divorce decree, appears to fall under the language which refers to "other order of a court of record".

The Exhibit C claim appears on its face to be nondischargeable pursuant to 11 U.S.C. 523(a)(5). It is described as child support, which is clearly nondischargeable under §523(a)(5).

Taking the Plaintiff's claims at their face, and presuming the claims to be nondischargeable, the Plaintiff lacks jurisdiction to bring a claim pursuant to 11 U.S.C. §727. In *In Re Mapley*, 437 B.R. 225 (E.D. Mich 2010), the plaintiff Gloria Mapley filed a complaint seeking the denial of her former husband David Mapley's discharge pursuant to various subsections of 11 U.S.C. §727(a). Judge Tucker scheduled an order to show cause hearing sua sponte requiring the plaintiff to appear and show cause why her complaint should not be dismissed for lack of standing. The court observed that the debts claimed to be owed by the Plaintiff "all arise from or based on orders of the Oakland County, Michigan circuit court in a pending divorce case between the parties... as such, it appears that these debts are nondischargeable under 11 U.S.C. §523(a)(15) and/or 11 U.S.C. 523(a)(5)." The court then went on to hold that it lacked jurisdiction because there was no case or controversy before it.

> "The Supreme Court has held that courts have a continuing duty to examine their own jurisdiction if the court determines that at any time it lacks subject matter jurisdiction, the court must dismiss the action." (See *Sturgis v Lloyd,* #10-10101, 210 WL 1052342 (E.D. Mich, March 19, 2010). (at p. 226)

The court also observed that:

> "...federal courts have no power to decide questions that cannot affect the race of the litigants in the case before them. When the controversy ceases to be actual or ongoing-when the issues presented are no longer live, or the parties lack a legally cognizable interest in the outcome, it is moot." (at p. 227).

The court then dismissed the plaintiff's complaint reasoning as follows:

> "The only injury which the plaintiff's complaint even arguably seeks to avoid is the discharge of the debt owed to her by the defendant". (at p. 227)

The court went on to hold that because the plaintiff's underlying claims were, as claimed by the plaintiff, nondischargeable, that the plaintiff had no remedy that the court could provide.

> "The only injury which the plaintiff's complaint even arguably seeks to avoid is the discharge of the debt owed to her by the Debtor. But in this case, it is clear, and the Plaintiff does not dispute, that any debt the Debtor owes Plaintiff, and which is the subject of her adversary complaint, arises from one or more orders issued by the state court in the parties' pending divorce case. Thus, it is clear, and plaintiff does not dispute, that the debt in question will not be discharged even if the Debtor obtains a discharge in his Chapter 7 case." (at p. 228).

Similarly, in *In Re Klingler*, 301 B.R. 519 (Bank.N.D. Ill. 2003), Richard Day, a creditor of Michael Klingler, filed an adversary proceeding seeking a determination that the debt owed to him was nondischargeable under 11 U.S.C. §523(a)(2)(A). After prevailing, the creditor then filed a second action seeking an order revoking the Debtor's Chapter 7 discharge. The court dismissed the second adversary proceeding based upon lack of subject matter jurisdiction.

> "The judgment in Day's favor in the first adversary rendered the second adversary moot. The injury for which Day sought relief in the first adversary was the potential discharge of Klingler's debt to him under section 727(b). The judgment he received in the first adversary gave him the relief he sought: the court specifically held that the debt (or, more accurately, the state court judgment to which the debt had been reduced) was 'non-dischargeable in bankruptcy'. (Final Judgment dated April 15, 2003). With that remedy, Day received all the relief to which he was entitled for the injury he claimed. The debt cannot be made any more nondischargeable than it currently is. There is no further relief the court can grant him... As a result of the first adversary, the debt Klingler owes Day will not be discharged. Having prevailed in that proceeding, Day no longer has any personal stake in any other discharge decision. He stands to gain nothing in the second adversary if he prevails. AT most, he is litigating now to vindicate the rights of any remaining creditors, which he cannot do. Or else he is simply litigating out of a distaste for Klingler, which he also cannot do." (at p. 525).

Similarly, in *In Re Neal*, 302 B.R. 275 (8th Cir BAP 2003), the debtor's ex-wife appealed two orders entered by the Bankruptcy Court. One was an order confirming the debtor's amended Chapter 13 plan and the second was an order granting the debtor a discharge. The court noted that there was a possibility that the state court could award the ex-wife maintenance retroactive to the date before the debtor had filed for relief under Chapter 13, and that the plaintiff apparently believed that it was necessary to contest the discharge order granted under §727. The 8th Circuit Bankruptcy appellate panel disagreed, holding that because debts for maintenance are nondischargeable under §523(a)(5):

> "The appeal of the discharge order was of no practical significance to the ex-wife... Federal courts have no power to decide questions that cannot affect the rights of the parties in the case before them. An appeal is moot if we can grant no effective relief because the plaintiff has already received all the relief the trial court can offer." (at pp. 522-523).

The Court then dismissed the appeal as moot.

Conclusion

The Defendant has filed proofs of claim which have not been contested and are presumptively valid. On their face, the proofs of claim are exceptions from discharge. One of them claims to be a support obligation (not dischargeable under §523(a)(5)) and the second purports to be an obligation to a third party which the Debtor has an obligation to jointly pay (See 11 U.S.C. §523(a)(15)). Because the Plaintiff is vouching for the accuracy of the claims by filing them and is estopped from denying their accuracy, the presumptive validity of these claims which are nondischargeable, deprives the Plaintiff of standing to file a complaint for revocation of discharge.

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Dated: September 22, 2011

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN – FLINT DIVISION

In re: Gina Papia Render Debtor.	Case No: 10-34091 Chapter: 7 Hon. Daniel S. Opperman
Tommee Render Plaintiff, v. Gina Papia Render Defendant.	Adversary Case No: 11-03414

Response to Defendant's Brief in Support of Objection to Motion for Leave to Amend Complaint

Debtor's objection raises two points, both already addressed in prior pleadings.

I. Substitution

First, Debtor argues that it is improper to add an additional Plaintiff to cure any standing deficiency because the one year deadline for denial of discharge under § 727(e) passed prior to the motion to amend. This argument was considered and specifically rejected in In re McKissack, 320 BR 703 (Bankr. D. Colo. 2005).

Despite finding no direct authority in the court rules or § 727 for substitution of a plaintiff, the McKissack court found that other courts "overwhelmingly approved the practice." *Id.* at 716. The court thus looked to its broad equitable powers under 11 U.S.C. § 105(a), which allows a court to "issue any order, process, or judgment that is necessary or appropriate to

carry out the provisions of [the Bankruptcy Code]." In doing so, the court considered a number of equitable measures:

(1) Whether the allegations have merit;

(2) Whether there is prejudice to the Defendant;

(3) Whether a party is attempting to escape time limitations, state new causes of action, or gain additional time.

"The defendant's due process rights require that a substituted plaintiff may assume no new rights and must be prohibited from raising new issues which were not raised in the original complaint." *Id.*

As this court concluded in its August 10, 2012 opinion, "the actions alleged . . . appear to be the same identical actions alleged in Plaintiff's original complaint." *August 10, 2012 Opinion and Order, p. 3.* Further, Debtor has identified no prejudice, nor any attempt at delay. As the allegations in Plaintiff's amended complaint are identical, the amendment should be granted and deemed to relate back. *Id.* at 2 (citing Miller v American Heavy Lifting Shipping, et al., 231 F.3d 242 (6th Cir., 2000). As this court made clear, "these motions are routinely granted." *Id.* at 3.

Debtor's response cites only cases involving Rule 15 in the context of general civil litigation. Again, this is not such a case. This is a case involving a quasi-prosecutorial action under § 727. Moreover, the cases cited by Debtor fail to consider this court's unique equitable power under § 105(a).

Thus, under McKissack and § 105(a), this court has the authority to grant Plaintiff's motion to amend.

II. Standing

Second, Debtor argues that Plaintiff lacked standing to bring this action, and thus no case exists for which to substitute a new plaintiff. As stated in Plaintiff's reconsideration motion, Plaintiff did have proper standing under established 6th Circuit precedence.

This is because Congress has endowed § 727 plaintiffs with a quasi-prosecutorial status, to represent all creditors. "A court of equity in protecting the rights of all creditors of a bankrupt will not shield dishonesty. . . . The opposition to the discharge of a bankrupt interposed by any creditor upon a lawful ground inures to the benefit of all creditors." Cunningham v. Elco Distributors, 189 F.2d 87, 89 (6th Cir. 1951) (allowing creditor to pursue denial of discharge on behalf of all creditors under the Bankruptcy Act, even though the false financial statement was made to different creditor.) Also see In re Thomas, 178 B.R. 852, 853 (Bankr. W.D. Wash. 1995) ("[A] creditor prosecutes a section 727 action as trustee, since the action inures to the benefit of all creditors.") And In re Rich, 202 B.R. 107 (Bankr. C.D. Ill. 1996) (standing argument not applicable to fully secured creditor acting to revoke discharge on behalf of all creditors).

Thus, a colorable § 727 action cannot be dismissed for lack of standing, where at least one other creditor will be injured by the discharge. To allow such a dismissal undermines the very public policy factors outlined in McKissack, and the case law recognizing that the creditor acts as a substitute trustee for all the creditors. Just as Plaintiff cannot dismiss its § 727 action without due consideration to other creditors (thereby depriving the court of jurisdiction), a § 727 action should not be dismissed for lack of standing without the same due consideration. In

other words, other aggrieved creditors must be given an opportunity to continue the litigation.

For these reasons, Plaintiff requests the court grants the motion to amend and add Capital Recovery IV, LLC as a plaintiff to this action.

Respectfully submitted,

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/s/ Wm Paul Slough

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SHOULD THE DEBTOR VALUE PROPERTY AT $0.00 OR AT UNKNOWN ON THEIR SCHEDULES?

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Overview:

Some of the Debtor's personal property rights, and potential causes of action are either difficult to evaluate, or impossible to evaluate. Routinely, if the asset is impossible to evaluate, the Debtor's counsel will choose to identify the value on the Debtor's schedules as "unknown." A common practice when identifying personal injury claims.

However, in those cases in which the asset is merely difficult to evaluate, how much effort should the Debtor use to evaluate the assets? If the Debtor chooses to evaluate property with either a $0.00 value, or a relatively small value, what are the consequences in a Chapter 7 case? What are the consequences to the Debtor's discharge?

Enclosed is a hypothetical question from a recent case involved an asset scheduled with a value of $0.00.

Hypothetical Question

The Debtor files bankruptcy and schedules a "Lawsuit" with a value of $0.00. The Trustee chooses not to administer the asset. After the end of the case, the Lawsuit turns out to be a fraudulent transfer lawsuit that is pursued by the pre-petition creditor. The defendant in the lawsuit asserts that only the Trustee could have brought the suit. That because the trustee accepted the valuation of "$0.00" by filing a no-asset report, that the value of the lawsuit was in fact "$0.00"

What should the court rule?

I. Disclosed assets that are not administered are abandoned at the close of a bankruptcy case back to the original party that owned the asset.

- Section 554(c) provides that "unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of the case is abandoned to the debtor and administered for the purpose of section 350 of this title."

- In the case of a fraudulent conveyance claim that is not administered by the Trustee that claim reverts back to the pre-bankruptcy creditor who originally held the claim. *Rutili v. O'Neil*, 468 B.R. 309, 333 n.4 (N.D. Ill. 2012).

- Only disclosed assets are abandoned out of the bankruptcy case. *Morlan v. Universal Guar. Life Ins. Co.*, 298 F.3d 609, 618 (7th Cir. 2002).

II. Only schedules assets that include sufficient information to put the Trustee on Notice of the Asset.

- A trustee is charged with the duty to "investigate the financial affairs of the Debtor under section 704(a). However, the Trustee generally has limited time and resources, and therefore has no obligation to run down all leads but only conduct searches that are realistic in the ordinary course of the trustee's performance of his duties. *Lujano v. Town of Cicero*, 2012 WL 4499326 at *7 (N.D. Ill. Sept 28, 2012).

III. Assets who value is listed at "zero" may provide insufficient information for a Trustee to be on notice of the Asset

- A claim that is identified with no monetary value is hardly different than denying the existence of the claim altogether. *Thomas v. Guardsmark, Inc*. 2005 WL 1629770, at *2 (N.D. Ill. July 7, 2005).

- The Trustee's interest in the debtor's claim is not known, and therefore no abandonment of the claim. *Leventhal v. Schenberg*, 917 F.Supp. 2d 837, 848 (N.D. Ill. 2013).

iv. If the value of the asset is listed as known, the Trustee's obligation to investigate the value of the assets is triggered

- When an asset is scheduled as "unknown, the Trustee is deemed to have had an opportunity to investigate. *Thomas v. Guardsmark, Inc*. 2005 WL 1629770, at *2 (N.D. Ill. July 7, 2005).

V. Holding from Hypothetical Question:

- The Court held that the since the asset was scheduled at $0.00, that it had not been abandoned at the end of the bankruptcy case by the Trustee. The Court found that pre-bankruptcy creditor had no standing to pursue the claim, and held the case open to see if the Trustee wanted to substitute into the case, and have the case transferred from District Court to the Bankruptcy Court.

VI. Questions from the Holding?

- Should Debtors simply evaluate all difficult assets at "unknown" rather than "$0.00" or with an extremely low value?

- Does valuing an asset as "unknown" when the Debtor may be able to evaluate constitute an act of bad faith?