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Evidence and Trial Skills in Consumer Bankruptcy Cases

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EVIDENTIARY ISSUES IN CONSUMER BANKRUPTCY CASES

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I. VALUATION OF COLLATERAL

As consumer bankruptcy practitioners, we are fortunate that we can resolve most matters by agreement or stipulation. From time to time, try as we might, parties just cannot agree and a contested, evidentiary hearing is necessary. The purpose of these materials is to review some of the Bankruptcy Rules (BR) and Federal Rules of Evidence (FRE) important to such hearings. For purposes of these materials we are assuming the hearing involves a dispute over the value of a motor vehicle being reorganized in a Chapter 13 plan. Much of what is covered here could be applicable to similar valuation hearings in Chapter 11 and 12 matters, too.

Also, note the second edition of a wonderful publication in the ABI bookstore entitled **ABI's Quick Evidence Handbook** is available for purchase and covers many of the topics reviewed here.

Also, references in these materials are to the National Form Chapter 13 Plan (Official Form 113) as it exists in June of 2018. This is done so there can be some common references. Those observations translate easily to most if not all Local Chapter 13 Plans.

How Can the Dispute Arise?

One of the reasons this scenario was chosen is due to recent changes in the Bankruptcy Rules, specifically BR 3012. BR 3012(a)(1) states "[o]n request by a party in interest and after notice--to the holder of the claim and any other entity the court designates--and a hearing, the court may determine: (1) the amount of a secured claim under § 506(a) of the Code…" The term "after notice and a hearing" is defined under the Rules of Construction found at 11 U.S.C. § 102(1)(B):

> (1) "after notice and a hearing", or a similar phrase--
>
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; **but**
>
> (B) **authorizes an act without an actual hearing if such notice is given properly** and if--
>
> (i) such a hearing is not requested timely by a party in interest; or
>
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

This is an important distinction given the changes to BR 3012. Specifically, that Rule as amended states that a request to determine the amount of an allowed secured claim (except claims of a Governmental Unit) may be made by:

- Motion
- In a claim objection, or
- In a plan filed under Chapter 12 and 13.

This is why the "warning box" in Part 1.1 of the National Plan (and Local Plans if BR 3015.1 is observed properly) is so important to creditors. If the second box in Part 3.2 is checked, it is a request by the debtor for the court to determine the value of the collateral as listed in the section entitled "Amount of secured claim". The ***amount*** of the claim is governed by the proof of claim filed by the creditor, but not the ***value*** of the collateral, i.e., the amount of the allowed secured claim. The same can be done in a Chapter 12 plan. This also is why BR 3012(b) was amended to require service of a plan (motion or claim objection) that proposes to set value, via BR 7004.

If perfection becomes an issue at a later time, a debtor may attack the value issue via a claim objection. If that is done after confirmation, I would imagine a creditor would argue res judicata or law of the case relying on the preclusive effect of the confirmation of a plan under 11 U.S.C. § 1327.

What Federal Rules of Evidence Come Into Play?

At a valuation hearing, many Federal Rules of Evidence come into play. The FREs regarding the qualification of an expert were substantially amended in 2000 in response to the U.S. Supreme Court case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999). As noted in the Advisory Committee Notes following FRE 702: "In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science."

Also as noted in this Advisory Committee Note, there were five (5), non-exclusive factors listed in *Daubert*. Those factors are not codified in the affected FRE. Those factors are not applicable to all situations involving an expert, including the scenario presented in connection with these materials. For purposes of completeness, those factors are:

(1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
(2) whether the technique or theory has been subject to peer review and publication;
(3) the known or potential rate of error of the technique or theory when applied;
(4) the existence and maintenance of standards and controls; and
(5) whether the technique or theory has been generally accepted in the scientific community.

With this background, the applicable FREs are as follows:

FRE 104(a) – Preliminary Questions

This is the rule that dictates the Court's duty to qualify any witness, including an expert. It states: "(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."

This is predicate for the Court deciding whether an expert is qualified to give an opinion. The following rules pertain to the qualifications of an expert witness.

FRE 702 – Testimony of an Expert Witness

The Rule states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

First and foremost, the expert must be able to help the trier of fact, the Bankruptcy Judge, determine the issue of fact; here, the value of the vehicle.

Secondly, the expert opinion must be based on some independent facts or data, not mere speculation or unsubstantiated opinion. A mere affidavit without some background or foundation regarding the opinion formed would be suspect and may not qualify the expert to present the opinion.

In the scenario presented, the appraiser actually inspected the vehicle. They found and presented comparable sales to form their opinion. They also used a book value and averaged that in to the market survey price to arrive at their opinion. This embodies the third and fourth factors set out in FRE 702. Note this rule goes to qualifying the witness. The next rule concerns the actual opinion.

FRE 703 – Bases of an Expert's Opinion Testimony

The Rule states:

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

The key elements to be gleaned from this FRE are:

- The opinion must be based on facts given to the expert or facts personally observed. If the expert were forming an opinion based upon corporate accounting data, then that would be information the expert "has been made aware of". In our scenario, it is important to note that the appraiser actually viewed the vehicle.

- The opinion is based upon facts or data others in the field would use. Here, the expert used NADA calculations and got comparable sales from widely recognized sources.

- Note this data may not be admissible. NADA should be admissible as a learned periodical or pamphlet under FRE 803(18). The prices obtained from Cars.com and Cargurus.com may not. The point to be emphasized is the data used to form the opinion need not be independently admissible. In that case…

- The proponent of the expert must show that the probative value of that data is of assistance to the trier of fact and outweighs any prejudicial effect. Here, the comparative values do assist in coming to an opinion on value.

FRE 704 – Opinion on an Ultimate Issue

Older cases held that an expert could not opine on the ultimate issue in a case, here, the value of the vehicle. FRE 704 makes it clear that opinion testimony, both lay and expert, is admissible when helpful to the trier of fact in making a decision. See, 1972 Advisory Commission Notes to FRE 704.

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

Simply stated: "Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination." In this case, after being qualified, the appraiser could simply state his or her conclusion as to the value of the vehicle. The proponent of the expert could choose to elaborate (to further bolster the credibility of the expert and the opinion) or simply leave it to the opponent to examine on cross examination.

FRE 701 – Opinion Testimony by Lay Witnesses

Consumers are allowed to take the stand and express an opinion. However, there are some limits:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;

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

Said differently, there has to be some rational basis for the opinion expressed by the lay person. The opinion could be based on having traded cars in the past, Bargain Mart prices, what a "fella offered him" to buy the car, etc. This could affect the weight of the evidence but not its admissibility.

Also, the rule does not distinguish between lay and expert witnesses, only lay and expert opinions. As noted in the Advisory Committee Notes from 2000, "The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case." [citation omitted].

Conclusion

In the end, the Court does not have to accept any opinion – the judge may draw his or her own, based on the testimony presented. With that said, what is the value to be established, and when?

The Standard to be Used to Establish the Value

11 U.S.C. Sec 506(a)(2) - Standard as to the value to be used

> (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.

For our purposes, we are agreeing that the vehicle was acquired for personal, family or household purposes. However that issue is not always so clear and neither is the time that fact must be determined. Even then, courts can disagree on the definition of "retail value". Some courts have decided what it *is* and others what it *is not*. A search using retail value AND automobile AND 11 U.S.C. Sec. 506(a)(2)/after 10-17-2005 [date

BAPCA became effective] turned up the following 17 cases. They are presented in reverse chronological order.

- In re Solis, 576 B.R. 828 (Bankr. W.D. TX 2016) - NADA Clean Retail value typically overstates the replacement value, but Edmunds price report adopted by the Debtor might understate the replacement value. The Court finds that the replacement value of the Debtor's SUV is somewhere between the NADA price and the Edmunds price. Interestingly, the Court noted in its conclusion: "The Court recognizes that the expense of expert testimony will rarely (if ever) be justified to establish the value of a debtor's personal vehicle under section 506(a)." Id. at 834.

- In re Nance, 477 B.R. 638 (Bankr. E.D. La. 2012) – Its survey of the law found four trends at setting retail value:

    - A presumptive retail value for the vehicle by deducting a certain percentage from the NADA Clean Retail value
    - A presumptive value of the vehicle at the full NADA Clean Retail value.
    - Use of NADA (or Kelley Blue Book (KBB)) values as starting points but hold that the facts of each case determine which value (Clean Retail, Private–Party, etc.) should be used.
    - Average the NADA Clean Retail and Clean Trade–In value

  Id. at 641. This court chose the last approach.

- In re Henry, 457 B.R. 402 (Bankr. E.D. Pa, 2011) – In this case, the court found that the vehicle was purchased by the debtor to be used in his construction business. The court used the first sentence of 11 U.S.C. §506(a)(2) which it found was a codification of the Supreme Court case of Associates Commercial Corp. v. Rash, 520 U.S. 953, 965, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). The Court also noted that these valuation issues often are presented without the benefit of any expert testimony, utilizing only commercial reports such as the NADA Guide or the KBB as a starting point in the valuation process. However, both parties presented experts in this case. The Court held: "generally, replacement value under Rash (and, following BAPCPA, under the first sentence of § 506(a)(2)) is something less than the retail value." Id. at 410.

- In re Scott, 437 B.R. 168 (Bankr. D. NJ 2010) – Agreeing that the first sentence of 11 U.S.C. §506(a)(2) is a codification of *Rash*, the court went on to note: "However, with respect to the second sentence of § 506(a)(2), the Bankruptcy

courts have not established a uniform method for calculating the retail value of a vehicle or any other personal property. … As a result, the task of calculating replacement value under the second sentence of § 506(a)(2) remains subject to a trial court's discretion, predicated on the unique condition of the redeemed property." Id. at p. 173, citations omitted. Siding with the court's conclusions in In Re Morales, 387 B.R. 36, 37 (Bankr.C.D.Ca.2008), this Court held that: "absent unusual circumstances, the retail value for vehicles under § 506(a)(2) should be calculated by adjusting either the KBB retail value or the NADA Guide retail value by a reasonable amount in light of evidence presented regarding condition, the retail market, and other relevant factors" Id. at 173.

- In re Zambuto, 437 B.R. 17 (Bankr. D. NJ 2010) – also adopted the methodology used in In Re Morales, 387 B.R. 36, 37 (Bankr.C.D.Ca.2008).

- In re Gonch, 435 B.R. 85 (Bankr. N.D. NY 2010) – This court emphasized the fact that it was not relegated to a single method of determining value. In this case, the vehicle in question had been involved in an accident. The Court noted that the definition of "Retail Value" in the NADA guide was as follows: "No mechanical defects and passes all necessary inspections with ease; Paint, body and wheels have minor surface scratching with a high gloss finish and shine; Interior reflects minimal soiling and wear, with all equipment in complete working order; Vehicle has a clean title history; Vehicle will need minimal reconditioning to be made ready for resale." Id at 864. The expert called by the creditor did not take any of this into consideration in making his report and did not physically inspect the vehicle. Accordingly, the Court used the KBB private party value.

- In re Reece, 428 B.R. 508 (Bankr. E.D. Mo. 2010) – This Court had adopted a Local Rule setting out retail value: L.R. 3015–2(G) (2009): The Court's Vehicle Valuation Policy (hereinafter "Policy") requires that absent evidence to the contrary, the value of a vehicle be equal to 97% of the NADA (Central Edition) retail value. Debtor proposed to rebut this presumption by introducing an appraisal using a liquidation value analysis. The Court rejected the value, but used the appraisal in applying the local rule. The Court went on to note that had it been presented with evidence of costs of repair, it would have been prepared to make appropriate adjustments.

- In re Martinez, 409 B.R. 35 (Bankr. S.D. NY 2009) – Court used value introduced by the debtor - the KBB Private Party Value which the creditor did not oppose. Additionally, creditor did not attach anything to its proof of claim to evidence the value it set forth therein.

- In re Berry, 2008 WL 2064777 (Bankr. E.D. La. 2008) – The Court employed a Local Rule regarding valuation: "(b) Rebuttable Presumption of Valuation of Motor Vehicles. As a starting point, the valuation of motor vehicle collateral shall be presumed to be the midpoint between the National Automobile Dealers Association ("NADA") wholesale value and the NADA retail value unless: (1) the parties agree to a different value; (2) the debtor or secured creditor presents an appraisal undisputed by the other party; or (3) the value is fixed by the Court as a result of an evidentiary hearing held specifically to determine the value of the particular vehicle." Creditor objected stating that the Local Rule was at odds with amended 11 U.S.C. 506(a)(2). In response, the Court relied heavily on In re De Anda–Ramirez, 359 B.R. 794 (10th Cir BAP, 2007). The *Anda-Ramirez* court reviewed the definition of Retail Value in the Kelly Blue Book and noted that 5% or less of the vehicles qualifies for that distinction. While the Court noted that this did not mean that the Retail Value could never be the appropriate value, it concentrated on "the salient language in § 506(a)(2) as the qualifier "considering the age and condition of the property." If the vehicle in question were in excellent condition then the KBB or NADA retail value might well be the appropriate measure for valuation." Id at *3. In the end, the Court held that: "it appears that a consensus is developing that it is the condition of the car that determines whether what KBB and NADA designate as "retail value" or "private party value" or some other value be used and that the critical starting point is "the age and condition" of the vehicle." Id at *4. [underline added].

- In re Morales, 387 B.R. 36 (Bankr. C.D. California, 2008) – this is one of the most often-cited cases on this subject. First, the case notes the differences in the time periods to be used to establish value between the first and second sentences of 11 U.S.C. §506(a)(2). The first sentence establishes value as of the date of the petition. However, the second paragraph uses the language "at the time value is determined". This would intimate that valuation is determined as of the hearing date. This makes sense as it would be difficult to determine the value of the vehicle at some date in the past. However, this court found the valuation should be at the petition date. This would mean the NADA or KBB pages used to value the unit should be for the month of the petition. Other courts could hold differently.

  In the end, the Court held that Retail Value of vehicles valued under the second sentence of 11 U.S.C. § 506(a)(2) should be calculated by adjusting the KBB or NADA Guide Retail Value by a reasonable amount based on evidence presented regarding the vehicle's condition and other relevant factors. The Court went on to provide some valuable insights on information a debtor should provide so the

Court may properly value the vehicle. The following is applicable to any party seeking valuation of a vehicle: "(1) a description of the vehicle, including any options installed and special features; (2) a description of the condition of the vehicle as of the petition date, including any damage, general deterioration, and past or necessary repairs; (3) the vehicle's mileage as of the petition date; and (4) the age of the vehicle as of the petition date. A debtor may also wish to submit photographs of the vehicle and evidence as to the retail values of other like vehicles for sale by retail merchants in the debtor's geographic area." Id at 46.

- In re Coleman, 373 B.R. 907 (Bankr. W.D. Mo., 2007) – The Court used the following formula: "Hence, to summarize, with regard to vehicles, valuation is determined by starting with the NADA "Retail Value," less the amount it would cost to put the vehicle into "clean" condition as defined by NADA, less 5%. If this formula is not appropriate under the circumstances of a particular case, the parties are free to submit further evidence of actual value." Id at 913.

- In re Cheatham - 2007 WL 2428046 (Bankr. W.D. Mo. 2007) – uses the formula reiterated in In re Coleman [the prior entry]

- In re De Anda-Ramirez, 359 B.R. 794 (B.A.P 10th Cir., 2007) – this is another often cited case, much of which has been reviewed above. The court noted the definition of Retail Value in the Kelly Blue Book was atypical of a vehicle involved in a Chapter 13 bankruptcy. The creditor did not provide any evidence while the debtor did note the mileage on the automobile was about twice what was normal for a vehicle of its age. In the end it used the KBB Private Party value, but again, that was due to the paucity of evidence before the court.

- In re Finnegan, 358 B.R. 644 (Bankr. M.D. Pa., 2006) – This case is interesting because the court determined that the claim in question could be bifurcated since it was not purchased for personal use of the debtor. It therefore established value pursuant to the first sentence in 11 U.S.C. § 506(a)(2) following the precedent of Associates Commercial Corp. v. Rash, 520 U.S. 953, 965, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997).

- In re Eddins, 355 B.R. 849 (Bankr. W.D. Ok, 2006) – The Court established a rule that the "NADA retail value is established as a guide for debtors, creditors and their counsel, as a starting point for valuation of vehicles under § 506(a)(2). Upon the objection of a party in interest, the court will conduct a valuation hearing during which other admissible evidence in support of a higher or lower value will be received." Id at 852.

- In re McIlroy, 339 B.R. 185 (Bankr. C.D. Ill., 2006) – This was a pre-BAPCPA case, but is cited here for the discussion about the appraiser. The creditor put on an appraiser with 44 years experience. However the court found him "minimally qualified." The appraiser "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." Id at 187. The Court made specific reference to FRE 702 set out above. Lesson to be learned: make sure you have the right appraiser.

Conclusion: There are any number of valuation methods used by the courts. The overwhelming take away is that NADA retail, without adjustments for condition, mileage, add-ons, etc., does NOT equate to retail value under 11 U.S.C. §506(a)(2). The appraisal in the scenario accompanying this outline used NADA as a basis, but made the adjustments and compared that value to comparable sales. It then averaged the adjusted NADA with those comparable sales to obtain a value. That appraisal did NOT take into consideration any mechanical repairs, calling its conclusion into question. The bottom line is that it is the responsibilities of the parties to present evidence to the court so the judge may make an information-based decision.

Who Has the Burden of Proof?

With the advent of the National Plan and Local Plans, this question bears scrutiny. Part 3.2 of the National Plan states the Amount of Secured Claim is the debtor's proclamation of the value of the vehicle. Bankruptcy Rule 3012 makes it clear that on the request of a party in interest, and upon notice and a hearing (see discussion above) the amount of a secured claim under 11 U.S.C. §506(a) may be established. That request for a determination may be done by motion, claim objection or in a Chapter 13 plan. Does the burden then shift to the creditor to object or be bound by the plan? It appears so.

Other Local Plans require a Motion to Value claims be filed. Example, Form Plan for the Southern District of West Virginia, Part 3.5 Secured Claims that are Subject to a Separate Motion or Adversary Proceeding Based on Valuation:

> This Plan does not value claims. To value a claim pursuant to 11 U.S.C. 506, the Debtor must file and serve a separate motion pursuant to Fed. R. Bankr. P. 3012, 7004, 9014(b), or, as applicable, file an adversary proceeding under Fed. R. Bankr. P. 7001, or submit an agreed order to the Court resolving value.

Bankruptcy Rule 3012 provides a lot of latitude in this area. A practitioner needs to be familiar with the local plans, rule and practices. Be prepared to present your evidence in a manner to best assist the Court.

II. SERIAL FILERS AND THE AUTOMATIC STAY

The 2005 amendments to the Bankruptcy Code addressed the issue of serial filers of Chapter 7, 11 or 13 petitions by modifying the automatic stay which is normally imposed under § 362(a) upon the filing of a bankruptcy petition.

§ 362(c)(3) deals with a situation where a debtor has had one bankruptcy case dismissed in the year prior to a second petition being filed. § 362(c)(4) concerns a situation where a debtor has had two or more bankruptcy cases dismissed in the year preceding the filing of yet another petition. Not surprisingly, the 2005 amendments penalized debtors who have had two or more bankruptcy cases dismissed in the prior year more severely than debtors who have had only one case dismissed in the preceding year.

Both situations can give rise to a contested hearing in which evidentiary issues must be considered. This section will first examine the substantive law of § 362(c)(3) and § 362(c)(4) and then discuss certain evidentiary matters which a bankruptcy practitioner might encounter in a hearing under either of these Bankruptcy Code sections.

§ 362(c)(3) – The Substantive Law

If a debtor who has filed a Chapter 7, 11 or 13 petition had one bankruptcy case dismissed in the year before the second petition was filed, then under § 362(c)(3)(A) the automatic stay will terminate with respect to the debtor on the thirtieth (30th) day after the filing of the second petition.[1] However, if the debtor (or any other party in interest) files a motion under § 362(c)(3)(B) requesting an extension of the automatic stay as to any or all creditors, the bankruptcy court may extend the stay if the movant can demonstrate that the filing of the second bankruptcy case was in good faith as to the creditors to be stayed. The hearing upon any such motion must be completed before the expiration of the thirty day period.

If a motion for extension of the stay is filed, under certain circumstances the second bankruptcy case is presumed by § 362(c)(3)(C) to not have been filed in good faith as to all creditors. According to § 362(c)(3)(C)(i), the circumstances giving rise to the bad faith presumption are as follows:

1. The debtor had more than one bankruptcy case under Chapter 7, 11 or 13 pending within the preceding one year period.

2. The debtor's previous case was dismissed in the prior year because of one of the following reasons:

[1] There is an exception to § 362(c)(3)(A) for cases dismissed under § 707(b) because the debtor had the financial ability to repay a part of his or her debts. Also, § 362(c)(3)(A) has no effect on the chapter 13 co-debtor stay imposed by § 1301. *In re Lemma*, 393 B.R. 299, 303-305 (Bankr. E.D. N.Y. 2008).

a. The debtor failed to amend the petition or documents as required by the Bankruptcy Code or by the bankruptcy court without substantial excuse.

b. The debtor failed to provide adequate protection as ordered by the bankruptcy court.

c. The debtor failed to perform the terms of a confirmed plan.

3. There has been no substantial change in the debtor's financial or personal affairs since the dismissal of the previous case.

4. There is some reason to conclude that the newly filed case will not result in a discharge (if the case is filed under Chapter 7) or will not end with a confirmed plan which will be fully performed (if Chapter 11 or Chapter 13).

If the presumption of a lack of good faith arises because one of the above-referenced circumstances is in existence, § 362(c)(3)(C) provides that the movant seeking an extension of the automatic stay may rebut the presumption by clear and convincing evidence to the contrary.

Also, there is a presumption under § 362(c)(3)(ii) that the second case was not filed in good faith as to a particular creditor if the creditor had filed a motion for termination or modification of the automatic stay in the previous case and the motion was either pending at the time of dismissal of the previous case or had been granted. This presumption only applies if the debtor is an individual. This presumption may also be rebutted by the movant by clear and convincing evidence to the contrary.

An interesting question is whether a creditor who is successful in defeating a stay extension motion actually gains anything. According to § 362(c)(3)(A), the automatic stay will terminate "with respect to the debtor" if not extended by court order. Courts are split on the issue of what these words actually mean. The majority view appears to be that termination of the automatic stay under § 362(c)(3)(A) only terminates the stay with respect to the debtor or property of the debtor and does not terminate the stay regarding "property of the estate," while the minority view is that the stay is terminated in its entirety. *In re Holcomb*, 380 B.R. 813, 815 and 816, (B.A.P. Tenth Cir. 2008). Since almost all property belonging to a debtor becomes property of the estate under § 541(a) upon the filing of a bankruptcy petition, if the bankruptcy court which hears a § 362(c)(3)(B) motion ascribes to the majority view, a creditor who is able to defeat a stay extension motion might be somewhat akin to the dog who caught the car. For example, a creditor might take the time and incur the expense of opposing a stay extension motion in a Chapter 13 case with the idea that the creditor will be able to garnish the debtor's wages if the motion is overruled. However, under § 1306(a)(2), property of the estate includes earnings from services performed by the debtor after commencement of the case but before the case is closed, dismissed or converted. If the stay is not terminated as to property of the estate, the creditor may have gotten what it wanted but have little to show for its victory.

§ 362(c)(4) – The Substantive Law

If a debtor who has filed a petition under any chapter of the Bankruptcy Code had two or more bankruptcy cases dismissed in the year before the new petition was filed, then under § 362(c)(4)(A)(i) the automatic stay will not go into effect upon the filing of the new case.[2] Furthermore, upon the request of a party in interest, the bankruptcy court must enter a "comfort order" pursuant to § 362(c)(4)(A)(ii) confirming that no stay is in effect under these circumstances.

However, if the debtor (or any other party in interest) files a motion under § 362(c)(4)(B) requesting the bankruptcy court to order the automatic stay to take effect as to any or all creditors, the bankruptcy court may sustain the motion if the movant can demonstrate that the filing of the new bankruptcy case is in good faith as to the creditors to be stayed. Unlike a motion filed under § 362(c)(3)(B) for which the hearing must be completed before the expiration of the thirty day period, a motion filed under § 362(c)(4)(B) need only be "filed" within thirty (30) days of the date the new petition was filed.

Despite some unfortunately awkward language in § 362(c)(4), it appears that there is ***always*** a presumption that the new case was not filed in good faith as to all creditors if two or more cases had been dismissed in the prior year. This conclusion is reached because § 362(c)(4)(D) contains the same grounds as § 362(c)(3)(C) for the presumption of a lack of good faith, but also contains another completely separate ground that "two or more previous cases under this title in which the individual was a debtor were pending within the 1-year period."

Reading this separate ground in conjunction with the language of § 362(c)(4)(A)(i) concerning two or more cases being dismissed in the prior year, the only logical interpretation of § 362(c)(4) is that the presumption always applies where two or more cases were dismissed in the prior year; the other bad faith grounds recited in § 362(c)(4)(D) (i.e., failure to amend, failure to provide adequate protection, failure to perform a confirmed plan, no substantial change in the debtor's affairs, or some other reason to conclude that the new case will not result in a discharge or a confirmed plan) are superfluous.

Just as under § 362(c)(3)(C), a movant who seeks an order under § 362(c)(4)(B) for the stay to take effect may rebut the bad faith presumption by clear and convincing evidence to the contrary.

Also, under § 362(c)(4)(D)(ii) there is a presumption that the new case was not filed in good faith as to a particular creditor if the creditor had filed a motion for termination or modification of the automatic stay in a previous case and the motion was either pending at the time of dismissal of the case or had been granted. This presumption only applies if the debtor is an individual, and the presumption may be rebutted by the movant by clear and convincing evidence to the contrary.

[2] The same exception to § 362(c)(3)(A) for cases dismissed under § 707(b) applies to § 362(c)(4)(A)(i). Also, § 362(c)(4)(A)(i) has no effect on the chapter 13 co-debtor stay imposed by § 1301. *In re King*, 362 B.R. 226, 233 and 234 (Bankr. D. Md. 2007).

Evidentiary Considerations

Bankruptcy Rule 4001 provides that a motion for relief from the automatic stay is to be made in accordance with Bankruptcy Rule 9014. Even though a motion for stay extension filed under § 362(c)(3)(B) or a motion to order the stay to take effect filed under § 362(c)(4)(B) does not fall precisely within the scope of Bankruptcy Rule 4001, it seems obvious that such motions are contested matters (at least if opposed) and therefore Bankruptcy Rule 9014 will apply to those motions as well. According to Bankruptcy Rule 9014, various rules (i.e., Bankruptcy Rules 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069 and 7071) concerning adversary proceedings are applicable to contested matters. Bankruptcy Rule 9014 also provides that the testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

For motions to extend the stay or to order the stay to take effect, the burden of proof can be a decisive factor. Even if there is no presumption of bad faith, the party bringing a stay extension motion will still have the burden of proving good faith, though perhaps by the lesser standard of preponderance of the evidence. Good faith is not defined in § 362(c)(3) or in § 362(c)(4), but the Sixth Circuit Court of Appeals has suggested a twelve part test to determine whether a Chapter 13 plan has been proposed in good faith. *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126-27 (6th Cir. 1990); *Metro Employees Credit Union v. Okoreeh-Baah*, 836 F.2d 1030, 1032 n. 3 (6th Cir. 1988). According to *In re Dowden*, 429 B.R. 894, 899 (Bankr. S.D. Ohio), courts have adopted this twelve part test for assessing good faith under § 362(c)(3). The twelve part test is as follows:

1) The amount of the proposed payments and the amount of the debtor's surplus;

2) The debtor's employment history, ability to earn and likelihood of future increase in income;

3) The probably or expected duration of the plan;

4) The accuracy of the plan's statement of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;

5) The extent of preferential treatment between classes and creditors;

6) The extent to which secured claims are modified;

7) The type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;

8) The existence of special circumstances such as inordinate medical expenses;

9) The frequency with which the debtor has sought bankruptcy relief;

10) The motivation and sincerity of the debtor in seeking bankruptcy relief;

11) The burden which the plan's administration would place upon the trustee; and,

12) Whether the debtor is attempting to abuse the spirit of the Bankruptcy Code.

Also according to *In re Dowden*, the Sixth Circuit Court of Appeals emphasized in both *Caldwell* and *Okoreeh-Baah* that a bankruptcy court must look to the totality of the circumstances in determining a debtor's good faith in filing a Chapter 13 petition and plan. *Dowden* also observed that *Okoreeh-Baah* said good faith is an amorphous notion, largely defined by factual inquiry.

Where the presumption of lack of good faith has been put into play concerning a motion to extend the stay or to order the stay to take effect, the party opposing the motion has the burden of proof on the issue of whether the presumption arises. *In re Ferguson*, 376 B.R. 109, 118 (Bankr. E.D. Ca. 2007). If the party opposing the motion meets its burden to show the existence of the presumption, the movant can only rebut the presumption by the strict standard of clear and convincing evidence to the contrary. In determining whether the presumption has been rebutted, *Ferguson* noted that courts must consider the totality of the circumstances.

If the bankruptcy court which hears a motion for extension of the stay or a motion to order the stay to take effect issues an evidentiary hearing order prescribing how the hearing on the motion is to be conducted, strict compliance with such an order cannot be overemphasized. Such orders typically set deadlines for the completion of discovery and the filing of witness and exhibit lists (and may require the parties to provide a summary of anticipated witness testimony and to produce exhibits to opposing counsel prior to the hearing). Evidentiary hearing orders may also require the parties to confer and prepare joint stipulations of fact, which can greatly reduce the time required for the hearing. The parties may additionally be required to submit trial briefs setting forth the issues in question, a summary of what the evidence will tend to prove and legal authorities in support of the parties' positions. Evidentiary hearing orders may also direct how objections to expert witness testimony or the admissibility of exhibits are to be made.

Conclusion

The keys to successfully navigating a hearing upon a § 362(c)(3) motion for stay extension or a § 362(c)(4) motion to order the stay in effect are to know the substantive law, establish the burden of proof, present evidence to demonstrate good faith or lack thereof, and comply strictly with any evidentiary hearing order issued by the bankruptcy court.

In addition, for § 362(c)(3) motions, creditors should determine whether the bankruptcy court hearing the motion is in the majority or the minority concerning whether the denial of the motion will result in the termination of the automatic stay with respect to property of the estate. If the court follows the majority view, the creditor may want to assess whether there will be any real benefit in opposing the motion.