

Trying Valuation (on a Budget): Consumer Case Examples

Dillon E. Jackson – Moderator
Foster Pepper PLLC; Seattle

Ford Elsaesser
Elsaesser, Jarzabek, Anderson, Marks, Elliot & McHugh, Chtd.; Sandpoint, Idaho

Richardo I. Kilpatrick
Kilpatrick & Associates, PC; Auburn Hills, Mich.

Claire Ann Resop
Brennan, Steil & Basting, SC; Madison, Wis.

Hon. Steven W. Rhodes
U.S. Bankruptcy Court; Detroit

LITIGATING VALUE ON A BUDGET

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INTRODUCTION

In consumer practice debtor's counsel is faced with the lack of funds to hire experts to present valuation testimony on the debtor's assets. While perhaps not apparent to the debtor's lawyer the lender also faces cost constraints. Specifically the amount at issue will not often justify the cost of an expert. The lender then, is at a distinct disadvantage because the debtor is allowed to testify as to the value of his property. See, attached § 701.2 of Barry Russell's Bankruptcy Evidence Manual.

How then to present the issue to the court. Hearsay information is not admissible. Letters from realtors or vehicle valuation experts will not be admitted. Some Courts will allow evidence of the assessed value of the property for tax purposes. But from county to county this valuation is often inaccurate. Trustees and Debtors can sometimes entice a realtor to do a valuation analysis on the promise of a listing, but that method is not available if sale of the property is unlikely. The fee for a valuation for obtaining a loan is usually within the reach of the debtor and the budget of the lender, but then the cost of trial testimony and preparation must be added. However, faced with real estate issues the parties must prepare for the presentation of the usual presentation of value on the basis of 3 comparable sales. Counsel for the other side must be familiar with this method of valuation and its vulnerabilities. Further, the cross examiner must be very familiar with the details concerning the subject property.

In the area of personal property, the same issues are present. However, unlike real estate, which is infinitely variable, the valuation cars, boats and recreational vehicles is based upon

make, model, year and condition. There are a number of services and publications that are available and they are illustrated in the materials. In addition to presenting the pages from the publications, the same information can be obtained by entering the variables into an internet site and obtaining the valuation report.

The illustration provided is a 2003 Honda Accord EX in clean condition with the relatively low mileage of 44,000. Each service has a slightly different approach and arrives at a different value. However, as a general proposition the information is reliable, generally consistent and can be helpful to the court as long as the input is correct. A variation on mileage or condition can result in a large change in value.

For Boats and RVs the variations are even greater due to the large number of options and variance of condition. Still at least some of the services offer valuation which is generally relied upon in the industry. The attachments contain a Boat and RV value.

The presentation will discuss these issues and the dynamics of presentation of valuation on a budget.

Bankruptcy Evidence Manual
Current through the 2007 Update

Hon. Barry Russell[FNa0]

Article VIII. Hearsay
Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

§ 803.29 Market Reports, Commercial Publications; Mortality Tables—Rule 803(17)

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  [323\(4\)](#)

Legal Encyclopedias

[C.J.S., Evidence § § 227 to 234, 279](#)

A hearsay exception is provided in Rule 803(17) for market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in particular occupations. The basis of this exception is the high degree of reliability of items of this nature. General reliance by the public or a particular segment thereof upon the contents of the publication reinforces the motivation of the compiler to be accurate. Moreover, no reason exists for the compiler to deceive. Necessity also plays a part in that in many instances it would be virtually impossible to produce the many people each having personal knowledge of a part of the matter compiled.

Telephone or city directories and printed pedigree registers begin to illustrate the diversity of the types of published compilations included within this hearsay exception. Also included are “reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market.” [Uniform Commercial Code § 2-724](#). Mortality and annuity tables, shown to be or recognized as standard authorities, may be introduced under Rule 803(17) to show expectancy of life.

Certain compilations raise unique problems. For example, credit reports if published as a compilation, would seem to meet the requirement of Rule 803(17) on its face. However, credit reports being evaluative in nature should be subjected to the same criteria for trustworthiness associated with admissibility under Rules 803(6) and 803(8) and in particular Rule 803(8). Since information relied upon in compiling a credit report will generally extend well beyond objective facts furnished by a person under a business duty to transmit, automatic inclusion in Rule 803(17) of such evaluative reports is unwarranted. Similar problems relating to trustworthiness are associated with the admission of safety codes and public opinion polls.

An example of a market guide often admitted in bankruptcy proceedings pursuant to Rule 803(17) is the National Automobile Dealers Association (NADA) blue book regarding the valuation of automobiles.

Example

1. Car values in National Automobile Dealers Association guide was admissible hearsay under Rule 803(17)..

A hearing was held on the value of motor vehicles securing the creditor's claim, for purposes of determining what amounts the debtors would have to pay to the creditor to “cram down” the chapter 13 plan over its objection. The issue was stated by the court:

The issue before the Court is the valuation of two vehicles—a 2003 Ford F150 Flareside Supercab XLT pickup and a 2002 Ford Explorer Limited V6—for purposes of cramdown in a Chapter 13 plan. Cramdown is the bankruptcy procedure which allows a debtor to keep collateral and pay the present value of the allowed secured claim over the life of the plan. [11 U.S.C. § 506\(a\)](#); § 1325(a)(5).

[In re McElroy, 339 B.R. 185, 186–7 \(Bkrcty.C.D.Ill.2006\)](#).

The court discussed the fact that Ford solely relied on the National Automobile Dealers Association (NADA) guide:

Ford relies solely on the NADA retail value for the vehicles. The NADA base retail for a 2003 Ford F150 pickup in the central region is \$17,150. The NADA adds a \$275 mileage adjustment because the vehicle has only been driven 38,600 miles. Thus, the NADA retail value is \$17,425 for the F150. The NADA base retail value of a 2002 Ford Explorer V6 is \$15,675. The NADA adds a \$800 mileage adjustment because the vehicle has been driven 35,000 miles. Thus, the NADA retail value for the Ford Explorer is \$16,475. Ford's suggested NADA retail values for the two vehicles did not include any adjustments for accessories or optional equipment.

[In re McElroy, 339 B.R. at 188](#).

The debtor objected to the admissibility of NADA data as hearsay.

Held: The court valued the vehicle at 95% of the NADA valuations. In overruling the debtor's objection, the court concluded:

The Debtors objected to the admissibility of the NADA data. However, [Rule 803\(17\) of the Federal Rules of Evidence](#) provides a hearsay exception for “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” The NADA fits well within this hearsay exception. [Bouzek, supra, 311 B.R. at 243](#); [In re Smith, 307 B.R. 912, 917 \(Bankr.N.D.Ill.2004\)](#), *rev'd on other grounds, 313 B.R. 267 (N.D.Ill.2004)*. Bankruptcy courts in the Central District of Illinois have long recognized the NADA guide as “the authoritative source that is most relevant and applicable to the valuation” of vehicles in Chapter 13 cases. [In re Madsen, 2001 WL 34076428 \(Bankr.C.D.Ill.\)](#) (Perkins, J.); [In re Knight, 254 B.R. 227, 228 \(Bankr.C.D.Ill.2000\)](#) (Fines, J.); [In re Henderson, supra, 235 B.R. at 429](#) (Altenberger, J.); [In re Gill, 1996 WL 33406075 \(Bankr.C.D.Ill.\)](#) (Lessen, J.)

[In re McElroy, 339 B.R. at 188](#).

See also [In re McElroy, 339 B.R. 185 \(Bkrcty.C.D.Ill.2006\)](#) (Evidence of retail values of the chapter 13 debtors' motor vehicles in the national handbook was admissible, over the hearsay objection by the debtors, in a proceeding to determine what price the debtors would have to pay to the creditor with security interest in these vehicles in order to “cram down” their plan over the creditor's objection. The handbook came within the scope of the hearsay exception for “[m]arket quotations, tabulations, lists, directories, or other published compilations.”)

[\[FN a0\]](#) Chief Judge, United States Bankruptcy Court, Central District Of California.

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BKRMANUAL § 803.29

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C

In re McElroy
 Bkrcty.C.D.Ill.,2006.


United States Bankruptcy Court,C.D. Illinois.
 In re Robert D. McELROY and Barbara A. McElroy,
 Debtors.
No. 05-78139.

March 9, 2006.

Background: Hearing was held on value of motor vehicles securing creditor's claim, for purposes of determining what amounts debtors would have to pay to creditor to "cram down" Chapter 13 plan over its objection.

Holding: The Bankruptcy Court, Mary P. Gorman, J., held that, in absence of evidence of extent to which retail values placed on motor vehicles of same type and year as those belonging to Chapter 13 debtors in national motor vehicle handbook included markup for warranty, reconditioning or other services or included profit margin for dealers, bankruptcy court, as evidence of vehicles' value for Chapter 13 "cramdown" purposes, would take 95% of retail values set forth in this national handbook.

So ordered.
 West Headnotes

[1] Bankruptcy 51 3715(7)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(7) k. Evidence. Most Cited

Cases


Appraiser and auctioneer of 44 years was minimally qualified to give expert opinion upon value of motor vehicles securing creditor's claim, in proceeding to determine what payments creditor would have to receive for debtors' Chapter 13 plan to be "crammed down" over its objection, though appraiser admitted that his experience with used motor vehicles was limited and that he did not have any particular training, degrees or certifications regarding vehicle appraisals; appraiser's lack of strong credentials

merely affected weight to be given his testimony. 11 U.S.C.A. § 1325(b).

[2] Bankruptcy 51 2163

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2163 k. Evidence. Most Cited Cases


Trial court has wide discretion in determining admissibility of expert testimony, especially when issue is being tried directly to the bench.

[3] Bankruptcy 51 3715(7)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(7) k. Evidence. Most Cited

Cases

Evidence of retail values of Chapter 13 debtors' motor vehicles in national handbook was admissible, over hearsay objection by debtors, in proceeding to determine what price debtors would have to pay to creditor with security interest in these vehicles in order to "cram down" their plan over creditor's objection; handbook came within scope of hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations." 11 U.S.C.A. § 1325(b); Fed.Rules Evid.Rule 803(17), 28 U.S.C.A.

[4] Bankruptcy 51 3708(6)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(6) k. Valuation; Periodic Payments. Most Cited Cases

Replacement, rather than liquidation, value is appropriate valuation standard for "cramdown" in Chapter 13 cases. 11 U.S.C.A. § 1325(b).

[5] Bankruptcy 51 3708(6)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down

[51k3708\(6\)](#) k. Valuation; Periodic Payments. [Most Cited Cases](#) “Replacement value,” such as Chapter 13 debtors must pay in order to “cram down” plan over objection of creditor with security interest in their motor vehicles, is not necessarily synonymous with retail value, which may include items such as warranties, inventory storage and reconditioning, items that debtors do not receive if they retain motor vehicles. [11 U.S.C.A. § 1325\(b\)](#).

[6] Bankruptcy 51 3708(6)

51 Bankruptcy

[51XVIII](#) Individual Debt Adjustment

[51k3704](#) Plan

[51k3708](#) Secured Claims; Cram Down

[51k3708\(6\)](#) k. Valuation; Periodic Payments. [Most Cited Cases](#)

In deciding what Chapter 13 debtors would have to pay to creditor with security interest in their motor vehicles, in order to “cram down” plan over creditor's objection, bankruptcy court could not accept values placed on vehicles by debtor's expert, where expert's valuations were significantly lower than retail values placed on such vehicles in national handbook, and expert failed to provide any basis, such as mechanical or other problems, to explain this discrepancy. [11 U.S.C.A. § 1325\(b\)](#).

[7] Bankruptcy 51 3708(6)

51 Bankruptcy

[51XVIII](#) Individual Debt Adjustment

[51k3704](#) Plan

[51k3708](#) Secured Claims; Cram Down

[51k3708\(6\)](#) k. Valuation; Periodic Payments. [Most Cited Cases](#)

In absence of evidence of extent to which retail values placed on motor vehicles of same type and year as those belonging to Chapter 13 debtors in national motor vehicle handbook included markup for warranty, reconditioning or other services or included profit margin for dealers, bankruptcy court, as evidence of vehicles' value for Chapter 13 “cramdown” purposes, would take 95% of retail values set forth in this national handbook. [11 U.S.C.A. § 1325\(b\)](#).

***186** [John S. Narmont](#), Springfield, IL, for Debtors.

[MARY P. GORMAN](#), Bankruptcy Judge.

The issue before the Court is the valuation of two vehicles—a 2003 Ford F150 Flareside Supercab XLT pickup and a ***187** 2002 Ford Explorer Limited V6—for purposes of cramdown in a Chapter 13 plan. Cramdown is the bankruptcy procedure which allows a debtor to keep collateral and pay the present value of the allowed secured claim over the life of the plan. ^{FNI} [11 U.S.C. § 506\(a\)](#); [§ 1325\(a\)\(5\)](#).

[FNI](#). The use of the cramdown procedure has been limited under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. For cases filed on or after October 17, 2005, [§ 1325](#) now provides that [§ 506](#) does not apply to purchase money debts incurred within 910 days before the case was filed. This change in the law does not apply here because this case was filed before the effective date of the new law.

The Debtors, Robert and Barbara McElroy, filed a petition pursuant to Chapter 13 of the Bankruptcy Code on October 16, 2005. The Debtors' Chapter 13 Plan valued a 2003 Ford F150 at \$15,400 and a 2002 Ford Explorer at \$10,000. The Plan proposed to pay 0% interest on the F150 and 8% interest on the Explorer. Ford Motor Credit Company (“Ford”), which holds liens on the two vehicles, filed an objection to the Debtors' Chapter 13 Plan. Ford objects to both the valuations and the interest rates. In its objection, Ford valued the F150 at \$19,650 and the Explorer at \$17,700. Ford seeks 9% interest on both vehicles.

A valuation hearing was held on February 7, 2006. Nelson Aumann testified for the Debtors. Mr. Aumann has been an appraiser and auctioneer for 44 years. He is based in Nokomis, Illinois. He conducts approximately 100 auctions per year, 35 to 40 of which involve vehicles.

Mr. Aumann testified that, in appraising a vehicle, he looks at the mileage, condition, tires, and wheels. He also usually starts the engine and drives the vehicle. In this case, he saw the vehicles and heard the engines run, but he did not drive them. Mr. Aumann did not see anything in these vehicles which would distinguish them from other vehicles of similar age and mileage.

In determining a value for a vehicle, Mr. Aumann consults the National Automobile Dealers Association (NADA) guide, Hotline, and his own experience in selling vehicles at auction. Although

NADA is the widely accepted authority for vehicle values, [In re Bouzek](#), 311 B.R. 239, 243 (Bankr.E.D.Wis.2004); [In re Henderson](#), 235 B.R. 425, 429 (Bankr.C.D.Ill.1999). Mr. Aumann described the NADA values as too high. Instead, he relies more on Hotline, a source unknown to this Court and not cited as a recognized source for vehicle valuations by any reported bankruptcy decisions. Mr. Aumann also relies on his experience, but he admitted that his experience with used vehicles is limited. He has never owned or worked at a used car lot. He does not have any particular training, degrees, or certifications regarding vehicle appraisals. In the past year, he sold one Ford Explorer and one Ford F150.

[1][2] Ford objected to Mr. Aumann's qualifications as an expert on the value of used vehicles. "A trial court has wide discretion in determining the admissibility of expert testimony, especially when the issue is being tried directly to the bench." [Palmacci v. Umpierrez](#), 121 F.3d 781, 791 (1st Cir.1997). The Court finds that Mr. Aumann has the bare minimum of qualifications necessary to be considered an expert under [Rule 702 of the Federal Rules of Evidence](#). However, Mr. Aumann's lack of strong credentials will affect the weight to be given to his testimony. [Russell on Evidence](#) § 702.2, p. 1118.

Mr. Aumann submitted a written appraisal on each vehicle. The appraisals contained a photo of each vehicle, the inspection*188 date, the make and model of the vehicle, and the mileage of the vehicle. Mr. Aumann did not include excerpts from NADA, Hotline, or any publication regarding the vehicles. He did not include any information about comparable sales. There is nothing in the appraisals which would suggest a reason to deviate from the NADA values. Mr. Aumann valued the Explorer at \$10,000 and the Ford F150 at \$16,000.

Ford relies solely on the NADA retail value for the vehicles. The NADA base retail for a 2003 Ford F150 pickup in the central region is \$17,150. The NADA adds a \$275 mileage adjustment because the vehicle has only been driven 38,600 miles. Thus, the NADA retail value is \$17,425 for the F150. The NADA base retail value of a 2002 Ford Explorer V6 is \$15,675. The NADA adds a \$800 mileage adjustment because the vehicle has been driven 35,000 miles. Thus, the NADA retail value for the Ford Explorer is \$16,475. Ford's suggested NADA retail values for the two vehicles did not include any adjustments for accessories or optional equipment.

[3] The Debtors objected to the admissibility of the NADA data. However, [Rule 803\(17\) of the Federal Rules of Evidence](#) provides a hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." The NADA fits well within this hearsay exception. [Bouzek](#), *supra*, 311 B.R. at 243; [In re Smith](#), 307 B.R. 912, 917 (Bankr.N.D.Ill.2004), *rev'd on other grounds*, 313 B.R. 267 (N.D.Ill.2004). Bankruptcy courts in the Central District of Illinois have long recognized the NADA guide as "the authoritative source that is most relevant and applicable to the valuation" of vehicles in Chapter 13 cases. [In re Madsen](#), 2001 WL 34076428 (Bankr.C.D.Ill.) (Perkins, J.); [In re Knight](#), 254 B.R. 227, 228 (Bankr.C.D.Ill.2000) (Fines, J.); [In re Henderson](#), *supra*, 235 B.R. at 429 (Altenberger, J.); [In re Gill](#), 1996 WL 33406075 (Bankr.C.D.Ill.) (Lessen, J.).

[4][5] Replacement value, rather than liquidation value, is the appropriate valuation standard for cramdown in Chapter 13 proceedings. [Associates Commercial Corp. v. Rash](#), 520 U.S. 953, 956, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). Replacement value is not, however, necessarily synonymous with retail value: "[W]here the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning." [Rash](#), *supra*, 520 U.S. at 964, n. 6, 117 S.Ct. at 1886. In addition, the market to which debtors may look to replace a vehicle is not limited to the retail market. [In re Glueck](#), 223 B.R. 514 (Bankr.S.D. Ohio 1998); [In re McElroy](#), 210 B.R. 833, 835 (Bankr.D.Or.1997). Many courts use as their starting point for determining a vehicle's replacement value the average of a car's wholesale and retail values, subject to appropriate adjustments according to other evidence of value introduced by the parties. [In re Getz](#), 242 B.R. 916, 919 (6th Cir.BAP2000); [In re Lyles](#), 226 B.R. 854, 856-57 (Bankr.W.D.Tenn.1998); [In re Oglesby](#), 221 B.R. 515, 519, 523 (Bankr.D.Colo.1998); [In re Younger](#), 216 B.R. 649, 656-57 (Bankr.W.D.Okla.1998). One court has a local rule that says that the value of a vehicle is 95% of the NADA retail value for the first three years of age if neither party presents any conflicting*189 evidence. [In re Mitchell](#), 320 B.R. 687, 689 (Bankr.E.D.Mo.2005).^{FN2}

FN2. To the extent cramdown remains available under Chapter 13, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 provides a definition of replacement value. Replacement value is “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.” 11 U.S.C. § 506(a)(2). Again, the new law does not apply to this case and, accordingly, this definition does not control how replacement value is determined for the vehicles in this case.

[6] The Court finds the values placed on the vehicles by Mr. Aumann to be unreasonably low. Although a live witness is often better than a published compilation, Mr. Aumann's reliance on the unknown Hotline rather than the well-respected NADA undercut his testimony. Mr. Aumann failed to offer any explanation as to why the vehicle valuations should deviate from the published values. He testified that the vehicles had the regular scratches and dings to be expected of vehicles of that make and model year, but he did not find any body damage, mechanical problems, or any other reason why his values should be different from the NADA values.

On the other hand, the NADA retail values proffered by Ford may be too high. In re Gonzalez, 295 B.R. 584, 587 (Bankr.N.D.Ill.2003) (Prices in NADA are typically higher than Black Book or Kelley Blue Book because NADA prices do not vary with the vehicle's condition). The NADA values may include warranties, reconditioning, and other services not directly related to the actual value of the vehicle.

[7] In the absence of evidence of the markup for services or the profit margin which might be included in the NADA tables for the Debtors' vehicles, the Court finds that a 5% discount from the NADA retail values presented would be appropriate to determine the vehicles' replacement value for purposes of cramdown. Accordingly, the 2003 Ford F150 pickup is valued at \$16,553.75. The 2002 Ford Explorer V6 is valued at \$15,651.25.

Nothing in this Opinion should be construed as limiting the ability of debtors or creditors in other cases from presenting appraisals of vehicles which differ from the NADA published values. The Court recognizes that vehicles which are damaged or have been subjected to excessive wear and tear may have diminished values which would not be accurately

reflected in the NADA tables. Likewise, vehicles with custom equipment or decorating might have enhanced values also not reflected in the NADA tables.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

For the reasons set forth in an Opinion entered this day,

IT IS HEREBY ORDERED AS FOLLOWS:

A. For purposes of determining the secured claims of Ford Motor Credit Company in this case, the value of the Debtors' 2003 Ford F150 pickup be and is hereby determined to be \$16,553.75 and the value of the Debtors' 2002 Ford Explorer V6 be and is hereby determined to be \$15,651.25.

B. A telephonic conference be and is hereby scheduled for April 5, 2006, at 2:15 p.m. to consider the question of the interest***190** rate to be paid through the Chapter 13 Plan to Ford.

Bkrtcy.C.D.Ill.,2006.
In re McElroy
339 B.R. 185

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Bankruptcy Evidence Manual
Current through the 2007 Update

Hon. Barry Russell[FNa0]

Article VII. Opinions and Expert Testimony
Rule 701. Opinion Testimony by Lay Witnesses

§ 701.2 Owner's Testimony as to Value of Property

West's Key Number Digest

West's Key Number Digest, [Bankruptcy](#)  [2163](#), [2725.1](#), [2802](#), [3715\(7\)](#)West's Key Number Digest, [Evidence](#)  [470](#) to [503](#)

Legal Encyclopedias

[C.J.S., Bankruptcy § § 32, 162, 183, 438, 449 to 450, 452](#)[C.J.S., Evidence § § 509 to 523, 527 to 596, 610 to 612, 619, 628, 633, 636, 649 to 652, 654, 656, 659, 661 to 663, 665 to 675, 677, 688 to 690, 698, 708 to 711, 744 to 745](#)[C.J.S., Executions § 431](#)

Courts have generally held that an owner is competent to give his opinion on the value of his property, often by stating the conclusion without stating a reason. [South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Tex.](#), 614 F.2d 1056, 1061 (5th Cir.1980); [Kestenbaum v. Falstaff Brewing Corp.](#), 514 F.2d 690, 698 (5th Cir.1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); [First Nat. Bank of Montevideo, Minn. v. Johnson](#), 19 B.R. 651, 654 (D.C.Minn.1982), reversed on other grounds [719 F.2d 270 \(8th Cir.1983\)](#), *cert. denied* [465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed.2d 245 \(1984\)](#) (“The record supports a conclusion that his opinion as to the **value** of the land was based on his perceptions and was helpful to determination of a fact in issue. It was thus **admissible** under [Rule 701 of the Federal Rules of Evidence](#).”); [In re Hirsch](#), 351 B.R. 291 (Bkrcty.E.D.N.Y.2006) (the owner with the knowledge of the property's condition and purchase price is competent to give his opinion of property's **value**); [In re Damron](#), 8 B.R. 323, 325 (Bkrcty.S.D.Ohio 1980) (owner of property may ordinarily give opinion as to present **value** of his property under [Rule 701](#)). This is apparently based upon an assumption that the owner has sufficient knowledge to either testify as a layman under [Rule 701](#) or as an expert under Rule 702. Although Rule 702 defines the qualifications of an expert, and makes no special exceptions for “owners of property”, the Advisory Committee's Note to Advisory Committee's Note to Rule 702 adds to the confusion by stating:

“The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the ‘scientific’ and ‘technical’ but extend to all ‘specialized’ knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by ‘knowledge, skill, experience, training or education.’ Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called ‘skilled’ witnesses, such as bankers or *landowners*

testifying to land values.” (Emphasis added.)

Generally, whether a property owner's testimony as to the value of his property, is received under [Rule 701](#) or [Rule 702](#) makes little difference because if the witness is truly an expert and credible, his testimony will be given great weight and if he has very little or no real expertise, the testimony will be given little if any weight. However, whether the witness testifies under [Rule 701](#) or [Rule 702](#) is significant as to the extent of his testimony. If testifying under 701, the owner may merely give his opinion based on his personal familiarity of the property, often based to a great extent on what he paid for the property. On the other hand, if he is truly an expert qualified under the terms of [Rule 702](#) “by knowledge, skill, experience, training or education ...”, then he may also rely on and testify as to facts “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject ...” pursuant to Rule 703. For example, the average debtor-homeowner who testifies in opposition to a motion for relief from the § 362 automatic stay, should be limited to giving his opinion as to the value of his home, but should not be allowed to testify concerning what others have told him concerning the value of his or comparable properties unless, the debtor truly qualifies as an expert under [Rule 702](#) such as being a real estate broker, etc.

Examples

1. Court gives little weight to the chapter 7 debtors' testimony regarding the value of their residence.

The chapter 7 debtors moved to avoid a judgment lien as impairing the homestead exemption to which they would otherwise be entitled. The only fact in dispute was the value of the residence. The court initially stated:

The value of the Residence is listed in the Debtors' schedules and in the Debtor's declaration in support of the motion at \$289,000. The motion explains the Debtors' valuation as follows: “value is based on the debtors' comparison of their residence to others in their neighborhood that have either sold or are for sale.” The Debtors offer no specifics or back-up details regarding the basis for their opinion.

The Debtors offered their opinion of value as the owners of the Residence pursuant to [Fed.R.Ev. 701](#). Ms. File offered her opinion as an expert witness pursuant to [Fed.R.Ev. 702](#). The court must determine how much weight to give the competing opinions of value. The Debtor's testimony is subject to the same critical analysis as that of an independent appraiser. Based on the differences between the parties' respective positions, the court must carefully scrutinize the methods by which the competing opinions were derived. When the owner of property is unable to provide a detailed explanation of how he or she arrived at a value for the property, the testimony may be insufficient to establish in the court's mind an “actual belief ... derived from the evidence” as to the validity of the owner's opinion. *Russell*, Bankruptcy Evidence Manual § 701.2 at page 1218 (West 2006 edition), quoting [In re Brown](#), 244 B.R. 603, 612 (Bankr.W.D.Va.2000).

[In re Meeks](#), 349 B.R. 19, 22 (Bkrcty.E.D.Cal.2006).

Held: Motion to avoid lien partially granted. In holding that the creditor's valuation was correct and giving little weight to the debtors' valuation, the court stated:

Here, the Debtors are permitted to give an opinion of the value of the Residence, but they are not qualified as experts to appraise the Residence. Neither are they qualified to give an opinion regarding the value differences between the Residence and the Comp. Sales. For example, the Debtors may testify from their personal knowledge that the Residence has a shake roof. However, they are not qualified as experts to testify that a shake roof is worth \$25,000 to \$30,000 less than a tile roof. Consequently, the court cannot give much weight to the Debtors' testimony regarding the value of the Residence and their efforts to compare the Residence with the Comp. Sales.

Based on the Appraisal, Pacific Bell asserts that the value of the Residence is \$320,000. The Debtors contend that material differences between the Residence and the Comp. Sales, warrant a downward adjustment of up to \$44,000. This would result in an “adjusted value” of \$276,000. However, this “adjusted value” is \$13,000 below the Debtor's own stated opinion of the Residence's value. The discrepancy between the Debtors' opinion of value as stated in their schedules, and the “adjusted value” as suggested in their declaration, further mitigates the weight which the court can give to the Debtor's testimony.

[In re Meeks, 349 B.R. at 22.](#)

The court concluded:

Based on the evidence presented, the court finds that the value of the Residence is approximately \$320,000. The unavoidable liens plus the amended homestead exemption total \$305,308.11. The Residence therefore has \$14,691.89 of non-exempt equity. Pacific Bell's judgment lien impairs the Debtors' homestead exemption to the extent that the value of its judicial lien exceeds the non-exempt equity. Therefore, Pacific Bell's judicial lien will be partially avoided, but will survive in the amount of \$14,691.89.

[In re Meeks, 349 B.R. at 22.](#)

2. Uncontradicted testimony of chapter 13 debtor as to value of furniture and appliances not sufficient to satisfy debtors' burden of proof on value.

Creditor objected to confirmation of debtors' proposed chapter 13 plan based, among other things, on debtor's alleged failure to properly value it collateral for “cramdown” purposes. The court initially determined that the debtor had the burden of proof on the value of the collateral. As to the evidence the court stated:

In this case the only evidence (other than the original contracts themselves) before the Court on the valuation of the furniture and appliances which the debtors wish to retain is the testimony of Mrs. Brown. While the testimony has been challenged, it has not been contradicted. In the absence of any evidence contrary to the Debtors' assertion in their Petition that the property in question is now owned by them jointly, the Court will treat Mrs. Brown as an owner of the property. It is generally, if not universally, accepted that an owner of property may testify as to his or her opinion of such property's value without demonstrating any additional qualifications to give opinion evidence. [Justice v. Pennzoil Co., 598 F.2d 1339, 1344 \(4th Cir.1979\)](#); [Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 \(5th Cir.1975\)](#); [Neff v. Kehoe, 708 F.2d 639 \(11th Cir.1983\)](#); [Haynes v. Glenn, 197 Va. 746, 91 S.E.2d 433 \(1956\)](#). ‘In the absence of other evidence, the testimony of an owner may be conclusive, if it is credible.’ [In re Chelton-Stenton Seafood, Inc., 1989 WL 62106 \(Bankr.E.D.Pa.1989\)](#). In any event such testimony was received without objection and the Court is entitled to give it such weight as it determines appropriate. [Federal Rule of Evidence 103\(a\)\(1\)](#).

[244 B.R. at 611–12.](#)

Held: Confirmation Denied. In holding that the debtors had failed to carry their burden of proof on the valuation the Court concluded:

Even though her testimony as to valuation is admissible, it should be subject to the same type of critical analysis as would the testimony of an independent “expert”. Mrs. Brown was unable to provide any detailed explanation of how she arrived at a lump sum value of \$1,500 for the property in the aggregate. She either had not prepared an individual valuation of the items in question or was not prepared to introduce it at the hearing ... It is not so much that the Court considers the \$1,500 figure to be clearly wrong but more that at the end of the day the Court is simply left with the feeling that \$1,500 was a figure just pulled out of the air. In short, Mrs. Brown's

testimony concerning the reasonable value of the furniture and appliances was not nearly of the same detailed and credible nature as the evidence she offered concerning such property's condition. Therefore, the Court has decided that such testimony was insufficient to establish in the Court's mind an "actual belief ... derived from the evidence" as to the validity of the valuation opinion and thereby carry the Debtor's burden of proof.

[In re Brown, 244 B.R. 603, 612 \(Bkrtcy.W.D.Va.2000\).](#)

See also [In re Jester, 344 B.R. 331, 339 \(Bkrtcy.E.D.Pa.2006\)](#) ("It is generally accepted that an owner, because of her personal interest in the property, the uses to which it is put, the condition or the improvements made to it, is competent to provide valuation testimony. [In re Blakey, 76 B.R. 465, 469 \(Bankr.E.D.Pa.1987\)](#) (quoting [Kinter v. United States, 156 F.2d 5, 7 \(3d Cir.1946\)](#)). [Federal Rule of Evidence 701](#), which supports the admission of this testimony, does not address its weight which, as with any evidence, must be determined by the trier of fact.")

3. Debtors' opinion testimony as to value of their home was *admissible* but not credible.

A hearing was held to establish the **value** of chapter 13 debtors' home. The creditor's expert, a licensed realtor and appraiser prepared a formal appraisal report and testified that the **value** was \$104,000.

The debtors offered no expert testimony, but testified as to their own opinion that the **value** was \$90,700. The court stated:

An owner is competent to give his opinion as to **value** of his property, often by stating the conclusion without stating a reason. [South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Texas, 614 F.2d 1056, 1061 \(5th Cir.1980\).](#)

230 B.R. at 834 fn. 5.

Held: Value was \$104,000. In finding the expert testimony more credible than the debtors' the court concluded:

... The Debtors' assertion of a \$90,700.00 auditor's valuation is not supported by any credible evidence of record. Nor did the Debtors present a counter appraisal reflecting a fair market valuation different from that exhibited by Greentree. Rather, they chose to (1) rely upon their personal opinions for valuation based upon photos they took of specified areas of damage to their real property (Direct, P. and S. Petrella) (Ex. A, B, and C); (2) copies of two noncertified deeds purporting to be neighborhood sales comparables to the value of their property (Ex. D); and what purports to be a noncertified copy of their real property tax valuation as of the second half of 1997. (Ex. E) Upon comparison, Greentree's formal appraisal was more credible. Not only were the Debtors unable to satisfactorily counter the formal appraisal offered by Greentree, their presentment of noncertified documents and the absence of proper witnesses to authenticate the documents, caused their tendered documentary evidence to be less persuasive. Additionally, the Debtors are not appraisers and have not undertaken a course of study in appraisal work. (Cross-Exam., S. Petrella). Sabine Petrella also stated that she is not familiar with what factors to look for in valuing a house. (Id.)

[In re Petrella, 230 B.R. 829, 834 \(Bkrtcy.N.D.Ohio 1999\).](#)

4. President of corporate landowner qualified as expert on value of land.

In a condemnation action, the president of the corporation that owned land condemned by the United States offered his opinion of the land's value based upon sales of comparable properties. The trial judge excluded this opinion testimony on the basis that the president was not an expert witness under [Rule 702](#).

Held: The Tenth Circuit reversed, holding that a landowner is presumed to be an expert and his opinion as to **value** is **admissible** without further foundation. The court concluded that this principle applied "even when the

owner is a corporation and the valuation testimony comes from a designated corporate officer.”

[United States v. 10,031.98 Acres of Land, 850 F.2d 634 \(10th Cir.1988\).](#)

5. Opinion of landowner re value admissible.

A chapter 7 creditor filed a complaint under § 544(b) and Mississippi law to avoid an allegedly fraudulent transfer of real property by the debtor to his wife. The wife testified that the land was only worth \$300 to \$500 per acre even though she and her husband had paid about \$580 over 10 years earlier.

Held: The Fifth Circuit stated that, generally, a landowner's opinion about the **value** of his or her land is **admissible** evidence, citing [United States v. 329.73 Acres of Land, Etc., 666 F.2d 281, 284 \(5th Cir.1982\)](#), which held:

[T]he opinion testimony of a landowner as to the **value** of his land is **admissible** without further qualification. [United States v. 3,698.63 Acres of Land, Etc., North Dakota, 416 F.2d 65, 67 \(8th Cir.1969\)](#); [United States v. Sowards, 370 F.2d 87, 92 \(10th Cir.1966\)](#). Such testimony is admitted because of the presumption of special knowledge that arises out of ownership of the land. *Id.* at 92.

[Joe T. Dehmer Distributors, Inc. v. Temple, 826 F.2d 1463, 1466 \(5th Cir.1987\).](#)

6. Financial officer's testimony as to value of business.

Cattle investors brought an action against a Texas bank on claims of wrongful offset in part causing losses by reason of funds held in trust by Feedlot at the defendant-bank. The Feedlot went into bankruptcy shortly after the bank offset the cattle trust account.

The bank objected to the testimony of the Feedlot's financial officer that the Feedlot's assets exceeded its liabilities by around \$100,000 at the time of the offset. The bank objected that the testimony was unreliable opinion evidence of a layman.

Held: “The testimony regarding the excess of the value of the Feedlot's assets over its liability is closely akin to the testimony of an owner of a business about that business's value. The value of the Feedlot was, in large part, simply the excess of the value of its assets over the value of its liabilities. The financial officer of the Feedlot was a witness qualified to testify to value by knowledge and experience just as an owner is such a witness, and the district court did not err in allowing him to testify.”

[South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Tex., 614 F.2d 1056, 1061–1062 \(5th Cir.1980\)](#). Here, the witness appeared to have had sufficient personal knowledge to have allowed him to testify as to the value of the business.

7. Debtor's opinion of value established equity for § 522(f)(1).

The debtor filed a complaint for avoidance of a judicial lien on debtor's real property. The only dispute was over whether the judicial lien “impairs an exemption to which the debtor would have been entitled” within the meaning of [11 U.S.C.A. § 522\(f\)\(1\)](#). Although the debtor testified that he had “no idea” of the current value of the property, he testified that, according to his present memory refreshed by a review of his bankruptcy schedules, he had an opinion of the value of the property as of the date of the filing of the schedules. That opinion was \$17,000, an amount greater than the balance due on the pre-existing lien Thus, according to the debtor's uncontradicted testimony, he had an equity in the property as of the date of bankruptcy in which he was entitled to an exemption under [§ 522](#).

Held: The debtor's “opinion of value, rendered as an owner of the property with knowledge of its condition and its purchase price, is admissible in evidence under [Rule 702 of the Federal Rules of Evidence](#) and is entitled to probative weight, particularly when, as here, it is uncontradicted.”

[Matter of Davis, 17 B.R. 547, 548 \(Bkrtcy.W.D.Mo.1982\).](#)

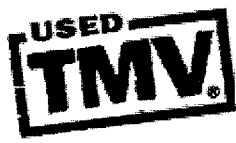
Comment:

Although the court cited [Rule 702](#), this testimony was really admissible under [Rule 701](#). It made no difference here, because the debtor only gave the typical land owner type testimony, *i.e.* the value based on its condition and the purchase price and did not attempt to introduce expert witness type evidence such as comparable sales data.

[\[FNa0\]](#) Chief Judge, United States Bankruptcy Court, Central District Of California.
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BKRMANUAL § 701.2

END OF DOCUMENT



2003 Honda Accord EX 4dr Sedan (2.4L 4cyl 5M)

Color: White

Mileage: 44,000

Condition: Clean

ASKING PRICE

\$13,000

Edmunds TMV® Private Party Pricing:

| | |
|----------------------|-----------------|
| Base Price | \$12,970 |
| Optional Equipment | \$0 |
| Color Adjustment | \$-43 |
| Regional Adjustment | \$-53 |
| Mileage Adjustment | \$749 |
| Condition Adjustment | \$0 |
| Total: | \$13,623 |

TMV® pricing represents estimated market transaction values.

Prices as of:
10/07

Contact Information:

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Standard Equipment:

Optional Equipment:



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4-Door Sedan

2003 Honda Accord-4 Cyl. Sedan 4D EX

PRICING

| | <u>Clean Trade-In</u> | <u>Clean Retail Value</u> |
|--------------------|-----------------------|---------------------------|
| Base Price | | |
| | \$12,325 | \$14,675 |
| Mileage | | |
| 44,000 miles | \$800 | \$800 |
| TOTAL PRICE | \$13,125 | \$15,475* |

The consumer values on nadaguides.com are based on the Consumer edition of the N.A.D.A. Official Used Car Guide ®, and should not be utilized for industry purposes. The consumer values may vary from the N.A.D.A. Official Used Car Guide values presented to you by insurance companies, banks, credit unions, government agencies and car dealers due to vehicle condition, regional market differences and frequency of updates.

Clean Trade-In

A Clean Trade-In vehicle will be clean and without glaring defects. Tires and glass should be in good condition. The paint should match and have a good finish. The interior should have wear in relation to the age of the vehicle. Carpet and seat upholstery should be clean and all power options should work. The mileage should be within the acceptable range for the model year. The "Clean Trade-In" value is a national average calculated from the Official Used Car Guide's ten regions. The "Clean Trade-In" value for your vehicle could be higher or lower than the national average due to your local market conditions.

Clean Retail Value

A Clean Retail vehicle will be clean and without glaring defects. Tires and glass should be in good condition. The paint should match and have a good finish. The interior should have wear in relation to the age of the vehicle. Carpet and seat upholstery should be clean, and all power options should work. The mileage should be within the acceptable range for the model year.

A Clean Retail vehicle on a dealer lot may include a limited warranty or guarantee, and possibly a current safety and/or emission inspection (where applicable).

Note: Vehicles with low mileage that are in exceptionally good condition and/or include a manufacturer certification can be worth a significantly higher value than the Clean Retail price shown.

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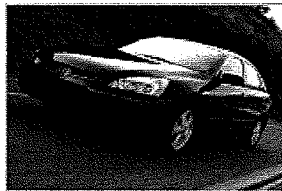
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| | | |
|------------|-------------|-----------|
| New Dealer | Used Dealer | Refinance |
| 5.99% APR | 6.65% APR | 7.20% APR |

Capital One | auto finance

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2003 Honda Accord EX Sedan 4D
BLUE BOOK® PRIVATE PARTY VALUE



| Condition | Value |
|----------------------|----------|
| Excellent | \$15,560 |
| ✓ Good (Selected) | \$14,660 |
| Fair | \$13,450 |

Average Consumer Rating (347 Reviews)

[Read Reviews](#)

★★★★★ 4.7 out of 5

[Review This Vehicle](#)

Vehicle Highlights

Mileage: 44,000
Engine: 4-Cyl. 2.4L VTEC
Transmission: Automatic
Drivetrain: FWD

Selected Equipment

Standard

| | | |
|------------------|---------------------|---------------|
| Air Conditioning | Cruise Control | ABS (4-Wheel) |
| Power Steering | AM/FM Stereo | Moon Roof |
| Power Windows | Multi Compact Disc | Alloy Wheels |
| Power Door Locks | Dual Front Air Bags | |
| Tilt Wheel | Front Side Air Bags | |

Blue Book Private Party Value

Private Party Value is what a buyer can expect to pay when buying a used car from a private party. The Private Party Value 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. This value may also be used to derive Fair Market Value for insurance and vehicle donation purposes.

Vehicle Condition Ratings

Excellent
○○○○○

\$15,560

advertisement

"TEN CARS WORTH WAITING FOR."
-CNN Money.com

CHEVROLET

THE ALL NEW CHEVY MALIBU
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TOUR THE MALIBU

As shown \$26,995. *Manufacturer's suggested retail price. Tax, title, license, dealer fees, and optional equipment extra. Arriving Fall 2007.

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"Excellent" condition means that the vehicle looks new, is in excellent mechanical condition and needs no reconditioning. This vehicle has never had any paint or body work and is free of rust. The vehicle has a clean title history and will pass a smog and safety inspection. The engine compartment is clean, with no fluid leaks and is free of any wear or visible defects. The vehicle also has complete and verifiable service records. Less than 5% of all used vehicles fall into this category.

✓ **Good** (Selected)



\$14,660

"Good" condition means that the vehicle is free of any major defects. This vehicle has a clean title history, the paint, body and interior have only minor (if any) blemishes, and there are no major mechanical problems. There should be little or no rust on this vehicle. The tires match and have substantial tread wear left. A "good" vehicle will need some reconditioning to be sold at retail. Most consumer owned vehicles fall into this category.

Fair



\$13,450

"Fair" condition means that the vehicle has some mechanical or cosmetic defects and needs servicing but is still in reasonable running condition. This vehicle has a clean title history, the paint, body and/or interior need work performed by a professional. The tires may need to be replaced. There may be some repairable rust damage.

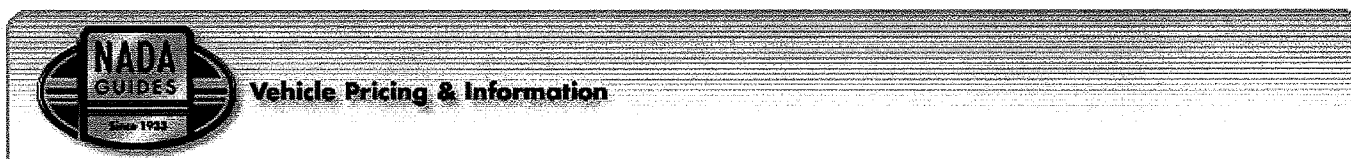
Poor



N/A

"Poor" condition means that the vehicle has severe mechanical and/or cosmetic defects and is in poor running condition. The vehicle may have problems that cannot be readily fixed such as a damaged frame or a rusted-through body. A vehicle with a branded title (salvage, flood, etc.) or unsubstantiated mileage is considered "poor." A vehicle in poor condition may require an independent appraisal to determine its value. Kelley Blue Book does not attempt to report a value on a "poor" vehicle because the value of cars in this category varies greatly.

* Washington 10/15/2007



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BOAT

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2004 BOSTON WHALER INC SPORT 130/RB(*)

October 15, 2007

Boats and Personal Watercraft

| | | | |
|-------------------------|-----------------|-------------|------------------------|
| Length: | 13' | Beam: | 5' 11" |
| Model Name/Description: | SPORT 130/RB(*) | Engine: | 1 40 HP Gasoline |
| Boat Type: | Outboard Boats | Net Weight: | 600 |
| Hull Material: | Fiberglass | | |

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[Title and Registration Forms](#)
[Donate Your Boat](#)

PRICING

| | <u>Low Retail</u> | <u>Average Retail</u> |
|---|-------------------|-----------------------|
| Base Price | \$5,710 | \$6,480 |
| Options | | |
| Power Boat: CANVAS | | |
| Boat Cover - 7 ft. thru 14 ft. | \$115 | \$130 |
| Power Boat: MISCELLANEOUS OPTIONAL EQUIPMENT | | |
| Outbd. Hydraulic Steering | \$610 | \$695 |
| Outbd. Power Tilt/Trim (50-100 HP) | \$375 | \$425 |
| TOTAL PRICE | \$6,810 | \$7,730 |

Notes

(*)INCLUDES THE VALUE OF THE OUTBOARD MOTOR(S) AND TRAILER. (**)INCLUDES THE VALUE OF THE OUTBOARD MOTOR(S). -- APPLY NOTE WITH * ONLY WHEN THERE IS AN ASTERISK(S) FOLLOWING THE MODEL NAME.

NEXT STEPS

- | | |
|----------------------------|---------------------------|
| Free Insurance Quote | Check this boat's history |
| Free Credit Report & Score | Sell a Boat |
| Get pre-approved Financing | Buy a Boat |

Value Explanations

Prices shown are retail consumer values and to be considered as selling prices. Trade-in and loan values are confidential for our dealers and industry base subscribers. Trade-in values are to be determined by local dealers and are generally lower than values shown.

Low Retail Value — A low retail valued boat will show excessive wear and tear either cosmetically and/or mechanically. This boat may or may not be in running order. The buyer can expect to invest in cosmetic and/or mechanical work. Low retail vessels usually are not found on a dealer's lot. **Low Retail should not be considered a trade-in value.**

Discover Hidden Problems!

BOAT HISTORY REPORT.COM


Record Check

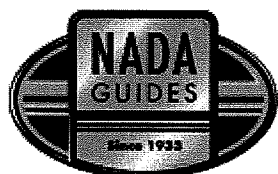
- **Hurricane Damage?**
- **Accident?**
- **Salvaged?**

Average Retail Value — An average retail valued boat should be in good condition with no visible damage or defects. This boat will show moderate wear and tear and will be in sound running condition. The buyer may need to invest in either minor cosmetic or mechanical work.

Note: Vessels in exceptional condition can be worth a significantly higher value than the Average Retail Price shown.

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| | |
|--|--|
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Motor Homes

2004 FORETRAVEL UNICOACH SERIES M-3410 U270

Model: M-3410 U270
 Length: 34'
 Coach Design: Motor Home
 Floor Plan: ALL
 Self-Contained: YES
 Slides: 1

| | <u>Low Retail</u> | <u>Average Retail</u> |
|---|-------------------|-----------------------|
| Base Price | \$175,690 | \$211,680 |
| Options | | |
| AIR CONDITIONING AND HEATING | | |
| 7,000 BTU | \$300 | \$365 |
| APPLIANCES | | |
| Gas Grill Cook Top | \$610 | \$740 |
| Microwave Oven | \$135 | \$165 |
| Refrigerator Side By Side Upgrade | \$215 | \$260 |
| Water Heater 6 Gallon Gas/Elec. | \$100 | \$125 |
| ENTERTAINMENT | | |
| AM/FM/CD Stereo | \$170 | \$210 |
| Satellite System W/Manual Point | \$230 | \$280 |
| T.V. 13" Color | \$135 | \$165 |
| GENERATORS | | |
| 2 - 3 KW Gas | \$860 | \$1,040 |
| JACKS AND LEVELING SYSTEMS | | |
| Scissor Stabilizer Jacks (Each) | \$120 | \$150 |
| MISCELLANEOUS OPTIONAL EQUIPMENT | | |
| Awning 10' - 12' (Each) | \$305 | \$370 |
| CB Radio | \$90 | \$110 |
| Driver Side Door W/ Power Window | \$340 | \$415 |
| Spare Tire and Carrier | \$85 | \$105 |
| TOTAL PRICE | \$179,385 | \$216,180 |

Notes

PRICES INCLUDE ALUMINUM WHEELS, AWNING, ICE MAKER, CB RADIO, CONVECTION MICROWAVE, AM/FM CASSETTE STEREO, VCR, (2)TV'S, GENERATOR, (2)ROOF A/C'S, BACK UP CAMERA, LEVELING SYSTEM AND WATER HEATER. ADD \$3500 TO M-2900 AND M-3300 IF EQUIPPED WITH ROADMASTER CHASSIS.

Value Explanations

Prices shown are retail consumer values and to be considered as selling prices. Trade-in and loan values are confidential for our dealers and industry base subscribers. Trade-in values are to be determined by local dealers and are generally lower than values shown.

Low Retail Value — A low retail unit may have extensive wear and tear. Body parts may have dents and blemishes. The buyer can expect to invest in cosmetic and/or mechanical work. This vehicle should be in safe running order. Low retail vehicles usually are not found on dealer lots. **Low retail should not be considered a trade-in value.**

Average Retail Value — An average retail vehicle should be clean and without glaring defects. Tires and glass should be in good condition. The paint should match and have a good finish. The interior should have wear in relation to the age of the vehicle. Carpet and seat upholstery should be clean, and all power options should work. The mileage should be within the acceptable range for the model year.

An Average Retail vehicle on a dealer lot may include a limited warranty or guarantee, and possibly a current safety and/or emission inspection (where applicable).

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Vehicle Pricing & Information

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Luxury Car

1997 Bentley Brooklands 4 Door Sedan (LWB)

Note: U.S. DISTRIBUTOR: BENTLEY MOTOR CARS NA LLC 3800 HAMLIN ROAD, AUBURN HILLS, MI 48326 PHONE: (248) 754-6464 MANUFACTURER: BENTLEY MOTORS LTD, CREWE, CHESHIRE, CW1 3PL, ENGLAND

PRICING

Original MSRP: \$169,900

| | <u>Low Retail</u> | <u>Average Retail Value</u> | <u>High Retail</u> |
|--------------------|-------------------|-----------------------------|--------------------|
| Base Price | \$63,800 | \$71,000 | \$80,400 |
| TOTAL PRICE | \$63,800 | \$71,000* | \$80,400 |

Low Retail Value

This vehicle would be in mechanically functional condition, needing only minor reconditioning. The exterior paint, trim, and interior would show normal wear, needing only minor reconditioning. May also be a deteriorated restoration or a very poor amateur restoration. Most usable "as-is".

Some of the vehicles in this publication could be considered "Daily Drivers" and are not valued as a classic vehicle. When determining a value for a daily driver, it is recommended that the subscriber use the low retail value.

Note: This value does not represent a "parts car".

Average Retail Value

This vehicle would be in good condition overall. It could be an older restoration or a well-maintained original vehicle. Completely operable. The exterior paint, trim, and mechanics are presentable and serviceable inside and out. A "20-footer".

High Retail Value

This vehicle would be in excellent condition overall. It could be a completely restored or an extremely well maintained original vehicle showing very minimal wear. The exterior paint, trim, and mechanics are not in need of reconditioning. The interior would be in excellent condition. **Note:** This value does not represent a "100 Point" or "# 1" vehicle *.

* "100 Point" or "# 1" vehicle is not driven. It would generally be in a museum or transported in an enclosed trailer to concourse judging and car shows. This type of car would be stored in a climate-regulated facility.

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C

In re McElroy
 Bkrcty.C.D.Ill.,2006.


United States Bankruptcy Court,C.D. Illinois.
 In re Robert D. McELROY and Barbara A. McElroy,
 Debtors.
No. 05-78139.

March 9, 2006.

Background: Hearing was held on value of motor vehicles securing creditor's claim, for purposes of determining what amounts debtors would have to pay to creditor to "cram down" Chapter 13 plan over its objection.

Holding: The Bankruptcy Court, Mary P. Gorman, J., held that, in absence of evidence of extent to which retail values placed on motor vehicles of same type and year as those belonging to Chapter 13 debtors in national motor vehicle handbook included markup for warranty, reconditioning or other services or included profit margin for dealers, bankruptcy court, as evidence of vehicles' value for Chapter 13 "cramdown" purposes, would take 95% of retail values set forth in this national handbook.

So ordered.
 West Headnotes

[1] Bankruptcy 51  3715(7)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(7) k. Evidence. Most Cited

Cases


Appraiser and auctioneer of 44 years was minimally qualified to give expert opinion upon value of motor vehicles securing creditor's claim, in proceeding to determine what payments creditor would have to receive for debtors' Chapter 13 plan to be "crammed down" over its objection, though appraiser admitted that his experience with used motor vehicles was limited and that he did not have any particular training, degrees or certifications regarding vehicle appraisals; appraiser's lack of strong credentials

merely affected weight to be given his testimony. 11 U.S.C.A. § 1325(b).

[2] Bankruptcy 51  2163

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2163 k. Evidence. Most Cited Cases


Trial court has wide discretion in determining admissibility of expert testimony, especially when issue is being tried directly to the bench.

[3] Bankruptcy 51  3715(7)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(7) k. Evidence. Most Cited


Cases

Evidence of retail values of Chapter 13 debtors' motor vehicles in national handbook was admissible, over hearsay objection by debtors, in proceeding to determine what price debtors would have to pay to creditor with security interest in these vehicles in order to "cram down" their plan over creditor's objection; handbook came within scope of hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations." 11 U.S.C.A. § 1325(b); Fed.Rules Evid.Rule 803(17), 28 U.S.C.A.

[4] Bankruptcy 51  3708(6)


51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(6) k. Valuation; Periodic Payments. Most Cited Cases

Replacement, rather than liquidation, value is appropriate valuation standard for "cramdown" in Chapter 13 cases. 11 U.S.C.A. § 1325(b).


[5] Bankruptcy 51  3708(6)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down

[51k3708\(6\)](#) k. Valuation; Periodic Payments. [Most Cited Cases](#) “Replacement value,” such as Chapter 13 debtors must pay in order to “cram down” plan over objection of creditor with security interest in their motor vehicles, is not necessarily synonymous with retail value, which may include items such as warranties, inventory storage and reconditioning, items that debtors do not receive if they retain motor vehicles. [11 U.S.C.A. § 1325\(b\)](#).

[6] Bankruptcy 51  3708(6)

[51](#) Bankruptcy
[51XVIII](#) Individual Debt Adjustment
[51k3704](#) Plan
[51k3708](#) Secured Claims; Cram Down
[51k3708\(6\)](#) k. Valuation; Periodic Payments. [Most Cited Cases](#)
In deciding what Chapter 13 debtors would have to pay to creditor with security interest in their motor vehicles, in order to “cram down” plan over creditor's objection, bankruptcy court could not accept values placed on vehicles by debtor's expert, where expert's valuations were significantly lower than retail values placed on such vehicles in national handbook, and expert failed to provide any basis, such as mechanical or other problems, to explain this discrepancy. [11 U.S.C.A. § 1325\(b\)](#).

[7] Bankruptcy 51  3708(6)

[51](#) Bankruptcy
[51XVIII](#) Individual Debt Adjustment
[51k3704](#) Plan
[51k3708](#) Secured Claims; Cram Down
[51k3708\(6\)](#) k. Valuation; Periodic Payments. [Most Cited Cases](#)
In absence of evidence of extent to which retail values placed on motor vehicles of same type and year as those belonging to Chapter 13 debtors in national motor vehicle handbook included markup for warranty, reconditioning or other services or included profit margin for dealers, bankruptcy court, as evidence of vehicles' value for Chapter 13 “cramdown” purposes, would take 95% of retail values set forth in this national handbook. [11 U.S.C.A. § 1325\(b\)](#).

*[186 John S. Narmont](#), Springfield, IL, for Debtors.

[MARY P. GORMAN](#), Bankruptcy Judge.

The issue before the Court is the valuation of two vehicles—a 2003 Ford F150 Flareside Supercab XLT pickup and a *[187](#) 2002 Ford Explorer Limited V6—for purposes of cramdown in a Chapter 13 plan. Cramdown is the bankruptcy procedure which allows a debtor to keep collateral and pay the present value of the allowed secured claim over the life of the plan. ^{FNI} [11 U.S.C. § 506\(a\)](#); [§ 1325\(a\)\(5\)](#).

[FNI](#). The use of the cramdown procedure has been limited under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. For cases filed on or after October 17, 2005, [§ 1325](#) now provides that [§ 506](#) does not apply to purchase money debts incurred within 910 days before the case was filed. This change in the law does not apply here because this case was filed before the effective date of the new law.

The Debtors, Robert and Barbara McElroy, filed a petition pursuant to Chapter 13 of the Bankruptcy Code on October 16, 2005. The Debtors' Chapter 13 Plan valued a 2003 Ford F150 at \$15,400 and a 2002 Ford Explorer at \$10,000. The Plan proposed to pay 0% interest on the F150 and 8% interest on the Explorer. Ford Motor Credit Company (“Ford”), which holds liens on the two vehicles, filed an objection to the Debtors' Chapter 13 Plan. Ford objects to both the valuations and the interest rates. In its objection, Ford valued the F150 at \$19,650 and the Explorer at \$17,700. Ford seeks 9% interest on both vehicles.

A valuation hearing was held on February 7, 2006. Nelson Aumann testified for the Debtors. Mr. Aumann has been an appraiser and auctioneer for 44 years. He is based in Nokomis, Illinois. He conducts approximately 100 auctions per year, 35 to 40 of which involve vehicles.

Mr. Aumann testified that, in appraising a vehicle, he looks at the mileage, condition, tires, and wheels. He also usually starts the engine and drives the vehicle. In this case, he saw the vehicles and heard the engines run, but he did not drive them. Mr. Aumann did not see anything in these vehicles which would distinguish them from other vehicles of similar age and mileage.

In determining a value for a vehicle, Mr. Aumann consults the National Automobile Dealers Association (NADA) guide, Hotline, and his own experience in selling vehicles at auction. Although

NADA is the widely accepted authority for vehicle values, [In re Bouzek](#), 311 B.R. 239, 243 (Bankr.E.D.Wis.2004); [In re Henderson](#), 235 B.R. 425, 429 (Bankr.C.D.Ill.1999). Mr. Aumann described the NADA values as too high. Instead, he relies more on Hotline, a source unknown to this Court and not cited as a recognized source for vehicle valuations by any reported bankruptcy decisions. Mr. Aumann also relies on his experience, but he admitted that his experience with used vehicles is limited. He has never owned or worked at a used car lot. He does not have any particular training, degrees, or certifications regarding vehicle appraisals. In the past year, he sold one Ford Explorer and one Ford F150.

[1][2] Ford objected to Mr. Aumann's qualifications as an expert on the value of used vehicles. "A trial court has wide discretion in determining the admissibility of expert testimony, especially when the issue is being tried directly to the bench." [Palmacci v. Umpierrez](#), 121 F.3d 781, 791 (1st Cir.1997). The Court finds that Mr. Aumann has the bare minimum of qualifications necessary to be considered an expert under [Rule 702 of the Federal Rules of Evidence](#). However, Mr. Aumann's lack of strong credentials will affect the weight to be given to his testimony. [Russell on Evidence](#) § 702.2, p. 1118.

Mr. Aumann submitted a written appraisal on each vehicle. The appraisals contained a photo of each vehicle, the inspection*188 date, the make and model of the vehicle, and the mileage of the vehicle. Mr. Aumann did not include excerpts from NADA, Hotline, or any publication regarding the vehicles. He did not include any information about comparable sales. There is nothing in the appraisals which would suggest a reason to deviate from the NADA values. Mr. Aumann valued the Explorer at \$10,000 and the Ford F150 at \$16,000.

Ford relies solely on the NADA retail value for the vehicles. The NADA base retail for a 2003 Ford F150 pickup in the central region is \$17,150. The NADA adds a \$275 mileage adjustment because the vehicle has only been driven 38,600 miles. Thus, the NADA retail value is \$17,425 for the F150. The NADA base retail value of a 2002 Ford Explorer V6 is \$15,675. The NADA adds a \$800 mileage adjustment because the vehicle has been driven 35,000 miles. Thus, the NADA retail value for the Ford Explorer is \$16,475. Ford's suggested NADA retail values for the two vehicles did not include any adjustments for accessories or optional equipment.

[3] The Debtors objected to the admissibility of the NADA data. However, [Rule 803\(17\) of the Federal Rules of Evidence](#) provides a hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." The NADA fits well within this hearsay exception. [Bouzek, supra](#), 311 B.R. at 243; [In re Smith](#), 307 B.R. 912, 917 (Bankr.N.D.Ill.2004), *rev'd on other grounds*, 313 B.R. 267 (N.D.Ill.2004). Bankruptcy courts in the Central District of Illinois have long recognized the NADA guide as "the authoritative source that is most relevant and applicable to the valuation" of vehicles in Chapter 13 cases. [In re Madsen](#), 2001 WL 34076428 (Bankr.C.D.Ill.) (Perkins, J.); [In re Knight](#), 254 B.R. 227, 228 (Bankr.C.D.Ill.2000) (Fines, J.); [In re Henderson, supra](#), 235 B.R. at 429 (Altenberger, J.); [In re Gill](#), 1996 WL 33406075 (Bankr.C.D.Ill.) (Lessen, J.).

[4][5] Replacement value, rather than liquidation value, is the appropriate valuation standard for cramdown in Chapter 13 proceedings. [Associates Commercial Corp. v. Rash](#), 520 U.S. 953, 956, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). Replacement value is not, however, necessarily synonymous with retail value: "[W]here the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning." [Rash, supra](#), 520 U.S. at 964, n. 6, 117 S.Ct. at 1886. In addition, the market to which debtors may look to replace a vehicle is not limited to the retail market. [In re Glueck](#), 223 B.R. 514 (Bankr.S.D. Ohio 1998); [In re McElroy](#), 210 B.R. 833, 835 (Bankr.D.Or.1997). Many courts use as their starting point for determining a vehicle's replacement value the average of a car's wholesale and retail values, subject to appropriate adjustments according to other evidence of value introduced by the parties. [In re Getz](#), 242 B.R. 916, 919 (6th Cir.BAP2000); [In re Lyles](#), 226 B.R. 854, 856-57 (Bankr.W.D.Tenn.1998); [In re Oglesby](#), 221 B.R. 515, 519, 523 (Bankr.D.Colo.1998); [In re Younger](#), 216 B.R. 649, 656-57 (Bankr.W.D.Okla.1998). One court has a local rule that says that the value of a vehicle is 95% of the NADA retail value for the first three years of age if neither party presents any conflicting*189 evidence. [In re Mitchell](#), 320 B.R. 687, 689 (Bankr.E.D.Mo.2005).^{FN2}

FN2. To the extent cramdown remains available under Chapter 13, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 provides a definition of replacement value. Replacement value is “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.” 11 U.S.C. § 506(a)(2). Again, the new law does not apply to this case and, accordingly, this definition does not control how replacement value is determined for the vehicles in this case.

[6] The Court finds the values placed on the vehicles by Mr. Aumann to be unreasonably low. Although a live witness is often better than a published compilation, Mr. Aumann's reliance on the unknown Hotline rather than the well-respected NADA undercut his testimony. Mr. Aumann failed to offer any explanation as to why the vehicle valuations should deviate from the published values. He testified that the vehicles had the regular scratches and dings to be expected of vehicles of that make and model year, but he did not find any body damage, mechanical problems, or any other reason why his values should be different from the NADA values.

On the other hand, the NADA retail values proffered by Ford may be too high. In re Gonzalez, 295 B.R. 584, 587 (Bankr.N.D.Ill.2003) (Prices in NADA are typically higher than Black Book or Kelley Blue Book because NADA prices do not vary with the vehicle's condition). The NADA values may include warranties, reconditioning, and other services not directly related to the actual value of the vehicle.

[7] In the absence of evidence of the markup for services or the profit margin which might be included in the NADA tables for the Debtors' vehicles, the Court finds that a 5% discount from the NADA retail values presented would be appropriate to determine the vehicles' replacement value for purposes of cramdown. Accordingly, the 2003 Ford F150 pickup is valued at \$16,553.75. The 2002 Ford Explorer V6 is valued at \$15,651.25.

Nothing in this Opinion should be construed as limiting the ability of debtors or creditors in other cases from presenting appraisals of vehicles which differ from the NADA published values. The Court recognizes that vehicles which are damaged or have been subjected to excessive wear and tear may have diminished values which would not be accurately

reflected in the NADA tables. Likewise, vehicles with custom equipment or decorating might have enhanced values also not reflected in the NADA tables.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

For the reasons set forth in an Opinion entered this day,

IT IS HEREBY ORDERED AS FOLLOWS:

A. For purposes of determining the secured claims of Ford Motor Credit Company in this case, the value of the Debtors' 2003 Ford F150 pickup be and is hereby determined to be \$16,553.75 and the value of the Debtors' 2002 Ford Explorer V6 be and is hereby determined to be \$15,651.25.

B. A telephonic conference be and is hereby scheduled for April 5, 2006, at 2:15 p.m. to consider the question of the interest***190** rate to be paid through the Chapter 13 Plan to Ford.

Bkrtcy.C.D.Ill.,2006.
In re McElroy
339 B.R. 185

END OF DOCUMENT

Bankruptcy Evidence Manual
Current through the 2007 Update

Hon. Barry Russell[FNa0]

Article VIII. Hearsay
Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

§ 803.29 Market Reports, Commercial Publications; Mortality Tables—Rule 803(17)

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  [323\(4\)](#)

Legal Encyclopedias

[C.J.S., Evidence § § 227 to 234, 279](#)

A hearsay exception is provided in Rule 803(17) for market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in particular occupations. The basis of this exception is the high degree of reliability of items of this nature. General reliance by the public or a particular segment thereof upon the contents of the publication reinforces the motivation of the compiler to be accurate. Moreover, no reason exists for the compiler to deceive. Necessity also plays a part in that in many instances it would be virtually impossible to produce the many people each having personal knowledge of a part of the matter compiled.

Telephone or city directories and printed pedigree registers begin to illustrate the diversity of the types of published compilations included within this hearsay exception. Also included are “reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market.” [Uniform Commercial Code § 2-724](#). Mortality and annuity tables, shown to be or recognized as standard authorities, may be introduced under Rule 803(17) to show expectancy of life.

Certain compilations raise unique problems. For example, credit reports if published as a compilation, would seem to meet the requirement of Rule 803(17) on its face. However, credit reports being evaluative in nature should be subjected to the same criteria for trustworthiness associated with admissibility under Rules 803(6) and 803(8) and in particular Rule 803(8). Since information relied upon in compiling a credit report will generally extend well beyond objective facts furnished by a person under a business duty to transmit, automatic inclusion in Rule 803(17) of such evaluative reports is unwarranted. Similar problems relating to trustworthiness are associated with the admission of safety codes and public opinion polls.

An example of a market guide often admitted in bankruptcy proceedings pursuant to Rule 803(17) is the National Automobile Dealers Association (NADA) blue book regarding the valuation of automobiles.

Example

1. Car values in National Automobile Dealers Association guide was admissible hearsay under Rule 803(17)..

A hearing was held on the value of motor vehicles securing the creditor's claim, for purposes of determining what amounts the debtors would have to pay to the creditor to “cram down” the chapter 13 plan over its objection. The issue was stated by the court:

The issue before the Court is the valuation of two vehicles—a 2003 Ford F150 Flareside Supercab XLT pickup and a 2002 Ford Explorer Limited V6—for purposes of cramdown in a Chapter 13 plan. Cramdown is the bankruptcy procedure which allows a debtor to keep collateral and pay the present value of the allowed secured claim over the life of the plan. [11 U.S.C. § 506\(a\)](#); § 1325(a)(5).

[In re McElroy, 339 B.R. 185, 186–7 \(Bkrcty.C.D.Ill.2006\)](#).

The court discussed the fact that Ford solely relied on the National Automobile Dealers Association (NADA) guide:

Ford relies solely on the NADA retail value for the vehicles. The NADA base retail for a 2003 Ford F150 pickup in the central region is \$17,150. The NADA adds a \$275 mileage adjustment because the vehicle has only been driven 38,600 miles. Thus, the NADA retail value is \$17,425 for the F150. The NADA base retail value of a 2002 Ford Explorer V6 is \$15,675. The NADA adds a \$800 mileage adjustment because the vehicle has been driven 35,000 miles. Thus, the NADA retail value for the Ford Explorer is \$16,475. Ford's suggested NADA retail values for the two vehicles did not include any adjustments for accessories or optional equipment.

[In re McElroy, 339 B.R. at 188](#).

The debtor objected to the admissibility of NADA data as hearsay.

Held: The court valued the vehicle at 95% of the NADA valuations. In overruling the debtor's objection, the court concluded:

The Debtors objected to the admissibility of the NADA data. However, [Rule 803\(17\) of the Federal Rules of Evidence](#) provides a hearsay exception for “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” The NADA fits well within this hearsay exception. [Bouzek, supra, 311 B.R. at 243](#); [In re Smith, 307 B.R. 912, 917 \(Bankr.N.D.Ill.2004\)](#), *rev'd on other grounds, 313 B.R. 267 (N.D.Ill.2004)*. Bankruptcy courts in the Central District of Illinois have long recognized the NADA guide as “the authoritative source that is most relevant and applicable to the valuation” of vehicles in Chapter 13 cases. [In re Madsen, 2001 WL 34076428 \(Bankr.C.D.Ill.\)](#) (Perkins, J.); [In re Knight, 254 B.R. 227, 228 \(Bankr.C.D.Ill.2000\)](#) (Fines, J.); [In re Henderson, supra, 235 B.R. at 429](#) (Altenberger, J.); [In re Gill, 1996 WL 33406075 \(Bankr.C.D.Ill.\)](#) (Lessen, J.)

[In re McElroy, 339 B.R. at 188](#).

See also [In re McElroy, 339 B.R. 185 \(Bkrcty.C.D.Ill.2006\)](#) (Evidence of retail values of the chapter 13 debtors' motor vehicles in the national handbook was admissible, over the hearsay objection by the debtors, in a proceeding to determine what price the debtors would have to pay to the creditor with security interest in these vehicles in order to “cram down” their plan over the creditor's objection. The handbook came within the scope of the hearsay exception for “[m]arket quotations, tabulations, lists, directories, or other published compilations.”)

[FN a0] Chief Judge, United States Bankruptcy Court, Central District Of California.

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BKRMANUAL § 803.29

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VALUATION AND EVIDENTIARY ISSUES

**By The Honorable Roger L. Efremsky
Richardo I. Kilpatrick©**

Fundamentals on Valuation Guides

- I. NADA Guides – overview
 - a. The National Automobile Dealers Association publishes guides through NADA Analytical Services Group, formerly the NADA Official Used Car Guide® Company; published since 1933
 - i. Comprehensive listings of pricing data for vehicles of all types, including cars, trucks, vans, SUV's, boats, RV's, snowmobiles, motorcycles, personal watercraft, and manufactured homes
 - ii. Also lists pricing data for classic, collectible, and special interest vehicles
 - iii. Separate guides published for each type of vehicle:
 - a. N.A.D.A. Official Used Car Guide®
 - b. N.A.D.A. Official Used Car Guide® Consumer Edition
 - c. ATD/N.A.D.A. Official Commercial Truck Guide®
 - d. N.A.D.A. Official Older Used Car Guide
 - e. N.A.D.A. Classic, Collectible, and Special Interest Car Appraisal Guide
 - f. N.A.D.A. Van/Truck Conversion and Limousine Appraisal Guide
 - g. N.A.D.A. Motorcycle/Snowmobile/ATV/Personal Watercraft Appraisal Guide
 - h. N.A.D.A. Antique, Classic and Special Interest Motorcycle Appraisal Guide
 - i. N.A.D.A. Recreation Vehicle Appraisal Guide
 - j. N.A.D.A. Older Recreation Vehicle Appraisal Guide
 - k. N.A.D.A. Marine Appraisal Guide
 - l. N.A.D.A. Older Marine Appraisal Guide
 - m. N.A.D.A. Title and Registration Textbook
 - n. N.A.D.A. Manufactured Housing Appraisal Guide
 - o. N.A.D.A. Manufactured Housing Appraisal System
 - p. ALG's Residual Guidebooks

- b. Published by National Automobile Dealers Association Analytical Services Group (NADA ASG).
- c. Pricing information also available at www.nadaguides.com for businesses and consumers; guides are available for purchase on the site.
- d. Pricing based upon mileage, model year, condition, and any warranties or certifications; books contain tables showing dollar amounts added or subtracted for lower or higher mileage.
 - i. A newer vehicle with higher mileage, for example, will have a greater price reduction than an older vehicle with less mileage – according to the July 2005 edition of the NADA Used Car Guide, a 2005 vehicle with mileage between 130,000 and 150,000 will lose \$9,925 in value, whereas a 1998 vehicle with the same mileage will lose only \$3,400 in value.
 - ii. Guide does not value “Grey Market Vehicles” – vehicles not manufactured for sale in the US, or vehicle that enters US commerce through channels other than factory-authorized dealers
- e. Used by both consumers and industry professionals
 - i. Used by consumers to determine trade-in value of their vehicles when purchasing a new or used vehicle
 - ii. Used by dealers to determine prices and by other industry professionals such as auctioneers and appraisers
- f. How is it produced?

NADA collect and compile about 1.2 million pieces of data per month from various sources. These sources include reports from over 6,000 auctions, which

accounts for 90% of the auctions held nationally, data from dealer management system owned by 3rd parties and OEMs' sales information.

II. Black book – Overview

- a. National Auto Research (NAR) out of Gainesville, Georgia has published guides since 1955
- b. Guides are published weekly, monthly, bimonthly, and annually
 - i. Weekly:
 - a. Black Book Official Used Car Market Guide – Weekly guide provides current reports of used car auction results in 4 classifications to used and new car dealers, bankers, wholesale buyers and credit union subscribers
 - i. 4 classifications are Extra Clean, Clean, Average, or Rough
 - ii. Once classified, survey personnel gather info on mileage, selling price, equipment and trim levels and send to editors
 - iii. Editors review information received and consider auction values, comparing that week's auction prices to the week before; also take into account external factors such as weather condition during auction; demand for certain models – whether prices were lower on certain models because models over-represented at auction

- iv. Sets weekly wholesale price based upon these and other factors, including mileage and optional equipment
- v. Within 10 days of auction close, the new Black Book is published from in-house printer

ii. Bi-Monthly:

- a. Black Book Official Used Truck, Van and SUV Guide

iii. Monthly:

- a. Black Book Official Used Car Market Guide – contains price adjustments for optional equipment and value adjustments for mileage
- b. Black Book XPRESS Official Retail Used Car Price Guide
- c. Black Book Official Motorcycle Value Guide
- d. Black Book Official Heavy Duty Truck & Trailer Guide – contains adjustments for optional equipment and mileage
- e. Black Book Official Old Car Market Guide

iv. Every Two Months:

- a. Black Book Cars of Particular Interest (CPI) Collectible Vehicle Value Guide – domestic vehicles, imported vehicles, and light duty trucks, classified as Excellent, Good, or Fair condition

- b. Dollar Residual Value Guide – designed to assist auto industry with leasing; provides dollar residual values in 12, 24, 36, 48, and 60-month increments
 - c. Black Book Original New Car Cost Guide – contains retail and invoice pricing for optional equipment; also warranty information and major changes from previous model year
 - d. Black Book Official Residual Value Guide – similar to Dollar Residual Value Guide, but contains current Model Year residual values in a percentage format
- c. Provides new and used car and truck pricing for automotive and finance industries plus vehicle descriptions and options
 - d. Also available online at www.blackbookonline.com; operated by Veretech, LLC

III. Definitions

- a. Retail
 - i. Under NADA guides, retail value is what a consumer would pay for a vehicle in clean condition that falls within NADA’s acceptable mileage category for that particular year, make and model.
 - ii. Retail value varies based upon the condition of the vehicle, desirability of the vehicle, security offered to the purchaser by way of a warranty, and a reasonable markup to cover the dealer’s expenses and generate profit.
- b. Wholesale
 - i. Wholesale value is the absolute value of the vehicle in its current condition; described as what a dealer would pay for the vehicle at auction

with the intent to sell the unit in the retail market after clean up and reconditioning, if necessary.

c. Trade In

- i. Trade-in value is an amount typically above wholesale that a dealer is willing to pay a consumer for the consumer's vehicle in exchange for a new vehicle
- ii. NADA definition: Trade-in is what a consumer or dealer would expect to receive for a vehicle being traded in a "one to one" experience (not in a competitive bidding environment such as an auction) in clean condition that falls within NADA's acceptable mileage category.
- iii. Trade-in value is affected by market conditions, the condition and age of the vehicle, the dealer's incentives, and wholesale value

d. BK definitions are different:

- i. Wholesale (foreclosure or liquidation value) = amount a creditor will realize after foreclosing on property and selling it in a distressed sale.
- ii. Retail = amount the buyer would have to pay to buy comparable property in the open market
- iii. Replacement value = not synonymous with retail value; *In re Rash*
- iv. No definition of trade-in

**Post-BAPCPA issues regarding
Valuation in Consumer Cases**

Bankruptcy Code Section 506:

Section 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 such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

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

Bankruptcy Code Section 722:

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible *personal property intended primarily for personal, family, or household use*, from a lien securing a dischargeable consumer debt, if such property is exempted under Section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such *lien the amount of the allowed secured claim of such holder that is secured by such lien in full at the time of redemption.*

Bankruptcy Code Section 1325:

(a) Except as provided in subsection (b), the court shall confirm a plan if--

* * * * *

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

(A) the holder of such claim has accepted 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; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and (iii) if-

-

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder,

* * * * *

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [period] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Bankruptcy Code Section 348:

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

(A) property of the estate in the converted case shall consist of property of the estate as of the date of filing of the petition that remains in the possession of or is under the control of the debtor on the date of conversion;

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan; and

(C) with respect to cases converted from chapter 13—

(i) the claim of any creditor holding security as of the date of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and

(ii) unless a prebankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable nonbankruptcy law.

Post-BAPCPA Case Law Dealing with Section 506

***In re De Anda-Ramirez*, 359 B.R. 794 (10th Cir. BAP 2007)**

In amending the Code section dealing with determination of creditor's secured status to expressly define 'replacement value' . . . as being '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,' Congress did not thereby mandate that, in valuing motor vehicle securing creditor's claim for Chapter 13 'cramdown' purposes, debtors had to use the blue book retail, as opposed to private party, value, though Congress had used word 'retail' in its definition; other than both containing the word 'retail,' the Code and blue book definitions had little in common.

***In re Eddina*, 355 B.R. 849 (Bankr. W.D. Okla. 2006)**

Under BAPCPA, in determining the "replacement value" of a motor vehicle securing an allowed claim, the bankruptcy court will start with the National Automobile Dealers Association (NADA) retail value and, upon objection of a party in interest, will conduct a valuation hearing during which other admissible evidence in support of a higher or lower value will be received; in the absence of such evidence, the amount ascertained as the starting point will be determined to be the value of the vehicle.

Post-BAPCPA Case Law Dealing with "910" Issues:

***In re Jackson*, 338 B.R.923 (Bankr. M.D. Ga. 2006)**

Motor vehicle that Chapter 13 debtor acquired within 910 days of petition date with proceeds of purchase-money loan, as replacement vehicle for his non-debtor wife, was not "acquired for the personal use of the debtor," within meaning of provision of BAPCPA which, if this condition was met, would have barred debtor from cramming down Chapter 13 plan in which he proposed to bifurcate purchase-money motor vehicle lender's undersecured claim and to pay lender only the value of its collateral. While vehicle may have been acquired for "personal, family or household" use, as those terms are used elsewhere in the Bankruptcy Code, it was not "acquired for the personal use of the debtor," regardless of whether debtor sometimes drove his wife's car.

***In re Lewis*, 347 B.R. 769 (Bankr. D. Kan. 2006)**

Motor vehicle that Chapter 13 debtors acquired, with purchase-money financing obtained within 910 days of petition date, for the use of adult daughter who could not get loan in her own name, was not acquired for personal use of the debtors, so that “hanging” paragraph did not apply to prevent debtors from “cramming down” their plan while paying purchase-money lender only the value of vehicle that secured its claim.

***In re Hill*, 352 B.R. 69 (Bankr. W.D. La. 2006)**

Under the totality of the circumstances, Chapter 13 debtors' pickup truck was not acquired for their “personal use,” and so the anti-cramdown provision of BAPCPA's so-called hanging paragraph did not apply, and secured creditor's debt could be modified, where, since debtors' acquisition of the vehicle, debtor-wife was employed and debtor-husband was not employed, debtors owned just the one vehicle, which served as collateral for creditor's claim, debtor-wife was required by her employment to have a vehicle in order to get to and from work, though she was not required to have one during the course of the day at her employment, and so the use of the vehicle was mixed, both personal and business, in that it was utilized by debtors in generating income for their maintenance and support.

***In re White*, 352 B.R. 633 (Bankr. E.D. La. 2006)**

Secured portion of 910-day car claim is entire purchase money portion of debt but interest is payable at *Till* formula rate only on principal portion, not on accrued pre-petition interest charges. A qualifying purchase money security interest claim is not limited to the value of the collateral securing the debt; nor is it allowed post-petition interest or other charges which may accrue on the claim, regardless of the existence of equity. Instead, the treatment of the purchase money security interest claim is entirely dependent upon the rights provided in § 1325(a)(5) . . . Debtor is not required to provide contractual interest or reimbursement of other charges accruing post-petition as part of the claim. By the same token, the claimant's secured claim for purposes of the plan, is not limited to the value of the collateral as required by § 506(a)(1) nor may it be bifurcated. Amounts advanced for two insurance contracts were unsecured claims. With respect to purchase money portion of debt: “Under both *Till* and *Rash*, Debtor is still free to modify the terms of the claim under § 1322. . . . [T]he creditor is entitled to the present value of its claim based on a *Till* formula.

Post-BAPCPA Cases Dealing with “negative equity” issues: what is pmsi?

***In re Peaslee*, 358 B.R. 545 (Bankr. W.D. N.Y. 2006)**

Amount of secured claim that is based on negative equity is not purchase money obligation. Court finds no legal or equitable reason that Congress would have enacted a provision that would transform knowingly refinanced unsecured negative equity debt into secured debt not supported by collateral value.

***In re Martinez*, No. 06-21403, 2007 WL 621077 (Bankr. W.D.N.Y. Mar. 1, 2007)**

Chapter 13 trustee satisfied his initial burden of demonstrating that financing that debtor obtained within 910 days of petition date in connection with her purchase of motor vehicle was obtained, not just to allow debtor to purchase this vehicle for her personal use, but also to pay off negative equity which she possessed in vehicle that she traded in, based on evidence that negative equity of \$7,296.55 in the trade-in was refinanced, and that price which debtor agreed to pay for her new vehicle, after adjustments for direct expenses such as taxes and a service contract, was nearly \$6,000.00 in excess of manufacturer's suggested retail price; thus, unless lender requested hearing and presented contrary evidence on negative equity issue, lender did not have a purchase money security interest (PMSI) in all of the debt included in its filed claim, as required for protection under the Bankruptcy Abuse Prevention and Consumer Protection Act's (BAPCPA's) antibifurcation provision.

***In re Acaya*, 2007 WL 1492475 (Bankr. N.D. Cal. 2007)**

Purchase money security interest did not include amounts used to pay negative equity in a trade-in vehicle so hanging paragraph did not apply to that portion. Under California's UCC §9103(h), court had discretion to apply the California transformation rule or the dual-status rule. Court exercised its discretion to use the dual-status rule to determine the extent of the purchase money security interest in light of the fact that it was possible to determine how to make the allocation between the negative equity and the purchase price.

***In re Price*, 2007 WL 664534 (Bankr. E.D.N.C. 2007)**

Under North Carolina law, court had discretion to apply dual status or transformation rules and chose to apply the transformation rule regarding negative equity and "gap insurance." Refinancing the negative equity was not providing value to acquire rights in the collateral. Agrees with approach taken in *Peaslee*.

***In re Cohrs*, [*cite: www.caeb.uscourts.gov](Bankr. E.D. Cal. 2007)**

Disagrees with *Peaslee* and *Acaya*. Finds that all components of the obligation incurred for the purpose of acquiring property securing a new obligation are included in purchase money obligation. Relies on California Civil Code §2981(e) definition of “cash price” and finds that Cal. Comm. Code §9201(b) requires the court to interpret Cal. Comm. Code §9103 to be consistent with it.

***In re Petrocci*, 2007 WL 1813217 (Bankr. N.D. N.Y. 2007)**

Disagrees with *Peaslee* and cases taking similar approach. Finds negative equity transactions are purchase money based on N.Y. version of Commercial Code §9103 and definition of “price” in §9102 includes negative equity.

Cases dealing with Surrender in Full Satisfaction:

***In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn., 2006)**

The court held that §1325(a)(5)(C) is also subject to the Hanging Paragraph, and that surrender of a 910-day vehicle is in full satisfaction of the claim, because such a claim is fully secured for the amount of debt owed. See also *In re Payne*, 2006 Bankr. LEXIS 1696 (Bankr. S.D. Bankr. Ohio, 2006)(The plain meaning of the Hanging Paragraph is that it is to apply to all of §1325(a)(5)).

***In re Long*, Case No. 06-6252 (6th Cir.); 2006 Bankr. LEXIS 1605 (Bankr. E.D. Tenn. 2006, J. Stair):**

The Bankruptcy Court for the Eastern District of Tennessee, in *In re Long*, faced the question of whether, under the “hanging paragraph” of Section 1325(a) enacted through the 2005 Amendments to the Bankruptcy Code, a debtor may surrender a motor vehicle in full satisfaction of the debt owed to an undersecured creditor. This Bankruptcy Court had previously ruled, in *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006), that a debtor is able to surrender a vehicle in full satisfaction of the debt when the obligation met the requirements of the “hanging paragraph”. The opinion of the *Long* Court merely elaborated on the rationale of the *Ezell* decision.

The “hanging paragraph” of Section 1325(a), in part, strikes the application of Section 506 to certain purchase-money security interest obligations incurred by a debtor within 910 days of the filing of a debtor’s Chapter 13 petition. Prior to the enactment of the “hanging paragraph”, upon

surrender and sale of the collateral, an undersecured creditor was permitted to file an unsecured deficiency claim. The *Long* court found that Section 506 was necessary to “bifurcate” an undersecured creditor’s claim into secured and unsecured portions in a bankruptcy proceeding. Therefore, the Court reasoned, the removal of Section 506 from the picture transformed an otherwise undersecured claim into an allowed fully secured claim for the entire amount of the debt owed. Because Section 1325(a)(5)(C) permits a debtor to satisfy an allowed secured claim through surrender of the collateral, the Court found that the entire claim of a creditor falling under the purview of the “hanging paragraph” must be fully satisfied through surrender. The Court further determined that revised language of Section 1325(a) was “confusing”, but not ambiguous and, therefore, it was not necessary for the Court to go beyond the statute as written.

Accordingly, the court ruled that a debtor in Chapter 13 may surrender an undersecured vehicle in full satisfaction of the debt to a secured creditor if the obligation qualified under the “hanging paragraph” of Section 1325(a). The creditor in the case appealed directly to the Sixth Circuit Court of Appeals. Currently, final briefs have been submitted by the parties; however, no oral argument has been scheduled in the matter.

***In re Wright*, 2007 U.S. App. LEXIS 15843 (7th Cir. 2007)**

The Debtors filed Chapter 13 bankruptcy post-BAPCPA. The Creditor holds a PMSI in a motor vehicle purchased within 910 days prior to the filing of the bankruptcy case. The Debtors’ Chapter 13 plan proposed to surrender the vehicle in full satisfaction, even though the loan balance was higher than the vehicle’s market value. The bankruptcy judge, following the minority rule that surrender could not be in full satisfaction, declined to approve the plan because it failed to provide for the deficiency. The Debtors appealed directly to the 7th Circuit Court of Appeals via 11 U.S.C. § 158.

The 7th Circuit held that the hanging paragraph knocks out § 506 and leaves the parties to the contractual obligations and entitlements. The Court held that the majority of courts have been mistaken in assuming that § 506 is the only source of authority for a deficiency judgment. According to the Supreme Court in *Butner v. U.S.*, 440 U.S. 48 (1979), state law determines the rights and obligations of the parties when the Code does not supply a rule. The Court held that because the contract between the Debtors and the Creditor explicitly states that the Debtors are liable for any deficiency and provides that the parties have all the rights they would normally have under the UCC, the Debtors cannot surrender in full satisfaction. The Court held that

“given the hanging paragraph, no operative section of the Bankruptcy Code contains any contrary rule” to treating the deficiency as an unsecured debt. The Court also held that Congress implied favoring the agreement freely negotiated by the parties, because the Public Act which enacted the hanging paragraph is entitled “Restoring the Foundation for Secured Credit”, and no argument was made that the foundation could be restored by making all PMSIs non-recourse.

Amicus argued that loans covered by the hanging paragraph are entirely unsecured, because § 506 provides for an allowed secured claim. The Court reiterated that § 506 is not the only method to create, allow, or recognize security interests; they can do so under state law.

Dupaco Comm. Credit Union v. Zehrung (In re Zehrung), 351 B.R. 675, 678 (W.D. Wis.2006)

Chapter 13 debtors' surrender of car that they had purchased for their personal use, within 910 days of bankruptcy petition, to creditor holding security interest in car did not extinguish creditor's remaining unsecured claim for deficiency on loan; pursuant to the applicable Bankruptcy Code provision, the creditor retained its right under state law to any unsecured claim for the balance of the loan. Surrender of 910-day PMSI car does not preclude unsecured deficiency claim. “[A]llowed secured claim’ in § 1325(5) [*sic*] is used in the sense that the claim is allowed under § 502 and secured by some collateral, not in the § 506 sense of the term. A creditor taking possession of collateral does not depend upon § 506 to determine the value of its unsecured claim. Section 506 has application only when the estate retains an interest in the collateral, a circumstance which disappears with surrender. Rather, when collateral is surrendered pursuant to § 1325(5)(C) [*sic*] the amount of the remaining unsecured claim is determined by state law The creditor’s rights being unmodified by § 506, it is entitled to its state law right to liquidate the collateral and retain an unsecured claim for the balance due.

In re Blanco, No. 06 B 13223, 2007 WL 733973(Bankr. N.D. Ill. Mar. 12, 2007)

“Pursuant to the minority line of reasoning, the ‘hanging paragraph’ does not allow a debtor to surrender a vehicle in full satisfaction of the creditor’s claim, thereby precluding an unsecured deficiency claim.”

Valuation upon conversion from chapter 13 to chapter 7:

In re Murray-Hudson, 147 B.R. 960, 962 (Bankr. N.D. Cal. 1992)

In *Murry-Hudson*, the debtor purchased a new automobile. FMCC provided financing and took a security interest in the automobile. The certificate of ownership was issued to FMCC as the legal owner, and the debtor was issued a registration card. Debtor subsequently filed a Chapter 13 case. The debtor's plan bifurcated FMCC's claim pursuant to section 506(a), listing \$4,370 as secured based on the book value of the automobile, and \$4,504 as unsecured. The plan further provided that FMCC would receive one hundred percent of its secured claim, and seventy cents on the dollar on its unsecured claim. The plan also contained a provision which stated that "secured creditors shall retain their liens until their allowed secured claims have been paid." *Id.* at 961. FMCC accepted the plan. Once the debtor had paid off the secured portion of FMCC's claim, the debtor sought to compel FMCC to convey title of the automobile to her even though, under the plan, payment of the unsecured claims would not be completed for more than a year. In its analysis, the bankruptcy court noted that because FMCC had not objected to the plan, "this dispute does not involve the raging controversy over bifurcation of claims under 506(a) and avoidance of liens under § 506(d) in Chapter 13 cases." The bankruptcy court then made two findings. First, the bankruptcy court found that the plan language clearly provided for lien stripping and thus FMCC should have objected to the plan at the time it was proposed. Second and significantly for the purposes of the case at bar, the bankruptcy court stated that it would have reached the same result even in the absence of the plan's language quoted above because the claim had been bifurcated under section 506(a). The court stated that "[g]iving section 1322(b)] its plain meaning, it must be concluded that a Chapter 13 debtor is permitted not merely to alter the amount and terms of payment of her secured debts, but to hold the property free and clear of liens after paying the allowed secured claims in accordance with the provisions of her confirmed plan." In other words, the court held that, in Chapter 13 cases, once the secured portion of a bifurcated claim is paid, lien-stripping occurs as a matter of law.

In re Scheierl, 176. B.R. 498 (Bankr. D. Minn. 1995)

The *Scheierl* court held, opposition to *In re Murry-Hudson*, that the debtors could not receive an early release of their the secured creditor's lien, because such a release is against the underlying policy of section 349(b). Chapter 13 debtors could not obtain confirmation of any plan that would allow them to demand release of secured creditor's lien of record before they complete all

payments to all creditors under their plan, and receive discharge. Plan's proposed disposition of creditor's secured status denied creditor adequate protection.

Interest Rates:

***Till v. SCS Credit Corp.*, 541 U.S. 465 124 S. Ct. 1951; 158 L. Ed. 2d 787 (2004)**

The issue decided in *Till* was what interest rate must be provided to a secured creditor to ensure that the creditor, pursuant to 11 U.S.C § 1325(a)(5)(B)(ii), receives “the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim” when a debtor elects to retain the collateral and the creditor does not accept the treatment in the plan (i.e., a “cramdown”). In *Till*, the loan in question was secured by a truck with an agreed value of \$4,000. The parties, however, disputed the interest rate that would apply to payments of this secured debt under the plan. At an evidentiary hearing in the Bankruptcy Court, the secured automobile creditor in *Till* introduced “expert” testimony from its general manager and a sales manager of a related entity that it and other similarly situated creditors (subprime automobile lenders) uniformly charge the contract rate of 21%. In opposition, the debtor presented an economics professor who, although admitting he had “only a limited familiarity with the subprime auto lending market”, determined, apparently without any empirical rationale as to how he arrived at this number, that 9.5% was “very reasonable”.

The Bankruptcy Court overruled the secured creditor’s objection and allowed an interest rate, in conformance with the testimony of the debtor’s expert, of 9.5%. On appeal, the District Court reversed finding that the “coerced loan”¹ approach should have been applied and determined that the contract rate of 21% should apply. The Court of Appeals, in turn, found that the contract rate was presumptively valid and reversed the decision of the District Court.

When the matter finally reached the Supreme Court, a plurality of justice determined that the prime rate, with the addition of a small risk factor, was the proper rate to apply in cramdown situations. The plurality’s finding that the “formula approach” should be applied essentially comports with the specious expert testimony introduced by the debtor in the Bankruptcy Court

¹ The “coerced loan” approach recommends the rate that a creditor could obtain if it had foreclosed on the loan with the debtor, sold the collateral, and reinvested the proceeds in loans or equivalent duration and risk.

that the prime rate plus a 1.5% risk adjustment (9.5% total at the time of the evidentiary hearing) was “very reasonable”. The plurality discussed, and then rejected, several alternatives including the “coerced loan approach”, the “presumptive contract rate approach”, and the “cost of funds approach”². The Court, after dismissing the other possible approaches, found that this “formula approach” most closely reflected the risk to a secured creditor of a bankrupt debtor. Moreover, the plurality found that this “formula approach” put the burden on the creditor to establish a higher rate. While the Supreme Court, in theory, did leave open this opportunity for a creditor to establish a higher risk adjustment, it cites, with approval, cases that have found such a rate to fall between 1% and 3%.

² The “cost of funds” approach, advocated by the dissenting Circuit Court Judge, looks at what it would cost the creditor to obtain the cash equivalent of the collateral from an alternative source.

Evidentiary Issues Associated with Valuation Guides

General Admissibility of Guides

Guides, such as NADA official used car Guide, Kelly Blue Book, etc. (collectively “Guides”), often used as documentary evidence fall within the definition of hearsay. Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FRE 801(c). Evidence classified as hearsay is not admissible unless it falls within one of hearsay exceptions, specifically, Rules 803 and 804. Guides satisfy the requirements for hearsay exception as “market reports, commercial publications” under FRE 803(17) and therefore are often admissible.

Federal Rules of Evidence 803(17)

“Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations” are not excluded by the hearsay rule. FRE 803(17).

This exception is based on the high degree of reliability of market reports and commercial publications. Barry Russell, Bankruptcy Evidence Mutual p. 1134. (2004 Ed.) On the other hand, general reliance by the public and or professionals in a particular occupation motivates the compiler (publisher) to be accurate. Id.

The public and professionals (experts) generally rely on Guides to estimate the value of vehicles and other collateral. Values in the automotive market are generally defined by industry standards. In re Nice, 355 B.R. 554, *; 2006 Bankr. LEXIS 2897, **; 57 Collier Bankr. Cas. 2d (MB) 116. Guides are often admitted as evidence to assist the court on the valuation of vehicles and other collateral in the bankruptcy proceedings pursuant to FRE 803(17). For example, Some courts have used 90% or 100% N.A.D.A. retail listings as the presumptive replacement value. In

re Caple, No. 05-50213, 2005 Bankr. LEXIS 1094 at *28 n.9 (Bankr. M.D.N.C. 2005); In re Russell, 211 B.R. 12, 14 (Bankr. E.D.N.C. 1997). The Bankruptcy Court for the Northern District of West Virginia adopts a replacement valuation standard based on the average between the N.A.D.A. retail and trade-in values. In re Nice, 355 B.R. 554, *; 2006 Bankr. LEXIS 2897, **; In re Henry, 328 B.R. 529, 536 (Bankr. S.D. Ohio 2004). The Bankruptcy Court for the Northern District of Texas applies formula using the midpoint between the N.A.D.A. retail and the Kelley Blue Book private party value to determine value. In re Gray, 285 B.R. 379, 384 (Bankr. N.D. Tex. 2002).

Introducing Guides into evidence

Foundation

For admission of the Guides under FRE 803(17), counsel must lay a foundation. Counsel must provide sufficient preliminary evidence of the authenticity and relevance for the admission of the Guides. The type of preliminary evidence necessary to lay the proper foundation depends on the form and type of evidence offered. The lack of foundation is a valid [objection](#) that an [adverse party](#) may raise during trial or an evidentiary hearing.

In order to introduce the Guides into evidence, counsel must first establish that the Guides are market quotations, published compilations, or commercial publications. Then it must be established that Guides are generally used and relied on by the public or particular professions and occupations.

Basis

Who wants to introduce, and what difference does it make

Both Debtors and Creditors attorneys may introduce the Guides into the evidence for valuation purposes. Creditor's usually introduce the NADA Guides into evidence to establish the appropriate (Rash, retail or replacement value) of vehicles. Note, NADA gives the clean

retail value which is often higher than the actual price that a debtor's vehicle would be sold for in the open market. The debtors may use the Guides to defend his/her position that the clean retail value does not reflect the condition of the debtor's vehicle and therefore the value should be adjusted.

Hearsay Exception

1. Hearsay within hearsay-Rule 805-"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

The Guides are examples of hearsay within hearsay because they are published compilations including information supplied by people other than editors. Since information relied upon in compiling the Guides are objective facts furnished by professionals under a business duty to transmit, such information arguably falls within the hearsay exceptions either as business records or market reports.

Cross examination by Debtor or Creditor

Cross-examination is generally limited to: (1) the scope of direct examination, and (ii) testing the credibility of the witness. FRE 611(b).

V. Alternatives to Guides

Creditor

i. Experts- FRE 702 and 704

FRE 702 governs expert testimony in Federal Courts. Rule 702 Testimony by experts provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable

principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

ii. Daubert Standard

Prior to the Federal Rules of Evidence in 1975, the Fry decision governed the standard for admitting scientific evidence in trials held in federal court until Daubert, *supra*. In Fry v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), the D.C. Circuit held that evidence could not be admitted in court only if “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” Fry made “general acceptance” the exclusive test for admitting expert testimony.

In Daubert, the United States Supreme Court held that the Federal Rules of Evidence, not Fry’s “general acceptance” test, provides the standard for admitting expert scientific testimony in a federal trial. Daubert v. Merrell Dow Pharmaceutical, 509 U.S. 579 (1993). Pursuant to Daubert and Rule 702, the trial judge plays a gatekeeper role in determining whether the expert’s testimony rests on a reliable foundation and is relevant to the case at hand. Id. at 589-592. The Court outlined a non-exhaustive list of factors that make scientific evidence sufficiently reliable for admission including: whether the theory or technique in question can be (and has been) tested; whether the theory or technique has been subjected to peer review and publication; known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. Id. at 593-94. The court noted that scientific knowledge must assist the trier of fact in understanding the evidence or determining a fact in issue in the case. Id. Whether or not scientific knowledge would indeed assist the trier of fact is determined by the trial judge. Id. 592-595.

The Daubert standard was expanded to non-scientific expert testimony scenario in Kumho Tire Co. v Carmichael, 526 US 137 (1999), in which the evidence in question was from a

technician. See Kumho Tire, 526 US at 142 (“We conclude that Daubert’s general holding—setting forth the trial judge’s general [quote]‘gatekeeping’ obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.”).

In the valuation scenario, the bankruptcy court acts as a gatekeeper to decide whether the expert’s testimony is sufficiently reliable for admission. The bankruptcy court is not bound to accept the valuations provided by the expert witnesses, rather, it forms its own opinion about the value of vehicles after considering the appraisals and expert testimony. See, e.g., In re Abruzzo, 249 B.R. 78, 86 (Bankr. E.D.Pa 2000).

An expert must have specialized knowledge in vehicle valuation. An expert’s specialized knowledge is based upon his/her education and experience in the particular occupation. Therefore, the preliminary evidence such as a resume or curriculum vitae showing the expert’s qualifications must be introduced into evidence to lay a foundation for the expert to testify.

Further, the expert’s testimony should assist the court in understanding the evidence and determining the values or other issues. Mere opinion without underlying supporting facts may not assist the judge in deciding valuation and therefore may be excluded from admission.

In addition to expert testimony, an appraisal report is often submitted by the expert to summarize the expert’s findings. The appraisal details the methods the expert witness use for valuation. The expert witness and the appraisal may be challenged through cross-examined by the adversary party premised on the analysis or information included in the appraisal.

An expert may testify in the form of an opinion or inference upon the ultimate issue pursuant to Rule 704. Therefore, the expert witness may provide his/her opinion on the car valuation, even if it is an ultimate issue to be decided by the court.

iii. Cross Examination

Cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. FRE 611(b).

The expert may be examined on the following:

1. Challenge qualifications of an expert witness.
2. Attack expert witness' credibility in terms of bias, interest or prejudice. For example, whether or not the expert spends most of his/her professional time testifying significantly for one side. Whether or not the expert has a history of testifying for the creditor's law firm. Inquire about the compensation for expert testimony.
3. Use favorable facts. The party opposing the expert may use the facts favorable to attack the expert's opinion. For example, the vehicle's engine is subject to repair or otherwise damaged; the expert witness was not aware or did not consider this fact or other relevant facts in the valuation.
4. Attack the assumptions. The expert may render an opinion without first testifying to the underlying facts or data. The expert may be required to disclose the underlying facts or data on cross-examination. FRE 705. Cross-examination reveals that the expert's testimony was based on incorrect assumptions, the court will determine the weight to be given to the testimony.

Debtor

i. Opinion by Lay Witnesses – FRE 701

Lay witness may testify in the form of opinions pursuant to Rule 701, which provides as follows:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness'

testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702 lays out three requirements for admission of opinions by lay witnesses. First, the witness must have personal knowledge of the matter to form an opinion or inference under Rule 602. Second, the opinion testimony of a lay witness must be helpful to a clear understanding of a fact in issue. Last, the opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person. See, Doddy v. Oxy USA, Inc., 101 F.3d 448 (5th Cir. 1996).

An owner is competent to give an opinion on the value of property without stating a reason. Barry Russell, Bankruptcy Evidence manual, p1006, 2004 Ed. (citing South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Tex., 614 F.2d 1056, 1061 (5th Cir. 1980); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690, 698 (5th Cir. 1975), cert. denied 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed. 2d 349 (1976); First Nat. Bank of Montevideo, Minn. v. Johnson, 19 B.R. 651, 654 (D.C.Minn. 1982), reversed on other grounds 719 F.2d 270 (8th Cir. 1983), cert. denied 465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984)). Courts apparently presume that the owner has sufficient knowledge to either testify as a layman under Rule 701 or as an expert under Rule 702. Id.

Therefore, a debtor may opine on valuation of his/her vehicles.

ii. Cross Examination

A Cross examination should focus on the following:

1. Question the lay person's assertions regarding the vehicle's conditions, mileages, and other relevant matters.

2. Attack the reliability of the sources used by the lay person to value the vehicle. If the witness used some publications in his/her direct examination, cross-examine to find out the sources and how he/she came up with the value.

3. Attack the sources as hearsay. If the witness obtained the valuation from a third party that is not available to be cross-examined, an objection to the evidence as hearsay is appropriate.