

2017 Alexander L. Paskay Memorial Bankruptcy Seminar

You Paid How Much?? Valuation Issues in Business and Consumer Cases

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Valuation Cheat Sheet¹

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Introduction

Valuation issues pervade the Code, and delving into the myriad legal and factual issues may be daunting. The following is an attempt to summarize the literally hundreds of valuation cases and provide a quick guide for bankruptcy judges to get started. Although we have made every attempt to be comprehensive, please be aware that approaches to value vary by Circuit; that the value of property may be different for different purposes and at different times during the life of a bankruptcy case; and therefore that this "cheat sheet" should not substitute for independent legal research and analysis depending on the circumstances of your particular case.

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I. Valuation Issues Pervade the Bankruptcy Code: A Partial List

- ► Adequate Protection under § 361: Requiring payments or replacement liens to protect the creditor against a decrease in the value of its interest.²
- ► Stay relief under § 362(d)(2)(A): Whether a debtor has "equity" in the property.³
- ► Sales of property under § 363(f)(3) free and clear of liens: Whether the price of the property to be sold is greater than the aggregate value of all liens on such property and for purposes of whether the buyer is a good faith buyer under § 363(m).⁴
- ▶ *Determination of Secured Status* under § 506 (discussed below).
- ► Scheduling of Assets/Disclosure of Transfers under § 521: Schedules and statements require a debtor to disclose under penalty of perjury the "current value" of the asset, and the "value" of the transfer. ⁵

- Test for determining whether debtor has any equity in property, for purpose of determining whether stay should be lifted to allow creditor to pursue its rights therein, involves comparison between total liens against property and property's current value; all encumbrances must be considered, whether or not all lienholders have requested relief from stay. **In re Bowman**, 253 B.R. 233 (8th Cir. BAP 2000); **In re Gindi**, 642 F.3d 865 (10th Cir. 2011). This is the majority view. *But see* **In re Cote**, 27 B.R. 510 (Bankr. D. Ore. 1983) (equity determined by comparison of value of property to amount owed to senior lienholder; liens of junior lienholders not considered).
- In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 149 (3d Cir. 1986) (in determining whether the purchaser was in good faith, courts consider that whether fair and valuable consideration is given in a bankruptcy sale is when the purchaser pays 75% of the appraised value of the assets). In re Adam Aircraft Industries, Inc., 2013 WL 773044 (Bankr. D. Colo. Feb. 28, 2013) (bankruptcy court properly applied replacement and not liquidation value standard in valuing assets sold by a Chapter 7 Trustee at a § 363 sale, since the business was being sold as a going concern).
- Fed.R.Bankr.P. 1007(b)(1) requires the filing of schedules of assets and liabilities prepared as prescribed by the appropriate Official Forms. The current forms were revised in December 2007, and require a disclosure of "current value." At some point in the past, however, the official forms required the debtor to list the "current market value" of the debtor's interest in the property this author was unable to determine when this changed. But, as recently as 2004, the court in Harker v. West (In re West), 328 B.R. 736, 749 (Bankr. S.D. Ohio 2004) noted the requirement that debtors value assets at "market value" in the forms. In West, the court noted that the phrase "market value" was not defined in the Code or Rules and that there were surprisingly few cases addressing the definition. The court noted that, with only two exceptions, the courts that had considered the question concluded that property should be listed in schedules and valued for exemption purposes at its "fair market value," defined as the price that a willing seller not under compulsion to sell and a willing buyer not under compulsion to buy agree upon "after the property has been exposed to the market for a reasonable amount of time" (cites omitted). Two courts had considered that items such as household goods should be listed at liquidation value. In considering whether debtor's discharge should be denied for valuing jewelry purchased at retail for \$30,000 which debtor scheduled as worth \$2,000, in reliance on her counsel's advice to use a pawnshop value, the court believed reliance on advice of counsel

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Adequate protection is to be determined by the value of the creditor's interest in property during the administration of the Chapter 11 case. If that interest is declining, then a secured creditor is entitled to cash or other security in the amount of the decline in value of its collateral during the course of the Chapter 11 case. In re Apex Oil, 85 B.R. 538, 541 (Bankr. E.D. Mo. 1988), citing United Savings Association v. Timbers of Inwood Forest, 484 U.S. 365, 108 S.Ct. 626, 629-30, 98 L.Ed.2d 740 (1988); no evidence was presented that the value of the debtor's service station would diminish during the course of this Chapter 11 proceeding.

- **Exemptions** under § 522(a)(2): "In this section...value" means "fair market value as of the date of the filing of the petition, or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.
- ▶ Lien Avoidance under § 522(f): Avoidance of liens to the extent they impair an exemption; under § 522(f)(2)(A), a lien shall be considered to impair an exemption to the extent that the sum of (i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value of that the debtor's interest in the property would have in the absence of any liens."
- ► Exceptions to discharge under § 523, e.g., value of property for purposes of determining fraud, damages.
- ▶ Preferential Transfers under § 547 for purposes of determining insolvency, defined as when the sum of the debts is great than all the property, at a "fair valuation" under § 101(32)⁸; and, for purposes of whether a creditor received more than it would have received in a chapter 7 liquidation.⁹

was reasonable, such there was limited support for that valuation approach and debtor could not reasonably have been expected to know that she should have used fair market, rather than liquidation, values in completing her Schedule B. *See* **Zitwer v. Kelly (In re Kelly),** 135 B.R. 459, 462 (Bankr. S.D.N.Y. 1992) ("The defense of reliance on counsel is not available when it is transparently plain that the advice is improper").

- In re Valentine, 2009 WL 3336081,*7 (Bankr.D.N.H. Oct 14, 2009) (rejecting trustee's objection to jewelry exemption on grounds of debtor's alleged bad faith in valuing jewelry; finding debtor's testimony that she relied on counsel's advice to value jewelry purchased for \$5,520 at \$1,000 liquidation value was not bad faith); In re Orton, 687 F.3d 612 (3rd Cir. 2012) (Debtor limited to the \$1.00 exemption in oil and gas lease, even though \$1.00 was the fair market value at the time of the petition; estate entitled to the postpetition appreciation in value, rejecting Debtor's argument that **Schwab v. Reilly**, 130 S.Ct. 2652 (2010) applies only to bad faith undervaluation).
- The majority view is that fair market value is the appropriate valuation standard for purposes of lien avoidance, and that costs of liquidation should not be deducted. *E.g.*, **In re Wolmer**, 494 B.R. 783 (Bankr. D. Conn. 2013). *But see* **In re Walsh**, 5 B.R. 239 (Bankr. D. C. 1980). There is also a split of authority on the issue of whether a judicial lien's priority under state law is relevant in determining whether a debtor may avoid such lien, and whether a debtor may use § **522(f)** to avoid a judicial lien that has priority even over the first mortgage. *See* **In re Moltisanti**, 2012 WL 5246509 (Bankr. E.D.N.Y. 2012) (collecting the cases); *See* **In re Kolich**, 328 F.3d 406, 410 (8th Cir. 2003); **In re Moore**, 495 B.R. 1(8th Cir.BAP 2013) (holding that Missouri state law exception to a debtor's homestead exemption rights did not prevent debtor from asserting her state law homestead exemption rights to avoid a judgment lien that creditor obtained after debtor acquired homestead property).
- In re Trans World Airlines, Inc., 134 F.3d 188 (3d Cir. 1998) (fair valuation of assets contemplates a conversion of assets into cash during a reasonable period of time, in this case, 12 to 18 months; rejecting the preference defendant's argument that fair value implies a hypothetical sale for the highest and best price, with no time pressure, citing American Nat'l Bank & Trust Co. v. Bone, 333 F.2d 984, 987 (8th Cir. 1964); "[T]he reasonable time should be an estimate of the time a typical creditor would find optimal: not short a period that the value of the goods is substantially impaired via a forced sale, but not so long that a typical creditor would receive less satisfaction of its claim, as a result of the time value of money and typical business needs, by waiting for the possibility of a higher price;" also rejecting the defendant's argument that the fair valuation standard applies to liabilities; the Court determines that it should use the face value of debt, rather than market value, in light of the fact the business is being valued as a going concern); In re Heilig-Meyers Company, 328 B.R. (E.D. Va. 2005) (balance sheet test of insolvency applies; however, at the threshold, the court must determine whether, on the date of

- ► Fraudulent Conveyances under § 548(a)(1)(B)(i): Avoidance of transfers where debtor received less than "reasonably equivalent value"; "value" is defined in § 548(d)(2)(A) as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." ¹⁰
- ► *Recovery of transfer or its value* under § 550¹¹: Not defined by the Code; nor does the Code indicate at what time "value" is determined.

the transfers, the debtor operated as a going concern or was on its deathbed – on deathbed means the valuation should be a liquidation value); **In re Golden Mane Acquisitions, Inc.**, 221 B.R. 963 (Bankr. N.D. Ala. 1997) ("Fair value, in the context of a going concern, is determined by the fair market price of the debtor's assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor's debts).

- In re Nguyen, 2014 WL 61410 (Bankr. S.D. Tex. Jan. 7. 2014) (denying plaintiff's complaint to avoid foreclosure of property on ground foreclosing creditor received more than it would have received in a chapter 7 case; Wells Fargo bid the amount of its debt; plaintiff asserted that, based on the tax assessed value, which was more than the debt, Wells Fargo had received in excess; plaintiff failed to designate an expert or submit a report in response to Wells Fargo's motion for summary judgment; court accepted Wells Fargo's expert appraisal report opining that value was less than the debt); In re Lewis W. Shurtleff, Inc., 778 F.2d 1416, 1422 (9th Cir. 1985) (we are unsure whether the bankruptcy court should have deducted the transaction costs of a sale in computing the value of the property transferred. Section 547(b) itself does not address the method by which transferred property should be appraised. Nor does the Code appear to authorize a uniform method for valuation).
- BFP v. Resolution Trust Corp., 114 S.Ct. 1757 (1994) (We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with; rejecting an argument that "reasonably equivalent value" constitutes "fair market value"; the term "fair market value," though it is a well-established concept, does not appear in § 548); see also In re Russell-Polk, 200 B.R. 218 (Bankr. E.D. Mo. 1996) (Chapter 13 debtor sought to avoid real property tax sale of her property to tax sale purchaser as a fraudulent transfer; held, that proceeds received from properly conducted real property tax sales in Missouri conclusively satisfied requirement that transfers of property by debtor in year prior to petition filing be in exchange for reasonably equivalent value; "[t]he Court is sensitive to the fact that most, if not all, forced tax sales yield a purchase price much lower than the "fair market value" of the property. The Supreme Court also recognized this fact in the mortgage foreclosure sale context, yet it did not control their analysis. BFP v. Resolution Trust Corp 114 S.Ct. 1757, 1762. Similarly, the consideration received at a tax sale should not control the analysis in this case").
- In re Hecker, 459 B.R. 6, 14-15 (8th Cir. BAP. 2011); In re American Furniture Outlet USA, Inc., 209 B.R. 49, 52 (Bankr. M.D. N.C. 1997) (when chapter 11 debtor-retailer returned furniture to supplier within 90 days prepetition, fair market value of transferred goods, the value of the preference, was properly reflected in the amount netted by the supplier in liquidation sales after costs and expenses, not amount grossed at those sales, since supplier acted in a commercially reasonable manner and absent bankruptcy would have been entitled to collect costs and expenses associated with sales under North Carolina law; noting that the Code's failure to prescribe a valuation formula for § 550(a) has engendered some case law; the purpose and thrust of § 550 is to restore the debtor's financial condition to the state it would have been had the transfer not occurred; where debtor returned goods to supplier in return for the supplier's full credit of the account, the court holds that the term "value" connotes "market value" or the amount the trustee would receive if he offered the items for sale; the credit memo is not relevant); But see In re First Software Corp., 84 B.R. 278 (Bankr. D. Mass. 1988), aff'd 107 B.R. 417 (D. Mass. 1989) (value that the trade creditor ascribed in a credit memo for returned goods was evidence of the market value of the goods at the time of the transfer); distinguishing those cases because the credit memo was the only evidence of value; return of furniture from Debtor to its supplier was not reflective of arms-length transaction between a willing seller and a willing buyer; amount netted by supplier after its liquidation sale of the furniture was the best evidence of value.

- ► **Abandonment** under § **554** of property "of inconsequential value and benefit to the estate."
- ► **Redemption** under § 722: Paying the holder of the lien the amount of the allowed secured claim (as determined under § 506). 13
- ▶ Denial of Discharge under § 727(a)(4)(A) (false oath). 14
- ► Cramdown & Strip Offs: Determination of allowed secured claims in Chapters 11, 12 and 13 (§§ 506(a), 1129, 1225, 1325(a)(5)) (discussed below).
- ► Liquidation analysis or "best interests of creditors" tests in Chapters 11, 12 and 13 (§§ 1129(a)(7), 1225(a)(4), 1325(a)(4)): Unsecured creditors to receive value, as of the

In re Thornton, 269 B.R. 682 (Bankr. W.D. Mo. 2001) (Chapter 7 trustee would be directed to abandon 15.2-acre parcel of homestead property to debtors, as being of inconsequential value, where property's fair market value of \$27,000, as reduced by encumbrances thereon, costs of sale, debtor's homestead and other exemptions thereon, and trustee's 25% fee for distributing the remainder, would result in total distribution of only \$1,119.51 (or less than 2%) on general unsecured debt of \$66,784.64; benefits to estate of administering property were de minimis); In re Nelson, 251 B.R. 857 (8th Cir.BAP 2000) (evidence supported bankruptcy court's determination that the two parcels were of inconsequential value or benefit to the estate, despite trustee's contentions that the parcels had value as rental property, and that equity of redemption in the property provided a source of value for the estate; court rejected trustee's argument that the parcels could be rented; argument was speculative at best; trustee did not demonstrate any effort to rent the parcels, and lienholders had assignment of rents clause; court need not consider speculative factors); In re Weiss, 111 F.3d 1159 (4th Cir. 1997) (before bankruptcy court may abandon property of estate, trustee must ascertain property's fair market value as well as amount and validity of outstanding liens against property).

In re Bryan, 318 B.R. 708 (Bankr. W.D. MO. 2004) (trade-in value, as defined by the National Automobile Dealers Association Guide (NADA), is generally the most appropriate starting point for value, and is the applicable value in this case). *Accord* In re Weber 332 B.R. 432 (10th Cir. BAP 2005). *But see* In re Smith, 307 B.R. 912 (Bankr.N.D.III. 2004) (determining retail, or replacement value), *rev'd* Smith v. Household Automotive Finance Corp., 313 B.R. 267 (N.D.III. Aug 19, 2004). NOTE: These are pre-BAPCPA cases; see now § 506(a)(2) (discussed below).

Harker v. West (In re West), 328 B.R. 736, 749 (Bankr. S.D. Ohio 2004) (debtor's undervaluation of jewelry was a false oath; representations in schedules relate to the existence of and disposition of assets of the estate and are therefore material; debtor had purchased jewelry for approximately \$30,000 but scheduled the "market value" as \$2,000; testimony was that appraised value was nearly \$4,000; however, reliance on counsel's advice was a defense); In re Charles, 2013 WL 436441 (Bankr. D. N.D. 2013) (Debtor denied a discharge for undervaluation of real estate; debtor scheduled value of real estate at \$225,000, the tax assessed value, but had listed the property for \$274,900, and received a written offer of \$249,900, and had countered at \$274,900; the debtor had no evidence to support his contention that he had valued the property based on an oral offer of \$225,000); In re Edwards, 2011 WL 2619193, *5 (Bankr.E.D.Ky. Jul 01, 2011) (debtor's discharge denied; debtor was sophisticated business person who knowingly scheduled real estate at values thousands of dollars below their appraised value and valued listed in financial statement given to bank within 6 months of filing bankruptcy in attempt to show no equity; not reasonable for debtor to rely on tax values when debtor knew those values were not fair value); In re Ferebee, 2012 WL 506740, *13 (Bankr.E.D.Va. Feb 15, 2012) (valuation of jewelry in schedules at \$50 but that had been purchased for \$32,000 warranted denial of discharge).

effective date of the plan, that is not less than the amount that such holder would receive if the debtor were liquidated under chapter 7.

▶ Value for Purposes of § 1111(b) election. See In re McGarey, 529 B.R. 277 (D. Ariz. 2015) (affirming bankruptcy court holding that for purposes of a § 1111(b) election, "inconsequential value" should be determined by comparing the value of the collateral to the value of the secured creditor's total claim. The court held that a plain reading of § 1111(b) provides that an "undersecured creditor cannot make a § 1111(b) election if 'the interest on account of such claims of the holders of such claims in such property is of inconsequential value.' Interest, as used in § 1111(b)(1)(B)(i), means the value of the security in which the creditor has a claim." Thus, to determine "inconsequential value," the court must compare the lien value to the asset value; bankruptcy court's order denying debtors' motion to disallow creditor's § 1111(b) election affirmed).

II. General Valuation Principles

- ► Many meanings of value: Justice Brandeis observed, "[v]alue is a word of many meanings." Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 310 (1923) (Brandeis, J., concurring)
- ▶ *Not defined*: With limited exceptions (secured claims under and exemptions, discussed below), "value" is not a defined term in the Bankruptcy Code or Rules or the Official Forms, and, where not defined, is therefore left to case law.
- ▶ A determination of value inherently incorporates a consideration of time: "Logic and common sense inform us that the amount that can be realized from the sale of an asset varies as a function of the time period over which the asset must be sold." In re Trans World Airlines, Inc., 134 F.3d 188, 194 (3rd Cir. 1998). See also BFP v. Resolution Trust Corp., 114 S.Ct. 1757, 1762 (1994) (discussing value for purposes of whether value received at a foreclosure sales constitutes reasonably equivalent value for purposes of § 548; "An appraiser's reconstruction of "fair market value" could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that must be sold within those strictures is simply worth less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques.") (emphasis in original).
- ▶ The date/time for determining value is not specified: With limited exceptions, the Code does not specify the date as to which the court should determine value; relevant valuation points in time include the date the creditor acquired its interest in the collateral (prepetition); the date of the petition; the date of the motion; and the date of the hearing or final judgment, or some other point.
 - For Purposes of Value of Exemptions: Date of Petition: § 522(a)(2) "In this section...value" means "fair market value as of the date of the filing of the petition, or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate." In re Polis, 217 F.3d 899 (7th Cir. 2000) (Assuming that Chapter 7 debtor's TILA claim was not assignable and so could not be the subject of a "market" transaction in the literal sense, that was irrelevant to its status as property of bankruptcy estate, which could be valued for exemption purposes on basis of its fair market value on the date the petition was filed; error for district court to determine exemption had no value due to later events and to dismiss the claim for lack of standing). But see Fitzgerald v. Davis, 729 F.2d 306 (4th Cir. 1984) (although recognizing that § 522(a)(2) requires the court to determine value of exemption as of the petition date, the , a bankruptcy court should not disregard the price obtained from a sale of the property during the pendency of the bankruptcy proceedings. Under these circumstances, a sale price greatly in excess of an estimate is the more reliable evidence of the "value" defined in § 522(a)(2)).

- For Purposes of Preferences: Date of Petition: In re Hecker, 459 B.R. 6, 11 (8th Cir. BAP 2011) (whether the transfer enabled a creditor to receive more than they would have received in a hypothetical liquidation for purposes of § 547 is conducted as of the petition date.no preferential transfer because there was no equity in the property as of that date; reversed and remanded for determination of trustee's recovery under § 550).
- For Purposes of Property of the Estate: Not limited to value as of date of petition: *In re Potter*, 228 B.R. 422 (8th Cir. BAP 1999) (value of contingent interest in trust; postpetition appreciation belongs to the estate).
- For Purposes of Redemption: Pre-BAPCPA Split of Authority: In re Podnar, 307 B.R. 667, 673 (Bankr. W.D. Mo. 2003) (Redemption value is determined as of the date of the motion to redeem or, if the motion is contested, the date of the redemption hearing; valuing the property as of the date of the petition would place the creditor in a better position than it would be if it were allowed to repossess in the ordinary course of events; but, if the creditor can show undue delay by the debtor, gross negligence, or other acts by which the debtor has unreasonably diminished the value of the collateral between the date of the bankruptcy filing and the redemption hearing, the valuation made be made as of the date of the bankruptcy filing); but see In re Smith, 313 B.R. 785 (Bankr. N.D. Ind. 2004) (date of petition). NOTE: BAPCPA redemption is discussed below.
- For Purposes of Lien Avoidance in Chapter 7: In re Wade, 354 B.R. 876 (Bankr. N.D. Ia. 2006) (When the purpose of the valuation is to determine the amount of the lien surviving discharge in a Chapter 7, petition date is appropriate, since postpetition appreciations in value of the property inure to the benefit of the debtor under the fresh start principle).
- For Purposes of Cramdown: Valuation of Secured Creditor's Claim at Confirmation: Split of Authority: In re Roach, 2010 WL 234959, *5 (Bankr. W.D. Mo. Jan. 15, 2010) (For purposes of Chapter 13 modification of mortgage, Court concludes date of confirmation is date for valuation of the home, notwithstanding delay in getting to confirmation and the fact that value had declined; creditor should have asked for adequate protection); In the Matter of Heritage Highgate, Inc., 449 B.R. 451 (D. N. J. 2011), aff'd 679 F.3d 132 (3d Cir. 2012) (When value is for purposes of confirming a plan, it should be determined as of the confirmation date); but see In re Johnson, 165 B.R. 524 (Bankr. S.D. Ga. 1994) (date of petition).
- For Purposes of Strip-Off & Anti-Modification Provisions: Split of Authority: TD Bank, N.A. v. Landry, 479 B.R. 1 (D. Mass. 2012) (reversing the bankruptcy court and finding that valuation date was petition date; since the purpose of the valuation was whether the bank's claim was entitled to protection of §1322(b)(2) and therefore whether the bank is entitled to relief from stay; In re Abdelgadir, 455 B.R. 896, 902 (9th Cir. BAP 2011) (While it might be

entirely appropriate to value secured claim of junior deed of trust lender whose lien the individual Chapter 11 debtors were seeking to strip as of time of confirmation of their lien-stripping plan, determination as to whether real property that secured lender's claim was debtors' primary residence, as required for lender to be protected by antimodification provision of Chapter 11, § 1123(b)(5), had to be made not as of time of plan confirmation, or as of earlier date when debtors entered into loan, but as of petition date); In re Marsh, 475 B.R. 892 (N.D. Ill. 2012) (date of petition or date of entry of final judgment resolving adversary); *But see* In re Proctor, 494 B.R. 833 (Bankr.E.D.N.C. 2013) (date of the loan documents).

PRACTICE TIP TO YOUR BAR: Lawyers must parse these cases very carefully and make sure they understand what date the court is going to use for purposes of determining value. A failure to present evidence as of the correct date for determination, when the value has increased or decreased significantly, for example, may result in the court finding no credible evidence to support a proffered value. Since the proper date to value is a legal question, it is reviewed de novo on appeal, and may result in reversal if the bankruptcy court applies – at a lawyers urging – the wrong date.

Numerous Valuation Standards/Approaches: There are numerous valuation standards used in the Code, in case law, as well as in common parlance. One court has expressed it this way: "Wholesale," "foreclosure," "liquidation," or "quick sale" values describe a proposed disposition of property by surrender to the creditor and prompt conversion of the property by the creditor to cash, usually in accordance with State foreclosure law. "Retail," "going concern," "replacement cost," or "rehabilitation" values describe a proposed retention and use of property in the debtor's ongoing financial reorganization." In re Johnson, 145 B.R. 108, 115, n.10 (Bankr. S.D. Ga. 1992), cited with approval, pre-Rash by In re Gallup, 194 B.R. 851, 853, n.2 (Bankr. W.D. Mo. 1996).

► Terms used to denote the lowest types of value:

- "Liquidation Value": At least one court has observed, "[w]e do not know of an accepted standard or definition for a liquidation value. It is thought to be a distress sale and less than market value, but that may not always be the case." In re Yoder, 32 B.R. 77 (Bankr. W.D. Pa. Aug 16, 1983), rev'd on other grounds 48 B.R. 744 (W.D. Pa. 1984).
- "Pawnshop Value": "Simply a different manner of expressing liquidation, or distressed sale value." In re West, 328 B.R. 736, 752, n.8 (Bankr. S.D. Ohio 2004).
- "Foreclosure Value" or "Distress Value" (or "Distressed Value"): "What the secured creditor could obtain through foreclosure sale of the property." Rash, 15 520 U.S. at 955-56.

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

• "Wholesale Value": Considered to be synonymous with foreclosure value. In re Perez, 318 B.R. 742, 743 (Bankr. M.D. Fla. 2005); what secured creditor could expect to recover by repossessing vehicle and selling it at auction or by other wholesale means. In re Bouzek, 311 B.R. 239, 428 (Bankr. E.D. Wis. 2004) (value of vehicle for § 722 redemption purposes).

► Terms Used to Denote the Highest Value:

- "Fair Market Value": Generally understood as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction" (*Black's Law Dictionary* (Westlaw 9th ed. 2009)), but considered synonymous with "replacement value" under Rash. *But see* In re Walsh, 5 B.R. 239 (Bankr. D.C. 1980) (notwithstanding § 522(a) definition of value as fair market value, exemptions must be interpreted in the liquidation context of a Chapter 7 case, and thus, in such a case, "fair market value" is the equivalent of "liquidation value." NOTE: Walsh has been soundly criticized. *E.g.*, In re Wolmer, 494 B.R. 783 (Bankr.D.Conn. Jun 25, 2013).
- "Replacement Value": What the debtor would have to pay for comparable property, defined by the Supreme Court in Rash for purposes of §§ 506 and 1325(a)(5)(B) and cramdown of a vehicle; "[b]y replacement value, we mean the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition." Rash, 520 U.S. at 959 n.2. 16

► Terms Used For Something in the Middle:

• "Split-the-difference value" or "midpoint between foreclosure and replacement value": rejected by **Rash**; *but see* **In re Tripplett**, 256 B.R. 594 (Bankr. N.D. Ill. 2000) (appropriate when debtor was proposing to redeem vehicle at midpoint between the vehicle's retail and wholesale value).

► Terms Used In Connection With Vehicle Valuations:

- There are three approaches for valuing a vehicle -- retail, replacement and wholesale, liquidation or foreclosure. In some instances, some variation or departure might be appropriate in the court's equitable discretion. In re Podnar, 307 B.R. 667, 670 (Bankr. W.D. Mo. 2003) (NOTE: This case is pre-BAPCPA and pre-§ 506(a)(2)).
- "Retail Value": The price a willing buyer is willing to pay for any car. In re Bryan, 318 B.R. 708, 710-11 (Bankr. W.D. Mo. 2004).

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The 9th Circuit in **In re Taffi**, 96 F.3d 1190 (9th Cir. 1190) had distinguished between fair market value and replacement value; post-**Rash**, these terms are considered to be synonymous for purposes of value under § **506(a)**, since, as the Supreme Court explained, "replacement value" does not mean what it would cost the debtor purchase the collateral brand new."**Rash**, 520 U.S. at 959 n.2.

- **"Replacement Value":** The price a willing buyer is willing to pay for a similar car minus the cost of sale. **In re Bryan**, 318 B.R. 708, 710-11 (Bankr. W.D. Mo. 2004).
- **"Wholesale, Liquidation or Foreclosure Value":** "For the most part, though there are subtle differences, courts use the terms liquidation, wholesale, trade-in and foreclosure value interchangeably. In general, the values contained in these terms are defined as either the amount a secured creditor would receive if it repossessed the collateral and sold it in the most beneficial manner it could foreclosure or liquidation value or the amount a consumer might expect a dealer to offer when asking the dealer to take a vehicle in trade trade-in or wholesale value. **In re Bryan**, 318 B.R. 708, 710-11 (Bankr. W.D. Mo. 2004).
- "Trade-in Value": "The retail price of the car minus the costs to recondition and repair the car, the interest paid to finance the care until it is sold, the cost of storing the car, and any profit." In re Bryan, 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004).
- "Private Party Value": What a buyer can expect to pay when buying a used car from a private party. It assumes the vehicle is sold "as is" and carries no warranty (other than the continuing factory warranty). The final sale price may vary depending on the vehicle's actual condition and local market conditions. In re Weber 332 B.R. 432 (10th Cir. BAP 2005) (quoting from *Kelley Blue Book* definition).
- "Gross sales price": The gross amount received at the sale. In re Bryan, 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004).
- "Net to seller price": The amount received at the sale, less the costs of sale, which include costs of repossession, transportation, storage and sales commission. In re Bryan, 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004) (noting that this was not appropriate for redemption value, since there was no sale or repossession).

PRACTICE TIP:

There are three accepted sources or market guides for vehicle valuation: (1) the Black Book; (2) the Kelley Blue Book; and (3) the National Automobile Dealers Association (NADA) Guide. **In re Bryan**, 318 B.R. 708, 710 (Bankr. W.D. Mo. 2004).

► Terms Used In Connection With Asset Sales:

• "Open Market Value" or "Market Value": The price the assets would bring on the open market; the value a prudent business person can obtain from the sale of an asset when there is a willing buyer and a willing seller; under this approach, it is not appropriate to deduct the costs and expenses associated with the sale, such as real estate transfer taxes, since this method focuses on what a willing buyer would pay, not necessarily what a willing seller would receive; value may be reduced by factors regarding the difficulty of the sale, or if the asset is the subject of extended litigation or where there is no ready market; such factors affect the market price of the asset, not the

costs of sale; it is appropriate to adjust the market value by the net cost of making the asset marketable. **In re Golden Mane Acquisitions, Inc.**, 221 B.R. 963, 968 (Bankr. N.D. Ala. 1997).

• "Going Concern Value": "The term going concern is commonly understood to refer to "[a] commercial enterprise actively engaging in business with the expectation of indefinite continuance (citing Black's Law Dictionary). In the valuation context, it is generally used in contradistinction to a business that will be liquidated. Essentially, it requires an appraisal to assume the continued operation of the same type and size of business ... and to exclude consideration of any merger or liquidation." In re Adam Aircraft Industries, Inc., 2013 WL 773044, n.4 (Bankr. D. Colo. Feb. 28, 2013).

► Other Valuation Terms:

- "As Is"
- "Face Value"
- "Book Value"
- "Appraised Value"
- "Value for insurance purposes"
- "Tax-assessed Value"
- "Clean Retail Value"

III. Section 506(a) Value Determinations & Rash¹⁷

► Secured Claim Valuations: Governed by § 506(a):

§ 506(a)(1): An allowed claim of a creditor secured by a lien on property in which the estate has an interest...is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of the secured claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(emphasis added).

Personal Property Exception: § 506(a)(2) - Personal Property Valuations in Individual Chapter 7/13 Cases:

If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the **replacement value** of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, **replacement value** shall mean **the price a retail merchant would charge for property of that kind** considering the age and condition of the property at the time value is determined. *See* **In re Brown**, 746 F.3d1236 (11th Cir. 2014) (mobile home valued in chapter 13 plan was properly valued at replacement value under § 506(a)(2), notwithstanding the fact the mobile home was being surrendered).

(emphasis added)

- ▶ Replacement Value, Not Wholesale or Midpoint for Chapter 13 Cramdown: For purposes of cramdown value of a vehicle, bankruptcy court should use replacement, not wholesale value, or the value in between, to determine the amount of the secured creditor's claim. Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997).
- ▶ Definition of Replacement Value: "By replacement value, we mean the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition." Rash, 520 U.S. at 959 n.2.
- ▶ Rationale: Under the cramdown option, the creditor is exposed to "double risks" in that the debtor keeps the collateral under a court-imposed "crammed down" financing arrangement, with the risk the debtor may again default and the property may deteriorate further. Rash, 520 U.S. at 962-63. Because the creditor is receiving back neither its collateral nor its proceeds, liquidation value is not relevant to the debtor's intended use or disposition in the context of a cram down under chapter 13. *Id*.

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

- ► Two-Step Process: In valuing property under § 506(a)(1), a court must engage in a two-step process: First, a court must compare the creditor's claim to the value of the "such property" the collateral. This determination necessarily requires the court to ascertain the "creditor's interest in the estate's interest in" the property. The second step is the valuation process requires the court to determine how to value the collateral.
- ▶ But, beware the footnotes: Bankruptcy Courts, as triers of fact, must determine whether the replacement value is the equivalent of retail, wholesale, or some other value based on the type of debtor and the nature of the property. Adjustments are necessary, where appropriate, to account for the absence of warranties, inventory, storage and reconditioning charges." Rash, 520 U.S. at 965, n 6. Courts are to consider the purpose of the valuation, but are not allowed to use different valuation standards based on the facts and circumstances of individual cases. Rash, 520 U.S. at 965, n. 5.
- ▶ Rash applies in other contexts besides Chapter 13: E.g., In re Adam Aircraft Industries, Inc., 2013 WL 773044 (Bankr. D. Colo. Feb. 28, 2013) (applying Rash principles in context of a Chapter 7 § 363 sale); Rash-type analysis applies to Chapter 11 valuation. In re Inter-City Beverage Co., Inc., 209 B.R. 931 (Bankr. W.D. MO. 1997) (decided before the Supreme Court handed down Rash).

IV. Applying *Rash* in the Real World (or, can you make a *Rash* decision?)

- ► Flexible Standard: Section 506(a) does not specify the appropriate valuation standard. Rather, Congress envisioned a flexible approach to valuation whereby bankruptcy courts would choose the standard that best fits the circumstances of a particular case. In re Heritage Highgate, Inc., 679 F.3d 132, 141 (3rd Cir. 2012).
- ▶ But, what about fn.5 "As our reading of § 506(a) makes plain, we also reject a ruleless approach allowing use of different valuation standards based on the facts and circumstances of individual cases." Rash, 520 U.S. at 965, n. 5.

Redemption Examples:

Rash required the chapter 13 debtor who proposed to keep the vehicle to pay the secured creditor replacement value, rather than liquidation value, on account of debtor's "proposed use and disposition" of the vehicle under § 506(a) and the risks to the secured creditor of default and depreciation. Pre- BAPCPA, most courts had determined that redemption in a lump sum carried less risk and that a wholesale or trade in value, as of the time of the redemption, was the correct value. In re Bryan, 318 B.R.708 (Bankr. W.D. MO. 2004) (trade-in value, as defined by the NADA, is generally the most appropriate starting point for value, and is the applicable value in this case, noting the difference between "retail value" and "replacement value." *Accord* In re Weber, 332 B.R. 432 (10th Cir. BAP 2005).

BAPCPA added § 506(a)(2), specifying that value of personal property for an individual chapter 7 or 13 debtor would be "replacement value" as of the petition date, and further defined "replacement value" — in the case of property held for personal, family, or household purposes — as the price a retail merchant would charge for property of that kind considering the age and condition at the time value is determined. NOTE: In the same way that Rash equated fair market value with replacement value, Congress has seemingly chosen to equate "replacement value" with "retail value" — for purposes of certain personal property valuations.

In re Pearsall, 441 B.R. 267, 270 n.2 (Bankr. N.D. Ohio 2010.

QUERY: What value does Rash -- in light of § 506(a)(2) -- require the chapter 7 debtor to pay to redeem the vehicle? And when is it determined in light of the arguably contradictory language in the first and second sentences of § 506(a)(2) - "replacement value as of the date of the petition" and "age and condition of the property at the time value is determined."

ANSWER: There is no consensus. See In re Labostrie, 2012 WL 6554727 (9th Cir. BAP. 2012) (not error for bankruptcy court to reply on NADA retail, minus adjustments for condition and mileage); In re Perales, 2012 WL 902790 (6th Cir. BAP 2012) (no error for bankruptcy court to accept debtor's Edmunds.com private party value in absence of any evidence adduced by creditor and where creditor did not request an evidentiary hearing); In re Meredith, 2013 WL 4602966, Bankr. M.D.Pa. (August 29, 2013) (retail value of mobile home

determined by comparable sales and NADA guide for mobile home values); In re Griffin, 2013 WL 781141 (Bankr. M.D.N.C. Mar. 1, 2013) (90% of NADA retail unless the debtor is prepared to offer evidence of a different value); but see In re Nance, 2013 WL 2897527 (Bankr. M.D.N.C. June 12, 2013) (in Chapter 13 case converted to Chapter 7, where debtor had paid more than 90% of the NADA retail value as of the petition date, court rejected debtor's argument that redemption amount was \$0; debtor had to pay balance of contract price); In re Pottinger, 2012 WL 3561966 (Bankr. M.D.N.C. 2012) (denying unopposed motion to redeem for NADA trade in value.); In re Pearsall, 441 B.R. 267 (Bankr. N.D. Ohio 2010) (concluding that the "most probative evidence of the value of the vehicle for redemption purposes ... is the actual circumstances of its acquisition" which occurred less than one month before filing, minus adjustments); In re Gehring. 2011 WL 2619552 (Bankr. N.D. Ohio July 1, 2011) (rejecting 722.Redemption's appraisal where it didn't specify the trim on the vehicle and was unclear whether vehicle had even been inspected; noting that the helpful and necessary information is: (1) year, (2) model, (3) trim, (4) options, (5) mileage, (6) condition, and (7) the basis, e.g. inspection or third party report, upon which the person makes the evaluation. This may be supplemented with arguments and evidence concerning variations or adjustments from retail price relating for conditioning expenses and the like).

Vehicle Cramdown Examples:

QUERY: What is the appropriate value for chapter 13 cramdown in light of § 506(a)(2)?

ANSWER: There is no consensus. **In re Nance,** 477 B.R. 638 (Bankr. E.D. La. 2012), noting that among the courts who utilize the NADA Guide in determining the retail value of a vehicle under § 506(a)(2), four basic approaches have emerged:

- (1) Under the first, courts establish a presumptive retail value for the vehicle by deducting a certain percentage from the NADA Clean Retail value, *citing* **In re Cheatham**, 2007 WL 2428046, *3 (Bankr. W.D. Mo. 2007); U.S. Bankr.Ct. Rules E.D. Mo., L.R. 3015–2 and Proc Manual.
- (2) Under the second, courts set the presumptive value of the vehicle at the full NADA Clean Retail value.
- (3) Under the third, courts make use of NADA (or Kelley Blue Book (KBB)) values as starting points but hold that the facts of each case determine which value (Clean Retail, Private–Party, etc.) should be used.
- (4) Finally, under the fourth approach, the one that the court has settled on, courts average the NADA Clean Retail and Clean Trade–In values for a vehicle of the same make, model, and year as the vehicle in question).

Sample Vehicle Cramdown Cases:

In re Cheatham, 2007 WL 2428046 (Bankr. W.D. MO June 19, 2007) (NADA for vehicles still the starting point, unless it is shown that NADA is not useful in the area or appropriate; NADA may be adjusted to account for the expense need to bring the vehicle to a clean condition as described in NADA; since debtor has superior access to the property, Debtor bears burden of offering evidence as to adjustments; then, adjustment for fact that NADA is dealer asking price; presumed to be discount of 5% in the absence of other evidence; valuation can be considered as part of the confirmation process when parties are in agreement).

In re Cook, 415 B.R. 529 (Bankr. D. Kan. 2009)

(1) Appropriate date for valuing the motor vehicle that secured the claim of a non-910 motor vehicle lender, for purpose of determining what treatment lender had to receive under debtor's proposed Chapter 13 plan in order to be assured of receiving a stream of payments whose present value was at least equal to amount "allowed secured claim" as specified in cramdown provision, was of creditor's date of valuation hearing, § 506(a)(2) appears to contain two temporal benchmarks. Personal property that was not acquired for personal, family or household purposes is to be valued "as of the date of the filing of the petition." In the second sentence of the subsection, however, property acquired for personal, family or household purposes is to be valued "at the time value is determined," (2) Best approximation of value of motor vehicle was clean retail value of vehicle in motor vehicle dealers' handbook, adjusted for needed mechanical, body and interior repairs, as well as for other items, like reconditioning or detailing, that debtor would not receive in retaining vehicle and cramming down plan over lender's objection. Accord In re Byrd, 2011 WL 2604765 (Bankr. D. Kan. 2009). But see In re Morales, 387 B.R. 36, 47 (Bankr. C.D. Cal. 2008) (value should be calculated as of the petition date, not the valuation hearing).

In re Feagans, 2006 W.L. 6654576 (Bankr. D. Kan. Oct. 18, 2008 (value of vehicle for purposes of cramdown in Chapter 13; Debtor failed to appear; creditor presented retail merchant in car sales; Court notes that NADA and *Kelly Blue Book* don't necessarily determine retail value; witness referred to NADA, but testified she would sell the car off her lot for less; court used that value (\$3,000 less than NADA), and deducted costs of repairs and reconditioning).

In re De Anda-Ramirez, 359 B.R. 794 (10th Cir. BAP 2007) (not error for court to rely on KBB private party instead of KBB retail).

Mobile Home Cramdown Examples:

In re Coleman, 373 B.R. 907 (Bankr. W.D. MO 2007) (mobile home that secured creditor's claim, which was not permanently affixed to real property on which it sat, but simply rested on bricks and was tied to the land with "standard tiedowns," and which was not shown to be attached to well, to septic system, or to any other permanent type of fixture, was not "real property," such that creditor was not protected by antimodification provision; value of mobile home which

secured creditor's claim would be set, for purpose of determining creditor's allowed secured claim, at price estimated in dealer's handbook (NADA) for mobile home of that type and year, without any downward adjustment; NADA for mobile homes is considered a depreciated replacement cost in retail dollars; therefore, NADA is starting point with no 5% deduction as there is for cars; presumes an average condition; burden on debtor to show what it would cost to bring the mobile home to an average condition).

In re Kollmorgen, 2012 WL 195200 (Bankr. D. Kan. Jan. 20, 2012) (For purposes of the amount of the secured creditor's claim in a chapter 13, Court rejected Debtor's appraiser's valuation of mobile home at \$5,000; NADA value for manufactured home more closely approximated replacement value; value determined to be \$16,700; Debtors used a "provisional licensed appraiser" whose appraisals had to be reviewed by a certified appraiser; appraiser had no training or certification specific to mobile homes and employed a market approach based on comparable sales but could give no specifics about adjustments except he relied on professional judgment. The creditor's appraiser was a certified mobile home appraiser, used a cost analysis with adjustments for condition). See also In re Patricia Ann Little, Case No. 12-12650 (Bankr. D. Kan. Sept. 24, 2013).

Sale of Asset Examples:

QUERY: Does **Rash** require liquidation or replacement value when a Chapter 7 trustee sells assets at a § 363 sale?

ANSWER: Bankruptcy court properly applied replacement and not liquidation value standard in valuing assets sold by a Chapter 7 Trustee at a § 363 sale, since the business was being sold as a going concern. **In re Adam Aircraft Industries, Inc.**, 2013 WL 773044 (Bankr. D. Colo. Feb. 28, 2013).

QUERY: How do you allocate value when assets are not sold as part of one sale?

ANSWER: In determining whether a compromise over the amount of creditor's superpriority claim, based on a sale of assets, was reasonable, district court affirms the bankruptcy court's approval; bankruptcy court had valued the assets that were sold at a § 363 sale as a going concern value with respect to the portion of the business that was being sold as a going concern, and had valued the remainder of the assets, that were liquidated, at the appropriate liquidate value; rejecting the objecting parties' argument on appeal that, as a matter of law, the bankruptcy court should have considered liquidation value only in valuing the assets. **In re SK Foods, L.P.,** 487 B.R. 257 (E.D. Cal. 2013).

Real Estate Examples:

QUERY: For purposes of Chapter 12 confirmation, does **Rash** require farmland to be valued as farmland or at its more valuable use as vacant development property?

ANSWER: District court affirmed bankruptcy court's refusal to give bank's appraiser's testimony any weight, when appraiser valued farmland at its highest and best use as vacant development land; under **Rash**, the appraisal did not take into account "the proposed disposition and use" of the property as farmland, given that the Chapter 12 debtor intended to continue farming it. **In re Southall, III**, 475 B.R. 275 (M.D. Georgia 2012).

QUERY: For purposes of determining extent of judgment creditor's lien in single family homes Debtor used as residential care facilities, does **Rash** require valuation of the homes as residences or as residential care facilities?

ANSWER: Rash says that the first step is to determine the creditor's interest in the estate's interest before valuing that interest; a judgment lien creditor had no interest in the stream of income or business generated on the property -- therefore, the lien was just on the real estate; so valuation as single family residences, rather than as higher- valued, income generating residential care facilities was more appropriate, particularly where the homes had not been improved as residential care facilities and the license was not transferable. **In re De Leon**, 2013 WL 3805733 (Bankr. N.D. Cal. July 18, 2013).

QUERY: In context of Chapter 11 confirmation, does **Rash** require consideration of the value of low income housing credits in valuing the real estate, when the Debtor asserts the creditor doesn't have a lien in tax credits?

ANSWER: In re Lewis and Clark Apartments, L.P., 479 B.R. 47, 52-53 (8th Cir. BAP 2012); legal error for bankruptcy court not to have considered tax credits in valuing property; ultimately, both the benefits and burdens associated with property ownership are relevant in valuing the real property. In re Creekside Senior Apartments, L.P., 477 B.R. 40, 58 (6th Cir. B.A.P. 2012).

QUERY: Debtor's Chapter 11 plan proposes to pay the EPA and relieve the debtor of the clean up liability. Does **Rash** require the court to value the property as though it is still contaminated?

ANSWER: The court has to value the property as it exists in the debtor's hands and for the debtor's use; appropriate to discount the value on account of its environmental contamination. **In re Arden Properties, Inc.**, 248 B.R. 164 (D. Ariz. 2000).

QUERY: For purposes of stripping of IRS lien attached to debtor's TBE interest in house owned with nonfiling spouse who doesn't owe taxes, does **Rash** require a \$0 value since no willing buyer would buy the debtor's interest?

ANSWER: Broker testimony that debtor would have limited ability to sell his interest in the house doesn't render his interest worthless; **Rash** focuses on a willing buyer in the debtor's situation; the debtor's situation is as an owner of a TBE property, not a third party purchaser; his marriage is sound; his actual use,

rather than what he could sell his interest for, is the measure of value. **In re Basher**, 291 B.R. 357 (Bankr. E.D. Pa. 2003).

V. Now That You Understand *Rash*, Understanding Value Evidence: The Relevant FREs

FRE 104(a) – Preliminary Questions

The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

In valuation context: court must be satisfied both that such items are of the type actually relied upon by experts in the field AND that such items are sufficiently trustworthy to much such reliance sufficiently trustworthy – cross reference to FRE 703

FRE 403 – Excluding Relevant Evidence

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FRE 701 – Opinion Testimony by Lay Witness

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FRE 702 – Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony if the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case

FRE 703 – Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely

on those kinds of fact or date in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

-this is a preliminary question for the Court under Rule 104(a). In determining whether reliance by the expert is reasonable, the court must be satisfied both that such items are of the type actually relied upon by the experts in the field AND that such items are inherently trustworthy to make such reliance reasonable. Russell, Rule 703. -can rely on hearsay, but it is not substantive evidence

FRE 705 – Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion – and give reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

FRE 706 – Court-Appointed Expert Witnesses

On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed...

FRE 803(17)- excepts from the hearsay rule market compilations generally used and relied upon by the public

Rule 26(a)(2)(A) –party must disclose the identity of any witness it may use at trial to present evidence under FRE 702, 703 or 704; (a)(2)(B) – the disclosure must be accompanied by a written report if the witness is retained or specially employed to provide expert testimony or whose duties as the party's employee regularly involve giving expert testimony.

In sum:

FRE 104: preliminary question: whether expert testimony could assist the trier of fact in understanding the evidence or determining a fact in issue.

Second, whether the witness called is properly qualified to give the testimony sought.

Expert Testimony subject to exclusion under FRE 403 on grounds of unfair prejudice or waste of time

Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 570, 597, 113 S.CT. 2786, 125 L.Ed.2d 469 (1993): under **FRE 104**, must make a preliminary assessment of whether the testimony's underlying methodology is scientifically valid and properly can be applied to the facts of the case.

VI. Practical Strategic, Evidentiary, & Other Considerations

- ▶ Motion v. Adversary? Fed.R.Bankr.P. 3012: "The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct." Valuation of collateral may be established through the confirmation process if proper notice is given to creditors. Bennett v. Springleaf Fin. Serv., 466 B.R. 422 (Bankr. S.D. Ohio). Compare Fed.R.Bankr.Proc. 7001(2) (a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d)).
- ▶ Burden of Proof: Neither the Code nor the Federal Rules of Bankruptcy Procedure allocates the burden of proof as to the value of secured claims under § 506(a). There are three approaches to the burden of proof: (1) secured creditor bears the burden of proof; In re Sneijder, 407 B.R. 46, 55 (Bankr. S.D.N.Y. 2009); (2) the party challenging the value of a claim, usually the debtor, bears the burden of proof; and (3) burden-shifting analysis, e.g., the debtor bears the initial burden of proof to overcome the presumed validity and amount of the creditor's secured claim, but the ultimate burden of persuasion is upon the creditor to demonstrate by a preponderance of the evidence both the extent of its lien and the value of the collateral securing its claim. The circumstances will dictate the assignment of the burden of proof on the question of value. In re Herrara, 454 B.R. 559 (Bankr. E.D.N.Y. 2011) (adopting the burden shifting approach) (debtor had burden of proof on redemption to prove it more likely than not that the value of vehicle was \$6500 as proposed; debtor's evidence not credible, where it consisted of NADA guide for a different model)
- ► Standard of Review is a mixed question of law and fact. E.g., In re Lewis and Clark Apartments, L.P., 479 B.R. 47, 50 (8th Cir. BAP 2012); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 149 (3d Cir. 1986).
- ► Finality for Purpose of Appeal An order determining the value of property pursuant to 11 U.S.C. § 506(a) is a final order for purposes of appeal if the valuation was made for purposes of plan confirmation. In re Creekside Senior Apartments, LP, 477 B.R. 40, 45 (6th Cir. BAP 2012); Since the determination of value was not needed for the stay relief motion, and since the court had not yet ruled on confirmation, the determination as to value was not a final order; granting leave for the appeal to proceed on an interlocutory basis. In re Lewis and Clark Apartments, L.P., 479 B.R. 47, 5-52 (8th Cir. BAP 2012).
- ► Local Rules/Continuances: Emergency motion to continue valuation hearing denied. Valuation hearing could continue without the debtors because they had scheduled an expert witness to testify. In re Cumella, 2013 WL 4441588 (Bankr. M.D. Fla. Aug. 19, 2013); compare McCarron (continuance denied); expert reports not admitted when not filed or presented in accordance with local rules. In re Cocreham, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013).
- ▶ Weight Given to Expert Testimony: The determination of the weight to be given expert testimony or evidence is a matter within the discretion of the trier of fact which

in a nonjury proceeding like the instant case is the bankruptcy court. **Fox v. Dannenberg**, 906 F.2d 1253, 1256 (8th Cir. 1990). Valuation is ultimately the opinion of a particular appraiser and, as such, the weight to be accorded the opinion rests upon a number of factors frequently used by courts in evaluating appraisal testimony. A nonexclusive listing of these factors includes: The appraiser's education, training, experience, familiarity with the subject of the appraisal, matter of conducting the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented. **In re Creekside Senior Apartments, LP**, 477 B.R. 40, 61 (6th Cir. B.A.P. 2012).

- **Considerations For Assessing Conflicting Expert Testimony:** The valuation of property is an inexact science and whatever method is used will only be an approximation and variance of opinion by two individuals does not establish a mistake in either. **Boyle v. Wells (In re Gustav Schaefer Co.)**, 103 F.2d 237, 242 (6th Cir. 1939). "Because the valuation process often involves the analysis of conflicting appraisal testimony, a court must necessarily assign weight to the opinion testimony received based on its view of the qualifications and credibility of the parties' expert witnesses. **In re Smith**, 267 B.R. 568, 572 (Bankr. S.D. Ohio 2001).
- ▶ Court Not Bound By Either Appraisal: A bankruptcy court is not bound to accept the values contained in the parties' appraisals; rather, it may form its own opinion of the value of the subject property after considering the appraisals and expert testimony. In re Smith, 267 B.R. 568, 572-73 (Bankr. S.D. Ohio 2001). But see In re Byington, 197 B.R. 130, 138 (Bankr. D. Kan. 1996) (The court believes that it must review the testimony, the credibility of the witnesses and all supporting evidence, and accept one of the proffered values. It recognizes that a number of courts typically hear all the experts and then arrive at a value somewhere in the range offered. Logically, this approach makes no sense. In effect, the court is believing both (or all) of the experts testifying. Logically, the court should determine which of the experts is most credible and accept that value. .. No court hears experts on causation and finds that the defendant "sort of" caused the injury); also recognizing that the averaging approach is unassailable on appeal as long as the valuation "found" by the trial court is within the range of evidence; also, a discussion of use of market guides, such as NADA, which are admissible under FRE 803(17).
- ▶ Owner Testifying As To Value: Debtor as owner competent to offer a lay opinion of value FRE 701, where the debtor is shown to be familiar with the property or its value; the owner of real property has the benefit of a presumption that he is familiar with or has knowledge of, the property and its value, but the presumption is rebuttable. But, unless the debtor is qualified as an expert, the debtor cannot testify as to the types of information that an appraiser would rely on, such as what others have told him concerning the value of his or comparable properties. In re Cocreham, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013). When an expert offers an opinion of value, the lay opinion of the debtor is typically found to be less credible. In re Wilson, 378 B.R. 862 (Bankr. D. Mont. 2007). But see In re Cocreham, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013) (court found creditor's real estate broker's testimony not credible, where he was only familiar with an urban area, and had no experience in the remote, rural area where debtor's property was located; methodology was suspect, because he simply looked for

residential property near the subject property, and made no adjustments to account for the differences in the property; and his comparable sales including listings, not actual sales; in the court's experiences, sellers are frequently willing to accept less than asking price).

- ► Corporate Representative Not Qualified as Owner: The presumption that an owner of property is qualified to give his opinion as to its value does not extend to officers of corporate owners of land. DiPietro v. Boynton, 628 A.2d. 1019 (Me. 1993); Southern Missouri Dist. Council of Assemblies of God v. Hendricks, 807 S.W. 2d 141 (Mo. Ct. App. 1991).
- ► Nonowner, non expert may not testify as to value under FRE 701, 702. In re Cocreham, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013).
- **Zillow.com or Internet Evidence:** Zillow.com and other similar internet based sources are hearsay, FRE 801. Zillow.com is not a market compilation under FRE 803(17); it is a participatory site; a homeowner with no technical skill beyond the ability to surf the web can log in to Zillow and add or subtract data that will change the value of his property; therefore, it is inherently unreliable. In re Cocreham, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013), *citing* In re Darosa, 442 B.R. 173, 177 (Bankr. D. Mass. 2010); In re Phillips, 491 B.R. 255, 260, n. 7 (Bankr. D. Nev. 2013); Zillow.com and other internet based sources not admissible; no foundation that these are market compilations generally used and relied upon by the public. In re Cocreham, 2013 WL 4510694 (Bankr. E.D. Cal. Aug. 23, 2013);
- ▶ Tax Assessment Evidence: In re McCarron, 242 B.R. 479, 482 (Bankr. W.D. Mo. 2000) (for purposes of strip off of lien in Chapter 13; court accepted testimony of property manager who exhibited a thorough knowledge of the Debtor's property, the market for single family residences in the inner city of KC where the house was located; discounted the testimony of the County tax assessor because his valuation was prepared for tax assessment purposes only, not for the purpose of determining present market value; he had not inspected the house and was not aware of its actual condition).
- ► Value in Schedules: Court will accept a lender's unopposed allegation that a property lacks equity based on the value of that property set forth in a debtor's schedules; based on the fact that it is under oath and that an owner is competent to testify as to value. In re Darosa, 442 B.R. 173, 177 (Bankr. D. Mass. 2010), citing Klapmeier v. Telecheck Intern, Inc., 482 F.2d 247, 253 (8th Cir. 1973).
- ► Auction: Generally speaking, an auction may be sufficient to establish that one has paid value but not if the bidding was collusive or notice inadequate. In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 149 (3d Cir. 1986).
- ► Unaccepted Offer Not Evidence of Market Value. "It is well settled that a mere offer, unaccepted, to buy or sell is inadmissible to establish market value." United States v. Smith, 355 F.2d 807, 811 (5th Cir. 1966).

- ► Summary Judgment: In re Roach, 2010 WL 234959 (Bankr. W.D. Mo. Jan. 15, 2010) (For purposes of Chapter 13 modification of mortgage, Court concludes date of confirmation is date for valuation of the home, notwithstanding delay in getting to confirmation and the fact that value had declined; creditor should have asked for adequate protection. Debtor's evidence of written appraisal report and Bank's evidence of tax assessment value present conflicting evidence which renders summary judgment on the issue of value not warranted).
- ► An unverified statement of an appraiser is hearsay and is not competent evidence as to the value of real property. In re Light, 2006 WL 3832810 (Bankr. E.D. Mo. Dec. 28, 2006), citing FRE 801(c).
- ► Fair & Equitable/Chapter 11: For purposes of extinguishing debtor's equity interests; bankruptcy court did not err in relying on appraisal compiled by a recognized expert according to accepted professional standards and used an accepted valuation method income capitalization that incorporated anticipated future profits and the anticipated reversion value into the final present going concern value of the estate. In re Westpointe, L.P., 241 F.3d 1005, 1008 (8th Cir. 2001)
- **▶** Budget Not Evidence of Value in Chapter 11 -- In the Matter of Heritage Highgate, Inc., 449 B.R. 451 (D. N. Jersey 2011), aff'd 679 F.3d 132 (3d Cir. 2012) (confirmation of plan did not automatically transform budget, which was intended to establish feasibility, into valuation of debtor's assets; budget projected future sales from anticipated completion of real estate project; value as of a future date is inconsistent with Rash; creditor argued that its claims should be deemed wholly secured because projections that accompanied the plan estimated that debtor would generate enough income to pay them in full; also rejecting the "wait and see" approach to value -- it would effectively do away with the bankruptcy court's obligation to determine value under § 506(a)).

Addendum I: Eleventh Circuit Update¹

Prepared for the 2017 Alexander L. Paskay Memorial Bankruptcy Seminar

I. Valuation Issues Pervade the Bankruptcy Code: A Partial List

► Adequate protection under ' 361

- Desert Fire Prot. v. Fontainebleau Las Vegas Holdings, LLC (In re Fontainebleau Las Vegas Holdings, LLC), 434 B.R. 716, 752 (S.D. Fla. 2010) (A[I]n fashioning adequate protection, courts must seek to compensate a secured creditor for any decrease in the value of its interest caused by [among other things] the grant of a priming lien or the use of collateral.@).
- Joyner Auto World v. George (In re George), 315 B.R. 624, 629 (Bankr. S.D. Ga. 2004) (A>Adequate protection payments are intended, first and foremost, to protect against, and compensate for, a decrease in the value of a creditor=s collateral.=@ (quoting In re SunCruz Casinos, LLC, 298 B.R. 833, 844 (Bankr. S.D. Fla. 2003) (citing Timbers, 484 U.S. 365))).

► Stay relief under ' 362(d)(2)(A)

- *In re Caldwell*, 457 B.R. 845, 853 (Bankr. M.D. Fla. 2009) (AThe Bankruptcy Courts have uniformly held no equity exists in property where the claims secured by the property exceed the value of the property.@).
- *In re Powell*, 223 B.R. 225, 235 (Bankr. N.D. Ala. 1998) (AMost courts hold that a debtor lacks equity when the balance of all debts secured by liens on the property exceed the fair market value of the property.@).

► Sales of Property under ' 363(f)(3)

• In re Flyboy Aviation Props., LLC, 501 B.R. 828, 834 (Bankr. N.D. Ga. 2013) (A[B]ecause the value of the liens, as determined by section 506 of the Bankruptcy Code, is being paid, section 363(f)(3) provides authority for the Debtor to sell the Property.@) (citing In re Levitt & Sons, LLC, 384 B.R. 630, 648 (Bankr. S.D. Fla. 2008)).

► Scheduling of Assets

• The current forms, which became effective on December 1, 2015, require a disclosure of Acurrent value. *Instructions for Bankruptcy Forms for Individuals*, 14 (Dec. 2015), available at http://www.uscourts.gov/forms/individual-debtors/schedule-ab-property-individuals (AIn this form [Schedule A/B], report the *current value* of the property that you own in each category. *Current value* is sometimes called *fair market value* and, for this form, is the fair market value as of the date of the filing of the petition. *Current value*

This addendum was originally prepared by the Hon. John E. Hoffman, Jr., Bankr. S.D. Ohio, for an FJC CLE. Judge Hoffman's original addendum included Sixth, Seventh, and Eleventh Circuit case law updates. The addendum has been edited to remove the Sixth and Seventh Circuit cases. Thank you to Judge Hoffman for his contributions.

is how much the property is worth, which may be more or less than when you purchased the property. *Property you own* includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.@). The instructions state that Acurrent value, fair market value, or value@ is defined as A[t]he amount property is worth, which may be more or less than when you purchased the property. Absent specific instruction, the value should be the price that could be realized from a cash sale or liquidation without duress within a reasonable time. See the instructions for specific forms regarding whether the value requested is as of the date of the filing of the petition, the date you complete the form, or some other date.@ *Id.* at 42.

• Menotte v. Cutaia (In re Cutaia), 410 B.R. 733, 738B39 (Bankr. S.D. Fla. 2008) (AThe Debtor testified that he listed the Rolex=s value at \$250.00 based on his purchase price of \$1,000.00 years earlier and his experience in selling used items where a seller receives only >25 to 30 percent of what the value is.= The Court considers it improbable that the Debtor, a sophisticated businessperson, believed in good faith that substantially discounting his purchase price of \$1,000.00 would produce an accurate current value for the Rolex.@). However, we=re not sure that this case remains relevant given the instructions accompanying the new official forms.

► Exemptions under ' 522(a)(2)

• In re Richardson, 280 B.R. 717, 719 (Bankr. S.D. Ala. 2001) (ASection 522(a)(2) defines >value= as the fair market value as of the date of the filing. The statute does not list costs of sale as an amount to be considered in the calculation. ②).

► Lien Avoidance under ' 522(f)

- Cadle Co. v. Taras (In re Taras), 131 F. App=x 167, 170 (11th Cir. 2005) (agreeing with the Eighth Circuit=s ruling in Kolich and holding that liens junior to the judicial lien(s) should be included in the calculation for purposes of ' 522(f)(2)(a)).
- *In re Richardson*, 280 B.R. 717, 719 (Bankr. S.D. Ala. 2001) (AThis Court agrees with those cases disallowing estimated costs of a hypothetical sale in a lien avoidance determination.@).

► Preferential Transfers under ' 547: determining insolvency

- *Kipperman v. Onex Corp.*, 411 B.R. 805, 835 (N.D. Ga. 2009) (AAlthough a plaintiff may seek to prove >balance sheet= insolvency without an expert on the basis of the debtor=s balance sheet and tax documents alone, . . . the majority of plaintiffs seem to employ experts to do so. Experts typically rely on a combination of valuation methodologies including actual sale price, discounted cash flow, or DCF, and comparable transactions.@) (citations omitted).
- In re Golden Mane Acquisitions, Inc., 221 B.R. 963, 967 (Bankr. N.D. Ala. 1997) (AFair value, in the context of a going concern, is determined by the fair market price of the debtor=s assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor=s debts.@) (already in Judge Norton=s materials).
- Moecker v. Johnson (In re Transit Grp., Inc.), 332 B.R. 45, 55 (Bankr. M.D. Fla. 2005)

- (A>Fair value, in the context of a going concern, is determined by the fair market price of the debtor=s assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor=s debts.=@ (quoting *In re Golden Mane Acquisitions, Inc.*, 221 B.R. 963, 967 (Bankr. N.D. Ala. 1997))).
- Official Comm. of Unsecured Creditors of Toy King Distribs., Inc. v. Liberty Savs. Bank, FSB (In re Toy King Distribs., Inc.), 256 B.R. 1, 92 (Bankr. M.D. Fla. 2000) (AIn circumstances where the debtor is on its >financial deathbed= and has no hope of continuing to operate as a going concern, liquidation value may represent a fair valuation of the financial condition of the debtor.@).

► Recovery of transfer or its value under ' 550

- Bakst v. Wheeler Oil Co. (In re Denmark Co.), 73 B.R. 325, 326 (Bankr. S.D. Fla. 1987) (A[T]he [defendant in a preferential transfer claim] removed . . . gasoline from the underground tanks at the debtor=s place of business, [and its] credit memorandum . . . deducted . . . charges for the four hours= time of its tank truck in removing the gasoline . . . [The trustee] has proved each of the five elements necessary to recovery under '' 547(b) and 550(a)(1) of the sum of \$7,913. I agree with the trustee that there is no basis to deduct anything for the time spent by the defendant in extracting and removing the gasoline.@).
- Henderson v. Andrews (In re Perry Cty. Foods, Inc.), 313 B.R. 875, 912B913 (Bankr. N.D. Ala. 2004) (AAlthough the language of '550(a) sets forth that the recovery may be >the value of such property,= the case law interpretation of this provision limits what the trustee may recover to the property=s value less any consideration received by the debtor for the property transferred.@).

► Abandonment under ' 554

- *In re Sunbum5 Enters., LLC*, No. 6:10-cv-1268-Orl-28, 2011 WL 4529648, at * 9 (M.D. Fla. Sept. 30, 2011) (A[T]he recognized purpose of ' 554(b)Cwhich allows parties in interest to move for abandonmentCis to prevent trustees from unnecessarily administering assets that bring no value to the estate and to thwart the practice of trustees increasing their own commissions by not abandoning valueless property on their own. . . . >[P]roof that an estate lacks equity in property sets forth at least a prima facie case [for the party seeking abandonment] that the property is of inconsequential value and benefit to the estate.= This showing >can then be rebutted by evidence that the estate does have some equity in the property= or evidence of >some other form of value or benefit to the estate which would accrue to it by retention of the property.=@ (quoting *In re Paolella*, 79 B.R. 607, 609, 610 (Bankr, E.D. Pa. 1987))) (alterations in original).
- *In re Moore*, No. 88-40105, 1990 WL 605862, at *2, 7 (Bankr. S.D. Ga. May 31, 1990) (approving Chapter 11 debtor=s abandonment of certain real property in which debtor had de minimis equity, but holding that more than \$300,000 of equity in other property meant that the other property was Anot burdensome and of inconsequential value and benefit to the estate, and the abandonment of this [other] property . . . could not be approved by the court@).

► Redemption under ' 722

• *In re Ortiz*, No. 06-16243-BKC-RBR, 2007 WL 1176019, at *3 (Bankr. S.D. Fla. Feb. 27, 2007) (To determine Areplacement value@ for redemption purposes, courts should Atake the retail value of an identical make and model car then deduct from it the retail value of the repairs required to bring the car up to retail standard.@).

► Denial of Discharge under ' 727(a)(4)(A)

- SunTrust Bank v. Mitchell (In re Mitchell), 496 B.R. 625, 642 (Bankr. N.D. Fla. 2013) (ATaking all of the Debtors= well-pleaded allegations as true, and considering the totality of the undisputed material facts, in particular the Debtors= testimony, supports denial of both Debtors= discharges under ' 727(a)(4). The Court finds that the Debtors= explanations are insufficient to overcome the fact that their omissions and incorrect values amount to a knowing and fraudulent false oath.@).
- Cadle Co. v. Leffingwell (In re Leffingwell), 279 B.R. 328, 346, 347 (Bankr. M.D. Fla. 2002) (AIn Schedule A, the [debtors] listed joint ownership of real property . . . with a value of \$475,000 . . . [that the evidence showed] had a value of \$770,000 at the time [they] filed their bankruptcy petition. . . Accordingly, the plaintiff has established that the defendants made this false oath. . . [T]he totality of the evidence overwhelmingly establishes that the personal property and furnishings of the defendants were worth well in excess of the \$1,685 that the [debtors] scheduled. Such a low value is completely inconsistent with the value of the home, their luxury automobile, their income, and their lifestyle. The court is firmly convinced, therefore, that the [debtors] made a false oath when they scheduled their personal property at such a ridiculously low value.@).

II. General Valuation Principals

▶ Date/time for determining value is not specified

► For purposes of Value of Exemptions

• Johnson v. Gen. Motors Acceptance Corp. (In re Johnson), 165 B.R. 524, 528 (S.D. Ga. 1994) (AThe date on which the bankruptcy petition is filed and the order for relief is entered is the watershed date of a bankruptcy proceeding. As of this date, creditors=rights are fixed (as much as possible), the bankruptcy estate is created, and the value of the debtor=s exemptions is determined. (a).

► For Purposes of Preference

• Hill v. Se. Bank, N.A. (In re Cont=l Country Club, Inc.), 108 B.R. 327, 332 (Bankr. M.D. Fla. 1989) (Plaintiff must Ademonstrate that the transfers enabled the defendant to receive more than it would have received in a Chapter 7 distribution if the transfer had not occurred. . . . The appropriate date for determination of whether a payment is preferential is the date of filing of the Chapter 11 petition. ②).

► For Purposes of Property of the Estate

• In re Moyer, 421 B.R. 587 (Bankr. S.D. Ga. 2007) (post-petition appreciation in stock

that is attributable solely to Chapter 7 debtor=s ownership interest and not to any services the debtor performs is property of the estate).

► For Purposes of Redemption: Pre-BAPCPA Split of Authority

• *In re Perez*, 318 B.R. 742, 749 (Bankr. M.D. Fla. 2005) (A[T]he wholesale value determined as of the date of the hearing on the motion to redeem is the appropriate value for purposes of a debtor=s redemption of personal property under section 722.@).

► For Purposes of Lien Avoidance in Chapter 7 under ' 522(f)

• Thigpen v. Cadle Co. (In re Thigpen), 374 B.R. 374, 376 (Bankr. S.D. Ga. 2007) (The petition date is Athe particular date the Court should use to assess the value of the Property for the [Chapter 7] Debtors= motion to avoid the Lien . . . This position has been echoed by courts around the country.@).

► For Purposes of Cramdown

• Johnson v. Gen. Motors Acceptance Corp. (In re Johnson), 165 B.R. 524, 528 (S.D. Ga. 1994) (AThough the timing of the value determination required by ' 1325(a)(5)(B)(ii) is not prescribed therein, . . . the scheme of Chapter 13 in attempting to accommodate competing goals of financial rehabilitation for the debtor and preservation of the constitutionally protected, bargained-for rights of secured creditors is best served by valuing the collateral as of the date of filing.@) (pre-BAPCPA).

► For Purposes of Strip-Off & Anti-Modification in Chapter 13

- *In re Gilpin*, 479 B.R. 905, 908 (Bankr. M.D. Fla. 2011) (A[U]nder the facts of the present case where the Debtors intend to remain in their home, . . . the petition date serves as the appropriate date for valuation.@).
- In re Valls, No. 09-35347-BKC-LMI, 2010 WL 2745951, at *1 n.1 (Bankr. S.D. Fla. July 6, 2010) (AWhile there is a split of authority regarding what is the appropriate valuation date for purposes of a Chapter 13 lien strip, the Court finds that under the facts of this case, where the Debtor seeks to keep his home, it is appropriate to use the petition date as the relevant valuation date.@) (citations omitted).

► Terms used to denote the lowest types of value (Liquidation, Pawnshop, Foreclosure, Distress(ed), Wholesale)

- *In re Ard*, 280 B.R. 910, 915 (Bankr. S.D. Ala. 2002) (ALiquidation/foreclosure value is defined as the amount that the secured creditor >would receive if it repossessed the collateral and sold it in the most beneficial manner it could.=@ (quoting *In re Dunbar*, 234 B.R. 895 (Bankr. E.D. Tenn. 1999))).
- *In re Perez*, 318 B.R. 742, 743 n.1 (Bankr. M.D. Fla. 2005) (AFor purposes of valuation of the Debtor=s automobile in this [Chapter 7 redemption] case, the Court considers the terms >liquidation value=, >foreclosure value=, and >wholesale value= to be synonymous and to represent the low end of the valuation spectrum @).

► Terms Used to Denote the Highest Value

• Miles v. Capital One Auto Fin. & Nat=l Bankr. Services.com (In re Miles), 524 B.R. 915, 920 (Bankr. N.D. Ga. 2015) (in valuing vehicle for redemption purposes the court began with Aretail value,@ finding that approach Aconsistent with Section 506(a)=s direction that the replacement value be the >price a retail merchant would charge=@).

► Terms Used in Connection with Vehicle Valuations

► Retail Value

• Miles v. Capital One Auto Fin. & Nat=l Bankr. Services.com (In re Miles), 524 B.R. 915, 920 (Bankr. N.D. Ga. 2015) (starting with a clean retail value from NADA then Areduc[ing] the retail value in varying amounts representing the condition of the vehicle and the cost of repair@).

► Replacement Value

- *In re Hauser*, 405 B.R. 684, 685B86 (Bankr. S.D. Fla. 2009) (taking retail value of identical make and model of car and then deducting from it the retail value of repairs necessary to bring car up to a Aretail standard,@ resulting in replacement value; calculation is based on retail value for repairs that general public would have to pay to bring car up to retail standards, and not discounted repair price to which creditors have access).
- Miles v. Capital One Auto Fin. & Nat=l Bankr. Services.com (In re Miles), 524 B.R. 915, 920 (Bankr. N.D. Ga. 2015) (AThe most common approach [in vehicle valuations] is to start with the retail value, since that is consistent with Section 506(a)=s direction that the replacement value be the >price a retail merchant would charge.= Then the court reduces the retail value in varying amounts representing the condition of the vehicle and cost of repair.@).

► Wholesale, Liquidation, or Foreclosure Value

• *In re Perez*, 318 B.R. 742, 743 n.1 (Bankr. M.D. Fla. 2005) (AFor purposes of valuation of the Debtor=s automobile in this [Chapter 7 redemption] case, the Court considers the terms >liquidation value=, >foreclosure value=, and >wholesale value= to be synonymous and to represent the low end of the valuation spectrum @).

►Trade-In Value

• *In re Franklin*, 213 B.R. 781, 782 (Bankr. N.D. Fla. 1997) (equating Atrade-in value@ with Awholesale value,@ both based on the NADA Guide).

▶ Terms Used in Connection with Asset Sales

► Market Value/Open Market Value

• *In re Golden Mane Acquisitions, Inc.*, 221 B.R. 963 (Bankr. N.D. Ala. 1997) (AAn open market value, or simply, market value, has been further defined as that value that a prudent business person can obtain from the sale of an asset when there is a willing buyer and a willing seller.@) (NOTE: appears in Judge Norton=s materials at page 12).

► Going Concern Value

- Cox Enters., Inc. v. News-Journal Corp., 510 F.3d 1350, 1358 (11th Cir. 2007) (AThe term >going concern= is generally understood to refer to >[a] commercial enterprise actively engaging in business with the expectation of indefinite continuance.= Blacks Law Dictionary (8th ed. 2004). In the valuation context, it is generally used in contradistinction to a business that will be liquidated. Essentially, it requires an appraisal to assume the continued operation of the same type and size of business . . . and to exclude consideration of any merger or liquidation.@)
- NOTE: This quote appears in Judge Norton=s materials at page 12, but the *Cox Enterprises* case is the original source for this quote.
- SE Prop. Holdings, LLC v. Seaside Eng. = g & Surveying, Inc. (In re Seaside Eng = g & Surveying, Inc.), 780 F.3d 1070, 1075 (11th Cir. 2015) (AThe bankruptcy court considered future losses, which are necessary to a discounted cash flow analysis, the core of a going-concern valuation.@), cert. denied sub nom. Vision-Park Props., LLC v. Seaside Eng = g & Surveying, LLC, 136 S. Ct. 109 (2015).

III. Section 506(a) Value Determinations and Rash

► Rash applies in other contexts besides Chapter 13

• *In re Perez*, 318 B.R. 742, 743 (Bankr. M.D. Fla. 2005) (A[J]ust as *Rash* mandates the use of a replacement value in the context of cram down under chapter 13 . . . , *Rash* mandates the use of a wholesale value in the context of redemptions under chapter 7.@).

► Redemption Examples (Pre-BAPCPA)

- *In re Perez*, 318 B.R. 742, 747 (Bankr. M.D. Fla. 2005) (finding that the Awholesale/liquidation-value standard [is] the appropriate standard for valuing collateral in Chapter 7 redemption cases@ rather than the replacement value).
- *In re Ard*, 280 B.R. 910, 915 (Bankr. S.D. Ala. 2002) (Ahold[ing] that the appropriate starting point for valuing collateral in a chapter 7 redemption proceeding is liquidation/foreclosure value@).

► Section 506(a)(2) and the equation of Aretail@ and Areplacement@values

- Miles v. Capital One Auto Fin. & Nat=l Bankr. Services.com (In re Miles), 524 B.R. 915, 920 (Bankr. N.D. Ga. 2015) (AThe most common approach, though, is to start with the retail value, since that is consistent with Section 506(a)=s direction that the replacement value be the >price a retail merchant would charge.=@).
- *In re Ortiz*, No. 06-16243-BKC-RBR, 2007 WL 1176019, at *3 (Bankr. S.D. Fla. Feb. 27, 2007) (AThe new statute [' 506(a)(2)] makes clear that retail value is the measure for replacement value [with respect to a vehicle purchased for personal use].

The statute is unclear on how to arrive at such a measurement. ⓐ).

► Appropriate value for redemption of vehicle in light of ' 506(a)(2)

• Miles v. Capital One Auto Fin. & Nat=l Bankr. Services.com (In re Miles), 524 B.R. 915, 920 (Bankr. N.D. Ga. 2015) (AThe most common approach [for valuing a vehicle for purposes of redemption] is to start with the retail value, since that is consistent with Section 506(a)=s direction that the replacement value be the >price a retail merchant would charge.= Then the court reduces the retail value in varying amounts representing the condition of the vehicle and cost of repair.@).

► Mobile Home Cramdown Example

• *In re Tucker*, No. 12-53285-JDW, 2013 WL 3230615, at *4, *6 (Bankr. M.D. Ga. June 25, 2013) (A[I]n determining the amount of the creditor=s secured claim, the Court must determine the >price a retail merchant would charge= for a manufactured home of the type, age, and condition of Debtor=s home. . . . While [the creditor=s expert=s] appraisal represents relevant evidence of the retail value of Debtor=s mobile home, the Court gives more weight to [the debtor=s expert=s] appraisal because it relies on actual sales of mobile homes as well as the opinion of a local dealer in used mobile homes. The Court concludes such evidence is more representative of current retail values for mobile homes sold in the . . . area.@).

► Vehicle Cramdown Examples

• *In re Hauser*, 405 B.R. 684, 685B86 (Bankr. S.D. Fla. 2009) (AI will adopt [the] retail standard test for establishing the replacement value of the Vehicle [which] requires one to >take the retail value of an identical make and model car [and] then deduct from it the retail value of repairs [necessary] to bring the car up to [a] retail standard,= resulting in the replacement value. The calculation is based on the retail value for repairs the general public would have to pay to bring the car up to retail standards, and not the discounted repair price to which creditors have access.@ (quoting *In re Ortiz*, No. 06-16243-BKC-RBR, 2007 WL 1176019, at *3 (Bankr. S.D. Fla. Feb. 27, 2007))).

► Allocation of value when assets are not sold as part of one sale

• *In re All. Aerospace, LLC*, No. 01-52973, 2001 WL 1855337, at *4 (Bankr. M.D. Ga. Sept. 13, 2001) (On the motion of the debtor to sell substantially all its assets, the court rejected, for purposes of allocating the sale proceeds, a Aresidual value method, @ under which proceeds that exceed the fair market value for assets are Aallocated to a fourth, intangible asset, . . . a premium for buying all the property intact. @ Instead, the court stated it was Amost persuaded by the common proportions that run through the bidders= allocation and the appraisals. @).

► Real Estate Examples: value land at highest and best or by actual use?

- Farmers & Merchs. Bank v. Southall, III, 475 B.R. 274 (M.D. Ga. 2012) (appears in Judge Norton's materials at page 19).
- See also Dunson v. Regions Bank (In re Dunson), 515 B.R. 387, 391B92 (Bankr. N.D. Ga. 2014) (A[T]he valuation must be made in light of the Debtors= proposed use or disposition of the property, which is the retention and continued use of the properties as rental property. Therefore, a valuation method that considers what an investor in residential rental property, such as the Debtors, would pay a seller to acquire such properties, rather than what a retail buyer would pay, is a more appropriate method to obtain a replacement value. (2).
- But see Farm Credit of Fla., ACA v. Superleaf Timber, LLC (In re Sugarleaf Timber, LLC), 529 B.R. 317 (M.D. Fla. 2015) (finding that for purposes of cramdown it was not clearly erroneous for bankruptcy court to adopt highest-and-best-use valuation).

VI. Practical Strategic, Evidentiary, & Other Considerations

► Motion v. Adversary? Fed. R. Bankr. P. 3012

- Green Tree Acceptance, Inc. v. Calvert (In re Calvert), 907 F.2d 1069, 1072 (11th Cir. 1990) (ARule 3012 requires that specific notice be given that the bankruptcy court will determine the extent to which the claim is secured. Mere notice that the bankruptcy court will hold a confirmation hearing on a proposed bankruptcy plan, without inclusion of notice specifically directed at the security valuation process, does not satisfy the requirement of Rule 3012.@).
- *In re Sernaque*, 311 B.R. 632, 637 (Bankr. S.D. Fla. 2004) (A[A]ssuming proper service of the Notice and the Plan, the confirmation procedures in this case clearly and properly incorporated a valuation of [the creditor=s] collateral and its secured claim under ' 506(a) and Rule 3012.@).

▶ Burden of Proof

- Dunson v. Regions Bank (In re Dunson), 515 B.R. 387, 390 (Bankr. N.D. Ga. 2014) (ACourts disagree as to the proper placement of the burden of proof when the creditor=s interest in property is being valued to determine whether a plan is confirmable. Having considered the various approaches to determining which party has the burden of proof, the Court will place the burden of proof on the Debtors in this case. (a) (citing numerous cases) (citations omitted).
- In re Fletcher, No. 07-10597-BKC-RBR, 2007 WL 1804931, at *2 (Bankr. S.D. Fla. June 19, 2007) (Aln a motion to value collateral under 11 U.S.C. ' 506(a) the debtor bears the initial burden of proof. As part of this initial burden of proof the debtor has the burden of proving that ' 506(a) applies to the debt in question. This burden includes showing that the hanging paragraph is inapplicable. Therefore, the burden of a ' 506(a) valuation action includes the burden of demonstrating the absence of at least one of the three elements found in the hanging paragraph.@).

► Standard of Review

• SE Prop. Holdings, LLC v. Seaside Eng=g & Surveying, Inc. (In re Seaside Eng=g & Surveying, Inc.), 780 F.3d 1070, 1075 (11th Cir.) (AThe valuation of Seaside is a mixed question of law and fact. Selection of a valuation method is a legal matter subject to de novo review, and findings made under that standard are facts subject to clear error review.@) (citations omitted), cert. denied sub nom. Vision-Park Props., LLC v. Seaside Eng=g & Surveying, LLC, 136 S. Ct. 109, 193 L. Ed. 2d 37 (2015).

► Finality for Purpose of Appeal

• Babic v. Ford Motor Credit Corp. (In re Ashoka Enters., Inc.), 156 B.R. 343, 345 (S.D. Fla. 1993) (AThe bankruptcy court=s order determining the date of valuation is not a final order, even when evaluated under the more liberal standard applied to bankruptcy proceedings. (emphasis added).

► Local Rules/Continuances

• The Westlaw citation for *In re Cumella*, No. 9:12-bk-06378-FMD, 2013 WL 4441588 (Bankr. M.D. Fla. Aug. 19, 2013) is no longer accessible. The order is still available on Lexis, however, at 2013 Bankr. LEXIS 3419. The order is also available at http://pacer.flmb.uscourts.gov/pdf-new/476033.pdf.

► Weight Given to Expert Testimony

- SE Prop. Holdings, LLC v. Seaside Eng=g & Surveying, Inc. (In re Seaside Eng=g & Surveying, Inc.), 780 F.3d 1070, 1075 (11th Cir.) (AThe bankruptcy court also has discretion to weigh expert testimony and select portions to accept or reject.@), cert. denied sub nom. Vision-Park Props., LLC v. Seaside Eng=g & Surveying, LLC, 136 S. Ct. 109, 193 L. Ed. 2d 37 (2015).
- Farmers & Merchs. Bank v. Southall, III, 475 B.R. 274, 278 (M.D. Ga. 2012) (A[The expert=s] appraisal fails to take into consideration the relevant factors that demonstrate the debtor=s use of the property. Thus, his appraisal does not properly account for the >disposition and use= under ' 506(a) and is not a proper consideration in the valuation of the collateral.@).

► Considerations for Assessing Conflicting Expert Testimony

• Farm Credit of Fla., ACA v. Sugarleaf Timber, LLC (In re Sugarleaf Timber, LLC), 529 B.R. 317, 332 (M.D. Fla. 2015) (AWhen two appraisal reports conflict, a court >must determine the value based on the credibility of the appraisers, the logic of their analysis, and the persuasiveness of their subjective reasoning.=@ (quoting In re Atl. S. Bus. Park, Ltd., 173 B.R. 444, 450 (Bankr. N.D. Ga. 1994))) (internal quotation marks omitted).

▶ Owner Testifying As To Value

• In re Levitt & Sons, LLC, 384 B.R. 630, 646 (Bankr. S.D. Fla. 2008) (A>[I]t is settled

- that the owner of personal property is qualified by his ownership alone to testify as to its value= This rule has been extended to real property valuations.@ (quoting *Berkshire Mut. Ins. Co. v. Moffett*, 378 B.R. 1007, 1011 (5th Cir. 1967))).
- In re Ard, 280 B.R. 910, 915 (Bankr. S.D. Ala. 2002) (A[T]he Court may, of course, consider other evidence pertinent to value such as the debtor=s testimony as to the vehicle=s condition, high mileage, etc. in determining whether a reduction in value in a particular case is appropriate. . . . The evidence reflects that the wholesale value of the vehicle is \$2,500. . . . [The debtor testified as to the vehicle=s condition and states that she] believes the car is now worth \$1,500. Given the [vehicle=s] high mileage and [the debtor=s] testimony concerning its condition, the Court concludes that a \$1,000 reduction in value is appropriate so that the debtors may redeem the car for \$1,500.@).

► Corporate Representative Not Qualified as Owner

• But see In re Levitt & Sons, LLC, 384 B.R. 630, 646B47 (Bankr. S.D. Fla. 2008) (holding that chief restructuring officer of corporate debtor was competent to testify as to the value of real property owned by the debtor).

► Tax Assessment Evidence

• *In re Digby*, 47 B.R. 614, 618 (Bankr. N.D. Ala. 1985) (holding copy of tax assessor=s returns showing property=s appraised value were hearsay and thus not admissible to establish the value of debtor=s property).

► Value in Schedules

- *In re Hains*, No. 07-02205, 2007 WL 2570745, at *3 (Bankr. N.D. Ala. Aug. 29, 2007) (AIn the Debtor=s schedules, the Debtor lists the Vehicle=s value at \$19,650 with a total debt owed to Ford of \$29,832 .086. The Debtor, by his own admission, has no equity in the Vehicle.@).
- Joyner Auto World v. George (In re George), 315 B.R. 624, 627 (Bankr. S.D. Ga. 2004) (AThe Debtor swore under penalty of perjury that the vehicle is worth \$2,500.00. This statement of value constitutes a judicial admission. Additionally, Debtor listed the value of Movant=s claim as \$2,887.88. Therefore, according to Debtor=s schedule D, Debtor has no equity in the vehicle.@).

► Unaccepted Offer Not Evidence of Market Value

• Sharp v. United States, 191 U.S. 341, 349 (1903) (AOral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value.@).

► An unverified statement of an appraiser is hearsay

• In re Digby, 47 B.R. 614, 618 (Bankr. N.D. Ala. 1985) (AThe Federal Rules of

Evidence apply in bankruptcy cases, and, thereby, >hearsay= is not admissible except as those rules permit. The >appraised= values stated in the exhibit are >hearsay= because the >declarant= of such values did not make the statements >while testifying at the . . . hearing,= and the statements are not excepted from the prohibition.@).

► Fair & Equitable/Chapter 11

• SE Prop. Holdings, LLC v. Seaside Eng=g & Surveying, Inc. (In re Seaside Eng=g & Surveying, Inc.),780 F.3d 1070, 1075B76 (11th Cir. 2015) (AWe disagree with [the secured creditor objecting to confirmation] that the bankruptcy court valued [the debtor] using a forced-sale method. To begin, the bankruptcy court explicitly stated that >the correct method of valuation of the [d]ebtor is that as a going concern.= The bankruptcy court also considered future losses, which are necessary to a discounted cash flow analysis, the core of a going-concern valuation. Most telling, the bankruptcy court discussed and selected a discount rate, the critical input to calculate the present value of a business based on a cash flow.").

Addendum II: Case Law Update¹

Prepared for the 2017 Alexander L. Paskay Memorial Bankruptcy Seminar

I. Vehicle Valuation

▶ In re Boston, Case No. 16-50261-can13, Docket Entry 53 (Bankr. W.D. Mo. Dec. 2, 2016)

- In *Boston*, a creditor filed a proof of claim for a purchase money car loan. The debtor filed a claim objection, attempting to bifurcate the claim. The parties agreed on all but two components of the car's value: a GAP insurance policy and a service contract. The parties stipulated that the value of the car, exclusive of these two components, was \$3,927.45, and asked the court to determine whether the secured portion of the claim should include the value of the GAP insurance policy (\$187.50) and the service contract (\$756.80).
- The court started by examining the relationship between *Rash* and section 506. Although the *Rash* Court did determine that, for Chapter 13 cramdown purposes, "value" means replacement value, Congress provided more specific valuation criteria in section 506(a)(2) post-*Rash*. That subsection applies with respect to valuing personal property, and the second sentence applies where the debtor acquires the property for personal, family, or household purposes.
- However, before determining which valuation method to use, the court looked at section 506(a)(1), which requires the court to value "the creditor's interest in the estate's interest" in such property. Here, the security agreement clearly gave the creditor a security interest in the car as well as the Gap insurance policy and service contract. Because the debtor did not propose to reject these executory contracts as separate pieces of property through the plan, they became part of the bankruptcy estate. Because the debtor did not dispute the creditor's values related to the GAP insurance policy and service contract, the court accepted these numbers. The court ended by distinguishing other cases discussing the value of GAP insurance policies and service contracts, because the real issue in those cases is the purchase money nature of the 910 car under section 1325(a)'s hanging paragraph.
- The court sustained the claim objection in part, allowing a secured claim for \$4,871.75, which incorporates the GAP insurance policy and service contract values.

► In re Pembleton, 2016 WL 3963709 (Bankr. D. Kan. July 15, 2016) (Somers, J.)

- In *Pembleton*, a secured creditor filed a proof of claim for \$11,856.42. It claimed \$8,700 was secured by the value of the underlying vehicle. The debtors' Chapter 13 plan valued the vehicle at \$4,939. The debtors objected to the claim and the creditor objected to the plan.
- At an evidentiary hearing, the debtor relied on Kelley Blue Book private party sale value to assert that the value of the vehicle was \$5,027. The creditor obtained an appraisal that valued the vehicle at \$8,981.67. The creditor's expert witness was an auto damage appraiser who worked for a company that mainly dealt with insurance companies. The expert inspected the exterior of the vehicle and then ran Internet

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¹ Prepared by Trevor Bond and Zachary Fairlie, law clerks to the Hon. Cynthia A. Norton, Bankruptcy Judge for the Western District of Missouri.

searches of NADA publications and Autotrader.com. The Autotrader website lists dealers' offers to sell vehicles, stating an asking price for each listing. The expert found three similar vehicles on Autotrader with similar mileage, and all were located within 100 miles. The expert then averaged the asking price of the three vehicles to arrive at \$8,981.67.

- The court found that the expert witness was credible, and that he was an expert in evaluating vehicle damage and determining the cost of making repairs for insurance purposes. The court noted, however, that neither the expert nor the company he worked for was in the business of selling vehicles in the retail market, or otherwise determining current retail value of vehicles.
- The court held that the Kelly Blue Book private party value of \$5,027 was the most accurate evidence presented regarding the vehicle's value for purposes of § 506(a)(2) and § 1325(a)(5). Even if the expert was properly qualified as an expert at determining the retail value of vehicles, the court was not convinced that his approach to valuing the debtor's minivan in this case arrived at the price a retail merchant would charge for the vehicle considering the age and condition of the vehicle, as required by § 506(a)(2). Thus, the court held that the debtors' Chapter 13 plan must propose to make payments to the creditor equal to the present value of \$5,027 to be confirmable.

► In re Brown, 2016 WL 3414816 (Bankr. N.D. Ohio June 14, 2016)

- In *Brown*, a secured creditor filed a proof of claim for \$10,528.49. It claimed \$4,650 was secured by the value of the underlying vehicle, and the remaining amount was unsecured. The debtor filed an objection to the proof of claim, valuing the collateral at \$2,133. The debtor's proposed value of the vehicle was based on Kelly Blue Book private party value and NADA values. The debtor alleged that the vehicle had approximately 87,000 miles and that it was in good operating condition, but had some cosmetic damage and required some maintenance.
- The court noted that pursuant to 11 U.S.C. § 506(b), adjustments to value may be appropriate. Adjustments include, but are not limited to, the age and mileage of the vehicle. Such adjustments are only permissible if they are supported by evidence. Additionally, the court noted that the debtor provided evidence of published trade-in values, clean retail values, and private party sale values, which, "absent specific evidence justifying an alternative valuation method, the values of a private party sale or a trade-in are not consistent with the valuation methods Congress has chosen for valuing personal property for personal, family, or household purposes in Chapter 7 or 13 cases." In determining the value of the vehicle, the court relied on the Kelly Blue Book "fair purchase price," which was defined as "the price people are typically paying a dealer for a used car with typical mileage in good condition or better. This price is based on actual used car transactions and adjusted regularly as market conditions change." The Kelly Blue Book fair purchase price for the vehicle was \$3,536. Thus, the court sustained in part the debtor's objection to claim as to the reduction in the value of the vehicle.

II. Mobile & Manufactured Home Valuation

► In re Jude, 2016 WL 3582133 (Bankr. E.D. Ky. June 24, 2016)

- In *Jude*, a secured creditor objected to the debtor's Chapter 13 plan based on the plan's valuation of the creditor's claim, which was secured by a mobile home. The plan valued the mobile home at \$18,468.77. The debtor's valuation was based on his own personal opinion and that of is experts, who used a sales-comparison approach. The creditor's expert valued the mobile home at \$40,100. The creditor's expert reached this value after first determining the base value using NADAguides.com, and then applying several adjustments to account for the home's age, condition, accessories, and installed components.
- The court noted that while a sales-comparison approach could provide a fair valuation, the debtor's evidence was not reliable given that the experts' comparable sales differed materially from those of the actual mobile home. Instead, the court found the creditor's expert credible and his valuation reliable. Thus, the court sustained the creditor's objection, found that the mobile home had a valuation of \$40,100, and ordered the debtor to file an amended plan.

► In re Brown, -- B.R. --, 2016 WL 6068111 (Bankr. E.D.N.C. Oct. 14, 2016)

- In *Brown*, the creditor filed a proof of claim based on a loan secured by the debtor's manufactured home. Through the Chapter 13 plan, the debtor proposed bifurcating the \$39,359.91 claim into a secured claim for \$28,600 and an unsecured claim for the remainder. The creditor objected, citing section 1325(a)(5)(B), and argued the manufactured home had a much higher value.
- At the valuation hearing, the debtor's expert testified that the home was worth \$26,538. The expert started with the NADA value for "average" condition (\$35,393), and then made deductions for almost \$10,000 worth of repairs. Inexplicably, the debtor's expert assumed the collateral's dimensions were 28 feet X 60 feet, whereas the manufactured home was actually 30 feet X 66 feet. The creditor's expert started with the NADA value for "good" condition, and used the actual dimensions. After deducting for minor repairs and adding more than \$7,000 worth of improvements, the creditor's expert testified that the value was \$50,151.
- Ultimately, the court found the creditor's expert much more credible, and noted he was better prepared for the hearing. Further, the debtor's expert failed to explain the size discrepancy. The creditor's expert's methodology was more reliable, as it followed the approach of starting with NADA and then subtracting necessary repairs, then adjusting for value-added features. The court adopted the creditor's expert's valuation for the most part, but agreed with the debtor that extensive repairs were necessary. The court also deducted a location discount of 5% based on the home's rural location.
- Ultimately, the court subtracted the additional repair discount (\$2,250) and location discount (\$2,398) from the creditor's expert's value of \$50,200, and arrived at a value of \$45,552. Because the value was greater than the claim, the court ruled that the claim was fully secured and bifurcation was inappropriate.

► In re Denaro, 556 B.R. 86 (Bankr. W.D.N.Y. 2016)

• In *Denaro*, the creditor held a claim secured by the debtor's manufactured home (but not the real estate). The Chapter 13 debtor proposed to cram down the secured

- lender's claim to \$18,000 under section 1325(a)(5), treating the remainder of its claim as unsecured. The creditor objected, valuing the manufactured home at \$28,844.50.
- Interestingly, although both parties procured expert reports, both parties waived the valuation hearing and the right to cross-examine the experts. The court compared the two expert reports, finding fault with both of them. The debtor's expert's report failed to explain how the beginning value (\$30,900) was chosen, and deducted more than \$9,000 for delivery and setup costs in contravention of section 506(a)(2). The debtor's expert, using the sales-comparison approach, started with a more reasonable number, which he calculated using the average adjusted price of the comparables. However, the expert then made an unexplained downward departure from this number.
- Ultimately, the court found that the sales comparison approach was reliable. However, because the debtor's expert provided no reason for departing from the average adjusted sales price, the court refused to allow the deduction. Without further evidence, the court adopted the average adjusted sales price, or \$22,633, as the value of the manufactured home.

► In re Hardy, 2016 WL 3549078 (Bankr. E.D. N.C. June 21, 2016)

- In *Hardy*, a secured creditor filed a proof of claim in the amount of \$50,644.02, claiming the entire balance as fully secured by a manufactured home. The debtor's Chapter 13 plan valued the manufactured home at \$24,089.51. The creditor filed an objection to the Chapter 13 plan.
- At an evidentiary hearing, the creditor relied on a written appraisal by its expert that valued the manufactured home at \$33,100. The debtor relied on the NADA Appraisal Guide, which valued the manufactured home at \$29,811.98. The court noted that while in a typical case the NADA Guide listing prevails, the general average value is subject to further adjustment based upon evidence concerning actual condition and need for repairs. The court also noted that "where value is contested, a court is called upon to assess the retail value of the property at issue based upon the testimony, exhibits, and other evidence presented at an evidentiary hearing." The court reasoned that because the creditor had a detailed written appraisal and presented testimony from a credible expert witness, the creditor's valuation provided the most accurate starting point of present value of the manufactured home. The court then reduced the creditor's valuation by \$2,040 based on a handful of line items.
- Thus, the court sustained in part and denied in part the objection to confirmation and directed the debtor to amend the proposed plan to reflect a secured value of the manufactured home in the amount of \$31,060.

► In re Prewitt, 552 B.R. 790 (Bankr. E.D. Tex. 2015)

- In *Prewitt*, a creditor whose claim was secured by the Chapter 13 debtor's manufactured home moved for valuation of the collateral. The secured creditor filed a proof of claim for \$31,752.75. In the motion for valuation, the secured creditor asserted a value of "at least \$24,104." The debtor objected to the motion for valuation.
- The creditor had two experts appraise the manufactured home. The first expert appraised the home at \$24,104, which included upward adjustments for delivery and

- setup that would be charged by a retail dealer. The creditor's second expert appraised the home at \$18,600 and did not include an upward adjustment for delivery and setup costs. The debtor's expert appraised the manufactured home at \$13,898.
- The court did not find the debtor's appraisal to be credible, citing the expert's comparison of dissimilar manufactured homes for his comparable sales analysis and his rejection of NADA sales information. Instead, the court found that the creditor's second expert's appraisal was generally the most reliable and credible in assessing the value of the manufactured home. The court denied the creditor's request that the replacement value of the debtor's manufactured home include hypothetical delivery and setup costs. The court noted that "when the proposed disposition is to keep a mobile home at its current location, *Rash*'s rationale indicates that all moving costs, whether increasing or reducing value, should be disregarded." The court reasoned that these upward adjustments reflected services that the debtor would not actually receive and costs that the creditor would not actually incur. Thus, the court found that the replacement value of the manufactured home was \$18,600.

► In re Thornton, 2016 WL 3092280 (Bankr. S.D. Ind. May 23, 2016)

- In *Thornton*, a creditor whose claim was secured by the Chapter 13 debtors' manufactured home objected to the debtors' Chapter 13 plan based on the valuation of the creditor's secured claim.
- The debtors' expert, using a combination of the cost comparison approach and the sales comparison approach, valued the collateral at \$20,000. The debtors' expert downgraded the property's condition to "fair," because the debtors' did not own the real estate where the manufactured home sat so a buyer would have to pay to remove the property from its current location.
- The creditor's expert, using a cost comparison approach, valued the collateral at \$41,017. The court found that the comparable sales used by the debtors' expert were not sufficiently comparable to give a credible opinion as to value. Instead, the court found the creditor's appraisal more credible because it substantially complied with the NADA guide's use of the National Appraisal System. In addition, the court noted that the debtors' expert's downward adjustment for the cost of removal is not appropriate. The court reasoned that "removal of personal property from its seller's existing location to the buyer's intended location is inherent in personal property sales transactions. The costs incurred by the buyer in getting the property to its intended location is a cost of sale. Section 506(a)(2) expressly provides that costs of sale are not to be deducted in determining replacement value of personal property." Thus, the court sustained the creditor's objection to confirmation.

▶ In re Atchison, 557 B.R. 818 (Bankr. M.D. Ala. 2016): In Atchison, the court determined that the manufactured home at issue had not transformed from personal property to real property under Alabama law. This meant the antimodification provision in 1322(b)(2) did not protect the creditor, and the debtor (at least in theory) could bifurcate the claim under section 506. However, in its opinion, the court considered only the effect of the antimodification provision, and resolved to determine value at a later hearing. This case illustrates that certain other provisions may prevent a court from determining value, and these sections (including section 1322(b)(2)) must be addressed as threshold issues.

▶ In re Sweeney, 556 B.R. 208 (Bankr. E.D.N.C. Aug. 18, 2016): In valuing a manufactured home in the Chapter 13 cramdown context, the bankruptcy court arrived at its own value that was in the middle of the two values argued by the parties. The debtor, without an expert, testified that the home was worth \$11,000, but the court discounted her testimony because it was based almost entirely on the tax assessors' appraisal. On the other hand, the creditor's expert valued the home at \$19,600. He judged the manufactured home to be in "fair" condition, which led him to use 82% of NADA value as the starting point. However, the debtor was most familiar with the condition of the home, and the court found, according to her testimony, that the home was closer to "poor" condition than "fair" condition, meaning a starting point of 65% of NADA value was proper. In making this determination, the court noted that the expert showed a "distinct lack of independence" in refusing to budge from his "fair" condition determination. Ultimately, the court valued the home at \$14,700.

▶ In re Tudor, 2016 WL 5485183 (Bankr. S.D.W.V. Sept. 29, 2016): In a battle of the experts regarding the value of a manufactured home in the Chapter 13 cramdown context, the court decided on a value in the middle of the two valuations. While giving little weight to the debtor's belief that the manufactured home was worth \$10,000, the court did accept the debtor's testimony regarding the extent of damages to the manufactured home. The court found that the creditor's expert's valuation of \$50,000 was much too high, in part based on the expert's assertion that "if he were in the market for a mobile home, []he would pay \$50,000" – the court noted that this diminished his credibility. Ultimately, the court valued the manufactured home at \$32,500.

III. Restrictive Covenants and Collateral Valuation in chapter 11 Cramdown

► In re Sunnylope Housing, Ltd., 818 F.3d 937 (9th Cir. 2016), rehearing granted, 838 F.3d 975 (9th Cir. Sept. 22, 2016)

- NOTE: On September 22, 2016, the Ninth Circuit ordered an en banc rehearing pursuant to Federal Rule of Appellate Procedure 35(a). Thus, the Ninth Circuit Panel's opinion, while illustrative, is no longer precedential.
- In *Sunnyslope*, the debtor developed and operated an apartment complex in Phoenix, Arizona for the purpose of providing affordable housing. The primary financing for the project came from an \$8.5 million loan from Capstone Advisors, LLC ("Capstone"), which the Department of Housing and Urban Development ("HUD") guaranteed. As part of that guarantee, the debtor had to enter into and record a regulatory agreement that required that the project be operated as affordable housing and that limited rents that tenants could be charged to amounts within levels set by HUD.
- The debtor defaulted on its loan with Capstone, and HUD stepped in and took over the loan. HUD then sold a package of loans to First Southern National Bank ("First Southern"), which included the Capstone loan. The loan sale agreement provided that the deed of trust was a valid and enforceable lien on the property and that HUD released the HUD regulatory agreement. First Southern then moved to foreclose on the loan, however, before a sale could occur, the debtor's general partner filed a

- petition for involuntary bankruptcy. The court later converted the involuntary bankruptcy to a voluntary Chapter 11 bankruptcy.
- Exercising the cram-down power under 11 U.S.C. § 1129(b), the debtor valued the creditor's secured claim at \$2.5 million. The creditor filed a motion to determine the amount of its secured claim under § 506(a), valuing the collateral at \$7.5 million. The creditor premised its valuation on the release of the affordable housing covenants, alleging that foreclosure would extinguish the covenants. The creditor argued that with the covenants, the collateral was worth approximately \$4.885 million. The debtor argued that the collateral was worth \$7 million without the covenants, and \$2.6 million with the covenants. The debtor argued that the covenants still applied, limiting the amount of rental income that could be realized from the apartments and substantially reducing the value of the project. The bankruptcy court and district court agreed with the debtor, concluding that the secured value of the collateral was \$2.6 million.
- The Ninth Circuit reversed. The Ninth Circuit explained that the "starting point is that First Southern as a secured creditor stands in the first position. It obtained the rights of the senior lender from HUD. HUD acquired the Capstone Loan after it fell into default, sold it to First Southern, and released First Southern from the requirements of the HUD Regulatory Agreement." The Ninth Circuit went on to explain that "all of the restrictive covenants and other provisions that [the debtor] seeks to invoke . . . are derived from positions that were junior and expressly subordinated to the Capstone Loan." The Ninth Circuit reasoned that *Rash* does not support assigning a value to First Southern's secured interest based on the income that can be generated when used in the specific way that the debtor elects to use the collateral. Instead, *Rash* requires the replacement value standard, which in this case was the cost to either build or purchase a similar apartment complex. The Ninth Circuit reversed and remanded.

IV. Collateral Valuation Required to Redeem After Conversion

► In re Maynard, 2016 WL 3135069 (Bankr. N.D. Ohio May 25, 2016)

- In *Maynard*, the debtors owned two vehicles at the time they filed for Chapter 13 relief. After paying the secured portion of the claims in full, the debtors converted their case to Chapter 7. The debtors then moved to redeem their vehicles for the amount that they paid through their Chapter 13 plan. The court considered whether the valuation made for cramdown purposes in a Chapter 13 survives conversion and governs redemption payments under 11 U.S.C. § 722.
- The court held that the debtors were not entitled to redeem the vehicles based on payment of the allowed secured portion of a bifurcated claim while the case proceeded under Chapter 13 unless the lien was fully paid. The court reasoned that when a debtor seeks to redeem collateral after converting from Chapter 13 to Chapter 7, the collateral must be valued to determine the extent of the creditor's allowed secured claim under 11 U.S.C. § 506(a). Thus, the court denied the debtors' motions to redeem their vehicles.

V. Value Evidence

- ▶ In re Pod, -- B.R. --, 2016 WL 6238478 (Bankr. E.D.N.Y. Oct. 25, 2016): In Pod, the debtor attempted to strip the junior lien on his residence. The court noted that while the debtor has the initial burden to establish value, the ultimate burden of persuasion lies with the creditor to establish that there is some equity. Both experts used the sales-comparison approach, but the court gave less weight to the debtor's expert because the appraisal contained several deficiencies. For example, the expert failed to adjust the comparables to account for the style and age of the property and used listings (as opposed to actual sales) in its list of comparables. Ultimately, because the creditor's expert's report contained fewer deficiencies, the court found the creditor satisfied its burden to establish some equity.
- ▶ In re Barnes, 2016 WL 4052714 (Bankr. N.D. Ill. July 22, 2016): In Barnes, the debtor filed an adversary to strip a second mortgage under section 506, and the second mortgage holder did not respond. The court accepted the debtor's value for the home based solely on a brokers price opinion, which indicated no equity, and avoided the second mortgage. The court did not hear any evidence on value. Accord In re Segura, 2016 WL 4399483 (Bankr. N.D. Ill. Aug. 12, 2016) (stripping the second mortgage based on an appraisal produced by debtor, where there was no other evidence on value); In re Clarke, 2016 WL 5400388 (Bankr. D. Neb. Sept. 27, 2016) (court stripped the junior lien where the lienholder failed to respond to the adversary complaint and the only evidence of value was the county assessor's valuation report); In re Henson, 2016 WL 6269582 (Bankr. D. Neb. Oct. 26, 2016) (same).
- ▶ In re Dixon, 2016 WL 4054940 (Bankr. S.D.W.V. July 26, 2016): The issue in Dixon was the value of five acres of farmland in the Chapter 13 cramdown context. The creditor's expert testified that the value of the land was \$27,000 based on the sales-comparison approach. Debtor testified on his own behalf as to value. Ultimately, the court found the creditor's expert reliable. However, because the creditor's expert failed to visit the site, he did not account a large swath of swampland, which none of the comparables contained. For this reason, the court deducted \$8,000 from the creditor's expert's value to account for the swampland, arriving at a value of \$19,000.
- ▶ In re Miller, 558 B.R. 146 (Bankr. E.D. Penn. 2016): Where the debtor attempted to avoid the junior mortgage on his principal residence under section 506(d), the court found that the debtor failed to meet his burden to show that there was no equity in the second mortgage. The debtor's expert valued the property by giving a large discount based on the age of the home, whereas the creditor's expert put more emphasis on the home's effective age, which takes into account updates and renovations. Ultimately, the court found the effective age more indicative of value than the age of the home, and arrived at a value of \$325,000. Because the amount of the first mortgage was \$254,140.97, the antimodification clause in section 1322(b)(2) precluded lien avoidance.
- ▶ Pennymac Loan Services, LLC v. Crocker, 2016 WL 6134009 (N.D. Ohio Oct. 20, 2016): Where both the debtor and creditor presented experts on the value of a home under section 506, the bankruptcy judge noted that he was familiar with the area of the home and admitted that his knowledge of the area affected his opinion. He then chose a value in the middle of the two experts' numbers. The creditor appealed, arguing that the bankruptcy judge should not have

allowed his personal experience to affect his valuation result. The district court affirmed, ultimately finding that the bankruptcy judge properly weighed the credibility of the competing experts and did not make any value determinations based solely on his personal experience. "[A]lthough he was admittedly familiar with the area, the Judge's decision was rationally supported by all the evidence on the record."

Stripping Down Your Spouse: A Discussion of Tenancy by the Entirety Property Ownership under Section 506 of the Bankruptcy Code¹

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Since 2008, real estate property values in many parts of the country have declined. As a result, bankruptcy courts around the country have been asked to resolve motions in which the Debtor seeks to strip down or strip off a creditor's lien. While numerous issues can arise under the Bankruptcy Code, one issue which continues to be litigated is whether an individual debtor, as only one of two tenants by the entirety, can strip off a fully unsecured second priority mortgage lien when the remaining tenant is not before the court.

Tenancy by the entirety (TBE) is a type of concurrent estate which can only exist between husband and wife where each spouse owns the undivided whole of the property. Grant S. Nelson, William B. Stoebuck & Dale A. Whitman, *Contemporary Property* 314-315 (2d ed. West Group 2002). This unique property right is not recognized by all states and certain states recognize the right as to real property only and do not allow TBE for personal property. Property held by husband and wife as TBE does not belong to either spouse individually, but instead each spouse is said to own the entire estate. Neither spouse may transfer or encumber their interest without the other's consent. See *Wilson v. Florida Nat'l Bank & Trust Co.*, 64 So.2d 309, 313 (Fla.1953); *Beal Bank, SSB v. Almand and Associates*, 780 So.2d 45, 53 (Fla. 2001).

¹ Originally published in the ABI Young & New Members Committee Newsletter. Vol. 10, Num. 3 (September 2012).

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"Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v U.S.*, 440 U.S. 48, 99 S.Ct. 914 (1979); See also *U.S. v. Craft*, 535 U.S. 274, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002). Under *Butner*, courts must first look to the applicable non-bankruptcy law to determine what rights a non-debtor owner of real property would have to effect a strip down or strip off of the mortgage in question. *Id*. Absent a bankruptcy court exercising jurisdiction in a bankruptcy case, a lien strip off could not be done, because there is not a remedy available under state law. After making the state law determination, the Court must, in applying the provisions of the Bankruptcy Code to the issues, respect the underlying state law concerning TBE.

One of the first cases to examine this issue was *In re Hunter*, 284 B.R. 806 (Bankr.E.D.Va.2002). In *Hunter*, the Court examined both the state law and Bankruptcy Code implications of TBE property, and ultimately concluded that TBE does not permit a lien against only one spouse's share in the tenancy and therefore the individual debtor could not strip off a fully unsecured lien on TBE property. *Id*. After an in depth analysis of the nature of TBE, the Court determined that such tenancy is an all or nothing proposition, where TBE offers the benefit of certain protections, it also requires the tenants to live with its burdens. *Id*. The Court concluded that it would be improper to allow one spouse to lien strip and benefit the non-filing spouse who is not before the Court and not eligible for the very relief sought. *Id*.

After *Hunter*, the Bankruptcy Court in *In re Strausbough* 426 B.R. 243 (Bankr.E.D.Mich. Mar 25, 2010) took a contrary position holding that an individual

debtor could strip off a wholly unsecured second mortgage lien without participation from the non-filing spouse. The Court reasoned that where a second mortgage was fully unsecured, the creditor had an unsecured claim for the purposes of section 506(a), citing the 2002 6th Circuit decision of *In re Lane*, 280 F.3d 663, 664 (6th Cir.2002). *Id.* at 246. The Court further determined that none of the prohibitions mentioned by the Court in *Hunter* precluded the individual tenant from unilaterally "enhancing" the TBE property such as paying a mortgage payment, paying taxes or making an improvement to the property without the other spouse's necessary joinder. *Id.* at 250. Specifically, the Court stated that enhancing the entireties estate "...was certainly not an action to alien, convey or encumber" either tenants interest in the property. *Id.*

With the split between *Hunter* and *Strausbough*, the next case to examine the issue was *In re Erdmann*, 446 B.R. 861 (Bankr.N.D. III., March 2011). The facts in the *Erdmann* case were unique as both spouses were before the Court, but only one spouse was eligible for a chapter 13 discharge as the other spouse had received a discharge in a chapter 7 case within the past four years. *Id.* at 5. The spouse who received a chapter 7 discharge had already discharged his personal liability as to the second lien on the TBE property, but was not eligible for a chapter 13 discharge and therefore was not able to strip off the wholly unsecured lien under section 1325(a)(5). *Id.* The Court determined that the nature of TBE property precluded one tenant from receiving different treatment from the other tenant and as a result, even though the spouses were willing to act in concert, they could not effectuate lien stripping. *Id.* Upon the creation of a TBE, husband and wife lose their separate interests, and the property is held by the tenancy as a single entity. *Id.* All interest in the property is vested in the marital unit and an individual

spouse cannot unilaterally take any action or achieve any result with respect to the property. *Id*. One spouse may not act to sever the TBE and may not alienate the tenancy or affect the rights of third parties. *Id*. at 6. It is only when both of the tenants act in concert that any results may be obtained. *Id*.

The most recent Court to examine this issue is the Middle District of Florida in *In* re Pierre, 468 B.R. 419 (Bankr.M.D.Fla. 2012). In Pierre, both the chapter 13 debtor and her non-filing spouse had previously filed and received chapter 7 discharges, the chapter 13 debtor then reopened her chapter 7 case and vacated her prior discharge in order to seek a strip off of her second mortgage lien in her individual chapter 13 case. *Id.* at 423. In *Pierre*, the Court's well-reasoned analysis takes the reader through the intricacies of not only the TBE issue, but also what is commonly called the "chapter 20" issue and whether eligibility for a chapter 13 discharge is a requirement to lien stripping in a chapter 20 case. Id. at 424 - 426. Specific to the TBE issue, the Court reasoned that "any type of ownership change requires joint action by both spouses" and held that in order for the debtor to strip off or strip down a mortgage held as TBE, both spouses must be debtors in the chapter 13 case and eligible to receive a chapter discharge. *Id.* at 427. The Court then correctly points out that the *Strausbough* decision ignores the fact that section 506 of the bankruptcy code cannot act by itself to accomplish a lien strip down or strip off result. Id. One must, according to Dewsnup v Timm, 502 U.S. 410 (1992), still find the power in the bankruptcy code to strip off and strip down a lien. *Id*. That power only exists when section 506 can act in tandem with another code section. *Id*.

While the TBE set of issues may be unique to those states which still acknowledge the validity of such form of property ownership, the underlying issue

concerning how to deal with lien stripping when not all of the property owners are before the court is not unique. The issue must be correctly considered and addressed in all forms of co-owned property. The bankruptcy court must acknowledge that the co-ownership rights of a non-debtor may create a burden on the bankruptcy estate which may preclude the debtor in bankruptcy from seeking to strip down or strip off a mortgage lien.

In re Pierre, 468 B.R. 419 (2012)

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468 B.R. 419
United States Bankruptcy Court,
M.D. Florida,
Orlando Division.

In re Senayda PIERRE, Debtor[s].

No. 6:10-bk-21663-KSJ. | March 16, 2012.

Synopsis

Background: Chapter 13 debtor moved to value nonresidential mortgagee's claim for purpose of "strip down" in her individual Chapter 13 case, and mortgagee objected on ground that debtor's husband, a co-owner of this entireties property, was not party to bankruptcy case and had recently received a discharge in Chapter 7.

Holdings: The Bankruptcy Court, Karen S. Jennemann, Chief Judge, held that:

- [1] spouse who owns property by the entireties with another spouse cannot "strip down" a partially secured lien, or "strip off" a totally unsecured lien, in Chapter 13 case, when the other spouse is not also a co-debtor in bankruptcy case, and
- [2] even if this were not the case, debtor-wife could not "strip down" mortgage lien when her husband, the co-owner and non-debtor, was not entitled to similar relief due his recent discharge in Chapter 7.

Motion denied.

West Headnotes (10)

[1] Bankruptcy

Discharge

Bankruptcy

Successive proceedings

Use of Chapter 13 plan to modify rights of secured creditors, whether through "strip down" of claim collateralized by nonhomestead property or "strip off" of wholly unsecured lien, is not effective unless and until debtor receives a Chapter 13 discharge, something which cannot occur in "Chapter 20" context, where debtor has recently received discharge under Chapter 7. 11

U.S.C.A. §§ 1325(a)(5)(B), 1328(f).

[2] Bankruptcy

Individual Debt Adjustment

Bankruptcy

Curing Defaults

Bankruptcy

Time for completion; extension or modification

Chapter 13 was created to protect overextended individual wage earners that desired to voluntarily repay their debts, not as an instrument for protecting real property; while debtors may indeed use Chapter 13 to save their homes, legislative purpose of Chapter 13 was to maximize recovery to creditors by allowing debtors to cure arrears and make payments over period of up to 60 months.

[3] Bankruptcy

-Liens securing claims not allowed

Bankruptcy

► Modification of claim, right, or debt in general

Spouse who owns property by the entireties with another spouse cannot "strip down" a partially secured lien, or "strip off" a totally unsecured lien, in Chapter 13 case, when the other spouse is not also a co-debtor in bankruptcy case.

1 Cases that cite this headnote

[4] Husband and Wife

Nature and incidents

Under Florida law, entireties property belongs to neither spouse individually; rather, each spouse holds the whole or the entirety, and not a share,

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moiety, or divisible part.

1 Cases that cite this headnote

[5] Husband and Wife

Evidence

Under Florida law, there is a presumption that real and personal property acquired by married couple is held by the entireties when all six unities are present: (1) unity of possession, because there is joint ownership and control; (2) unity of interest, because each spouse's interest is identical; (3) unity of title, because these interests originated in same instrument; (4) unity of time, because interests commenced simultaneously; (5) survivorship; and (6) unity of marriage, because the parties were married at the time the property became titled in their joint names.

[6] Husband and Wife

Creation and existence in general

Under Florida law, there is no entireties estate should any of the six unities of possession, interest, title, time, survivorship and marriage never have existed or be destroyed.

[7] Husband and Wife

Separate contracts as to property **Husband and Wife**

Separate conveyance or mortgage

Under Florida law, neither spouse can sell, forfeit or encumber any party of entireties estate without consent of the other, nor can one spouse alone lease it or contract for its disposition.

[8] Husband and Wife

Rights of creditors as to estate in entirety or in common

Under Florida law, creditors cannot levy on entireties property to satisfy debt of individual spouse.

[9] Husband and Wife

Rights and liabilities of spouses

One benefit, and perhaps sometimes burden, of entireties ownership under Florida law is that any type of ownership change requires joint action by both spouses.

1 Cases that cite this headnote

[10] Bankruptcy

Liens securing claims not allowed

Bankruptcy

► Modification of claim, right, or debt in general

Bankruptcy

Successive proceedings

Even assuming that the law allowed Chapter 13 debtor, as co-owner of investment property held by the entireties with her non-debtor husband, to independently strip an undersecured lien on that property in her individual Chapter 13 case, debtor could not "strip down" that lien in her own Chapter 13 case when her husband, the co-owner and non-debtor, was not entitled to similar relief due his recent discharge in Chapter 7. 11 U.S.C.A. §§ 1325(a)(5)(B), 1328(f).

Attorneys and Law Firms

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In re Pierre, 468 B.R. 419 (2012)

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Opinion

*421 MEMORANDUM OPINION DENYING DEBTOR'S MOTION TO VALUE LIEN OF CITIMORTGAGE

KAREN S. JENNEMANN, Chief Judge.

Debtor, Senayda Pierre, and her non-filing spouse, Maurince Pierre, jointly own as tenants-by-the-entireties investment real estate. The investment property1 (the "Property") is located in Orlando, Florida, and is encumbered by a first mortgage payable to CitiMortgage. Debtor has filed a motion seeking to value (or strip down) CitiMortgage's lien.2 Because Mr. Pierre, the co-owner of the Property, is not a joint debtor in this bankruptcy case, and also because he recently received a discharge in a separate Chapter 7 bankruptcy case, CitiMortgage objects to debtor's request.3 The issue is whether the Court can strip down a partially unsecured mortgage in a Chapter 13 case when the collateral is jointly owned by husband and wife as tenants by the entireties and only one spouse is a debtor. The Court holds that a prerequisite to stripping down a secured lien under § 1322(b)(2) of the Bankruptcy Code4 is that both co-owner spouses must be debtors in the same Chapter 13 case and that each joint debtor also must qualify for a Chapter 13 discharge.

CitiMortgage holds a partially unsecured lien on the Property. Although the parties do not agree as to the exact value of the real property at issue, debtor contends the value of the Property subject to CitiMortgage's lien is \$77,000. CitiMortgage argues the value is higher but likely not to exceed the amount of the outstanding indebtedness of \$148,962.5

Strip Off and Strip Down

A Chapter 13 debtor normally can bifurcate an under-secured mortgage claim encumbering non-homestead property into a secured portion and an unsecured portion pursuant to § 506(a).6 "Section 506(a) defines the secured and unsecured components of debts according to the value of the underlying collateral."7 Sections 506(a) and 1322(b)(2) work in tandem for claims valuation.8 Section 1322(b)(2) allows a debtor to "modify the rights of holders of secured claims," but not where the underlying collateral is the debtor's principal residence.9

*422 The valuation of an under-secured mortgage claim is commonly referred to as a "strip down" or "cram down."

Where the valuation of property indicates that a claim is partially secured, the secured portion of the claim is paid through the debtor's plan as an allowed secured claim, and the unsecured portion is "stripped down" to an allowed unsecured claim. The unsecured claim generally is paid on a pro rata basis along with all other general unsecured claims. If a mortgage claim is completely unsecured, a Chapter 13 debtor can eliminate or "strip off" the entire secured claim, leaving the creditor with only one claim, an unsecured claim, pursuant to § 506(d).10 A wholly unsecured lien claim is void pursuant to § 506(d).

The same is not true in a Chapter 7 case. A Chapter 7 debtor cannot strip off a totally unsecured lien because no Chapter 7 counterpart to § 1322(b)(2) exists.11 Neither lien strip off nor lien cram down is available in Chapter 7. The issue is how these restrictions on modifying secured claims work in this particular case, where debtor seeks to strip down a partially unsecured claim on the Property, a remedy unavailable to her non-filing husband who owns the Property as a tenant by the entirety.

With the recent economic recession and the drastic devaluation of real property values, Mrs. Pierre and her husband stopped making payments to CitiMortgage and other lenders for the debt owed on their multiple investment properties. CitiMortgage and the other lenders instituted foreclosure actions to recover their collateral. On June 14, 2010, debtor and her husband jointly filed a Chapter 7 bankruptcy case to stop these foreclosures.12 The debtors indicated they intended to surrender their interest in their jointly owned properties, including the Property subject to this dispute.13 The Chapter 7 trustee submitted a report of no distribution declaring the case a no-asset case and abandoning all property.14 Both debtors in the joint Chapter 7 case received a discharge pursuant to § 727(a) on October 5, 2010.15

Shortly thereafter, on December 6, 2010, only Mrs. Pierre filed this Chapter 13 case. Contrary to the Statement of Intentions she and her husband filed in their *423 joint Chapter 7 case, Mrs. Pierre now states that she wants to retain (not surrender) her jointly owned real property, including CitiMortgage's collateral. Because she wants to strip down or strip off various secured liens encumbering the investment properties she now seeks to retain, Mrs. Pierre sought, and was granted, a revocation of her Chapter 7 discharge.16 Given the recent line of cases decided by Bankruptcy Judge Arthur B. Briskman, the revocation of Ms. Pierre's discharge was inadvertent and would not be granted today.17 However, what was done was done, and this Court allowed Mrs. Pierre to revoke her discharge. Her husband, however, is still receiving the benefits of his Chapter 7 discharge.

[1] Mr. Pierre, who is not a debtor in this case, would not

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be entitled to receive a Chapter 13 discharge within four years of the petition date of his previous Chapter 7 case under § 1328(f)(1). Section 1328(f) was added to the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and prevents courts from issuing two discharges to a single debtor in rapid succession in so-called "Chapter 20" situations.18 (A "Chapter 20" occurs where a debtor files a Chapter 13 case shortly after obtaining a Chapter 7 discharge). Therefore, even if he were to file a Chapter 13 case, Mr. Pierre still could not cram down CitiMortgage's claim because he cannot receive a discharge in the later Chapter 13 case. The vast majority of courts, including this one, uniformly have held that any modifications to secured creditors' rights through cram down or strip off are not effective unless and until the debtor receives a Chapter 13 discharge.19 Mr. *424 Pierre will never receive such a discharge. This Court similarly has held that a lien valued at zero pursuant to § 506(d) is not void again unless and until the debtor receives a discharge.20 The bright-line rule for extinguishment of a lien, as set forth in In re Sadala, was created to protect the creditor's interest in the event a debtor defaults prior to conclusion of his Chapter 13 case.21

Looking to the plain language of § 1328(f)(1), the confirmation requirements of § 1325(a)(5), and Congress' intent in enacting BAPCPA, the vast majority of courts have determined cram down and strip off are impermissible where a debtor is prohibited from receiving a discharge pursuant to § 1328(f).22 Allowing cram down or a strip off of a lien without a discharge or payment of the debt would result in a "'de facto discharge, a benefit to which [debtors who are prohibited from receiving a discharge pursuant to Section 1328(f)] are not entitled.' "23 Put another way, allowing a debtor to discharge his debts in a Chapter 7 and then immediately filing a Chapter 13 to strip off or cram down a mortgage claim would be equivalent to modifying the mortgage in the Chapter 7, which a debtor cannot do.

[2] A minority of courts have allowed the cram down of mortgage claims in Chapter 20 situations, arguing the purpose of Chapter 13 is to protect debtors' homes.24 Such contention contradicts Congress' clearly articulated intent in creating Chapter 13.25 Senate Report 95–989 (Bankruptcy Reform Act of 1978) sets forth:

The new Chapter 13 undertakes to solve these problems insofar as bankruptcy law can provide a simple yet precise and effective system for individuals to pay debts under bankruptcy court protection and supervision. The new chapter 13 will permit almost any individual with regular income to propose and have approved a reasonable plan for debt repayment based on that individual's exact circumstances.26

The House of Representatives Report 95–595 sets forth:

The purpose of Chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his *425 debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full settlement.27

Chapter 13, as the legislative history sets forth, was created to protect overextended individual wage earners desiring to voluntarily repay their debts through the automatic stay and provide financial relief through a fresh start. To view Chapter 13 as an instrument for protecting real property, or as a panacea for the real estate recession, misconstrues Congress' intended purpose of Chapter 13. Although debtors indeed may use Chapter 13 to save their homes, the legislative purpose of Chapter 13 is to maximize recovery to creditors by allowing debtors to cure arrears and make payments over a period of up to 60 months

The legislative history of BAPCPA also indicates Congress was much more interested in having debtors repay their debts than in saving their homes. The 2005 amendments, as established by the legislation's title "Bankruptcy Abuse Prevention and Consumer Protection Act," were intended to curb what was perceived to be abusive bankruptcy practices, and to ensure that debtors with the ability to repay their debts do so.28 Sections 1328(f) and 1325(a)(5) were enacted as part of the 2005 overhaul to prohibit debtors from receiving two discharges within a four year period and to increase repayment obligations by debtors. BAPCPA certainly was not enacted to "save homes." These two new provisions, particularly when read in conjunction with Section 348(f), which is also a BAPCPA addition to the Bankruptcy Code, clearly posit that a discharge is fundamental to the modification of a secured claim.29 Attempts to strip off or cramdown in a Chapter 20 no-discharge situation not only violate the plain language of the Bankruptcy Code, but violate Congress' clear intent in enacting BAPCPA.

Returning to Mrs. Pierre's dilemma, she owns the Property at issue with her husband as tenants by the entireties. Mr. Pierre was discharged of his *in personam* liability to CitiMortgage in his previous Chapter 7 case and cannot now receive a Chapter 13 discharge. Mrs. Pierre, however, remains fully liable to CitiMortgage because she revoked her Chapter 7 discharge. Mrs. Pierre now would like strip or value down CitiMortgage's lien in this Chapter 13 case, even though her husband cannot.

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Mrs. Pierre's request raises at least two issues. First, whether one spouse who owns property as a tenant by the entireties with another spouse can strip down a partially secured lien (or strip off a totally unsecured lien) in a Chapter 13 case, when the other spouse is not also a co-debtor in the bankruptcy case. Second, even if the law allows one co-owner as tenants by the entirety to independently strip a secured lien in an individual Chapter 13 case, *426 whether Mrs. Pierre can strip a secured lien in her own Chapter 13 case when Mr. Pierre, the co-owner and non-debtor, is not entitled to similar relief due to a prior discharge. The Court here answers both questions in the negative.

Spouses Owning TBE Property Must File Joint Chapter 13 Cases to Value Secured Liens

[3] [4] [5] [6] [7] [8] Here, Mrs. Pierre undisputedly owns the property at issue as a tenant by the entireties with her husband. Tenancy by the entireties (TBE) is a form of ownership of property unique to married couples.30 Entireties property belongs to neither spouse individually, but each spouse holds "the whole or the entirety, and not a share, moiety, or divisible part."31 In Florida, real and personal property acquired by a married couple is afforded a presumption of TBE ownership when all six unities are present: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests must be identical); (3) unity of title (the interest must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their ioint names.)32

"Should one of these unities never have existed or be destroyed, there is no entireties estate. As long as all the unities remain intact, however, each spouse's interest comprises the whole or entirety of the property and not a divisible part; the estate is inseverable. 'Neither spouse can sell, forfeit or encumber any party of the estate without the consent of the other, nor can one spouse alone lease it or contract for its disposition. Creditors cannot levy on entireties property to satisfy the debt of an individual spouse.' "33

The first issue is whether, in this Chapter 13 case, Mrs. Pierre can strip down CitiMortgage's lien, even though her spouse and co-TBE owner is not a debtor. With two exceptions,34 every court addressing the issue has refused to allow a spouse in an individual Chapter 13 case to strip down or off a mortgage encumbering TBE property.35

In *In re Hunter*, Judge Mayer carefully reviewed applicable TBE law and concluded that individual debtors

simply are prohibited from stripping down or off a mortgage unless the other spouse also is a joint debtor in the Chapter 13 case.36 Central to Judge Mayer's analysis was the treatment of a husband and wife as single entity pursuant to TBE law:

*427 Fundamentally the estate rests on the legal unity of husband and wife. It is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to legal intendment one and the same.37

Judge Mayer, looking to the applicable state TBE law, delineated the rights and responsibilities of spouses who own property as tenants by the entirety. An essential characteristic of TBE property is that each spouse owns an undivided and indivisible interest in the entire property. A spouse may not unilaterally sever an estate held TBE. Judge Mayer concluded allowing an individual debtor to lien strip or cramdown TBE property would constitute a unilateral severance of the estate, which violates the fundamentals of TBE law 38

[9] The Court agrees with this ruling and finds that nothing in Florida TBE law would posit a different result. Florida courts repeatedly have held that property owned as TBE "belongs to neither spouse individually, but each spouse is seized of the whole."39 In concluding that no creditor of only one of the spouses can seize TBE property, the Florida Supreme Court held that TBE property is "an estate over which the husband and wife have absolute disposition and as to which each, in the fiction of the law, holds the entire estate as one person."40 More pertinent to this analysis, the First District Court of Appeal held that any encumbrance or conveyance [of TBE property] would also require joint action of the selling parties under the contract, since "neither spouse can without the assent of the other, alien or forfeit any part of an estate by the entirety so as to defeat the rights of the other."41 Simply stated, one benefit, and perhaps sometimes burden, of TBE ownership is that any type of ownership change requires joint action by both spouses. Mrs. Pierre simply cannot reduce or eliminate a mortgage encumbering real property she owns as TBE with Mr. Pierre, unless he is a debtor in this Chapter 13 case, and he is entitled to also receive a Chapter 13 discharge.

In the one decision allowing a sole spouse to strip a lien in a Chapter 13 case, *In re Strausbough*, the Michigan Bankruptcy Court assumed that a debtor's ability to strip a lien under § 506 is self-effectuating.42 This reasoning is incorrect because, in a Chapter 13 case, modification of a lien is only possible upon the issuance of a Chapter 13 discharge under § 1328. As such, § 506 is only the beginning of the analysis, and unless and until a debtor complies with all provisions of Chapter 13, a debtor

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cannot modify a secured claim.

In a Jointly-Filed Chapter 13 Case, Both Spouses Must Receive a Chapter 13 Discharge Before the Co-Debtors can Strip Off/Down a Secured Claim

[10] The next issue is whether, even if Mr. Pierre were a joint debtor in this Chapter 13 case, both spouses could strip down CitiMortgage's lien. The Court concludes *428 they could not because Mr. Pierre cannot receive a Chapter 13 discharge inasmuch as he received a Chapter 7 discharge within the applicable 4-year look-back period.43 As previously discussed, a Chapter 13 debtor may strip a lien pursuant to § 506 and § 1322(b)(2) of the Bankruptcy Code. The strip off or cramdown is only effective, however, upon the issuance of a Chapter 13 discharge, which only occurs when all payments are completed under a confirmed plan of reorganization, and only if each debtor has complied with the provisions of § 1325. A debtor who has received a Chapter 7 discharge within the prior four years cannot receive a Chapter 13 discharge pursuant to § 1328(f). Here, because Mr. Pierre recently received a Chapter 7 discharge, he simply cannot receive a discharge in this Chapter 13 and, as such, neither he nor his wife, Mrs. Pierre, is entitled to strip down CitiMortgage's lien.

In the decision of *In re Erdmann*, the Bankruptcy Court for the Northern District of Illinois held that when one of the co-debtors is ineligible to receive a Chapter 13 discharge due to an earlier Chapter 7 discharge, neither spouse could strip a lien encumbering their jointly-owned property.44 The Court rightfully established a black and white rule that both co-owners of TBE property must be joint debtors and each must be eligible to receive a Chapter 13 discharge before either can strip a lien.45

This Court also believes allowing one co-TBE owner to strip liens unilaterally would result in other types of mischief that could affect the integrity of the bankruptcy process and state property recordation procedures. This case is a perfect example. Here, Mr. Pierre has discharged his personal liability to CitiMortgage in his Chapter 7 case. Yet, rather than truly surrendering his interest in the Property, which is the normal result when one surrenders their interest in a Chapter 7 case, his co-TBE owner, Mrs. Pierre, is attempting to retain the property in this Chapter 13 case but substantially reduce or eliminate the amount of the secured claim. This places the secured creditor CitiMortgage in an untenable and unfair predicament. CitiMortgage cannot foreclose on the property hollowly surrendered in Mr. Pierre's Chapter 7 case, due to Mrs. Pierre's Chapter 13 case, nor can CitiMortgage sue Mr. Pierre for any deficiency judgment due. For all purposes, Mr. Pierre is receiving the full benefit of his wife's Chapter 13 discharge, even though he is not entitled to the benefits. For this, and the other reasons restricting debtors from benefitting from a Chapter 7 case rapidly followed by a Chapter 13 case, i.e., Chapter 20 cases, the Court adopts the reasoning of *In re Erdmann* and sets a black and white rule: co-TBE owners must file a joint Chapter 13 case and both must receive Chapter 13 discharges before either can strip down/off a secured lien.

Here, Mrs. Pierre has failed on both prongs of this test. Her husband and co-TBE owner is not a joint debtor in this Chapter 13 case. Moreover, even if he were, he could not strip down the lien of CitiMortgage because he is not entitled to a discharge. Debtor's Motion to Value the Mortgage of CitiMortgage is denied. CitiMortgage's *429 claim is allowed in full as a secured claim. A separate order consistent with this Memorandum Opinion shall be entered.

DONE AND ORDERED.

Parallel Citations

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Footnotes

- 1 The property is not debtor's homestead.
- 2 Doc. No. 32.
- 3 Doc. Nos. 36, 63.
- 4 All references to the Bankruptcy Code are to 11 U.S.C. § 101, et seq.
- For the purposes of this opinion, the parties do agree that the amount of CitiMortgage's lien is more than the value of its collateral.
- Nobelman v. Am. Savs. Bank, 508 U.S. 324, 328–29, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993); Tanner v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357, 1360 (11th Cir.2000).
 Section 506(a) provides:

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

- 7 In re Tanner, 217 F.3d at 1358.
- 8 *Id.* at 1360.
- Section 1322(b)(2) provides a plan may, subject to subsections (a) and (c):
 modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the
 debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

 In addition to stripping down or stripping off a mortgage, modification of a claim pursuant to § 1322(b)(2) may include
 modifying the amount or timing of payments on the claim, reducing the interest rate, or deferring a balloon payment.
- 10 In re Tanner, 217 F.3d at 1360 (holding any claim that is wholly unsecured is not protected from modification under § 1322(b)(2)).
 Section 506(d) provides:
 - To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—
 - (1) Such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
 - (2) Such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.
- Armstrong v. Regions Bank (In re Armstrong), No. 6:10-cv-1316-Orl-31, 2011 WL 768080, at *3 (M.D.Fla. Feb. 28, 2011); In re Hoffman, 433 B.R. 437, 440 (Bankr.M.D.Fla.2010).
- 12 In re Maurince and Senayda Pierre, Case No. 6:10-bk-10319-KSJ.
- 13 Case No. 6:10-bk-10319-KSJ, Doc. No. 1, Pages 36 and 37.
- Case No. 6:10-bk-10319-KSJ, Doc. No. 1, administrative entry, August 17, 2010.
- 15 Case No. 6:10-bk-10319-KSJ, Doc. No. 18.
- 16 Case No. 6:10-bk-10319-KSJ, Doc. No. 28.
- In re Poorvin, No. 6:11-bk-01028-ABB, 2011 WL 5572607 (Bankr.M.D.Fla. Nov. 15, 2011); In re Gomez, 456 B.R. 574 (Bankr.M.D.Fla.2011); In re Attaway, No. 6:09-bk-17777-ABB (Bankr.M.D.Fla. Feb. 2011); see, also, In re Stokes, Case No. 6:09-bk-01126-ABB (Bankr.M.D.Fla. Feb. 9, 2011) (denying debtor's motion to waive his Chapter 7 discharge in converted case where he sought to recharacterize his home as investment property and permanently modify the secured claims encumbering the property). "The discharge injunction is permanent; it forever enjoins a debtor's creditors from pursuing the debtor for discharged debts. Debtors and their creditors rely upon the permanency of the discharge and the discharge injunction." In re Gomez, 456 B.R. at 577. To allow a debtor to vacate his discharge "would undermine the sanctity of the Chapter 7 discharge and the discharge injunction" and "lead to abuses of the bankruptcy system by debtors who seek to avoid the repercussions of Section 1328(f)." Id.
- 18 Section 1328(f) provides:
 - (f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—
 - (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or
 - (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.
- In re Slate, No. 6:11–15737–ABB, 2012 WL 293591 (Bankr.M.D.Fla. Feb. 2, 2012); In re Rosa, No. 6:10–bk–07799–ABB, 2011 WL 6257305 (Bankr.M.D.Fla. Dec. 15, 2011); In re Judd, No. 6:11–bk–04093–ABB, 2011 WL 6010025 (Bankr.M.D.Fla. Dec. 1, 2011); In re Morrobel, No. 6:10–bk–17417–ABB (Bankr.M.D.Fla. May 3, 2011); In re Fleeton, No. 6:10–bk–07391–ABB (Bankr.M.D.Fla. Apr. 12, 2011); In re Attaway, No. 6:09–bk–17777–ABB (Bankr.M.D.Fla. Feb. 18, 2011); In re Stokes, Case No. 6:09–bk–01126–ABB (Bankr.M.D.Fla. Feb. 9, 2011); In re Daniel J. Vega, No. 6:10–bk–11229–ABB (Bankr.M.D.Fla. Nov. 30, 2010); In re Trujillo, No. 6:10–bk–02615–ABB, 2010 WL 4669095 (Bankr.M.D.Fla. Nov. 10, 2010); In re Colbourne, 458 B.R. 598 (Bankr.M.D.Fla.2010).

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- 20 In re Sadala, 294 B.R. at 185.
- This decision was issued prior to the enactment of BAPCPA and §§ 1328(f) and 1325(a)(5). With the enactment of §§ 1328(f) and 1325(a)(5), the creditor's rights are protected in the situation where the Chapter 13 case fails.
- Section 1325(a)(5) was enacted by BAPCPA and requires for confirmation that the plan provides the holder of an allowed secured claim retain its lien securing its lien until the earlier of the payment of the underlying debt determined under nonbankruptcy law or discharge under § 1328. Therefore, strip off or cramdown occurs at discharge. *In re Gerardin*, 447 B.R. 342, 350 (Bankr.S.D.Fla.2011) (en banc); *In re Jarvis*, 390 B.R. 600, 607 (Bankr.C.D.III.2008); *In re Lilly*, 378 B.R. 232, 236 (Bankr.C.D.III.2007).
- 23 In re Gerardin, 447 B.R. at 349 (quoting In re Fenn, 428 B.R. 494, 500 (Bankr.N.D.III.2010)).
- 24 See, e.g., In re Scantling, 465 B.R. 671, 682 (Bankr.M.D.Fla.2012) ("A central purpose of chapter 13 is to save homes.").
- Chapter 13, entitled "Adjustment of Debts of an Individual with Regular Income" and derived from Chapter XIII of the Bankruptcy Act of 1938, was enacted by Congress in the Bankruptcy Reform Act of 1978, Public Law No. 95–598.
- 26 S. REP. No. 95–989, at 13 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5799.
- 27 H.R. REP. No. 95–595, 95th Cong., 1st Sess. 118 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6079.
- H.R. REP. No. 109–31, pt. 1, at 2 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89. "The purpose of the bill [S. 256] is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors ... The heart of the bills' consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford."
- 29 Section 348(f) provides that a lien modification is ineffective upon conversion of a Chapter 13 case to Chapter 7.
- 30 Beal Bank, SSB v. Almand & Assoc., 780 So.2d 45, 52 (Fla.2001).
- 31 Bailey v. Smith, 89 Fla. 303, 103 So. 833, 834 (1925).
- 32 Beal Bank, 780 So.2d at 52.
- 33 U.S. v. One Single Family Residence With Out Buildings Located at 15621 S.W. 209th Ave., Miami, Fla., 894 F.2d 1511, 1514 (11th Cir.1990) (citations omitted).
- 34 In re Janitor, 2011 WL 7109363 (Bankr.W.D.Pa. January 4, 2011); In re Strausbough, 426 B.R. 243 (Bankr.E.D.Mich.2010).
- In re Hunter, 284 B.R. 806 (Bankr.E.D.Va.2002); Alvarez v. HSBC Bank USA, N.A., No. MJG-11-2886, 2011 WL 6491670 (D.Md. Dec. 28, 2011); In re Erdmann, 446 B.R. 861 (Bankr.N.D.III.2011); see also In re Barra, No. 09-16505-SSM, 2010 WL 2991028 (Bankr.E.D.Va. July 26, 2010) (stating the Court would follow In re Hunter if it had to rule on a TBE issue).
- 36 In re Hunter, 284 B.R. 806 (Bankr.E.D.Va.2002). See also In re Barra, 2010 WL 2991028 (Bankr.E.D.Va. July 26, 2010); Alvarez v. HSBC Bank USA, Nat. Ass'n, 2011 WL 6941670 (D.Md. Dec. 28, 2011).
- 37 In re Hunter, 284 B.R. at 810.
- 38 Id. at 814.
- 39 Beal Bank, 780 So.2d at 53 (quoting Bailey v. Smith, 103 So. at 834).
- 40 Hunt v. Covington, 145 Fla. 706, 200 So. 76, 77 (1941).
- 41 *Tingle v. Hornsby,* 111 So.2d 274, 277 (Fla. 1st DCA 1959). *But see, Gerson v. Broward County Title Co.,* 116 So.2d 455 (Fla. 2d DCA 1959) (holding that a husband may accept payment in discharging a note held by the entireties because possession by the husband *is* possession by the wife).

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- 42 In re Strausbough, 426 B.R. 243, 247–250 (Bankr.E.D.Mich.2010).
- 43 In re Perez-Gomez, Case No. 6:09-bk-13656-ABB, 2010 WL 5289498 (Bankr.M.D.Fla. December 7, 2010); In re Gerardin, 447 B.R. 342.
- 44 *In re Erdmann*, 446 B.R. 861, 865 (Bankr.N.D.III.2011).
- 45 Id. at 868–69 (noting that allowing one co-owner to strip a lien would result in confusion in state property records because the mortgage arguably is reduced or eliminated as to one spouse but not the other. Which would control?)

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UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

SENAYDA PIERRE,

Appellant,

Appellee.

v. Case No: 6:12-cv-642-Orl-22 CITIMORTGAGE,

ORDER

This cause comes before the Court on Debtor/Appellant Senayda Pierre's ("Appellant") Appeal of a bankruptcy court order denying her motion to "cram" or "strip" down the value of a lien held by Appellee CitiMortgage ("CitiMortgage") against an investment property owned by Appellant and her husband, Mr. Pierre, as tenants by the entireties ("TBE"). Appellant filed a Brief (Doc. No. 18) in support of her Appeal; CitiMortgage (Doc. No. 22) and the Trustee (Doc. No. 23) filed Answer Briefs. Appellant also filed a Reply Brief (Doc. No. 30). Appellant's request for oral argument (Appellant's Br. (Doc. No. 18), p. 7) is denied because the issues presented on appeal are clearly identified and thoroughly briefed.

I. BACKGROUND

The bankruptcy judge set forth much of the relevant background of this case in her Memorandum Opinion denying Appellant's motion:

Debtor, Senayda Pierre, and her non-filing spouse, Maurince Pierre, jointly own as tenants-by-the-entireties investment real estate. The investment property (the "Property") is located in Orlando, Florida, and is encumbered by a first mortgage payable to CitiMortgage. Debtor has filed a motion seeking to value (or strip down) CitiMortgage's lien. Because Mr. Pierre, the co-owner of the Property, is not a joint debtor in this bankruptcy case, and also because he recently received a discharge in a separate Chapter 7 bankruptcy case, CitiMortgage objects to debtor's request. The issue is whether the Court can strip down a partially unsecured mortgage in a Chapter 13 case when the collateral is

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jointly owned by husband and wife as tenants by the entireties and only one spouse is a debtor

CitiMortgage holds a partially unsecured lien on the Property. Although the parties do not agree as to the exact value of the real property at issue, debtor contends the value of the Property subject to CitiMortgage's lien is \$77,000. CitiMortgage argues the value is higher but likely not to exceed the amount of the outstanding indebtedness of \$148,962.

(Mem. Op. (Doc. No. 1-2), pp. 1–2.) CitiMortgage's claim is only partially secured because it exceeds the value of the Property. See 11 U.S.C. § 506(a) (2006) ("An allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property"). The CitiMortgage lien is a first mortgage, and the Court is unaware of any senior lien on the Property. (Appellant's Br. (Doc. No. 18), p. 11.) Although Appellant initially filed for Chapter 7 bankruptcy with her husband, her motion to set aside her Chapter 7 discharge was granted so that she could pursue all of the rights and privileges of Chapter 13 bankruptcy instead (discussed in greater detail *infra*). (*Id.* at p. 13.)

II. LEGAL STANDARD

Federal District Courts function as appellate courts when reviewing the decisions of United States Bankruptcy Courts. *In re Colortex Indus.*, 19 F.3d 1371, 1374 (11th Cir. 1994). Where, as here, the facts are not in dispute and the appeal concerns only matters of law, the Court reviews legal conclusions of the bankruptcy court *de novo. In re Winn-Dixie Stores*, 414 B.R. 764, 767 (M.D. Fla. 2009).

III. ANALYSIS

The bankruptcy court denied Appellant's motion to strip down the mortgage because "a prerequisite to stripping down a secured lien under §1322(b)(2) of the Bankruptcy Code is that both co-owner spouses must be debtors in the same Chapter 13 case and that each joint debtor

¹ The parties disagree as to the amount by which the lien exceeds the value of the Property, but that distinction is irrelevant for purposes of defining the type of claim CitiMortgage holds.

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also must qualify for a Chapter 13 discharge." Mem. Op. (Doc. No. 1-2), p. 1.) The two requirements noted by the bankruptcy judge implicitly accept the existence of a third – that to take effect, strip down also requires at least the possibility of discharge under Chapter 13.² There is conflicting authority on all three of the bankruptcy court's conclusions, but after a thorough *de novo* review, this Court affirms the bankruptcy judge and joins the majority positions on each of the disputed issues.

A. Spouses Must File Joint Chapter 13 Cases to Strip Down a Secured Lien on TBE Property

Florida law governs the Court's interpretation of tenancy by the entireties ownership. *In re Barrett*, 543 F.3d 1239, 1246 (11th Cir. 2008) (citing *Butner v. United States*, 440 U.S. 48, 54–55 (1979) (recognizing that state law determines property interests when the Bankruptcy Code does not supply a federal rule)). TBE is "unique to married couples" and property held as TBE possesses six characteristics:

(1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the account must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names).

Beal Bank, SSB v. Almand and Assocs., 780 So. 2d 45, 52 (Fla. 2001). Another key distinction of TBE is that each spouse holds the "whole or the entirety, and not . . . a share, moiety, or divisible part." Bailey v. Smith, 103 So. 833, 834 (Fla. 1925) abrogated in part on other grounds by Beal Bank, 780 So. 2d at 54–55. In other words, "property held by husband and wife as tenants by the entireties belongs to neither spouse individually, but each spouse is seized of the whole." Beal

.

² Even though the bankruptcy judge only identified two "prerequisites" in her holding, she persuasively discussed the importance of the third, implicit, requirement at length. (*See* Mem. Op. (Doc. No. 2-1), pp. 4–7.)

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Bank, 780 So. 2d at 53. Neither party disputes that the property at issue in this case is held as TBE by Appellant and her husband.

Ownership of real property as TBE presents a unique challenge to loan modification under Chapter 13. Because each spouse holds an indivisible interest in the entire estate, any modification to one spouse's interest must have the same effect on the interest of the other spouse, or else there could be an impermissible severance of the estate. *In re Hunter*, 284 B.R. 806, 810–13 (Bankr. E.D. Va. 2002). The court in *Hunter* provided the following hypothetical that could arise should a debtor-husband go through Chapter 13 without his wife:

If the debtor were to predecease his wife, the [TBE] property would be subject to the lien because his wife's interest would be subject to the mortgage lien and she would be the sole owner of the property. If the debtor survived his spouse, the lien on her interest would disappear with her interest leaving only the husband's interest which would not encumbered.

Id. at p. 813. The unity of interests, critical to TBE under Florida law, would cease to exist. The Bankruptcy Code does not permit severing an entireties estate by just one debtor; the only possible exception is § 363(h), which allows the <u>trustee</u> to sell both the estate's interest and the co-owner's interest in property held as TBE. *Id.* (emphasis added). Here, Appellant, not the trustee, is seeking to sever the estate by dissolving the unity of interests. The bankruptcy court correctly held that this action is impermissible, and Appellant's motion was denied accordingly.³

Appellant cites *In re Strausbough* – the only case reaching a contradictory holding – to support her claim that a single spouse may strip a lien on TBE property via Chapter 13. However, as the bankruptcy court pointed out, that case relies almost exclusively on an interpretation of § 506(a) and (d). The *Strausbough* court found that "under the plain language of § 506(a) and (d), the second mortgage holder's claim is not an allowed secured claim and is

.

³ In its brief, CitiMortgage identifies several other cases adopting the holding in *Hunter*. The Court will not restate the analyses contained in those cases as they substantially comport with that of *Hunter*. Nevertheless, the Court is confident that it is joining the clear majority point of view.

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therefore void." *In re Strausbough*, 426 B.R. 243, 248 (Bankr. E.D. Mich. 2010). As the bankruptcy court correctly noted, this interpretation is flawed at the outset because § 506 is not self-executing – "in a Chapter 13 case, modification of a lien is only possible upon the issuance of a Chapter 13 discharge under § 1328." (Mem. Op. (Doc. No. 1-2), p. 10.) The Court is not persuaded by the Strausbough court's characterization of lien stripping as "enhancing" TBE property. *See Strausbough*, 426 B.R. at 250. Unlike paying down a mortgage or repairing the property, which simply increases the value of each spouse's interest, lien stripping as proposed by Appellant unilaterally modifies the nature of the interest. This difference is important, and the Court will not undermine TBE ownership by allowing one spouse to sever the combined interest through Chapter 13 proceedings.

Strip Down of a Secured Lien Requires Possibility of Discharge Under Chapter 13

Appellant does not dispute that CitiMortgage's claim is allowed and partially secured. Modification of this type of claim, even where permitted by § 502, is limited by § 1325(a)(5)⁴ and § 1328(f).⁵ These two statutes were part of the Bankruptcy Abuse Prevention and Consumer

(a) [T]he court shall confirm a plan if –

(5) with respect to each allowed secured claim provided for by the plan:

(B)(i) the plan provides that –

(I) the holder of such claim retain the lien securing such claim until the earlier of

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law . .

⁵ § 1328(f) reads:

- 5 -

⁴ § 1325(a)(5) reads, in pertinent part:

⁽f) [T]he court shall not grant a discharge of all debts provided for in the plan or

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Protection Act of 2005 ("BAPCPA"), which tightened the rules on so-called "Chapter 20" bankruptcies (where a debtor files for Chapter 13 bankruptcy protection almost immediately after receiving a discharge under Chapter 7). The majority of courts, including the bankruptcy court below, have concluded that cram down and strip off are forbidden if § 1328(f) precludes the debtor(s) from receiving a Chapter 13 discharge. (*See* Mem. Op. (Doc. No. 1-2), p. 5 n.19 (collecting cases).) After *de novo* review, the Court finds no legal error in the bankruptcy court's conclusion that, based on the plain language of the above-quoted statutes and substantial legislative history discussed in the Memorandum Opinion (*see* pp. 5–7), a debtor seeking cram down or strip off under the factual circumstances of this case must be eligible for discharge.

Appellant relies on *In re Tran* and similar cases (including *In re Scantling*, 465 B.R. 671 (M.D. Fla. 2012)) to support her contention that cram down or strip off is permissible absent eligibility for discharge. However, both *Tran* and *Scantling* dealt with wholly unsecured, junior liens on the respective debtors' primary residences. *Tran*, 431 B.R. 230, 232–33 (Bankr. N.D. Cal. 2010); *Scantling*, 465 B.R. at 673. Because the respective lenders' claims were unsecured, § 1325(a)(5) never came into play, and the courts were able to strip off the junior liens pursuant to § 1322(b)(2). In the appeal presently before the Court, CitiMortgage holds a senior, partially-secured claim against an investment property; this type of claim clearly implicates § 1325(a)(5) and presents facts that are materially different from *Tran* and *Scantling*. As such, the Court finds those cases to be of no moment for the present decision.

disallowed under section 502, if the debtor has received a discharge –

⁽¹⁾ in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or

⁽²⁾ in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

⁶ The Court is aware that Appellant's counsel have sought Eleventh Circuit review of this legal conclusion in three bankruptcy appeals decided by Judge Corrigan of this District. See Colbourne v. Ocwen, No. 6:10-cv-1813-ORL-32 (M.D. Fla. Sept. 9, 2012); Trujillo v. BAC Home Loan Servicing, L.P., No. 5:10-cv-646-ORL-32 (M.D. Fla. Sept. 9, 2012); Vega v. Weatherford, No. 6:11-cv-384-ORL-32 (M.D. Fla. Sept. 9, 2012).

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C. Both Spouses Must be Eligible for Chapter 13 Discharge

Finally, Appellant claims that the bankruptcy judge erred in holding that both spouses must be eligible for discharge. The bankruptcy court logically concluded that if both spouses must join a Chapter 13 filing to modify a lien on TBE property, and such modification requires discharge eligibility, then each spouse must be eligible for discharge. To hold otherwise would create the same problems that would arise if spouses were allowed to file independently of one another (after all, adding Appellant's husband to her Chapter 13 filing would present nothing more than a minor procedural speed bump). A married couple could get all of the benefits of Chapters 7 and 13, while only one spouse would have to bear the burdens of each. This is exactly the outcome that BAPCPA was intended to prevent. The Court thus approves of the bankruptcy court's bright line rule: "co-TBE owners must file a joint Chapter 13 case and both must receive Chapter 13 discharges before *either* can strip down/off a secured lien." (Mem. Op. (Doc. No. 1-2), pp. 11–12 (citing *In re Erdmann*, 446 B.R. 861, 868–69 (Bankr. N.D. Ill. 2011).)

IV. CONCLUSION

Based on the foregoing, it is ordered as follows:

- The Clerk shall enter a Final Judgment providing that the Order of the Bankruptcy
 Court (Doc. No. 1-3) denying Appellant Senayda Pierre's Motion to Value and
 Cram Down Mortgage of Appellee CitiMortgage (Doc. No. 2-5) is AFFIRMED
 for the reasons set forth herein. The Judgment shall also provide that the Appellee
 shall recover its costs of action.
- 2. The Trustee's Motion Requesting Judicial Notice of Appellant's Chapter 7 Petition (Doc. No. 24), filed August 7, 2012, is **DENIED** as moot because the Court did not reach the issue of Appellant's alleged bad faith.
- 3. The Clerk is directed to **CLOSE** this case.

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DONE and **ORDERED** in Chambers, in Orlando, Florida on February 13, 2013.

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record Unrepresented Parties

In re Lehman, 205 F.3d 1255 (2000)

43 Collier Bankr. Cas. 2d 1369, Bankr. L. Rep. P 78,125, 13 Fla. L. Weekly Fed. C 437

KeyCite Yellow Flag - Negative Treatment
Disagreed With by In re White, Bankr.N.D.Cal., November 23, 2005
205 F.3d 1255
United States Court of Appeals,
Eleventh Circuit.

In re Lowell W. LEHMAN, Jr., Debtor. Lowell W. Lehman, Jr., Plaintiff—Appellant, v. VisionSpan, Inc., Defendant—Appellee.

> No. 99–12545 | Non–Argument Calendar. | Feb. 18, 2000.

Chapter 7 debtor moved to avoid entire amount of judicial lien as impairing his homestead exemption. The United States Bankruptcy Court for the Northern District of Georgia, No. 97-80376 ADK, A.D. Kahn, J., 223 B.R. 32, held that only portion of lien could be avoided. On appeal, the United States District Court for the Northern District of Georgia, No. 98-02181-CV-ODE-1, Orinda D. Evans, Chief Judge, affirmed. Debtor appealed. The Court of Appeals held that, in calculating extent to which lien could be avoided, bankruptcy court properly used total value of home owned by debtor and his non-debtor spouse as tenants in common, rather than value of debtor's interest in property.

Affirmed.

West Headnotes (2)

[1] Statutes

Relation to plain, literal, or clear meaning; ambiguity

Although statutory interpretation begins with the language of the statute itself, a court may look beyond the plain language of a statute if applying the plain language would produce an absurd result.

17 Cases that cite this headnote

Bankruptcy Homestead; residence Bankruptcy

Operation and effect

Bankruptcy court properly used total value of home owned by Chapter 7 debtor and his non-debtor spouse as tenants in common in calculating portion of judicial lien that could be avoided as impairing debtor's homestead exemption, rather than using debtor's interest in property as required by literal reading of relevant Bankruptcy Code provision; because of mortgage on property, literal reading of statute would have had absurd result of allowing debtor to shield his entire equity interest of \$30,000 in home from \$53,878 judicial lien, even though his exemption was only \$5,312. Bankr.Code, 11 U.S.C.A. § 522(f)(2)(A).

39 Cases that cite this headnote

Attorneys and Law Firms

*1255 J. Michael Lamberth, Lamberth, Bonapfel, Cifelli & Wilson, Atlanta, GA, for Plaintiff–Appellant.

Charles E. Buker, III, Perrie, Buker, Stagg & Jones, P.C., Atlanta, GA, for Defendant–Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before COX and WILSON, Circuit Judges, and RONEY, Senior Circuit Judge.

Opinion

PER CURIAM:

In this bankruptcy case, appellant debtor Lowell Lehman sought complete avoidance of a judicial lien on his home in the amount of \$53,878.19 held by appellee VisionSpan, Inc. The bankruptcy judge, affirmed by the district court, held that only part of the lien could be avoided and that

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In re Lehman, 205 F.3d 1255 (2000)

43 Collier Bankr, Cas, 2d 1369, Bankr, L. Rep. P 78, 125, 13 Fla. L. Weekly Fed. C 437

\$24,6881 of that lien could not be avoided. We affirm.

[1] This case involves interpretation of the Bankruptcy Code. Although the precise terms of the applicable provision would call for avoidance of the entire lien, the bankruptcy court reasoned that such a reading would produce an absurd result and departed from those precise terms. See In re Lehman, 223 B.R. 32, 34–35 (Bankr.N.D.Ga.1998). We have held this to be a legitimate approach to statutory interpretation. Although statutory interpretation begins with the language of the statute itself, see In re Southeast Banking Corp., 156 F.3d 1114, 1120 (11th Cir.1998), *1256 a court may look beyond the plain language of a statute if applying the plain language would produce an absurd result, see Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir.1996). There was no error in the decision that a literal application of the language of the statute would violate Congressional intent and would produce an absurd result.

Briefly, these are the undisputed facts. On November 13, 1997, Lowell Lehman filed a case under Chapter 7 of the Bankruptcy Code. At the time of the filing, VisionSpan had a judgment lien against Lehman's property in the amount of \$53,878.19. Lehman and his wife, as tenants in common, owned a home in Atlanta, Georgia valued at \$225,000. Lehman's wife is not in bankruptcy and is not a debtor of VisionSpan. Lehman had only an undivided fifty-percent interest in the home. NationsBank held a first-priority mortgage on the entire interest in the home in the amount of \$165,000.

Section 522 of the Bankruptcy Code, 11 U.S.C. § 522, sets out a statutory scheme permitting a debtor in bankruptcy to exempt certain property from his or her bankruptcy estate. For property to qualify for an exemption, it must first be part of the bankruptcy estate. If the debtor has mortgaged his or her property, the debtor has retained only an equitable interest in the property. Absent a provision providing otherwise, only that equitable interest would be property of the estate and eligible for an exemption.

Section 522(f), however, provides a special mechanism for the debtor to "avoid" certain liens on property, thereby bringing the whole property within the bankruptcy estate and potentially qualifying it for an exemption. *See generally Owen v. Owen*, 500 U.S. 305, 308–09, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991). To accomplish this purpose, § 522(f) provides, in basic part, that a debtor may "avoid" a lien to the extent it "impairs" an exemption. This amount is calculated as follows:

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that

the sum of-

- (i) the lien;
- (ii) all other liens on the property; and
- (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

§ 522(f)(2)(A).

In this case, under the express language of the statute, the following calculation would be made:

- · Add (i) \$53,878.19 (the amount of the VisionSpan judgment lien); (ii) \$165,000 (the amount of the mortgage held by NationsBank); and (iii) \$5,312 (the amount of the exemption claimed by Lehman). The total of these figures is \$224,190.19.
- · The value of Lehman's "interest in the property ... in the absence of any liens" is \$112,500.
- · \$224,190.19 "exceeds" \$112,500 by \$111,690.

Therefore, VisionSpan's lien would be "considered to impair" Lehman's exemption by \$111,690 and Lehman could avoid it to that extent, which would permit Lehman to avoid all of VisionSpan's lien of \$53,878.19.

This would be the consequence of applying the precise terms of the statute: Lehman, as shown above, would avoid all of VisionSpan's lien. Lehman, however, would still have equity in the property of \$30,000 (derived by subtracting the \$165,000 amount of the NationsBank mortgage from the \$225,000 property value and dividing by two, to account for Lehman's one-half ownership of the property). In effect, Lehman would shield his entire equity of \$30,000 from VisionSpan's lien of \$53,878.19, even though Lehman was entitled to a debtor's exemption of only \$5,312.00.

*1257 Concluding this result would provide Lehman a windfall and would be "absurd," the bankruptcy court took the following common sense approach:

The value of the entire property is \$225,000.00. Deducting the mortgage, \$165,000.00, leaves \$60,000.00 equity in the property, not accounting for VisionSpan's lien. The Debtor's half-interest in the property is therefore worth

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In re Lehman, 205 F.3d 1255 (2000)

43 Collier Bankr. Cas. 2d 1369, Bankr. L. Rep. P 78,125, 13 Fla. L. Weekly Fed. C 437

\$30,000.00. After deducting the debtor's exemption, \$5,312.00, there is remaining in the property \$24,688.00. [VisionSpan's] lien is in the amount of \$53,879.00, which clearly impairs the Debtor's exemption. [VisionSpan] however, entitled to retain its lien on the unencumbered, nonexempt portion of the Debtor's property, in the amount of \$24,688.00.

In effect, the court was simply substituting, in the statutory formula, the *total value* of the home (\$225,000) in place of Lehman's *interest* in the home in the absence of any liens (\$112,500). The same outcome would also be produced by substituting the value of the NationsBank mortgage attributable to Lehman's share of the property (\$82,500), in place of the value of the mortgage on the whole property (\$165,000).

[2] Although a literal reading of the text of § 522(f)(2)(A) would support Lehman's position, there is clear evidence that a literal interpretation would disserve the legislative intent behind the provision.

The legislative history demonstrates that in 1978, when Congress adopted the power of avoidance in § 522(f), its intention was only to entitle the debtor to the debtor's exemptions provided by § 522. As explained by the House Judiciary Committee in connection with the adoption of § 522(f):

> [T]he bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may void any judicial lien on exempt property, ... [which] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.

H.R.Rep. No. 95-595, at 126-27 (1977), reprinted in

figures in this opinion.

Footnotes

1978 U.S.C.C.A.N. 5963, 6087-88. The Senate Judiciary Committee report supports this interpretation of the purpose of § 522(f), stating that § 522(f) "gives the debtor the ability to exempt property that the trustee recovers under one of the trustee's avoiding powers if the property was involuntarily transferred away from the debtor (such as by the fixing of a judicial lien)...." S.Rep. No. 95–989, at 76 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5862.

Additional evidence is found in the legislative history to the 1994 amendments, which adopted the § 522(f)(2)(A) formula. The House Judiciary Committee report states that the formula in § 522(f)(2)(A) was "based upon" In re Brantz, 106 B.R. 62 (Bankr.E.D.Pa.1989). H.R.Rep. No. 103-835, at 52 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3361. The formula used by the court in Brantz based its calculation on the value of the "property"—as opposed to the value of the "debtor's interest in the property," as appears in § 522(f)(2)(A). See Brantz, 106 B.R. at 68. So, too, the bankruptcy court in this case calculated lien avoidance using the value of the whole property, not the value of the debtor's interest in the property. Because the bankruptcy court essentially employed the Brantz formula, upon which § 522(f)(2)(A) was "based," we are further persuaded that the deviation from the literal language of § 522(f)(2)(A) was consistent with the legislative intent.

The decision to depart from the statutory language accords with the recent decision of the First Circuit in a comparable case, Nelson v. Scala, 192 F.3d 32 (1st Cir.1999). But see In re Cozad, 208 B.R. 495 (10th Cir. BAP 1997) (applying literal language of § 522(f)(2)(A) in similar scenario).

*1258 There was no error in declining to follow a literal application of the language of § 522(f)(2)(A) which would produce an absurd result and would violate the Congressional intent.

AFFIRMED.

All Citations

205 F.3d 1255, 43 Collier Bankr.Cas.2d 1369, Bankr. L. Rep. P 78,125, 13 Fla. L. Weekly Fed. C 437

The bankruptcy court made a minor arithmetical error in the amount of \$10. We have corrected the bankruptcy court's

3

In re Lehman, 205 F.3d 1255 (2000) 43 Collier Bankr.Cas.2d 1369, Bankr. L. Rep. P 78,125, 13 Fla. L. Weekly Fed. C 437		
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C

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
M.D. Pennsylvania.
In re Shirley L. HARRIS a/k/a Shirley Harris, Debtor.
Shirley Harris, Plaintiff

Amerifirst Home Improvement Finance Co., Charles J. Dehart, III, Esquire, Defendants.

Bankruptcy No. 5–12–bk–00031–JJT. Adversary No. 5–12–ap–00060–JJT. April 26, 2013.

Background: Seeking to strip entire second mortgage lien from property that she and her non-debtor grandson held as joint tenants with right of survivorship, the value of which was stipulated to be less than the balance of the first mortgage lien, Chapter 13 debtor filed adversary complaint, requesting a determination of the validity and extent of the second lien.

<u>Holding:</u> The Bankruptcy Court, <u>John J. Thomas</u>, J., held that one-half of the balance owed on the second mortgage lien was subject to being stripped.

So ordered.

West Headnotes

1 Joint Tenancy 226 8

226 Joint Tenancy

<u>226k7</u> Mutual Rights, Duties, and Liabilities of Joint Tenants

226k8 k. In General. Most Cited Cases

Under Pennsylvania law, each joint tenant is considered in law as owning an undivided share of the whole estate.

[2] Bankruptcy 51 2575

51 Bankruptcy

51V(D) Lions and Transf

51V(D) Liens and Transfers; Avoidability
 51k2575 k. Liens Securing Claims Not
 Allowed. Most Cited Cases

Bankruptcy 51 € 3708(9)

51 Bankruptcy

51XVIII Individual Debt Adjustment 51k3704 Plan

51k3708 Secured Claims; Cram Down 51k3708(9) k. Security Interests in Principal Residences. Most Cited Cases

Where Chapter 13 debtor and her non-debtor grandson held, as joint tenants with right of survivorship, property whose value was stipulated to be less than the balance of the first mortgage lien against the property, debtor could not strip entire second lien from the property but, rather, only one half of the balance owed on the second lien was subject to being stripped; one half of the outstanding balance on the first mortgage was attributable to the estate's interest in the property and, likewise, the lien attributable to the estate's interest in the second mortgage amounted to one half of the balance owed on the second mortgage lien. 11 U.S.C.A. §§ 506(a)(1), 506(d), 1322(b)(2).

Tullio DeLuca, Scranton, PA, for Plaintiff.

Martin S. Weisberg, Mattleman Weinroth and Miller,

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PC, Cherry Hill, NJ, for Defendants.

Charles J. DeHart, III, Hummelstown, PA, pro se.

OPINION FN1

**Nature of Proceeding: Complaint to Determine the Validity and Extent of Mortgage Lien Under 11

U.S.C. § 506(d) and 11 U.S.C. § 1322(b)(2)(Doc. #

1)}

JOHN J. THOMAS, Bankruptcy Judge.

*1 This adversary was initiated by Complaint of the Chapter 13 Plaintiff/Debtor requesting a determination of the validity and extent of mortgage lien under 11 U.S.C. §§ 506(d) and 1322(b)(2). The material facts have been admitted and can be briefly summarized. The Defendant mortgagee retains a second lien against property that is held by the Debtor and her grandson as joint tenants with right of survivorship. By correspondence dated September 7, 2012, and found at Doc. # 13, the parties stipulated that the value of the property is less than the balance of the first mortgage lien. The parties also stipulated the only issue remaining for resolution is whether an individual Chapter 13 debtor can avoid a joint mortgage on real property jointly owned with a non-filing grandson with a right of survivorship. By the same correspondence, the parties requested the matter be submitted on briefs with a stipulation of facts to be filed thereafter. A review of the docket indicates a stipulation of facts was not filed of record by the date suggested in the correspondence, and the only party to file a brief was the Plaintiff. Plaintiff's Brief in Support at Doc. # 16.

Debtor seeks to strip the entire second lien from the subject property.

I begin my analysis with the pertinent language of 11 U.S.C. § 506(a)(1)(Determination of secured status):

An allowed claim of a creditor secured by a lien

on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim.

[1] To determine the extent of the value of the creditor's interest, I must first establish the extent of the estate's interest in the subject property. Exhibit A to the Complaint is the recorded second mortgage between the parties. Attached to the mortgage is the property description which indicates the premises were conveyed to the Debtor and her grandson "as joint tenants with right of survivorship...." As joint tenants, each is considered in law as owning an undivided share of the whole estate. See Ronald M. Friedman, Ladner Pennsylvania Real Estate Law, § 8.02 (Joint Tenancy) at 8–2 (5th ed.2012) citing American Oil Co. v. Falconer, 136 Pa.Super. 598, 8 A.2d 418 (1939).

[2] In Miller v. Okmi Sul (In re Miller), 299 F.3d 183 (3d Cir.2002), the court faced a request by a debtor to determine the extent to which a lien impaired the claimed exemption in property that, like the present case, was held by joint tenants with right of survivorship with a non-debtor. Although the Miller case addressed a lien avoidance under § 522(f) of the Bankruptcy Code, I find logic to the approach that our Appeals Court used in evaluating the interests of both debtor and lien holder. With that background, I reiterate the Miller court's holding because it articulately sets forth the reasoning which I adopt in the case before me.

*2 We conclude, consistently with the majority of the courts addressing the issue, that what might be characterized as a literal application of section522(f)(2)(A)(ii), produces an illogical result where a debtor owns property jointly with a non-debtor. It is illogical to net the total outstanding secured debt balance at-

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tributable to both a debtor and his joint tenant against the debtor's one-half interest in the property alone because Congress could not have intended that a debtor benefit under section 522(f)(2)(A) by the use of what realistically should be regarded as someone else's debt even if the debtor may be liable personally to the creditor for the entire debt. Such a mechanical application of section 522(f)(2)(A) would provide a windfall to the debtor at the expense of a secured creditor.

In our view, the correct approach is to view the debtor as owning one half of the property to which one half of the mortgage debt is thus attributable and therefore to regard "property" in subsection (ii) to mean the debtor's interest in the property and then to allocate the lien among the interests in the property proportionately. In this case, inasmuch as Miller has a one-half interest in the property, one half of the lien should be allocated to him. In reaching our result we are in agreement with the Court of Appeals for the Eleventh Circuit which in Lehman explained that the similar result that it was reaching there was correct because "a literal interpretation [of section 522(f)(2)(A) would disserve the legislative intent behind the provision" and "would produce an absurd result and would violate the Congressional intent." Lehman, 205 F.3d at 1257-58.

Miller, 299 F.3d at 186.

Again, the parties have agreed that the balance on the first mortgage exceeds the value of the property. Adopting the *Miller* court reasoning, I find one half of the outstanding balance on the first mortgage is attributable to the estate's interest in the property. The balance of the first mortgage is alleged to be \$95,456, making the lien attributable to the estate's one half interest \$47,728. I make a similar finding concerning the second mortgage, admitted to be \$5,255.50, which the Debtor is requesting be stripped in its entirety. In other words, I find the lien attributable to the estate's interest in the second mortgage amounts to one half of

the balance owed on the second mortgage lien (\$2,627.75) which is subject to being stripped.

My Order will follow.

<u>FN1.</u> Drafted with the assistance of Richard P. Rogers, Law Clerk.

Bkrtcy.M.D.Pa.,2013.
In re Harris
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Slip Copy, 2013 WL 324030 (Bkrtcy.S.D.Fla.) (Cite as: 2013 WL 324030 (Bkrtcy.S.D.Fla.))

Only the Westlaw citation is currently available.

United States Bankruptcy Court, S.D. Florida, Miami Division. In re Hermogenes **ABAD**, Debtor.

> No. 12–26435–RAM. Jan. 28, 2013.

ORDER DENYING DEBTOR'S MOTION TO VALUE AND DETERMINE SECURED STATUS OF LIEN ON REAL PROPERTY

ROBERT A. MARK, United States Bankruptcy Judge.

*1 The Court conducted a hearing on December 13, 2012, on the Debtor's Motion to Value and Determine Secured Status of Lien on Real Property Held by HSBC Bank USA, National Association, as Trustee for Deutsche ALT–B Securities Mortgage Loan Trust, Series 2007–AB1 ("Motion") [DE# 44]. The Motion seeks to value (and strip down the mortgage on) certain real property located at 6060 W. 21st Court, Apt. 405, Hialeah, Florida (the "Property). The Property is co-owned by a non-debtor.

Discussion

Property interests in a bankruptcy case are determined by state law. Butner v. U.S., 440 U.S. 48, 54 (1979). Under Florida law, a transfer or conveyance between two individuals who are unmarried, which does not provide for the right of survivorship, creates a tenancy in common. Fla. Stat. § 689.15. When a deed or other document conveying title to two or more persons as tenants in common is silent as to each tenant's proportional interest in the property, a presumption arises that the tenants own "equal undivided interests" in the property. Gennet v. Docktor (In re Levy), 185 B.R. 378, 381 (Bankr.S.D.Fla.1995). Thus, in this case, the Debtor, Hermogenes Abad, and the nonfiling co-owner, Nery De Leon, each own an undivided one-half interest in the Property and hold title to the Property as tenants in common.

Because the Debtor holds a one-half interest in the subject Property, only the Debtor's one-half interest became property of the estate upon the filing of this bankruptcy case. See <u>Maitland v. Cent. Fid. Bank</u> (In re Maitland), 61 B.R. 130, 132–33 (Bankr.E.D.Va.1986). The Debtor may only utilize § 506(a) for the purposes of valuing the "estate's interest in such property." Veneziale v. Sparkman (In re Veneziale), 267 B.R. 695, 701 (Bankr.E.D.Pa.2001). The value of the premises is bifurcated when computing the value of the estate of a tenant in common and the full value of the property must be divided in half to arrive at the value of the debtor's interest. Crompton v. Boulevard Mortg. Co. (In re Crompton), 68 B.R. 831, 835–36 (Bankr.E.D.Pa.1987).

Thus, because the Debtor only has a one-half interest in the Property, § 506 can only be used to value that proportional interest and not the Property as a whole. Though the Court might not preclude the Debtor's efforts to value his one-half ownership interest in the subject Property, upon such valuation, the creditor would retain its entire claim amount as a mortgage lien against the remaining non-filing co-owner's one-half interest in the Property. *In re Abruzzo*, 249 B.R. 78, 90 (Bankr.E.D.Pa.2000).

Based on the foregoing, it is-

ORDERED as follows:

- 1. The Debtor's Motion is denied without prejudice because it seeks relief with respect to the full value of the Property.
- 2. The Debtor may file a renewed Motion to Value the Property limited to his one-half interest in the Property.
- 3. If filed and granted, the relief stripping down the lien on the Debtor's one-half interest shall not affect the non-filing co-owner's interest in the Property and the creditor's full lien amount shall remain and shall continue to encumber the non-filing co-owner's one-half interest.

*2 ORDERED.

Bkrtcy.S.D.Fla.,2013. In re Abad Slip Copy, 2013 WL 324030 (Bkrtcy.S.D.Fla.)

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Slip Copy, 2013 WL 324030 (Bkrtcy.S.D.Fla.) (Cite as: 2013 WL 324030 (Bkrtcy.S.D.Fla.))

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Case 3:08-ap-00423-JAF Doc 34 Filed 03/23/10 Page 1 of 4

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

ALAN LEE KIRCHAIN And TRACY LYNN KIRCHAIN,	CASE NO.: 08-7284-3F3
Debtors/	
ALAN LEE KIRCHAIN And TRACY LYNN KIRCHAIN,	
Plaintiffs,	
v.	Adversary No.: 08-423
SUNTRUST BANK, N.A.,	
Defendant.	

IN RE:

ORDER PERMITTING PARTIES TO OBTAIN ADDITIONAL APPRAISALS OR RECONSIDER PRIOR OPINIONS AS TO VALUE

This proceeding came before the Court upon a complaint filed by Plaintiff pursuant to 11 U.S.C. § 506 to determine the validity, priority, or extent of a second mortgage held by Defendant. The Court conducted a trial on the matter on September 15, 2009. In lieu of oral argument, the Court directed the parties to submit memoranda in support of their respective positions.

On November 20, 2008 Plaintiffs filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. Plaintiffs own homestead property located at 521 North Bridgestone Avenue, Jacksonville, Florida 32259 (the "Home"). The parties stipulated in open court that Litton Loan Servicing LP, as servicing agent for Deutsche Bank Trust Company Americas, holds a first priority purchase money mortgage encumbering the Home securing a note in the amount of \$208,285 46. Additionally, the parties stipulated that Defendant holds second mortgage on the Home. Plaintiffs' appraiser, Kala Heald, valued the Home at \$197,000.00. Defendant's appraiser, Anthony Megas,

Case 3:08-ap-00423-JAF Doc 34 Filed 03/23/10 Page 2 of 4

valued the Home at \$230,000.00. Ms. Heald's comparables were sold on March 6, 2009, February 20, 2009, December 10, 2008, February 27, 2009, February 28, 2009, April 6, 2009, July 25, 2008, March 2, 2009, and March 13, 2009. Mr. Megas' comparables were sold on July 25, 2008, June 13, 2008, February 20, 2009, and December 30, 2008.

Section 506 of the Bankruptcy Code permits a debtor to value an estate's interest in property, bifurcating a claim into secured and unsecured components. Section 506 provides in pertinent part:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest... is a secured claim to the extent of the value of the creditor's interest in the estate's interest in such property... and is an unsecured claim to the extent that the value of such creditor's interest.. is less than the amount of such allowed claim. Such value shall be determined.

11 U.S.C. § 506 (West 2009).

Section 1322(b)(2) of the Bankruptcy Code permits a Chapter 13 plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." In Nobelman v. American Savings Bank, 508 U.S. 324, 332 (1993) the Supreme Court held that § 1322(b)(2) prohibits a debtor from reducing an under-secured homestead mortgage to the fair market value of the mortgaged residence. The Court left open the issue of whether a debtor can strip off a wholly unsecured home mortgage. In Tanner v. Firstplus Financial, Inc. (In re Tanner), 217 F.3d 1357, 1360 (11th Cir. 2000) the court held that a wholly unsecured claim is not protected from modification under § 1322(b)(2). The issue in this adversary proceeding is whether Defendant's lien is wholly unsecured and therefore avoidable or at least partially secured and therefore subject to § 1322(b)(2)'s antimodification provision.

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The threshold issue before the Court is the date upon which the Court is required to determine the Home's value. Section 506 was amended in 2005 to establish the petition date as the date for valuing personal property but does not address the proper date for the valuation of real property. Plaintiffs assert that the Court should set the trial date or the effective date of the plan petition date as the appropriate valuation date while Defendant asserts that the appropriate valuation date is the petition date. Plaintiffs assert that the Court should use the effective date of the plan because the code sections dealing with confirmation and the provision for secured claims refer to the effective date of a plan. There is no consensus among courts as to the proper valuation date of property when a debtor attempts to strip off a wholly unsecured lien. Dean v. LaPlaya Investments (In re Dean), 319 B.R. 474 (Bankr. E.D. Vir. 2004). The Court finds that the appropriate date to value real property pursuant to 11 U.S.C. § 506 is the petition date.

The Court indicated at the trial that if it determined that the Home's value was to be determined as of the petition date, it would permit the parties to obtain further appraisals or have the respective appraisers reconsider their opinion of value in light of that finding. (Tr. at 35-36.) In light of the Court's finding that the petition date is the proper date for valuation, it is

ORDERED:

1. Within twenty days of the date of this Order, each party shall file a notice indicating that: a) it intends to obtain an additional appraisal or to have its appraiser reconsider his/her opinion of value in light of the Court's finding that the petition date is the proper valuation date or b) it intends to rely on its prior appraisal. If either party elects to obtain an additional appraisal or have its appraiser reconsider his/her opinion, the notice shall indicate to the Court how much time the party needs to obtain and file such additional information.

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- 2. If both parties indicate that they intend to rely upon their prior appraisals, the Court will rule on the matter without further hearing.
- 3. If one or both of the parties elects to obtain an additional appraisal or to have its appraiser reconsider his/her opinion of value, at the time such additional information is filed with the Court the party/parties shall indicate whether they request an additional hearing.

DATED this 23 day of March, 2010 in Jacksonville, Florida.

JERRY A. FUNK
United States Bankruptcy Judge

Copies Furnished To:

E. Warren Parker, Jr., Attorney for Plaintiffs Larry Foyle, Attorney for Defendant Douglas Neway, Trustee