REPRESENTING CREDITORS IN CONSUMER BANKRUPTCY CASES

Stephen G. Wilcox
Wilcox Law, PLLC
P.O. Box 201849
Arlington, TX 76006
Phone 817-870-1694
swilcox@wilcoxlaw.net

In keeping with the paper's author's experience as the "repo man", representing mostly auto finance companies for a significant portion of his long career (exemplified by the grey in his beard and lack of hair on the top of his head), this paper focuses mainly on vehicle issues. It is hoped, however, that other creditors can gleam whatever pearls of wisdom might have accidently snuck into this paper in representing other secured creditors.

CHAPTER 7

With regard to the debtor's personal property in a Chapter 7, the debtor has four options:

1. Redemption - pay the secured creditor its allowed secured claim (in other words, the amount of the contractual claim or the value of the collateral, whichever is less) in one lump-sum payment.

2. Reaffirmation - agree to forgo the discharge with regard to the creditor's claim and continue to pay for the collateral pursuant to the terms of the original note (or such other terms as might be negotiated as part of the reaffirmation agreement).

3. Surrender - turn the collateral back over to the secured creditor in the knowledge that any deficiency will be discharged in the bankruptcy.

4. Depend on the kindness of strangers[1] (the infamous "fourth option") - although the Bankruptcy Code since BAPCPA[2] only allows for options one through three, many debtors do not do any of the three and instead simply keep the collateral and keep paying for it in the hopes the creditor wants the money more than the property.

CHAPTER 13

As noted by the Supreme Court in *Till v. SCS Credit Corp*., 541 U.S. 465 (2004), the debtor has three options for a vehicle in a Chapter 13:

1. Obtaining the creditor's acceptance of the plan;

2. Surrendering the property securing the claim;

3. Providing the creditor both a lien securing the claim and a promise of future property distributions (such as deferred cash payments) whose total "value, as of the effective date of the plan, . . . is not less than the allowed amount of such claim."

Id. at 468.

In practice, this means that in a Chapter 13, a debtor wishing to keep their personal

---

1 With apologies to Blanche DuBois.

2 The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act.

property can:

1. "Pay direct" - make payments directly to the creditor pursuant to the terms and conditions of the contract;

2. "Cure and maintain" - pay any pre-petition arrears "through the plan" (by the trustee out of the payments required by 11 U.S.C. §1326(a)(1)(C)) and resume post-petition payments under the terms and conditions of the contract. Note that this option is generally not available on non-mortgage debt in the Southern District; or

3. "Cram down" - include the total debt "in the plan" and pay either the total claim if required by the "hanging paragraph" following 11 U.S.C. §1325(a)(9) or the value of the vehicle if the vehicle can be valued pursuant to 11 U.S.C. §506(a).

CHAPTER 7

THE STATEMENT OF INTENTION

Pursuant to 11 U.S.C. §521(a)(2)(A), the debtor must file a Statement of Intention within 30 days of the filing of a petition under Chapter 7 or on or before the date of the meeting of creditors, whichever is earlier.[3] The Statement of Intention must indicate which of three options the debtor shall perform with regard to debts secured by personal property of the estate: surrender, redemption, or reaffirmation.[4]

If the debtor fails to file a Statement of Intention, files an improper Statement of Intention, or leaves a particular piece of property off of the Statement of Intention, then the automatic stay will terminate with regard to such collateral per 11 U.S.C. §362(h)(1)(A).

The time period to perform the Statement of Intention

---

[3] In a converted case, the deadline is arguably the date of the meeting of creditors, since there is no "petition filed under chapter 7 of this title, but there will be a new 341 date for the Chapter 7. A fair number of Debtors fail to file a Statement of Intention in a converted case.

[4] As noted above, the former fourth option of 'ride-through' or 'drive and pay' that permitted a debtor to simply retain personal property collateral and make payment with out reaffirming is no longer an option and the stay will lift if the Statement of Intention indicates that the debtor will attempt to retain the collateral without reaffirming. *Daimler Chrysler Fin. Servs. Am., LLC v. Jones (In re Jones),* 591 F.3d 308 (4th Cir. 2010); *Dumont v. Ford Motor Credit Co. (In re Dumont)*, 581 F.3d 1104 (9th Cir. 2009). Indeed, the First Circuit has stated that "Where the debtor decided not to reaffirm, or the parties cannot negotiate a reaffirmation, or redemption is not economically feasible, the debtor has but one option: 'surrender' the collateral." *In re Pratt*, 462 F.3d 14 (1st Cir. 2006).

The Bankruptcy Code contains two time limits stating the number of days that a debtor has to perform his or her Statement of Intention. Section 521(a)(2)(B) states:

> *within 30 days* after *the first date set* for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph...

11 U.S.C. § 521(a)(2)(B) (emphasis added). Section 521(a)(2)(C) states the consequence of the failure to comply within 30 days, which is a termination of the automatic stay under section 362(h).

Section 521(a)(6)(A)&(B) states a different time limit:

> In a case under chapter 7 of this title in which the debtor is an individual, [the debtor shall] not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, *not later than 45 days after the first meeting of creditors under section 341(a)*, either–[reaffirms or redeems]

11 U.S.C. § 521(a)(6) (emphasis added). The consequence of the failure to act under (a)(6) is that:

> [i]f the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law...

Hanging paragraph following 11 U.S.C. § 521(a)(7).

There is split of authority on which deadline controls. Compare, *In re Donald*, 343 B.R. 524, 535 n.5 (Bankr. E.D.N.C. 2006) (stating that if § 521(a)(6) applies, it should control), with *In re Norton*, 347 B.R. 291, 300 n.10 (Bankr. E.D. Tenn. 2006) (stating that § 521(a)(2) "invariably" trumps § 521(a)(6)), with *Ariz. Fed. Credit Union v. DeSalvo (In re DeSalvo),* 2009 Bankr. LEXIS 4232, at * 18, 2009 WL 5322428, (Bankr. S.D. Ga., 2009) ("The filing of a motion to redeem within the 45-day period set forth in 521(a) (6) constitutes an "act" necessitating the continuance of the automatic stay.")

Note, however, that the two sections can be reconciled. Per these two sections, §362(h) and §521(a), the automatic stay terminates by operation of law: (1) thirty days after the filing of the case if the debtor does not file a proper statement of intention; (2) thirty days after first date set for the meeting of if the debtor does not perform on a proper statement of intention by redeeming, reaffirming or surrendering the property; and (3) forty-five days after the first meeting of creditors if the debtor does not redeem or reaffirm. For this latter deadline, not only does the automatic stay terminate, but per 11 U.S.C. §521(a)(6) the debtor shall "not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in the such personal property."

While the differing 30 and 45 day deadlines can be confusing, they can be reconciled in that §521(a)(2) allows the Court to grant the debtor additional time to file the statement of intention or to perform the same so long as the request is made in the 30 day window set forth by the statute. Even if such extension is granted, then per §521(a)(6) the longest such deadline can be extended is to 45 days after the first meeting of creditors per §521(a)(6) and §521(a)(*). Only if a debtor requests an extension of the §521(a)(2) deadline within thirty days of the first date set for the meeting of creditors would the debtor have 45 days to redeem or reaffirm. And, again, the debtor is prohibited from retaining the property if the property is not redeemed or a reaffirmation agreement filed within this 45 day deadline.

REDEMPTION

One of the debtor's two listed options for keeping the collateral is redemption. Pursuant to 11 U.S.C. § 722, the debtor may pay the secured creditor its allowed secured claim, which pursuant to 11 U.S.C. §506 may be less than its total claim,[5] provided the payment is in one lump

[5] "Under 11 U.S.C. § 722 debtors may redeem tangible personal property intended primarily for personal, family or household use by paying the lien holder the amount of its allowed secured claim. This simply means a debtor must pay the lesser of the value of the collateral or the total amount of the secured debt on the collateral in order to redeem the collateral." *In re Breckinridge*, 140 B.R. 642 (Bankr.W.D.Ky 1992).

sum.

> Redemption thus allows the debtor to retain his or her property and avoid the high replacement cost that might be required if the secured creditor repossessed. Collier, supra at ¶ 722.01. At the same time, the secured creditor receives what it bargained for because the secured creditor must be paid what it would have received if it had fully exercised its security rights by repossessing and selling the collateral. See *In re Pierce*, 5 B.R. 346, 347 (Bankr.D.Neb.1980). Under § 722, the debtor may redeem the collateral by paying the creditor the full amount of the indebtedness or the value of the collateral, whichever is less. *In re Edwards*, 901 F.2d 1383, 1385 (7th Cir.1990)

In re Walker, 173 B.R. 512, 516 (Bankr.M.D.N.C. 1994).

Section 722 should be liberally construed in favor of the Debtor:

> The statute clearly indicates that redemption is a right of the Debtor and the fact that it cannot be waived and further that it is broader than the redemption provisions of the Uniform Commercial Code, reflects a clear intention of the Congress to benefit debtors and that a liberal construction in favor of the Debtor should be given this section.

In re Boitnott, 4 B.R. 122, 124 (Bankr.W.D.Vir. 1980). *Bointott* also held that where consumer debt was combined with non-consumer debt, the court should still allow the debtor to redeem the property to which the consumer debt applied. *Id*. However, if the property secured is clearly for a business use, it will not be consumer debt subject to redemption, even if the debt is in the name of the individual debtor. *See*, *Cypher Chiropractic Center v. Runski* (*In re Runski*), 102 F.3d 744 (4th Cir. 1996).

Note that 11 U.S.C. §722 is the exclusive redemption provision under Chapter 7. Debtors cannot use 11 U.S.C. §506 to strip down liens, leaving a small balance to pay after the Chapter 7 discharge. *See*, *In re Lange*, 120 B.R. 132 (9th Cir. BAP 1990). As such, it can only be used for personal property, not real property.

Redemption is also only for exempt property or property which has been abandoned. If the property cannot be exempted and has not been specifically abandoned by the trustee, it cannot be redeemed. *See*, *In re Seguin*, 76 B.R. 175 (Bankr.D.Colo. 1987); *In re Zaicek*, 29 B.R.

31 (Bankr.W.D.Ken. 1983).[6]

The Deadline for Redeeming

No deadline for a Motion to Redeem is provided by either the statute or the rules. Since the deadline for performing under the Statement of Intention is unclear, as noted above, this further complicates determining what the outside deadline is for the debtor to file their Motion to Redeem.

In a pre-BAPCPA case, Judge Sharp from the Eastern District of Texas held that a Motion to Redeem was not premature, based in apparent inconsistent deadlines in the pre-BAPCPA statutes. *In re Jewell*, 232 B.R. 904, 906 (Bankr.E.D.Tex. 1999). Given that the Debtor is now required to perform their Statement of Intention within 30 of the first date set for the first meeting of creditors (11 U.S.C. §521(a)(2)(B)) or within 45 days of the first meeting of creditors (11 U.S.C. §521(a)(6)), Judge Sharp's analysis is all the more compelling. Under BAPCPA, if the debtor had to wait until the deadlines for exemptions and discharge passed, they would be beyond the deadlines of 11 U.S.C. §§521(a)(2)(B) and (a)(6).

So if the debtor can file a Motion to Redeem immediately, what is the outside deadline for filing the Motion? The case law is split. In *In re Thompson*, 538 B.R. 410 (Bankr.E.D.Tenn. 2015), the court held that even though the automatic stay had terminated under 11 U.S.C. §521(a)(2)(B) and §362(h), the debtor's right to redeem had not expired. The debtor could still file a Motion to Redeem even though the automatic stay had lifted. The debtor simply ran the risk of the creditor repossessing the collateral in the meantime. *Id*. The court in *In re Nejic*, 2017 WL 2189527 (Bankr.C.D.Cal. 2017) disagreed. That court found that once the automatic stay terminated, the debtor's right to redeem was extinguished: "[T]he Court finds that the Debtor's right to redemption under section 722 expired with the termination of the automatic

[6] So, debtors' attorneys, stay on good terms with your Chapter 7 Trustees and maybe you can convince them to formally abandon property which the Debtor wants to redeem but cannot exempt.

stay." *Id.* at *3.

Both *Thompson* and *Nejic* looked to 11 U.S.C. §521(a)(2)(B) and the termination of the stay under that section. Arguably, the deadline established by 11 U.S.C. §521(a)(6) is stronger since not only does it provide that the stay is terminated and the property is no longer property of the estate, but that a debtor shall "not retain possession" of personal property which is not been redeemed or reaffirmed. It is hard to argue that the debtor can redeem personal property of which the debtor is prohibited from retaining possession.

Must the debtor actually redeem the collateral (i.e., pay for it), or must the debtor simply file a Motion to Redeem within the 45 days? The court in *In re Miles*, 524 B.R. 915 (Bankr.N.D.Ga. 2015) found that where the debtor filed its Motion to Redeem on a Monday, forty-seven days from the first meeting of creditors, the Motion to Redeem was timely and the creditor was prohibited in repossessing the collateral while the Motion to Redeem was pending. *Id*. at 919.[7]

A very recent case out of the Western District of Texas found that the stay terminated on the 46th day notwithstanding a pending Motion to Redeem. See, *Anderson v. AmeriCredit Fin. Servs*., 2025 U.S. Dist. LEXIS 260512 (W.D.Tex., December 11, 2025). In that case, the Debtor filed the Motion to Redeem on the forty-fifth day and the Court found that the stay terminated by operation of law notwithstanding the pending Motion to Redeem.

Valuation under 11 U.S.C. §722

In order to redeem the collateral, the debtor must "pay 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." In effect, the debtor must pay the replacement value of the collateral pursuant to 11 U.S.C. §506. See below for a discussion on valuation of collateral pursuant to §506. Note

---

[7] In so finding, the court held that the 45-day deadline of §521(a)(6) controlled over the 30-day deadline of §521(a)(2)(B).

that a recent decision by Judge Gargotta out of the Western District of Texas did a detailed analysis to find the that the value is the value as of the date of filing and the Debtor is bound by the value set forth in the Debtor's Schedules: See, 25-50357 *In re Goforth*, 2025 Bankr. LEXIS 1874 (Bankr.W.D.Tex. August 4, 2025).

Approval by the Court

While the debtor must formally move for redemption under 11 U.S.C. §722 if the creditor will not agree, if the debtor and creditor can reach an agreement as to the redemption amount, no court approval is necessary, as distinct from reaffirmation agreements. *See*, *Arunda v. Sears, Roebuck & Co.*, 273 B.R. 332 (D.R.I. 2002), aff'd, 310 F.3d 13 (1st Cir. 2002). *See also*, *Sears, Roebuck & Co. v. Spivey*, 265 B.R. 357 (E.D.N.Y. 2001). The redemption agreement can be entered into before or after discharge and, if entered into after discharge, is not a violation of the discharge injunction. *Id*. But see, *In re White*, 231 B.R. 551 (Bankr.D.Vt. 1999)(finding that Bankruptcy Rule 6008 requires and allows court approval of redemption agreements). If, however, the property could still be property of the estate (for instance, if the time for objecting to exemptions has not run), then court approval may be necessary. *In re Lopez*, 224 B.R. 439 (Bankr.C.D.Cal. 1998)(which court also held that it was not bound by the parties agreement as to value when approving a redemption agreement).

REAFFIRMATION

The purpose of a reaffirmation agreement.

Most of the time, a Chapter 7 discharge releases the debtor from personal liability on a debt secured by personal property, even though the collateral may remain subject to the creditor's lien.[8] When the debtor executes a reaffirmation agreement, the debtor remains

[8] Reaffirmation agreements, however, are not just for Chapter 7 cases. Even in a Chapter 11, a creditor may have to meet the requirements and make the disclosures required for reaffirmation agreements. *See*, *In re Sandburg Financial Corp*., 446 B.R. 793 (D.S.D.Tex. 2011), *aff'd. sub nom, In re American Rice, Inc*., 448 Fed.Appx. 415 (5th Cir. 2011).

personally liable on the debt and is bound by the terms of the instrument evidencing the debt. A reaffirmation agreement is a contract between the creditor and the debtor. *Pickerel v. Household Realty Corp. (In re Pickerel)*, 433 B.R. 679, 685 (Bankr. N.D. Ohio, 2010). Reaffirmation allows a Chapter 7 debtor who cannot immediately pay off debts secured by collateral the debtor wants to keep to continue making periodic payments and retain the property. *In re Turner*, 156 F.3d 713, 715 (7th Cir. 1998).[9]

It is important to remember that absent a reaffirmation agreement, any action by the creditor other than accepting payments could be found to be a violation of the discharge injunction under 11 U.S.C. §524(a)(2). If the debt has not been reaffirmed, the creditor arguably is prevented by the discharge injunction from negotiating with the debtor when there is a missed payment or the like. *See*, 11 U.S.C. §524. Since a reaffirmation agreement is a contract between the debtor and a creditor, the debtor may also be able to negotiate better terms under the reaffirmation agreement than are available in the underlying agreement. *See*, *In re Pendlebury*, 94 B.R. 120, 124 (Bankr.E.D.Tenn. 1988). Thus, it may be a good idea for the debtor to enter into a reaffirmation agreement even if the creditor will not repossess the collateral for failure to reaffirm the debt. Of course, since the reaffirmation agreement is voluntary for both parties[10], there is also nothing to prevent the creditor from negotiating different terms as well; for instance, requesting its attorneys fees incurred in negotiating the reaffirmation agreement be paid. *Id*. However, if the creditor insists on terms different than those of the underlying agreement, it may

---

[9] Prior to BAPCPA, numerous cases had held that debtors could not 'redeem by installments' and that redemption required a lump sum payment at the time of redemption. This was codified by BAPCPA in the addition of the phrase "in full at the time of redemption" to the end of 11 U.S.C. §722. Thus, a reaffirmation agreement is the only way the Code provides for a debtor to retain collateral and make payments over time.

[10] Just as a creditor cannot force a debtor to reaffirm a debt, there is nothing in the Code which requires a creditor to enter into a reaffirmation agreement with the debtor and neither the debtor nor the court can force the creditor to enter into a reaffirmation agreement. *See, In re Turner*, 208 B.R. 434 (Bankr.C.D.Ill. 1997), *aff'd in part, dism'd in part*, 156 F.3d 713 (7th Cir. 1998). *See also*, *In re McKinstry*, 56 B.R. 191 (Bankr.D.Vt. 1986). *McKinstry* is interesting, as well, in that it holds that 'Chapter 20' debtors who do not reaffirm a debt on a residence cannot cure the arrears and keep the property in the Chapter 13 case. Doing so would "unilaterally impose a reaffirmation on the mortgagee in a subsequent Chapter 13 bankruptcy in order to prevent foreclosure." *Id*. at 193.

lose the protections of 11 U.S.C. §521(a)(6) and the "other hanging paragraph" following §521(a)(7), discussed hereinbelow. *See*, 11 U.S.C. §362(h)(1)(B).[11] Further, if a debtor does not reaffirm the debt but continues to make payments, the debt will typically show on the debtor's credit report as the debtor being "discharged in bankruptcy," but will not reflect that the payments are still being timely made.[12]

It is worth asking: Why are creditors so keen on getting reaffirmation agreements, even in jurisdictions such as Texas, where collection of a deficiency claim would be difficult, at best? From the creditors' point of view, there are several advantages to having a reaffirmation agreement which have little to do with collecting a deficiency if the debtor defaults. First, the cost of monitoring an account which is a 'drive and pay' is higher than for a reaffirmed debt. The creditor must segregate these accounts and make sure that they have trained personnel who do not violate the discharge injunction in future dealings with the former debtor. Second, some of the larger creditors have 'run the numbers' and determined that non-reaffirmed debts have a higher failure rate than reaffirmed debts for various reasons, including the prohibition against sending statements and of negotiating repayment terms in the event of a payment default.[13] Third, since the typical American moves on average every five years, the debtor may move post-

---

[11] There is a disconnect in the statute between the 'other hanging paragraph' following 11 U.S.C. 521(a)(7) and 362(h). 11 U.S.C. §521(a)(6) provides that the debtor must redeem or reaffirm "not later than 45 days after the first meeting of creditors under section 341(a)" or, the debtor "shall not retain possession" per §521(a)(6) and per the 'other hanging pargraph' following §521(a)(7) the automatic stay terminates, the property is no longer property of the estate, and the creditor may take whatever action is permitted by applicable non-bankruptcy law. Section 362(h) provides, however, that the debtor must timely take the action specified in the statement of intention "within the applicable time set by section 521(a)(2)" which is "within thirty days after the first date set for the meeting of creditors under section 341(a)", otherwise the stay lifts and the property is no longer property of the estate, unless the creditor "refuses to agree to the reaffirmation on [the original contract terms]." So if a creditor refuses to agree to a reaffirmation on the original contract terms, does it *not* trigger 11 U.S.C. §362(h) but still *does* trigger §521(a)(6), just at the later date? That seems to be an open question. But note that the deadline under §526(a)(6), not §521(a)(2), is the one necessary to allow enforcement of the *ipso facto* clause in an underlying contract under 11 U.S.C. §521(d).

[12] See below for a discussion of the effect of bankruptcy on the debtor's credit score and, thus, debtor's ability to take out a new loan to replace the collateral if it is not redeemed or reaffirmed.

[13] Although some courts have said that sending statements post-discharge, so long as they do not 'seek to collect the debt' are not a violation of the discharge injunction, some courts have said that they are. For national lenders, it is safer to simply not send statements in any case.

bankruptcy to a state where the creditor may more easily collect a defaulted consumer debt. Finally, there is the 'rental car problem.' A former debtor who has no personal liability with regard to the debt is perhaps less likely to properly maintain the collateral and make sure that the collateral is properly insured. They are more tempted to "drive it like a rental car" and not worry as much about repairs, scheduled maintenance, etc., since if the car breaks down they can always give it back with no repercussions other than acquiring alternate transportation.

It is the debtor's duty to provide the reaffirmation agreement

It is not the creditor's duty to make sure that a debtor has a reaffirmation agreement and to prompt the debtor's compliance with section 521. It is the Debtor's "burden to perform" pursuant to 11 U.S.C. §521. *See In re Tomlinson*, No. 08-12579-CAG-7, W.D. Tex. Bankr. June 1, 2009, Docket entry 18). Furthermore, 11 U.S.C. § 521 "impose[s] duties on the *debtors* to act timely to perform their stated intentions. It imposes no similar duty on a *creditor* to inquire if the debtor is making any progress in performing the stated intention." *Id.* at p.2; *See also, In re Parker,* 363 B.R. 621, 625 (Bankr. M.D.Fla. 2007). *But see, In re Molnar*, 441 B.R. 108 (Bankr.E.D.Ill. 2010)(Debtor has to take steps to perform their intention, but do not have to entirely consummate their stated intention within the time frame of 11 U.S.C. §521).

Stay relief resulting from a failure to file a Statement of Intention or to reaffirm

The consequence of the failure to reaffirm is a stay lift and removal of personal property from the bankruptcy estate. As mentioned previously, the pre-BAPCPA choice affectionately referred to as a "ride-through" or "drive and pay" (where a debtor retains collateral and just keeps current on payments) is no longer an option that a debtor can select in his or her Statement of Intention. Attempting to do this by stating the debtor will retain and pay, will result in the stay terminating 30 days after the filing of the case.

Section 521(a)(2) mandates the filing of a Statement of Intention and performance of the intention set forth therein. 11 U.S.C § 521. Section C references section 362(h) which outlines the consequences of the failure to comply by filing a Statement of Intention. That section provides that failure to file a proper Statement of Intention and to perform on that Statement of Intention within 30 days of the first date set for the meeting of creditors shall result in the stay being terminated and the property no longer being property of the estate. 11 U.S.C. 362(h).[14]

Although containing a different time period (as discussed above) section 521(a)(6) produces a similar result

The consequence of the failure to comply with either section is summarized as:

> Here, [the debtor] did not fulfill her duties under sections 521 and 362(h) because she failed to indicate in her statement an intent either to reaffirm or redeem, yet still retained the Car. As a result, the stay lifted and the Car was no longer property of the estate. [The debtor] also failed to fulfill her duties under section 521(a)(6) and, in addition to stay relief and abandonment, Ford was free to take whatever action is allowed under California law.

Dumont v. Ford Motor Credit Co. (In re Dumont), 383 B.R. 481, 489 (B.A.P. 9th Cir. 2008), *aff'd,*581 F.3d 1104 (9th Cir. 2009). *See also Daimler Chrysler Fin. Servs. Am., LLC v. Jones (In re Jones)*, 591 F.3d 308, 310-12 (4th Cir. 2010).[15]

There is an exception where "drive and pay" is allowed: where a debtor tries to reaffirm but fails for some reason, such as a finding by the court that the reaffirmation agreement constitutes an undue hardship. The following describes the exception:

> The cases holding that the "ride-through" option is still viable after BAPCPA are limited in their applicability. In those cases, the debtor had largely complied with the requirements of § 521(a)(2) or § 362(h) either by filing a statement of intention indicating that he or she would redeem or reaffirm, or by actually entering into a reaffirmation agreement that the bankruptcy court later refused to approve because it would constitute an undue hardship on the debtor. See *In re Baker,* 390 B.R. 524, 527-30 (Bankr. D. Del. 2008); *In re Chim*, 381 B.R. 191, 198 (Bankr. D. Md. 2008); *In re Moustafi*, 371 B.R. 434, 438-39 (Bankr. D. Ariz.

---

[14] The trustee can frustrate the stay lift by obtaining an order that the property is of consequential value or benefit to the estate and providing adequate protection. 11 U.S.C. section 362(h)(2).

[15] *Dumont* and *Jones* also discuss the enforcibility of ipso facto clauses and the fact that a creditor must look to state law to determine its right to repossess its collateral. *Dumont*, 581 F.3d at 1114-19; *Jone*s, 591 F.3d at 312-13. That discussion is beyond the scope of this paper.

> 2007); *In re Husain*, 364 B.R. 211, 218-19 (Bankr. E.D. Va. 2007); *In re Blakeley*, 363 B.R. 225, 228, 232 (Bankr. D. Utah 2007). These cases held that substantial compliance with § 521(a)(2), §521(a)(6), and § 362(h) was sufficient. See, e.g., *In re Blakeley*, 363 B.R. at 230-32 ("Because this Debtor has fully complied with the requirements under § 521(a)(2), §521(a)(6), §521(d), and § 362(h), the remedies contained in each of the subsections are not triggered"). The fact that the bankruptcy court thereafter refused to approve the reaffirmation agreement in those cases did not alter the fact of the debtor's substantial compliance. *See In re Blakeley*, 363 B.R. at 232. The debtor's compliance is essential to the possibility of carving out a continued existence of the "ride through" option as a so-called "backdoor ride-through." In this case, the debtor did not choose one of the three statutory options in his statement of intention nor did he enter into a reaffirmation agreement. I therefore need not decide whether BAPCPA eliminated the "ride-through" option altogether or whether the limited "ride-through" option (or so-called "backdoor ride through") survived BAPCPA because it is clear that this debtor did *not* comply with §521 and §362(h) in any manner.

DaimlerChrysler Fin. Servs. Americas LLC v. Jones (In re Jones), 397 B.R. 775, 788 (S.D. W. Va. 2008), *aff'd*, 591 F.3d 308 (4th Cir. 2009). Note that under this same reasoning, however, a debtor could not rescind a reaffirmation agreement and claim that it complied with 11 U.S.C. 521(a)(2)(B) and contend that the automatic stay did not terminate under 11 U.S.C. §362(h) or the hanging paragraph following 11 U.S.C. §521(a)(7). *See*, *In re Sanders*, 2012 WL 692549 (Bankr.W.D.Tex. 2012 - Judge Clark)(finding that if the debtor rescinds the reaffirmation agreement, it has not reaffirmed the debt under 11 U.S.C. §521(a)(2)(B) and the creditor could enforce the *ipso facto* clause pursuant to 11 U.S.C. §521(d)).

Likewise, under the same reasoning, the debtor could not fail to appear at the "undue hardship" hearing and claim that it had complied with 11 U.S.C. §521(a)(2)(B). If the reaffirmation agreement is set for hearing and the debtor fails to appear, many creditors treat the debt as though no valid reaffirmation agreement exists. In that case, the debtor will not have taken all possible actions to have the reaffirmation agreement approved by the court.

CHAPTER 13

As noted above, there are three ways to pay for a vehicle in a Chapter 13 Plan: "Pay direct", "cure and maintain", and "through the Trustee". These are often referred to as "outside the plan", "pay direct with arrears through the plan", and "through the plan" or "through the trustee." These terms, however, are not really precise under the law. All payments on a pre-petition debt in a Chapter 13 are "payments under the plan."

PAY DIRECT

"Direct payments" or "payments outside the plan" are actually payments made by the debtor as disbursing agent, rather than the trustee as disbursing agent.[16] Fun fact: there is no specific Code section which provides for "direct" payments on a debt other than §1322(b)(5) which provides:

> notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due...

Id. This is the "cure and maintain" provision which shall be discussed hereinbelow. Note, however, that this provision only applies to long term debts, and arguably only applies to debts which are in arrears.

Section 1326(b) provides: "Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make all payments to creditors under the plan." This would indicate that *all* payments under the plan should be made by the Trustee. The Fifth Circuit, however, specifically allows "direct" payments:

> We agree with those courts which have concluded that Congress left open in § 1326(b) the possibility of direct disbursements "under the plan" by the Chapter 13 debtor. *In re Case*, 11 Bankr. 843, 846 (Bkrtcy.D.Utah 1981); *In re Hines*, 7 Bankr. 415, 420 (Bkrtcy.D.S.D.1980); *In re Centineo*, 4 Bankr. 654 (Bkrtcy.D.Neb.1980); *In re Wittenmeier*, 4 Bankr. 86, 88 (Bkrtcy.M.D.Tenn.1980).

In re Foster, 670 F2d 478, 486 (5th Cir. 1982). *Foster* made clear that payments "outside the

[16] Oft times, after a Motion for Relief has been filed, creditor's attorneys will get a call or email from the Debtor saying "but I didn't include that vehicle in my plan." Debtor's attorneys should be careful to point out that *all* debts are included in the bankruptcy, whether the debtor wants them included or not.

plan" were not actually payments *outside* the plan, but were payments under the plan where the debtor was the disbursing agent, not the trustee. *Foster* addressed the issue of whether the trustee was entitled to a fee on payments made directly by the debtor rather than the trustee, an issue which was settled by Congress with the replacement of §1302(e) with §586(2)(2) which now provides for the trustee to collect fees from payments "received by" the trustee as noted by the Eighth Circuit in *Wagner v. Armstrong*, 36 F.3d 723 (8th Cir. 1994).

Old bankruptcy practitioners (such as the author), however, still often refer to payments made by the debtor as the disbursing agent as "direct" payments or "payments outside the plan." Old habits are hard to break. As Judge Bill Parker noted, payments "outside the plan" "...is repeatedly confused with proposed distributions which are made within the confines of a Chapter 13 plan, but with the debtor acting as disbursing agent for such distributions." *In re Sanford*, 390 B.R. 873, 877 (Bankr.E.D.Tex. 2008).[17]

The Debtor may act as the disburing agent under the plan - making "direct" payments, on a claim addressed in a Chapter 13 plan - but Judge Parker noted Judge Bohm's twenty-one (21) factors which should be considered in determining whether the debtor can act as a disbursing agent:

> (1) the degree of responsibility of the debtor, as evidenced by his past dealings with creditors;
> (2) the reasons contributing to the debtor's need for filing a Chapter 13 petition and plan; 12
> (3) any delays that the trustee might make in remitting the monthly payment to the targeted creditor;
> (4) whether the proposed plan modi-fies the debt;
> (5) the sophistication of the target creditor;
> (6) the ability and incentive of the target creditor to monitor payments;
> (7) whether the debt is a commercial or consumer debt;
> (8) the ability of the debtor to reorganize absent direct payments;
> (9) whether the payment can be delayed;
> (10) the number of payments proposed to pay the targeted claim;

[17] In a footnote, Judge Parker cites Judge Sharp for the history of the phrase "outside the plan", noting that it was used by the Bankruptcy Act and became inapplicable with the adoption of the Bankruptcy Code but "it has survived 'lo these many years and serves little purpose these days other than to create confusion." *Id*. at Fn 5.

> (11) whether a direct payment under the proposed plan will impair the trustee's ability to perform his standing trustee duties;
> (12) unique or special circumstances of a particular case;
> (13) the business acumen of the debtor;
> (14) the debtor's post-filing compliance with statutory and court-imposed duties;
> (15) the good faith of the debtor;
> (16) the plan treatment of each creditor to which a direct payment is proposed to be made;
> (17) the consent, or lack thereof, by the affected creditor to the proposed plan treatment;
> (18) the ability of the trustee and the court to monitor future direct payments;
> (19) the potential burden on the trustee;
> (20) the possible effect upon the trustee's salary or funding of the U.S. Trustee system; and
> (21) the potential for abuse of the bankruptcy system.

Id. at 879-880, citing, *In re Perez*, 339 B.R. 385, 409 (Bankr. S.D. Tex. 2006) (citations omitted), *aff'd*, *Perez v. Peake* (*In re Perez*), 373 B.R. 468, 492 (S.D. Tex. 2007).

In *Sanford*, the IRS was objecting to the debtor making direct payments. Judge Parker denied confirmation of the plan, noting:

> Though a creditor does not possess an absolute veto power against a debtor acting as the disbursing agent for its claim, its position on that issue is highly influential since an affected creditor generally has the right to enjoy the benefits and protections arising from the trustee's statutory duty to ensure that payments are made under the plan and otherwise to ensure that the plan is properly executed.

Id. at 880. "...whether a debtor may do so rests within the discretion of the bankruptcy court. Direct disbursements by debtors is not an unqualified right; rather, it is a privilege." *In re Perez*, 339 B.R. 385, 390 (Bankr.S.D.Tex. 2006)(citations omitted).

So why go to all the trouble? Why "pay direct"? There can be many reasons. Perhaps there is a co-debtor making the payments. The main two reasons, however, are the trustee fee and interest rates. As noted above, the trustee fee is only collected on payments received by the trustee. The trustee fee is currently usually running at 10%. Vehicle payments are generally between $500-$1,000.00 (although the author has seen contractual payments of more than $2,000). If the debtor acts as the disbursing agent instead of the trustee, the debtor can save $50-

100 per month.[18] Another reason may be the interest rate. Given rising interest rates and low contractual rates on new car purchases, the interest rate under the contract may be less than the *Till* rate mandated by payments made "under the plan" pursuant to 11 U.S.C. §1325(a)(4). (see hereinbelow).

Direct payment, however, must be made pursuant to the terms and conditions of the pre-petition contract. The debtor cannot modify a claim being paid "direct." *See*, *In re Ford*, 179 B.R. 821 (Bankr.E.D.Tex. 1995). In that opinion, the debtors in three separate cases and their mortgage companies entered into agreements post-filing but pre-confirmation to modify the notes. These claims were to be then paid direct. The trustee objected, saying the modifications of the claims post-petition required that the payments be included "in the plan" to be paid by the trustee. The Court agreed. "This Court, therefore, holds that § 1322(b)(2), read in conjunction with other Code provisions, requires all claims modifications to be made through the Chapter 13 plan subject to the limitations imposed upon such plan by applicable Code provisions." *Id*. at 824.

Note that in the Southern District, if the Debtor is in arrears on direct payments, the Debtor must include the vehicle in the Plan, even on a modification of a confirmed plan which provided for direct payments. What many debtors fail to take into account, however, is Local Bankruptcy Rule 4001-1(e)(6) which provides:

> If a debtor proposes to make direct, post-petition payments to a lender on a v ehicle loan that was not in default as of the petition date, no additional adequate protection payments are required, unless otherwise ordered by the Court. If a debtor defaults on direct payments, the debtor must make a cash payment to the lien holder at or before the time of any plan modification. The cash payment

[18] Who ultimately pays this fee will depend on the particular Chapter 13 plan. If it is a 100% plan, the debtor will have to pay more into the plan to cover this extra fee. If it is a 0% plan, the debtor may have to increase their plan payments to pay in enough to make the payments due under the plan. Generally, however, it is the unsecured creditors who end up with a lesser distribution as the fee will be paid out of money that otherwise would go to the unsecured creditors.

must equal or exceed
1.25% of the
vehicle's value
(determined in the
manner set forth in
paragraph 4 above)
for each one month of
missed direct
payments.

If the debtor has missed a significant number of post-petition direct payments, this requirement for a lump sum payment of, in effect, ap payments as they would have been set at the beginning of the case for each month the Debtor didn't make a direct payment. Creditors should certainly demand this payment if a post-petition modification is filed.

Direct payments and discharge

An important consideration in determining whether to "pay direct" or "pay through the plan" is discharge. This is an issue to which some debtor's attorney's do not pay sufficient consideration. An interesting tool for creditors at the end of a Chapter 13 case is an objection to the entry of the debtor's discharge if the debtor is not current on direct payments to the creditor. 11 U.S.C. §1328(a) provides that the debtor is entitled to a discharge "after completion by the debtor of all payments under the plan." Judge Gargotta held in *In re Heinzle*, 511 B.R. 69 (Bankr.W.D.Tex 2014) that payments made directly to a creditor are still "payments under the plan." Therefore, if the debtor is not current on direct payments at the time of discharge, the debtor is not entitled to a discharge. A creditor who has not received all direct payments under the plan could therefore object to the entry of an order of discharge unless and until the debtor completed these payments.

Some debtor's attorneys file modifications of plans wherein the vehicle was repossessed after a motion for relief from stay, or where the vehicle was damaged and declared a total loss, to change the treatment of the claim from pay through the plan to pay direct. While this stops payments from the trustee to this creditor (and thereby may lower the payments due under the plan), if there is a deficiency balance remaining after the repo sale or total loss, the debtor would not have made all payments due under the plan and would not be entitled to a discharge. Many debtor have filed a certification under penalty of perjury to obtain their discharge stating that all direct payments were made under the plan when this is not true.

CURE AND MAINTAIN

11 U.S.C. §1322(b)(5) allows for "cure and maintain." That statutes provides that

> (b) Subject to subsections (a) and (c) of this section, the plan may—
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due...

Id. Of note is that the statute arguably only applies to long term debts: a claim "which the last payment is due after the date on which the final payment under the plan is due..." Until recently, this almost never would have applied to vehicles loans. Of late, however, some vehicles loans are 84 month loans, so a recent loan may indeed fall under the provisions of §1322(b)(5).

A number of courts seem to conflate 11 U.S.C. §1322(b)(3) and (b)(5) and allow the cure and maintenance of all contracts, even those which do not extend past the end of the plan. *See, i.e.*, *In re Anderson*, 29 B.R. 563 (Bankr.E.D.Va. 1983); *See also*, *Tidewater Fin.Co. V. Moffett* (*In re Moffett*), 288 B.R. 721 (Bankr.E.D.Va. 2002).

Note that the Southern District of Texas requires loans which are in default to be paid through the Chapter 13 Plan. See Form Plan paragraph 9C and Local Bankruptcy Rule 4001-1(e)(6).

CRAM DOWN

VALUATION UNDER 11 U.S.C. §506

Valuation of the debtor's motor vehicle must start with 11 U.S.C. §506. "The value of the allowed secured claim is governed by § 506(a) of the Code." *Associates Commercial Corp. V. Rash*, 520 U.S. 953, 957, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). Section 506 provides, in relevant part:

> **Section 506 Determination of Secured Status**
>
> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> (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.

The term "the value of such creditor's interest," however, means simply the value of the collateral that secures the creditors lien." *United Sav. Ass'n of Texas v. Timbers of Inwood Forrest Associates, Ltd.,* 484 U.S. 365, 372, 108 S.Ct. 626, 631, 98 L.Ed. 2d 740 (1988). 11 U.S.C. §506(a)(1) allows the debtor to bifurcate a secured creditor's claim into an allowed secured claim and an allowed unsecured claim. The provisions of 11 U.S.C. §1325(a)(5) only apply to the allowed secured portion of the claim, not the allowed unsecured portion of the claim. "[U]nder the cram down option, [the debtor may] keep the collateral over the creditor's objection and provide the creditor, over the life of the plan, with the equivalent of the present value of the collateral. *Associated Commercial Corp. v. Rash*, 520 U.S. at 962. See also, *In re Trimble*, 50 F. 3d 530, 530-531 (8th Cir. 1995)("The amount of a secured claim under 11 U.S.C. §3125(a)(5)(B) is determined by 11 U.S.C. §506(a).")

Raising the §506 Valuation

Valuation under §506 is raised by motion, as set forth in Bankruptcy Rule 3012. Rule

3012 provides:

> The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

Bankruptcy Rule 3012.

At first blush, this rule would seem to require that a separate motion for valuation be filed. *See, however*, *In re Hoskins*, 262 B.R. 693 (Bankr.E.D.Mich. 2001). In *Hoskins*, the court held that "[i]f only implicitly, then, it is fair to say that the very act of filing a plan constitutes a request that the Court enter an order confirming it, and so the chapter 13 plan itself *is* a motion." *Id*. at 697 (emphasis in original). The court went on to examine Bankruptcy Rule 9014 with regard to initiating and litigating contested matters and held that a chapter 13 plan meets the requirements of Rule 9014. *Id*. at 697-698. The court did note, however, that if a Motion for Valuation under §506 is included in the plan, it must meet the requirements of Rule 9013 which requires that a "motion shall state with particularity the grounds [for the order requested] ... and shall set forth the relief or order sought." Id. at 698. So if the chapter 13 plan itself seeks to value the collateral, it must allege that the plan seeks to value the collateral with particularity.

The debtor as well as the creditor may be bound by the confirmed plan. In *In re Fareed*, 262 B.R. 761 (Bankr.N.D.Ill 2002), the court noted that a Motion for Valuation under §506 was distinctly different than a "Claim Objection' under §502, although, it noted, most debtors and parties-in-interest in its district filed claim objections to value collateral. Claim allowance, the court noted, established the total amount of the creditor's claim under §502. Collateral valuation establishes the amount of the creditor's allowed secured claim under §506. The court cited *Adair v. Sherman*, 230 F.3d 890 (7th Cir. 2000) for the proposition that "Section 506(a) expressly requires that collateral be valued "in conjunction with any hearing on... a plan affecting [a secured] creditor's interest. In contrast, there is nothing in the Code that requires claims objections under § 502(b), to be determined at the time of confirmation." *In re Fardeed*, 262 B.R. at 769. Since the debtor's plan had provided for the payment of the secured creditor's proof of claim, and since no motion to value had been filed prior to confirmation, the court held that the debtor's objection to claim (which was really a motion for valuation) had to be denied. *Id*. at 771.[19][20]

As the Chapter 13 Plan included a Motion for Valuation it was required to be served per Bankruptcy Rule 7004 on an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service. Bankruptcy Rule 3012(b)(1): "Except as provided in (c), a request to determine the amount of a secured claim may be made by motion, in an objection to a claim, or in a plan filed in a Chapter 12 or 13 case. If the request is included in a plan, a copy of the plan must be served on the claim holder and any other entity the court designates as if it were a summons and complaint under Rule 7004."

Note that if the Chapter 13 plan includes a Motion for Valuation, the debtor must serve the Plan pursuant to Bankruptcy Rule 7004.

Methods of Valuation

How is the Court to determine value? The courts have made it clear that valuation is a question of fact for the bankruptcy judge and that no 'formulaic' approach is proper. "The legislative history of § 506(a) indicates that valuation should be done ad hoc and that no fixed approach is correct." *In re Balbus*, 933 F.2d 246, 249 (4th Cir. 1991). "Valuation is a question of fact, and can be overturned on appeal only if clearly erroneous." *Matter of Vitreous Steel*

---

[19] Other courts disagree. *See*, *In re Shook*, 278 B.R. 815 (9th Cir. BAP 2002).

[20] Some debtors and creditors have been trying to agree to put off the issue until the Trustee's Recommendation Concerning Claims, which is filed and heard after confirmation in some districts. There is a real question as to whether such a practice is permissible in that the issue may be *res judicata* after the confirmation order is entered.

Products Co., 911 F.2d 1223, 1232 (7th Cir. 1990). "'Value' is not a narrow term which can be rigidly applied under the same standard in all cases for all purposes; rather, the courts are called upon to determine 'value' on a case-by-case basis, in the process considering the purpose of valuation and the proposed disposition or use of the subject property." *In re Zersen*, 189 B.R. 732, 738 (Bankr.W.D.Wis. 1995). "The Bankruptcy Code offers no bright line standards to follow when valuing collateral for purposes of section 506(a). Value must therefore be determined on a case by case basis, guided by equitable principles." *In re Costello*, 184 B.R. 166, 171 (Bankr.M.D.Fla. 1995). "The valuation of assets is not an exact science, and is done on a case-by-case basis." *In re Gonch*, 435 B.R. 857, 864 (Bankr.N.D.N.Y. 2010).

> Section 506(a) of the Bankruptcy Code provides only general principles we should follow in determining what standard of valuation is proper in calculating the value of a creditor's secured claim: "... Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a). The legislative comments to this section do not give any further guidance except to reiterate that we are to determine value on a case-by-case basis, taking into account the facts of each case and the competing interests in the case. H.R.Rep. No. 545, 95th Cong., 1st Sess. 356 (1977) reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 6312.

Matter of Lackow Bros., Inc. 752 F.2d 1529, 1532 (11th Cir. 1985).

The Supreme Court in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997) stepped into the morass of valuation disputes. In *Rash*, the Supreme Court said that "In such a cram down case, we hold, the value of the property (and thus the amount of the secured claim under § 506(a)) is the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." *Id*. at 960. In other words, the Supreme Court said, valuation under §506 for purposes of a Chapter 13 plan is replacement value. However, after holding that replacement value was the proper standard, the *Rash* opinion included the infamous footnote 6, which stated:

> Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of

> fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. We note, however, that replacement value, in this context, should not include certain items. For example, where 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. Cf. 90 F.3d, at 1051-1052. Nor should the creditor gain from modifications to the property-e.g., the addition of accessories to a vehicle-to which a creditor's lien would not extend under state law.

Id. at fn 6.

Footnote six allowed the courts to interpret *Rash* in a variety of ways, often going right back to the valuation schemes that they were using before the *Rash* decision. See, for instance, *In re Gluek*, 223 B.R. 514 (Bankr.S.D.Ohio 1998). The Court in *Gluek* held that the Supreme Court, in *Rash*, provided no starting point for replacement value. Prior to *Rash*, the court used the mid-point between the wholesale and retail values from a "nationally recognized car valuation guide." *Id*. at 516. Although the Supreme Court specifically rejected a 'mid-point', 'split book', or 'split the difference' approach, the Court in *Gluek*, following a number of other courts, felt comfortable in going back to this as a "starting point" for valuation. "This Court is not setting the average of retail and wholesale as the per se value for purposes of cram down under § 1325(a)(5)(B), but is merely establishing that as a starting point for the analysis. The Court will consider any additional evidence presented by the parties probative of the value of the relevant automobile." *Id*. at 519-520.

Indeed, as the Supreme Court recognized in *Rash*, there is an "attractiveness" to a split-the-difference" approach. As the Supreme Court in *Rash* went on to say, "We agree with the Seventh Circuit that a "simple rule of valuation is needed" to serve the interests of predictability and uniformity." *Rash*, 520 U.S. at 964. The Court in *Gluek* made this case even more strongly: "The Court finds that it would be prohibitively costly to require expert testimony for determination of value of every automobile in Chapter 13 proceedings." *Gluek*, 223 B.R. at 519.

Indeed, Chapter 13 is a fast-moving, high-volume practice that lends itself to such "shortcuts" as the mid-book approach. Other courts adopted other presumptive standards:

> To assist in that determination [of replacement value under *Rash*], bankruptcy courts have developed various presumptive standards for making a replacement valuation determination because the majority of cramdown cases that come before the courts are filed by individual consumers who wish to retain and pay for their personal automobiles. Values in the automotive market are generally well defined by industry standards. For example, some courts set the presumptive replacement value of automobiles at 90% of the N.A.D.A. retail listing, *In re Capel*, No. 05–50213, 2005 WL 1287991 at *9 n. 9, 2005 Bankr.LEXIS 1094 at *28 n. 9 (Bankr.M.D.N.C.2005), the midpoint between the N.A.D.A. retail and the Kelley Blue Book private party value, *In re Gray*, 285 B.R. 379, 384 (Bankr.N.D.Tex.2002), the N.A.D.A. retail value, *In re Russell*, 211 B.R. 12, 14 (Bankr.E.D.N.C.1997), or the midpoint between the N.A.D.A. retail and trade-in values, *In re Henry*, 328 B.R. 529, 536 (Bankr.S.D.Ohio 2004).

In re Nice, 355 B.R. 554, 556 (Bankr.N.D.Va. 2006).

Then came BAPCPA and completely changed the playing field. Or did it?

Retail Value Versus Replacement Value

Following *Rash*, some creditors (including the authors) argued that, as to motor vehicles, "replacement value" was retail value. After all, that is the best measure of what a willing buyer (in the vast majority of Chapter 13 cases, an individual) would pay a willing seller. This argument was undercut somewhat, as noted above, by footnote 6 of the *Rash* decision. Many courts expressly held that whatever replacement value was, it was not retail value. *See, i.e. In re Lyles*, 226 B.R. 854 (Bankr.W.D.Tenn. 1998). The debate was supposedly ended, in the vast majority of cases, by the amendments to §506 enacted by BAPCPA.

BAPCPA added 11 U.S.C. §506(a)(2) to section 506. That addition provides:

> (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.

This provision will apply in the vast majority of Chapter 13 cases, at least for those vehicles which are not covered by the "hanging paragraph." Note that by its wording, this statute seems to recognize the result reached in a number of the post-*Rash* cases: replacement value is not ordinarily equivalent to retail value. If it was, the second sentence of the paragraph would be superfluous. Therefore, in valuing motor vehicles in Chapter 13 cases, we have to consider two different values: replacement value and retail value.[21]

The Court in *In re Nice, 355 B.R. 554 (Bankr.N.D.Va. 2006)* noted that "Indeed, Congress did not evidence an intent to overrule *Rash* (in fact, Congress codified it), and the focus of the 'replacement value' standard remains on what a retail merchant would charge for like-kind property 'considering the age and condition of the property.' § 506(a)(2)." *Id*.

The court in *In re Feagans*, 2006 WL 6654576 (Bankr.D.Kan. 2006) agreed that §506(a)(2) is a codification of *Rash*, but said, "However, whereas *Rash* did not definitively state which market would be used as a guide to determine replacement cost, § 506(a)(2) definitively sets replacement cost for a certain class of property as the price a retail merchant would charge for property of that kind considering its age and condition. Thus, under § 506(a), the value of personal property acquired by a Chapter 13 debtor for personal, family, or household purposes is the price a retail merchant would charge, but taking into consideration the age and condition of the property, which, like *Rash*, would exclude value for items not actually received by the debtor such as reconditioning and warranties." *Id*. at *3. But see, *In re Cook*, 415 B.R. 529, 534 (Bankr.D.Kan. 2009)("The first sentence of §506(a)(2) directs that in chapter 7 and 13 cases involving personal property, replacement value is to be determined without regard to the cost of

[21] While it is true that both are technically "replacement value" in that the second sentence of §506(a)(2) defines replacement value as "what a retail merchant would charge" (hence retail value), it is simpler to think of value as either replacement value (for property that *is not* acquired for personal, family or household use) or retail value (for property that *is* acquired for personal, family or household use). In order to differentiate the two, this paper will use "replacement value" for the former and "retail value" for the latter, asking the reader's indulgence for the sake of clarity.

sale or marketing. Because reconditioning prepares the vehicle for sale, it is a cost of sale or marketing that may not be deducted. This departs from the *Rash* standard that allowed reduction of the value of collateral by subtracting the value of items that the debtor did not receive like warranties and reconditioning.")[22]

So, given the amendment to 11 U.S.C. §506, we can just look to the retail value in one of the recognized guides and we're done, right? Ah, if only it were that simple. The following is an analysis of some of the cases which have interpreted "the price a retail merchant would charge" under §506(a)(2).

In *In re Cook*, 415 B.R. 529 (Bankr.D.Kan. 2009), the court noted that both appraisers before it used the NADA[23] website to establish retail and trade-in value of the vehicle. The court noted that "Clean Retail" is defined as -

> 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 535 (footnote omitted). Citing this definition, the court stated that "It strikes the Court that NADA Clean Retail, as so defined, is in most cases the best starting point for valuing personal use vehicles under § 506(a)(2)'s second sentence. While the Court recognizes that some vehicles will be sufficiently unique (low mileage, rare or classic) to require in depth appraisal and evaluation, courts valuing most vehicles in chapter 7 and 13 cases could safely begin with this well-accepted and readily available source." *Id*. (footnote omitted).

---

[22] What *Cook* giveth, *Cook* taketh away. As noted below, the *Cook* court then stated that "The "age and condition language" [of the second sentence of §506(a)(2)] suggests that the cost of reconditioning may be deducted from the merchant retail value of personal use property in order to account for depreciation and wear." *In re Cook*, 415 B.R. at 534.

[23] The National Automobile Dealers Association (www.nada.com), publisher of the NADA Guides, discussed later herein. Note that the NADA Blue Book was purchased by JD Power and is now the JD Power Valuation Guide (www.jdpowervaluesonline.com). Wherever this paper refers to NADA, it would apply equally to JD Power.

Compare *Cook*, with *Midwest Regional Credit Union v. De Anda–Ramirez (In re De Anda–Ramirez)*, 359 B.R. 794 (10th Cir. BAP 2007). In that case, the 10th Circuit BAP stated that, "It is common practice among bankruptcy courts to use the KBB or National Automobile Dealers Association ("N.A.D.A.") values as a starting point in vehicle valuation." *Id*. at 798. The BAP then went on to examine the debtor's reliance on the Kelly Blue Book (KBB) private party value versus the creditor's reliance on KBB's retail value. The BAP relied on the definition of KBB "Suggested Retail Value" and noted that it indicated that the value "assumes the vehicle has received the cosmetic and/or mechanical reconditioning needed to qualify it as "Excellent."" Since, the BAP noted, "the Bankruptcy Code's definition of "retail" includes an adjustment for the age and condition of the vehicle", the KBB retail value was not appropriate in that case. The BAP did note, however, in footnote 3, "The Court is not making a determination of the proper valuation procedure under revised Bankruptcy Code § 506(a)(2). It is clear that the KBB retail value was not appropriate in this case but that does not mean that it is never appropriate." *Id*. at fn 3. The BAP approved the bankruptcy's court's use of the KBB Private Party value.[24]

The Ninth Circuit BAP cited *De Anda-Ramirez*, saying that *De Anda-Ramirez* "not[ed] that Kelly Blue Book is not determinative of retail replacement value but holding that the court's reliance on Kelly Blue Book for the replacement value was not clearly erroneous." *In re Labostrie*, 2012 WL 6554727 (9th Cir. BAP 2012). Interestingly, the 9th Circuit BAP did not discuss the 10th Circuit BAP's rejection of Kelly Blue Book retail value. In *Labostrie*, the BAP approved the bankruptcy's court's valuing collateral (for purposes of Chapter 7 redemption,

---

[24] The holding is based, in large part, on the court's finding that the creditor "failed to produce any evidence in support of its objection." This is interesting for two reasons. First, the creditor apparently did produce the KBB retail value, which the court summarily rejected. Whether the court found that the KBB retail was appropriate or not, it was at least "some evidence" as noted hereinbelow. Second, the court apparently relied on the debtor's statement in the plan as "evidence" of value. The record in the decision is muddled, but the implications from a evidentiary and burden of proof standard are troubling.

which uses the same standard as Chapter 13 cramdown per §506(a)(2)) by taking the Kelly Blue Book retail value and adjusting it to "account for the age and condition of the Vehicle in reaching its final conclusion concerning the value of the Vehicle." Id. at *4. An interesting result considering *De Anda-Ramirez*'s rather curt rejection of KBB retail.

The court in *In re Mayland*, 2006 WL 1476927, (Bankr.M.D.N.C. 2006), noted that the addition of §506(a)(2) under BAPCPA required the court to value collateral acquired for personal family or household use at "what a retail merchant would charge for similar property." *Id*. at *7-8. The court then said that, "The NADA Guide is meant to provide information about the amount for which a retail automobile dealer would sell a given vehicle. Using ninety percent (90%) of the NADA retail value of a vehicle as a starting point for valuing the vehicle is therefore consistent with new *Section 506(a)(2)*, consistent with prior practice in this District, and consistent with the assumptions inherent in the NADA Guide." Id. at *8.

The court in *In re Morales*, 387 B.R. 36 (Bankr.C.D.Cal. 2008) stated that, "the Court concludes that, absent unusual circumstances, the retail value for vehicles under §506(a)(2) should be calculated by adjusting either the Kelly Blue Book retail value or the National Automobile Dealers Association ("N.A.D.A.") Guide retail value by a reasonable amount in light of evidence presented regarding condition, the retail market, and other relevant factors." *Id*. at 37. *Accord*, *In re Scott*, 437 B.R. 168 (Bankr.D.N.J. 2010)("...the Court will use the NADA retail value as the appropriate starting point for calculating the value of the Vehicle under the second sentence of § 506(a)(2).") and *In re Zambuto*, 437 B.R. 175 (Bankr.D.N.J. 2010)(rejecting a wholesale guide in favor of an NADA retail value adjusted for necessary repairs to the vehicle). *See also*, *In re Araujo*, 464 B.R. 15 (Bankr.N.D.Cal. 2011)(rejecting an Edmunds.com website valuation in favor of averaging Kelly Blue Book and NADA retail values.)

Most of the courts to review the issue have recognized that, rather than ending the quandary over the proper valuation standard, the BAPCPA amendments to §506(a)(2) have merely continued the disparate approaches and standards to valuation.

> A survey of case law reveals various approaches to valuing vehicles under § 506(a)(2). See, e.g., *In re Cook*, 415 B.R. 529, 535 (Bankr.D.Kan.2009) ("NADA Clean Retail ... is in most cases the best starting point for valuing personal use vehicles under § 506(a)(2)"); *In re Mayland*, Ch. 7 Case No. 06–10283, 2006 WL 1476927, at *3 (Bankr.M.D.N.C. May 26, 2006) (calculating retail value of car as 90 percent of NADA retail value, less cost of necessary repairs); *In re Ortiz*, Ch. 7 Case No. 06–16243, 2007 WL 1176019, at *3 (Bankr.S.D.Fla. Feb.27, 2007) (calculating value of car by deducting from the retail value the hypothetical cost of repairs required to bring the car up to retail standards); *In re Martinez*, 409 B.R. 35, 40 (Bankr.S.D.N.Y.2009) (quoting *Rash*, 520 U.S. at 960, 117 S.Ct. 1879) ("The Kelley Blue Book Private Party Value is what a buyer can expect to pay when buying a used car from a private party, a good match with the replacement-value standard promulgated by the *Rash* Court: the 'price a willing buyer in the debtor's trade, business or situation would pay to obtain like property from a willing seller.' "). At least three districts have addressed the issue by creating local rules. See, e.g., *864 Bankr. D. Vt. R. 3012–1(b);7 Bankr. N.D. W. Va. R. 3012–1(a) & App. N;8 Bankr. E.D. Mo. R. 3015–2(G).

In re Gonch, 435 B.R. at 863-864.

It is important to remember that there are actually two different valuation standards in §506, as set forth above: 'replacement value' versus 'retail value.' This was recognized by the court in *In re Henry*, 457 B.R. 402 (Bankr.E.D.Penn. 2011). The court in *Henry* said:

> Thus, in its present form, as it relates to individual chapter 7 and chapter 13 cases, the plain language of § 506(a)(2) directs the court to ascertain replacement value in two different ways, depending upon whether the secured property was purchased for consumer or non-consumer (presumably business) purposes.
>
> If the secured property was purchased for some non-consumer purpose, replacement value continues to be determined from the perspective of the debtor under the first sentence of § 506(a), as the Supreme Court directed in Rash in 1997: "the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." *Rash*, 520 U.S. at 960, 117 S.Ct. 1879.
>
> On the other hand, if the property was acquired for consumer purposes, the second sentence mandates that replacement value be determined from the perspective of a retail merchant, not that of the debtor.

Id. at 407. After recognizing these two different valuation standards, the court in *Henry* made a rather detailed analysis of the various valuation methods employed post-BAPCPA.

It would be ideal to have expert testimony at all §506(a)(2) valuation hearings, but, as the court in *In re Gluek* said, "The Court finds that it would be prohibitively costly to require expert testimony for determination of value of every automobile in Chapter 13 proceedings." *In re Gluek*, 233 B.R. at 519. The cost of an appraiser to the creditor could be more than any increase in value derived from such testimony, and the debtor generally does not have the extra funds necessary to hire an appraiser. Additionally, the necessity of presenting expert testimony in each case would greatly increase the length of Chapter 13 confirmation dockets. One can clearly understand, then, why the evidence presented is often simply "Blue Book" pages and the testimony of the debtor, unless the difference in value is significant enough to justify the cost of expert witnesses and lengthening the confirmation hearing.

The J.D. Power Vehicle Values (Formerly N.A.D.A.) and Other Market Guides

Were we Chapter 11 practitioners, fighting over multi-million dollar pieces of real estate or pieces of equipment, every valuation hearing would include dueling expert appraisers.[25] However, in the nitty-gritty world of Chapter 13, where the differences in value could be a few hundred dollars or, at most, a few thousand dollars, the use of appraisers is often cost-prohibitive.

Therefore creditors, especially, often rely on market guides, the most common of which are the J.D. Power Vehicle Values (formerly the National Automobile Dealers Association (NADA) Guide) and the Kelly Blue Book (KBB). As noted above, courts often cite one or both of these publications as the starting point for valuations. It is clear that the creditor (or debtor) may rely on these guides as competent evidence. "The National Automobile Dealers Association (NADA) guide, or a similarly recognized valuation source such as the Kelly Blue Book or the Black Book, would be acceptable and admissible under Rule 803(17) of the Federal

[25] Valuation in Chapter 13 is, after all, "minor league" compared to valuations in Chapters 11 or 12. *See*, *In re Johnson*, 165 B.R. 524, 529 (S.D.Ga. 1994)

Rules of Evidence." *In re Bouzek*, 311 B.R. 239, 242 (Bankr.E.D.Wis. 2004)(citation omitted). Accord, *In re Roberts*, 210 B.R. 325 (Bankr.N.D.Iowa 1997). *See also*, *In re Gonch*, 435 B.R. 857 (Bankr.N.D.N.Y. 2010).

One court even addressed the issue of which NADA guide to use, since there are different guides for different areas of the country. In *In re Farrell*, 71 B.R. 627 (Bankr.S.D.Iowa 1987), the vehicle was purchased in Wyoming but the debtor lived in Iowa. If repossessed, the creditor argued, the vehicle would be returned to Wyoming for sale. Wyoming is covered by the Mountain States Edition of the NADA. Iowa is covered by the Midwest Edition. The court held that the Midwest Edition should be used since valuation was to be made in light of the "proposed disposition or use of the collateral." Since the debtor's use of the collateral was to drive it around Iowa, that state's guide should be used.

Reliance solely on the JD Power guide or the Kelly Blue Book has its problems, however. The *Roberts* court, after noting the admissibility of the KBB went on to caution:

> Although these courts conclude that NADA Blue Book values constitute admissible evidence for purposes of valuation, they also recognize that the NADA values are not necessarily conclusive. Valuation of collateral is governed by § 506(a) which sets forth a flexible standard. Valenti, 105 F.3d at 62. Using an average of NADA values for a particular vehicle is a good guidepost which can account for the two considerations set out in § 506(a). Id. The NADA guidelines constitute some evidence of the value but are not conclusive. *In re Chrapliwy*, 207 B.R. 469, 474 (Bankr.M.D.N.C.1996). The NADA guide should be used in conjunction with expert testimony; use on its own is not favored. *Byington*, 197 B.R. at 138. Exclusive reliance on NADA's industry averages may contradict the court's duty under § 506(a) to value the specific collateral in the case before it. *Johnson*, 165 B.R. at 529.

In re Robert, 210 B.R. at 330-331.

Clearly, use of the JD Power guide, Kelly Blue Book, or some other market guide, without other expert testimony, can be risky.[26] Further, if one side has an expert and the other

[26] *See, i.e.*, *Midwest Regional Credit Union v. De Anda–Ramirez* (*In re De Anda–Ramirez*), 359 B.R. 794 (10th Cir. BAP 2007) which may have found that relying solely on Kelly Blue Book retail value was 'no evidence.'

relies only on the guide, the expert's testimony generally will control. *See*, *In re Ruiz*, 227 B.R. 264 (Bankr.W.D.Tex. 1998); *In re Smith*, 42 B.R. 198 (Bankr.N.D.Ga. 1984). However, sometimes using the guide alone is the only economical choice available to a party.

Of note is Judge Davis' opinion in *In re Solis*, 576 B.R. 828 (Bankr.W.D.Tex 2016). Judge Davis went through a careful analysis of valuation. He indicated the secured creditor did not carry its burden by showing what an appropriate discount from the NADA Clean Retail value was. He found replacement value to be somewhere between the NADA price and the Edmunds price. His decision, however, relied heavily on the burden of proof of the respective parties and noted that the burden in this case fell on the creditor as the context was an objection to claim. In a confirmation hearing, the burden would be different.

The Debtor's Testimony as to Value

If it is cost prohibitive for a creditor to hire an appraiser for a valuation hearing, it is often even more so for the debtor in bankruptcy. Therefore, many debtor's attorneys rely on the common-law presumption that an owner is competent to testify as to the value of his own property. *See*, *Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d. 532, 542 (4th Cir. 2007), "Courts indulge a common-law presumption that a property owner is competent to testify on the value of his own property. *See, e.g.*, *North Carolina State Highway Comm'n v. Helderman*, 285 N.C. 645, 207 S.E.2d 720, 725 (1974); *Fed.R.Evid. 701 advisory committee's note* ("[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an [expert].... The amendment does not purport to change this analysis")." *See also*, *Asplundh Mfg. V. Benton Harbor Engineering*, 57 F.3d 1190 (3rd Cir. 1995), "Other examples of this type of quintessential Rule 701 opinion testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, the *1198 value of one's property, and other situations in which the differences between fact and opinion blur and it is difficult or cumbersome for the examiner to elicit an answer from the witness that will not be expressed in the form of an opinion. See generally *Saltzburg*, supra, 1031-36; *Weinstein*, supra, ¶ 701[02]. These cases, it is important to add, all meet the core definitional terms of Rule 701-the opinion is based upon personal knowledge, is rationally based thereon, and is helpful to the trier of fact." *See also*, *In re Stratton*, 248 B.R. 177 (Bankr. D.Mont. 2000) (Debtor, as owner, allowed to testify as to value of mobile home).

While an owner is indeed competent to testify as to value, quite often this testimony at a valuation hearing goes too far. First, an owner testifying as to value is not allowed to use such testimony to admit hearsay. For instance, many debtors will bring a 'CarMax Appraisal'[27] and offer that as evidence. Or they will try and admit newspaper ads of 'similar' cars. However, the one must remember that, as noted above, the debtor is testifying as a layman under Rule 701 FRE, not an expert under Rule 702 FRE. Rule 802 FRE, the hearsay rule, still applies.

As the court noted in *Cunningham v. Masterwear Corp.*, 569 F.3d 673, 676 (7th Cir. 2009), "What the owner is not allowed to do is merely repeat another person's valuation, *United States v. 68.94 Acres of Land, supra*, 918 F.2d at 398, which was what [the property owner] wanted to do." The owner is allowed to testify as to the value because it is assumed to be within his personal knowledge. *Id*. However, the debtor often does not have any personal knowledge of the *value* of his or her vehicle.[28] The debtor may have knowledge of the *condition* of the vehicle, but it may behoove the careful creditor to take the debtor on *voir dire* to test his or her

---

[27] A 'CarMax Appraisal' is a written offer to purchase the debtor's vehicle, or setting a value for the debtor's vehicle, from a dealer in the business of buying cars. In addition to the hearsay problem noted above, one must remember that such a 'quote' is generally an offer to purchase the vehicle by a dealer and thus is clearly wholesale value - and quite often a low-ball wholesale offer at that. Such a quote or appraisal would clearly not be what the debtor would have to pay for a vehicle (replacement value) or what a retail merchant would charge (retail value) since the dealer is going to sell the car for considerably more than it is offering to pay the debtor. That is how the dealers pay their overhead and make a profit.

[28] It is interesting to note that the notes to Rule 701 FRE talk about allowing "the owner or officer of a business to testify to the value or the projected profits of a business, without the necessity of qualifying the witness as an accountant, appraiser or similar expert." This is different from a debtor testifying as to the value of his or her car.

actual knowledge of the value of the vehicle when the debtor attempts to testify to make sure that the debtor is not simply parroting values gleaned from others or from inadmissable hearsay sources.[29]

Of note with regard to the debtor testify as to value is *In re Brown*, 244 B.R. 603 (Bankr.W.D.Va. 2000). In *Brown*, the debtor wife of the purchaser of some furniture and appliances was allowed to testify as to its value based on the fact that her allegation that the property was owned jointly by her and her co-debtor husband was unchallenged. It therefore treated her as an 'owner' of the property and stated that, "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 Chelten–Stenton Seafood, Inc.*, 1989 WL 62106 (Bankr.E.D.Pa.1989)." *Id*. at 611.

However, the court, after finding as noted above that the debtor had the burden of proof as to value, found that the debtor's testimony was not credible and therefore did not meet the debtor's burden of proof[30]sufficient to allow the debtors to cram down the secured claim, even though the debtor's testimony was uncontroverted. The court stated that, "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"." *Id*. at 612. Because the court found that

---

29 *See, i.e.*, *In re Winston*, 236 B.R. 167, 172 (Bankr.E.D.Pa. 1999)("On the other hand, the Debtor's valuation testimony, while competent as the car's owner, see, e.g. Kinter v. United States, 156 F.2d 5, 7 (3rd Cir. 1946); and Blakely, supra, 76 B.R. at 469, is not worth a great deal. She was unable to quanify the effect of the Car's mechanical and body problems upon its value. The Debtor's testimony regarding the sales prices of allegedly comparable vehicles was vague and unconvincing. At bottom, she presented nothing but a wishful guess regarding the car's value.")

30 Which burden, the court found, was by a preponderance of evidence standard.

there was no credible basis for the values the debtor gave, the debtor's testimony was insufficient, even though uncontroverted, and confirmation was denied.

INTEREST RATE

After a prolonged period of very low interest rates, the prime rate increased dramatically during COVID. They are finally falling again, but much slower than they rose. The prime rate in 1955 was 3.25%. Lest one thinks the recent prime rate of 8.5% was way too high, it is worth remembering that the prime rate a high of 21.5% in December, 1980. When the author started practicing bankruptcy, the prime went up and down on a regular basis and parties fought over whether to use the prime rate from the date of filing or the date of confirmation. That fight was rendered moot for much of the last decade. The prime hit a low of 3.25% on December 16, 2008 and stayed there until December 17, 2015, when it went up to 3.5%. As noted, the current prime rate went to 8.5% starting on July 27, 2023, but has now dropped back to 6.75%.

The average amount financed for new cars as of the fourth quarter of 2022 was $41,445.00. (https://finmasters.com/car-loan-statistics/) The average amount financed for a used car loan for the same period was $27,768.00. Id. The average interest rate for a 60-month new car loan was 7.48% in the first quarter of 2023. Id. The interest rate for new car loans ranged from 5.18% for "super-prime" borrowers (credit score of 781 or above) to 14.08% for deep sub-prime (credit scores below 500). Id. Used care interest rates were higher, ranging from 5.99% for borrowers with excellent credit scores (720 or above) to 20.62% for those with credit scores below 580. Id.

What difference does the interest rate make? If we assume a relatively new car loan with a balance due at filing of $30,000.00, interest at the highest recent minumum *Till* rate (discussed below) of 8.5% amortized over 60 months requires a monthly payment of $615.50. Raising the interest rate to 9% raises the monthly payment to $622.75 (for a total increase of $435.00 over the life of the plan). 9.5% raises it to $630.06 (or $873.60 over the life of the plan). In this example, each half-point of interest between 8.5 and 11.5% raised the total payments over the life of the plan an average of $442.80. For a $20,000.00 claim, the average increase per half-point of interest is $295.20. For a $10,000.00 claim, the average increase per half-point of interest is $147.60.

Interest rates for Chapter 13 cases were established by *Till v. SCS Credit Corp*., 541 U.S. 465 (2004). Even though *Till* was a plurality opinion, the Fifth Circuit has made clear that *Till* is still binding precedent with regard to Chapter 13 cases. *Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343, 348-350 (5th Cir. 2008).

Till actually makes for an interesting read. While many bankruptcy attorneys are aware of its general holding, or what everyone says the general holding is - the interest rate in a Chapter 13 case shall be prime plus one to three points - few are aware of the rationale behind its holding. It is interesting, for instance, that the Supreme Court recognized that, strictly speaking, they were deciding a *discount rate*, not an *interest rate*.

> The discount rate also refers to the interest rate used in discounted cash flow (DCF) analysis to determine the present value of future cash flows. The discount rate in DCF analysis takes into account not just the time value of money, but also the risk or uncertainty of future cash flows; the greater the uncertainty of future cash flows, the higher the discount rate.

http://www.investopedia.com/terms/d/discountrate.asp

The legal fiction is that, at the moment of confirmation, the secured creditor receives from the debtor a payment equal to the value of its collateral. If this is not paid in a lump sum, however, a discount rate must be applied to make sure that the stream of payments is hypothetically equal to the current value of a lump sum payment. See, *In re Leath*, 389 B.R. 494, 500 (Bankr.E.D.Tex. 2008)

If one understands this rationale, then the various decisions following *Till* make more sense. *Till* itself, and the decisions which have followed *Till,* have held that contract rate is irrelevant with regard to the interest rate under the plan. *Till v. SCS Credit Corp*., 541 U.S. 465, 476-477 (2004)("Thus, a court choosing a cramdown interest rate need not consider the creditor's individual circumstances, such as its prebankruptcy dealings with the debtor or the alternative loans it could make if permitted to foreclose. Rather, the court should aim to treat similarly situated creditors similarly.")

In response to *Till*, some jurisdictions established a presumed interest rate (*See, i.e.*, *In re Johnson*, 438 B.R. 854 (Bankr.D.S.C. 2010)). Noting that the plurality in *Till* adopted a formula approach specifically to avoid excessive evidentiary inquiry, a number of jurisdictions such as the Northern District of Ohio have simply mandated an interest rate of prime plus 2%.

Under *Till*, the interest rate should be prime plus one to three percent. See, *In re Montemayor*, 2010 WL 5315814 (Bankr.S.D.Tex. 2010)("The Court finds the 5.25% rate consistent with Till's requirement that the required interest rate in a chapter 13 plan should be 1-3% above the prime rate.")[31] [32]

> The formula rate begins with the national prime rate and adjusts upwards based on several factors, including the 'circumstances of the estate, the nature of the security, and the duration and feasibility of the plan.'

In re Bufford, 343 B.R. 827, 835 (Bankr.N.D.Tex. 2006)(quoting *Till*); See also, *In re Texas Grand Prarie Hotel Realty, L.C.C.*, 710 F.3d 324, 332 (5th Cir. 2013)("Under the Till plurality's formula method, a bankruptcy court should begin its cramdown rate analysis with the national prime rate—the rate charged by banks to creditworthy commercial borrowers—and then add a supplemental "risk adjustment" to account for "such factors as the circumstances of the estate,

---

[31] The prime rate at the time of the *Montemayor* decision was 3.25%. For an explanation of the prime rate, see *In re Tirey*, 350 B.R. 62, fn 5 (Bankr.S.D.Tex. 2006).

[32] Mention should be made of Judge Jones decision in *In re Vasquez*, 2012 Bankr. LEXIS 3892, 2012 WL 3762981 (Bankr.S.D. Tex. 2012). Judge Jones started with the yield on a five-year treasury instrument (which was then at .8%) instead of with the prime rate. No other court has followed this holding and all the other reported decisions in the Fifth Circuit start with the prime rate. A number of commentators have been citing the Eighth Circuit Court of Appeals decision in *Farm Credit Servs. Of Am. V. Topp* (*In re Topp*), 75 F.4th 959 (8th Cir. 2023) in that it also used the T-Bill rate instead of the prime rate Topp, however, dealt with a lien on crops in a Chapter 12. Most courts hold that Till does not apply to, for instance, Chapter 11 proceeding. *See, i.e.*, *In re Couture Hotel Corp.*, 536 B.R. 712 (Bankr.N.D.Tex. 2015) in which Judge Houser considered Till but noted it did not mandate the interest rate in a Chapter 11, which required an evidentiary hearing which included expert testimony..

the nature of the security, and the duration and feasibility of the reorganization plan.")

A good explanation of *Till* and the prime-plus approach is found in *In re Turcotte*, 570 B.R. 773 (Bankr.S.D.Tex. 2017). "While the undersigned judge agrees with Chief Judge Jones that the treasury rate is much more representative of a risk-free rate than is the prime rate, the undersigned judge nevertheless agrees with Judge Isgur's interpretation of *Till* that bankruptcy courts are required to use the prime rate as the starting point for determining what the cramdown interest rate should be in a Chapter 13 case." *Id*. at 775-776.

As noted above, for a long period the prime rate did not change. Now, that the prime rate has been changing - sometimes every other month - the question of whether to use the prime rate at filing or confirmation can make a difference.

> There are various methods of choosing which date the Court should consider in applying the Prime Plus Approach. For example, within the Fifth Circuit alone, one bankruptcy court has used the prime rate that was published within a few days before publication of the court's opinion. *Tirey*, 350 B.R. at 69. Another has used the prime rate published as of the actual date of the publication of the opinion. *In re Process Property Corp*., 327 B.R. 603, 611 (Bankr. N.D. Tex. 2005).

Id. at 783. Judge Bohm, however, said that the best approach was to use the prime rate as of the effective date of the plan. He based this on §1325(a)(5)(B)(ii) which provides that the value to be paid to secured creditors is "as of the effective date of the plan..." *Id*.

> Further, the Fifth Circuit has recognized that: "The general consensus that has emerged provides that a one to three percent adjustment to the prime rate as of the effective date [of the plan] is appropriate." *In re Texas Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 333 n.53 (5th Cir. 2013) (citing and quoting *In re Riverbend Leasing LLC*, 458 B.R. 520, 535 (Bankr. S.D. Iowa 2011)) (setting the prime rate as of the effective date [of the plan] for purposes of Chapter 11 plan confirmation). Applying the Prime Plus Approach as of the effective date has also been adopted by various bankruptcy courts throughout the country. *See In re Riley*, 428 B.R. 757, 766 (Bankr. N.D. Ohio 2010); *In re Knight*, 254 B.R. 227, 229 (Bankr. C.D. Ill. 2000). Therefore, to determine the appropriate cramdown rate in the case at bar, this Court will use the prime rate as of the effective date of the Plan.

Id. He then stated that the effective date of the plan was the date on which the plan was confirmed and became binding. Recognizing that the prime rate may change between his decision and the actual effective date of the plan, he stated, "Accordingly, for purposes of this Opinion, this Court will use the prime rate that was in effect on April 20, 2017. Then, on July 27, 2017, if the prime rate has changed, the Plan will need to be further modified to take into account the change in the prime rate. Because the prime rate as of April 20, 2017 was 4.0%, this is the rate that the Court will now use to apply the Prime Plus Approach required by *Till*." *Id*. at 784. *See also*, *In re Smith*, 594 B.R. 376 (Bankr.W.D.La. 2018).

The Court may take judicial notice of the current prime rate. *See*, *In re Zafs Invs., LLC*, 2017 Bankr.LEXIS 722 (Bankr.S.D.Tex. March 16, 2017).

Till also applies to over-secured creditors - *See*, *First United Security Bank v. Garner (In re Garner)*, 663 F.3d 1218 (11th Cir. 2011)*; In re Stringer*, 508 B.R. 668, 671-672 (Bankr.N.D.Miss. 2014). *But* over-secured creditors are entitled to their contract rate of interest post-petition, pre-confirmation, per 11 U.S.C. §506(b). *Id*. *See also*, *In re Smith*, 594 B.R. 376 (Bankr.W.D.La. 2018)("It is settled law in the Fifth Circuit that an oversecured creditor is entitled to the allowance of contract interest rates during the pendency of the bankruptcy case from the petition date until the effective date of the plan.").

Till also applies to "910 claims" - *See, Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343, 346-348 (5th Cir. 2008) *Till* applies even if the contract rate of interest is lower than the *Till* rate. *In re Turcotte*, 570 B.R. 773 (Bankr.S.D.Tex. 2017)("The Prime Plus Approach will still apply when the contract rate is lower than the prime rate, such as in the case at bar.") *See also, In re Soards*, 344 B.R. 829 (Bankr.W.D.Ky. 2006). This is so even if the plan pays the claim off *faster* than the original contract. *See, In re Taranto*, 365 B.R. 85 (6th Cir. B.A.P. 2007).

Judge Bohm's decision in *Turcotte* also addressed the risk factors to consider in determining the adjustment to the prime rate, relying on *In re Bivens*, 317 B.R. 755

(Bankr.N.D.Ill. 2004).

> In *Bivens*, when the court examined the "risk factors," it took into account the following factors: (1) the debtor's two dependent children; (2) the debtor's job that she had maintained for four years; (3) the debtor's income and take-home pay; (4) extra income, such as child support; (5) the debtor's voluntary wage order; and (6) the debtor's good faith assertions to pay her creditors. Id. at 765. Further, the court gave credence to the fact that the debtor had "to find refuge under the Code" and concluded that the risk of default was somewhat reduced because the estate was being supervised by the Chapter 13 trustee and the debtor could not obtain new loans without express court approval. Id. The court also stated that the "post-petition payments are more indicative of whether or not Chapter 13 debtors will likely perform as they have proposed under their plans." *Id*. at 766.

In re Turcotte, 570 B.R. at 784.

It is clear, from *Till*, that factors such as the debtor's creditworthiness prior to the filing of the case should not be considered. Some factors that creditors might ask the court to consider, however, are:

> - the feasibility of the plan. If the debtor is proposing a very "tight" plan with little room for error, or if the debtor does not provide for any type of emergency[33], the risk is greater.
>
> - the debtor's payment history since the filing of the case. Has the debtor consistently made timely payments to the Chapter 13 Trustee? Is the debtor on a wage directive, or an ACH?
>
> - prior bankruptcy cases. If this is the debtor's second (or third or fourth) filing, that could certainly indicate this debtor is at a higher risk of default in this case.
>
> - the duration of the plan. If the plan provides for payment of the secured claim over 60 months, that is certainly a higher risk than if the plan pays out the claim over 36 or 48 months.
>
> - the nature of the collateral. One could certainly argue that the plan should provide for a higher interest rate for cars than houses - a debtor can crash a car a lot easier than a house. And it's harder to hide a house.
>
> - the debtor's employment history. If the debtor has only had their current job for a very short period of time, or if the job is seasonal or probationary, that would introduce an additional element of risk.

[33] Such as the Southern District's Emergency Savings Fund (Southern District Plan, paragraph 14).

> - the inherent risk of Chapter 13. As the Supreme Court said in *Harris v. Viegelahn*, 575 US. 1058 (2015), "Many debtors, however, fail to complete a Chapter 13 plan successfully. See Porter, The Pretend Solution: An Empirical Study of Bankruptcy Outcomes, 90 Tex.L.Rev. 103-107-111 (2011)(only one in three cases filed under Chapter 13 ends in a discharge)."[34]

Note that the Supreme Court in Till placed the burden squarely on the creditor as to the proper interest rate as the "more knowledgeable party" as to interest rates.

Note that in *Turcotte*, Judge Bohm set the interest rate at 1 point over prime because he found the risk factors very low: the Debtor had steady employment, high income, was under a wage order, and the creditor was oversecured.

The reality of the situation is that unless there is a fight over another issue, the creditor may not object to an interest rate that comports with *Till*'s prime plus. The difference between 8.5% and 9.5%, given the value of the collateral in most Chapter 13 cases, may not be worth litigating over. However, if a creditor is objecting on other grounds, objecting to interest rate can be a good and valid strategy.

In exceptional cases, under *Till*, the interest rate could be above or below 1% to 3%. While it would be difficult for the debtor to show that there was so little risk the interest rate should be below one percent over prime, there are instances where one could imagine such risky debtors that the interest rate should be adjusted accordingly. See, *In re SCC Kyle Partners, Ltd.*, 2013 WL 2903453 (Bankr.W.D.Tex. 2013).[35] However, a plan which poses a risk so high as to

---

[34] The Supreme Court in Till noted that the rate was higher than simply prime, " Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly." *Till*, 541 U.S. at 479. This factor should only be cited in those cases where the debtor attempts to argue for a rate lower than prime plus 1%. The inherent risk of Chapter 13 cases over commercial cases argues for some adjustment over prime.

[35] *SCC Kyle Partners* is a Chapter 11 case, but Judge Mott applies *Till* in order to determine the proper interest rate. After applying *Till*, he states, "The Court recognizes this is a significant upward risk adjustment on the outside of the 1% to 3% general range above the prime rate that courts have often approved as a cramdown rate in other cases. See *Texas Grand*, 710 F.3d at 335–36 (collecting cases). But simply put, under the facts and circumstances of this particular case, this level of risk adjustment is warranted." *Id*. at *24.

require an interest rate over prime plus 3% is likely not feasible and should not be confirmed.

Purchases in anticipation of bankruptcy.

Some debtors, knowing that they are about to file bankruptcy and realizing their current vehicle probably won't make it through the next five years, might purchase a new (to them) car just before the filing of the case. Creditors are justifiably upset when debtors take out a new loan, often at a high sub-prime interest rate, and then immediately file bankruptcy. Such a purchase can be bad faith, mandating the payment of the contract rate of interest. *See*, *In re Blackmon*, 459 B.R. 144 (Bankr.S.D.Fla. 2011); *In re Hoskins*, 590 B.R. 843 (Bankr.S.D.Ind. 2018); *But see*, *In re Powell*, 2013 WL 1829837 (Bankr.D.Kan. May 1, 2013). A "split the baby" approach was approved by the District Court on appeal in *McDonald v. Credit Accepance Co.* (*In re Horny*), 2011 U.S.Dist.LEXIS 146374 (E.D.Mich. December 21, 2011). In that case, the Debtor bought the vehicle less than a week before filing bankruptcy at 23.99% interest. The creditor objected to cram down of the interest rate based on bad faith. The creditor and the debtor agreed to settle at 15.2% and the Trustee objected. The bankruptcy court approved the plan and the Trustee appealed. The District Court upheld the bankruptcy court finding that Till's prime plus approach did not limit the applicable interest rate to a maximum of three points over prime and that the interest rate was needed to compensate for the risk in under these "unusual circumstances" and that the 15.2% interest rate was necessary to adequate compensate the secured creditor for the risk of future non-payment but was not too high for the plan to succeed. *Id*.

RELEASE OF LIEN WHEN THERE IS A CO-DEBTOR

Quite often, a debtor will seek to cram down a secured claim when there is a co-debtor who has not filed bankruptcy.[36] Is this allowed? What is the effect of such treatment?

One court simply held that if the debtor only had a one-half interest in the collateral, the debtor could not value the collateral pursuant to 11 U.S.C. §506. *See, In re Rodriguez*, 156 B.R. 659 (Bankr.E.D.Cal. 1993).[37]

Perhaps the better result is as set forth in *In re Faulkner*, 2013 WL 2154790 (Bankr.C.D.Ill. 2013) which held that, notwithstanding the fact that the plan paid the allowed secured claim, the creditor was not required to release its lien until the co-debtor paid the remaining contractual balance. *See also*, *In re Leonard*, 307 B.R. 611, 614 (Bankr.E.D.Tenn. 2004)(Motion to require creditor to release its lien denied); *In re Brooks*, 340 B.R. 648, 654 (Bankr.D.Me. 2006)("[S]o long as there remains the possibility of personal liability on behalf of a record owner of the vehicle, GMAC is within its rights in retaining its lien.")

CHAPTER 20

Some debtors resort to a "Chapter 20." They file a chapter 7 to discharge their unsecured debts, then file a Chapter 13 to reorganize their secured debts. Leaving aside the issue of §521(a)(6) (the debtor shall "not retain possession" of personal property when the debtor has not redeemed or reaffirmed), can the debtor cram down the value and/or interest rate on this (now non-recourse) debt? Indeed, the debtor can, but as they will not receive a §13289 discharge, the

---

[36] Note that surrender of the collateral, or providing for direct payment, is a different issue. If the vehicle is surrendered, then the plan proposes not to pay the claim. The creditor should be entitled to termination of the co-debtor stay under §1301(c)(2). If the plan proposed direct payments, then the issue of the debtor and the co-debtor having different obligations does not arise.

[37] See also, *In re Solis*, 356 B.R. 398, 413 (Bankr.S.D.Tex 2006)("Therefore, § 506(a) does not apply to Debtor's son's equitable interest in the Neon. The Court is not aware of any authority for bifurcation of a lien secured by property in which the estate holds only a nominal interest and for payment of the reduced claim in such a way that would eliminate the lien as it applies to the equitable interest owned by a non-debtor.31 Section 506(a) simply does not allow bifurcation of a lien to the extent that the lien attaches to the equitable interest that is not property of the estate.")[Citing, *In re Rodriguez*.]

secured creditor will not be required to release its lien until it is paid in full as determined under non-bankruptcy law. So the debtor is, in effect, leasing the vehicle for the term of the plan. *See, In re Harrison*, 394 B.R. 879 (Bankr.N.D.Ill. 2008); *In re Lilly*, 378 B.R. 232 (Bankr.C.D.Ill. 2007). Judge Michelle Larson recently issued an opinion on this issue. In re Rashidi, 2025 Bankr. LEXIS 40 (Bankr.N.D.Tex. January 10, 2025). In that opinion, Judge Larson found that §521 was not a absolute bar to including a debt not reaffirmed in a previous Chapter 7 in a subsequent Chapter 13, but found that filing a Chapter 13 immediately after the Chapter 7 was bad faith and an abuse of the bankruptcy process and terminated the automatic stay.

OBJECTIONS TO CONFIRMATION

General Plan Considerations

Value and interest rate are covered above. Some other considerations:

Adequate protection and equal payments under 11 U.S.C. §1325(a)(5)(B)(iii)

11 U.S.C. §1325(a)(5)(B) provides:

> (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;

Thus, payments under the plan must be (1) enough to cover adequate protection and (2) in equal monthly amounts.

"*Pro rata*" payments

Creditors should almost always object when the plan provides for "pro rata" payments. As one court said with regard to a plan which proposed pro rata payments, "The parties do not dispute that the proposed plan contemplates periodic payments to the Appellant on an allowed secured claim, as opposed to a lump sum payment. However, the amount of the those payments is not specifically set forth. Instead, it was left to the discretion of the trustee to make periodic payments to the Appellant. Thus, the plan does not provide that the trustee's distributions to the holder of the allowed secured claim be in "equal monthly amounts." 11 U.S.C. § 1325(a)(5)(B)(iii)(I). This fails to comport with the plain language of § 1325(a)(5)(B)(iii)(I)." *In re Rivera*, 2008 WL 1957896, 59 Col.Bankr.Cas.2d 1066 (D.Ct.N.D.Ind. 2008). (But see below regarding pro rata plans which are mathematically equal).

Indeed, as noted below,[38] under the terms of the form plans in most districts in Texas[39], as least as the plans are proposed, pro rata plans will result in the secured creditor not receiving any payments - even adequate protection payments - until attorneys fees and perhaps other priority claims are paid in full.

Note, however, Judge Jones' opinion in *In re Scott*, 2012 WL 1999437 (Bankr.S.D.Tex 2012) in which he said that pro rata payments are acceptable so long as mathematically the payments will be equal. *Accord*, *In re Erwin*, 376 B.R. 897, 901 (Bankr.C.D.Ill. 2007)(finding pro rata acceptable since the debtor's payments into the plan were equal and finding that the requirement for equal monthly payments applies to the debtor's proposed plan, not the trustee's obligation to distribute payments).

"Average" payments

Quite often, debtors will likewise propose a plan which provides for payments such as "$100 avg". Note that average payments are not equal payments. After all, a payment of $1.00 per month for 59 months and then $5,941.00 in month 59 is an "average" payment of $100 per month over the life of the plan. Yet it clearly does not meet the requirements of 11 U.S.C. §1325(a)(5)(b)(iii).

Equal payments

The major sticking point under 11 U.S.C. §1325(a)(5)(b)(iii) is how section (I) relates to section (II) and when the equal payments under

---

38 In the section analyzing the various different plan forms for the different districts and divisions.

39 The clear exception being the Southern District form which has savings language for most secured claims (see below).

§1326(a)(5)(B)(iii)(I) must start and must end.

> This is important as debtor's attorneys (understandably) would like to get paid as quickly as possible. If they can delay set and equal payments to secured creditors, it frees more money at the start of the case to pay attorneys fees. And, they argue, §1326(a)(4)(b) requires that administrative fees, including attorneys fees, be paid "before or at the time of each payment to creditors under the plan..."

Judge Isgur's opinion in *In re DeSardi*, 340 B.R. 790 (Bankr.S.D.Tex. 2006) was one of the first decisions to interpret 11 U.S.C. §1325(a)(5)(B)(iii).[40] Judge Isgur held that while payments had to be enough to cover depreciation post-confirmation pursuant to §1325(a)(5)(B)(iii)(II), that requirement was met by the provision of the Southern District form plan which provided that, no matter the amount of the payment proposed by the debtor or what month the debtor proposed to start payment, post-confirmation payments would be no less than the amount set forth by the court as pre-confirmation adequate protection. Judge Isgur went on to hold that while Congress mandated that payments, once started, must be equal, Congress did not mandate when debtors were required to start payments under the plan. Therefore, in order to harmonize the requirements of §1326(a)(4) and §3125(a)(5)(B)(iii), the debtor could provide that payments to secured creditors "be level once they begin and terminate once the lender is paid in full." *Id*. at 806.

DeSardi was initially followed by the majority of the courts deciding the issue. However, some courts have now called the reasoning of *DeSardi* into question. A good analysis both for and against the DeSardi approach is set forth in *In re Kirk*, 465 B.R. 300 (Bankr.N.D.Ala. 2012), which then came down on the side of those cases disagreeing with *DeSardi*. "In conclusion, the Court cannot confirm a chapter 13 plan unless the plan provides that the trustee will pay equal monthly payments on allowed secured claims, thereby satisfying § 1325(a)(5)(B)(iii), beginning with the initial post-confirmation distribution and continuing in the same amount each month until those secured claims are paid in full. If the plan also pays debtor's attorney fees pursuant § 1326(b)(1), those payments may be paid contemporaneously with payments to secured creditors, but the plan should be structured so that payments to the attorney neither reduce nor delay the required equal monthly payments to secured claimholders.." *Id*. at 308.

---

[40] Full disclosure: Stephen Wilcox of Wilcox Law argued in the *DeSardi* case on behalf of DaimlerChrysler. Since his objections to confirmation were, for the most part, overruled, he might have a little bit of a bias against the *DeSardi* opinion. Judge Isgur, on the other hand, thinks Mr. Wilcox needs to see the light, recognize the cogent and iron-clad legal reasoning of DeSardi, and just get over it.

Judges in the Southern District of Texas have followed *DeSardi*, although there is some argument that Judge Bohm's decision in In re Perez, 339 B.R. 385 (Bankr.S.D.Tex. 2006) contains some reasoning which does not comport with the reasoning *DeSardi*. Judge Bohm has, however, followed *DeSardi*.

Equal payments for 1322(b)(5) arrears.

Some courts have ruled that the equal payment requirements of §1325(a)(5)(B)(ii)(I) also apply to arrearage payments under §1322(c)(1) and (b)(5). See, *In re Schultz*, 363 B.R. 902 (Bankr.E.D.Wis. 2007). See also, *In re Flynn*, 402 B.R. 437 (1st Cir. B.A.P. 2014)(Chapter 13 Plan which proposed a balloon payment to cure arrears did not meet requirements of §1325(a)(5)(B)(iii)(I)). Therefore, if the debtor proposes a cure payment under §1322(b)(5) that does not provide equal payments, the creditor should consider objecting.

Adequate Protection

Note that 11 U.S.C. §1325(a)(5)(B)(iii)(II) provides that payments under the plan have to be enough to provide adequate protection. For vehicles (the main depreciating asset) that means enough to cover monthly depreciation for the vehicle. See, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370-371 (1988).

The Southern District of Texas (Local Bankruptcy Rule 4001-1(e)(2)) provides that "As additional adequate protection, the lien holder will be given an administrative claim, with priority under § 507(b), in an amount equal to 1.25% of the value of the vehicle for each 30 days that elapses from the date of the adequate protection order. For example, if the vehicle is valued at $10,000, a § 507(b) adequate protection claim in the amount of $125 will accrue each month. In the event of a dismissal or conversion of the chapter 13 case, the trustee will distribute the proceeds in accordance with § 1326(a)(2)"[41]

"Value" for the purposes of adequate protection is set by Local Bankruptcy Rule 4001-1(e)(4): "For purposes of valuation in the absence of any objection, the vehicle value will be determined based on 90% of the "Average Price Paid" stated on the website www.jdpower.com (utilizing the version available without charge) for a vehicle (without options or mileage adjustments) located at the first zip code listed for the Debtor on the docket sheet, unless the Court orders otherwise. In determining the principal amount due to the lien holder under the plan, the ' 507(b) payments will be (i) deducted from the value of the vehicle, if the value of the vehicle is less than the lien; and (ii) applied to interest if the value of the

[41] In the Southern District, the parties have 30 days from the entry of the standard adequate protection order to object to this standard.

vehicle is greater than the lien. If the value of the vehicle is less than the lien, interest will begin to accrue on the confirmation date."[42]

Creditors should object if the Adequate Protection amount is too low. [43]

Further, creditors should object if the payments set forth in the Chapter 13 Plan are less than the actual depreciation on the vehicle.[44]

Quite often, debtors cite excessive mileage or poor treatment of the vehicle in order to lower the value.

Note that this can be a valid objection under §1325(a)(5)(B)(iii)(II): if the debtor is depreciating the vehicle faster than normal, it may require that the monthly payments be higher to account for depreciation.

Further, if the creditor's collateral does not have a useful economic life equal to or in excess of the term of the plan (in other words, if it will be worthless before the end of the plan term), creditors should object under §1325(a)(5)(B)(iii)(II) to make sure that the allowed secured claim is paid before the end of the economic life of the collateral.

"910 Claims"

Necessity to object

Judge Parker of the Eastern District of Texas held in *In re Allen*, 360 B.R. 216 (Bankr.E.D.Tex 2006), that the court could not confirm a claim covered by the "hanging paragraph" following §1325(a)(9) if the debtor was attempting to strip down the claim. "Neither can the protected claim be bifurcated for the purpose of soliciting, and obtaining by default or forfeiture, an acceptance under § 1325(a)(5)(A)." *Id*. at 222. Judge Parker holds that an affirmative waiver by the creditor, in writing or in open court, is necessary to waive the provisions of the "hanging paragraph."

---

42 Note that this valuation is ONLY for the purposes of adequate protection. Debtors often argue that value at confirmation is 90% of JD Power retail. But the valuation under 4001-1(e)(4) is only for the purposes of adequate protection. And, of course, Debtors often want to use the "90% of retail" but ignore the "without options or mileage adjustment."

43 Note that in the Southern District of Texas, there is a deadline of 30 days from the entry of the Adequate Protection order to object to the adequate protection set forth therein. See, Southern District Local Bankruptcy Rule 4001-1(e)(3).

44 Although, again, in the Southern District, if a party does not timely object to the adequate protection, it may be too late to simply bring up the insufficiency of the payment amount at confirmation.

Does this mean that the creditor can ignore plans which try to cram down a 910 claim? Certainly not. The Debtor may appear and present evidence that the claim is not really a 910 claim.

But this holding is useful in those cases where the creditor's attorney did not timely file an objection and may be able to appear at the confirmation hearing and argue that, even without an objection, the court should not confirm the plan.

Alternatively, it creates an argument where a plan was confirmed without objection for a Motion for Reconsideration[45] under Bankruptcy Rules 9023 or 9024.

Personal use of the debtor

Note that the language of the "hanging paragraph" with regard to motor vehicles is "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..." This is different than, for instance, 11 U.S.C. §506(a)(2) which refers to "personal, family or household use."

To determine whether a vehicle was acquired for the personal use of the debtor, courts use a totality of the circumstances test propounded by Judge Steen in *In re Solis*, 356 B.R. 398 (Bankr.S.D.Tex 2006).

Note also that the test is as of the date the vehicle was acquired, not the use at the time of the bankruptcy. *Id*. at 408-409[46]

If, for instance, the debtor acquired the vehicle solely for the use of his wife, then it was not acquired for the personal use of the debtor. *See*, *In re Adaway*, 367 B.R. 571 (Bankr.E.D.Tex 2007)(Judge Parker). [47] But if a vehicle was acquired for both personal and

---

[45] The author is aware that there is actually no such thing as a "Motion for Reconsideration." It is a Motion for New Trial under Bankruptcy Rule 9023 or a Motion for Relief from Judgment under Rule Bankruptcy 9024. But most bankruptcy courts in Texas will consider a Motion for Reconsideration as a Motion under Bankruptcy Rule 9023 or 9024, whichever is applicable.

[46] Most motor vehicle retail installment contracts will include a box to check which either states that the vehicle is for personal, family or household use unless the box showing business use is checked or a box stating affirmatively that the vehicle was acquired for personal, family or household use. This doesn't end the inquiry, but it is evidence which should be presented to the court regarding the debtor's intention at the time of the purchase.

[47] Note, however, that Judge Steen opines (in dicta) that purchasing a vehicle for a family member could be considered a "personal use" of the debtor. *In re Solis*, 356 B.R. 395, fn 29 (Bankr.S.D.Tex 2006).

business use of the debtor, the "hanging paragraph" would apply. *See*, *In re Maushart*, 483 B.R. 627 (Bankr.M.D.Penn. 2012)(vehicle acquired both for the personal use of the debtor and also to transport cadavers).

Note, however, that in *Solis*, the court held that although a vehicle purchased for an adult son was not subject to the "hanging paragraph" as not acquired for the personal use of the debtor, the chapter 13 plan which tried to cram down this vehicle was not filed in good faith as a result of including this vehicle, even though the adult son was willing to pay the debtor more than the debtor proposed to pay to the creditor.[48]

Creditors should object when the debtor attempts to "strip down" a 910 claim, and should be prepared lest the debtor argue that the vehicle was not acquired for the personal use of the debtor.

Negative Equity

It is worth mentioning, since it still comes up occasionally, that the fact that debtor traded in a vehicle that was under water and this "negative equity" was rolled into the purchase money loan does not mean that the loan is no longer a purchase money security interest. The "hanging paragraph" will still be applicable to the entire loan. *Ford Motor Credit Comp. v. Dale* (*In re Dale*), 582 F.3d 568 (5th Cir. 2009).

No surrender in full satisfaction

Additionally, just because §506 does not apply to a "910 car", it does not mean the debtor can surrender the vehicle in full satisfaction of the debt. *DaimlerChrysler Fin. Serv. Americas, LLC v. Miller* (*In re Miller*), 570 F.3d 633 (5th Cir. 2009). Of course, the vehicle can be surrendered, but the creditor will have an unsecured claim for the deficiency.

Surrender of Collateral

The debtor must actually surrender - not just point out where it is

Often, debtors will list a vehicle as "surrender" under the plan, but it turns out the debtor does not have the vehicle. The vehicle might be with a relative who refuses to turn it over, or at a repair shop with a large unpaid bill.

[48] Which raised a completely different valuation issue noted, but not addressed by, the court. See, *In re Solis*, 356 B.R. at fn. 9.

> Merely pointing out where the collateral is located is not a surrender. "The operative phrase in section 1325(a)(5)(C) does not end with the word "property" but continues with the words "to such holder," making it plain that a debtor must at least tender possession or control of the collateral to the creditor, without regard to whether the creditor's consent is a further condition. Merely telling the creditor where it can find the collateral is not a surrender "to such holder."" *In re Smith*, 207 B.R. 26, 30 (Bankr.N.D.Ga. 1997).

Likewise, if the debtor files a plan to "surrender" the collateral but has refused to turn the vehicle over the creditor (a common occurrence), the creditor should object to confirmation. See *Internal Revenue Service v. White* (*In re White*), 487 F.3d 199, (2007)(Debtor proposed to surrender property to the IRS but the IRS could not levy on the property without an additional administrative hearing).

> See also, *In re Stone*, 166 B.R. 621, 623 (Bankr.S.D.Tex 1993)(Judge Leticia Clark)("The term "surrender" was contemplated by Congress to be a return of property and a relinquishing of possession or control to the holder of the claim. *In re Robertson*, 72 B.R. 2 (Bankr.D.Colo.1985).")

What if the collateral is lost/stolen/missing?

Can the debtor surrender the collateral if it is in the possession of another who refuses to turn it over?

> *See, In re Prior*, 2014 WL 585284 (Bankr.S.D.Ga. 2014). In that case, the debtor bought engagement rings for his then fiancee, who refused to return the rings. The debtor proposed to "surrender" the rings in his plan by surrendering any interest in the rings. The court said, "A debtor cannot surrender the debtor's interest in collateral if the debtor is unable to deliver possession or control of the collateral. Based on a strict literal interpretation of the language in § 1325(a)(5)(C), it appears that a debtor providing for surrender must, in fact, surrender the property and not merely the debtor's interest in the property." Id. at *3.[49]
>
> Note, however, that some courts have allowed confirmation even without surrendering the collateral if the collateral truly is lost,

---

[49] Interestingly, in Texas, there is case law on whether one can recover an engagement ring given to another depending based on whether it was a "conditional gift." It may actually turn on the question of who was at fault in the breakup of the engagement. See, *McLain v. Gilliam*, 389 S.W.2d 131 (Tex.Civ.App.—Eastland 1965, writ ref'd n.r.e.). The creditor may be better off arguing, however, that any alleged "gift" was a fraudulent transfer that the debtor should be required to obtain the return of as a condition of confirmation.

stolen or destroyed (absent bad faith on the part of the debtor). *See*, i.e., *In re Anderson*, 316 B.R. 321 (Bankr.W.D.Ark. 2004).[50]

§506. *See, In re Rodriguez*, 156 B.R. 659 (Bankr.E.D.Cal. 1993).[51]

Leases

Leases pose an interesting problem in consumer cases.

Creditors should be cautious in that some debtors list leases (or executory contracts) in the section of the plan for secured claims - direct pay.

Could the debtor then argue that the plan is res judicata and the debtor is actually a security interest, not a true lease?

11 U.S.C. §365(d)(2) provides that in a chapter 13 case, "the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan..."

If the debtor does not file a motion to reject the lease, the lease is rejected upon confirmation of the plan. *See*, *In re Milstead*, 197 B.R. 33 (Bankr.E.D.Va. 1996).

In the Southern District, the debtor must list which executory contracts are assumed. All others are rejected.

Administrative claim for post-petition use of leased property

If the debtor continues to use the leased property post-petition, but before rejection of the lease, the creditor will have an administrative claim for the use of the leased property. See, *Memphis-Shelby County Airport Auth. v. Braniff Airways, Inc*. (*In re Braniff Airways, Inc*.), 783 F.2d 1283 (5th Cir. 1986). See also, *In re Appletree Markets, Inc*., 139 B.R. 417 (Bankr.S.D.Tex. 1992)(Noting that §365(d)(3) requires trustee to timely

---

50 A creditor should still consider a Motion for Relief from Stay (if the surrender does not terminate the stay - see the plan provisions, above) so that the creditor can repossess the collateral if it does appear. Further, if the debtor claims that the property is lost (as in "I just don't know where I put that $4,000 ring") or stolen, creditors should consider something in the confirmation order requiring the debtor to notify the creditor if the property somehow turns up, or requiring the debtor's cooperation in trying to locate the missing collateral.

51 See also, *In re Solis*, 356 B.R. 398, 413 (Bankr.S.D.Tex 2006)("Therefore, § 506(a) does not apply to Debtor's son's equitable interest in the Neon. The Court is not aware of any authority for bifurcation of a lien secured by property in which the estate holds only a nominal interest and for payment of the reduced claim in such a way that would eliminate the lien as it applies to the equitable interest owned by a non-debtor.31 Section 506(a) simply does not allow bifurcation of a lien to the extent that the lien attaches to the equitable interest that is not property of the estate.")[Citing, *In re Rodriguez*.]

perform all obligations of the debtor, including lease payments, until rejected.)

Breach of the lease post-assumption

If the debtor breaches the lease after assumption, any liability incurred will be treated as an administrative expense. See, *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 531-532, 104 S. Ct. 1188, 79 L. E. 2d (1984)(collective bargaining case). *Mason v. Official Comm. of Unsecured Creditors* (*In re FBI Distrib. Corp.*), 330 F.3d 36, 42 (1st Cir. 2003)("If a debtor in possession assumes an executory contract under subsection 365(a), 'it assumes the contract cum onere,' and the liabilities incurred in performing the contract will be treated as administrative expenses.").

Reasonable time to cure

If the debtor is assuming the lease, the debtor must "promptly cure" any defaults under the lease.

Quite often, debtors will either not list the time to cure the default or will provide that any arrearages under the lease will be paid "pro rata" or over the life of the plan (up to 60 months).

Prompt cure must be decided on a case-by-case basis. See, *In re Reed*, 226 B.R. 1, 2 (Bankr.W.D.Ky. 1998)(holding that debtor must cure auto lease over no more than 6 months and noting other courts rejected any cure of more than 12 months).

"[T]he Court may consider the nature of the leased property, the provisions of the lease, the amount of arrearage under the lease, the remaining term of the lease, and the provisions of a debtor's proposed plan." *In re Brown*, 2006 WL 2546824, *3 (Bankr.S.D.Miss. 2006).

Clearly, creditors should object if the proposed cure period is too long, and especially if the debtor proposes a cure period which is beyond the term of the lease.

MOTIONS FOR RELIEF FROM THE AUTOMATIC STAY

Southern District of Texas - Local Bankruptcy Rule 4001-1

A certificate of conference with "opposing counsel" is required.

Note that in a Chapter 7 with non-exempt property, this might be the Chapter 7 Trustee or the attorney for the Trustee.

Creditors should consider, with regard to residences or exempt vehicles ("Consumer Lift Stay Motions"), sending a proposed order on the official local form, along with the payment history. This is the simplest way to comply with Local Bankruptcy Rule 4001-1(f)(4)

14 day negative notice language

Order must accompany the Motion (form order for houses, cars and divorces)

Self calendared

There are official local forms for exempt residence and exempt vehicles, and divorces for the Motion for Relief itself, Motions to Approve, and the various orders therefore. There is also a form default order.

Variation from the forms is allowed in "exceptional circumstances."

As a practice tip for creditors, since the official form for exempt residences and exempt vehicles includes the information the court will consider for a Motion for Relief from Stay, it is advisable to use the "exempt" form for "non-exempt" property.

The same applies with regard to the form orders.

11 U.S.C. §362(g) is your friend.

11 U.S.C. §362(g) provides:

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

Look to the debtor's schedules.

The values the debtor has placed in his or her schedules are a judicial admission. They cannot be explained or controverted. *See*, *In re Sissom*, 366 B.R. 677, 697 (Bankr.S.D.Tex. 2007).

Since in most cases, there will be a lack of equity in the property, once the schedules are offered, it will then be up to the debtor to show that the property is necessary for an effective reorganization[52] and that the creditor is adequately protected.

The Co-Debtor Stay

Creditors should note that just because a claim is included in a Chapter 13 plan, it does not preclude obtaining at least limited relief from stay as to the co-debtor.

If the debtor is paying the claim in full pursuant to non-bankruptcy law, the court will likely not lift the co-debtor stay.

However, 11 U.S.C. §1301(c)(2) provides that the court *shall* grant relief from the co-debtor stay to the extent that the plan filed by the debtor proposes not to pay such claim.

If the debtor proposed to strip down the creditor's lien, the creditor can obtain relief from stay to pursue the co-debtor as to the remainder. *See, In re Fink*, 115 B.R. 113 (Bankr.S.D.Ohio 1990).

If the plan provides to pay a lower interest rate than that provided by the note, the creditor can obtain relief to pursue the co-debtor for the remaining interest. *See*, *In re Pardue*, 143 B.R. 434 (Bankr.E.D.Tex. 1992)

Even as to an unsecured debt, if the debtor only proposes to pay a percentage of the claim, the creditor is entitled to relief from stay to pursue the remainder of the claim. *See*, *In re Jacobsen*, 20 B.R. 648 (9th Cir. B.A.P. 1982).

The threat of action against a co-debtor may encourage the debtor to amend their plan to pay more of the claim upon which the co-debtor is liable. *See, i.e.*, *Southeastern Bank. v. Brown*, 266 B.R. 900 (Bankr.S.D.Ga. 2001).

On a related note, it is also occasionally helpful to point out to the debtor's attorney that, even if there is no motion for relief from the co-debtor stay, if there is a co-debtor, the debtor will not obtain the title to the collateral once the case is over if the claim is not paid in full pursuant to non-bankruptcy law. *See*, *In re Leonard*, 307 B.R. 611 (Bankr.E.D.Tenn. 2004).

MOTIONS TO EXTEND OR IMPOSE THE AUTOMATIC STAY

---

[52] As to Chapter 7 cases, see Judge Isgur opinion in *In re Young*, 2007 WL 128280 (Bankr.S.D.Tex. 2007) holding that in a chapter 7 the property is not necessary for an effective reorganization as a matter of law.

Can the debtor even be a debtor in the newly filed case?

If the voluntarily dismissed his or her case within 180 days of the filing of the petition and a Motion for Relief was filed in the previous case, the debtor is not eligible to be a debtor. 11 U.S.C. §109(g)(2)

Some courts require a causal connection between the dismissal and the motion for relief for §109(g)(2) to apply. *See*, *In re Sole*, 233 B.R. 347 (Bankr.E.D.Va. 1998)

Other courts have followed the strict language of the statute and found, if a case is voluntarily dismissed at any time following the filing of a Motion for Relief, "irrespective of the time interval two events or the disposition of the creditor's motion," the debtor is not eligible to be a debtor under 11 U.S.C. §109(g)(2). *In re Munkwitz*, 235 B.R. 766, 768 (D.Ct.E.D.Pa. 1999).

The Fifth Circuit noted that some courts have applied a good faith exception, but declined to decide whether such an exception exists. *Moran v. Frisard* (*In re Ulmer*), 19 F.3d 234 (5th Cir. 1994)

A creditor should clearly object and consider a Motion to Dismiss if the case was filed in violation of 11 U.S.C. §109(g)(2).

If the debtor does not file a Motion to Extend Stay, what is the effect?

The language of §11 U.S.C. §362(c)(3) is imprecise. Is the stay lifted as to the debtor? the estate? both? The Fifth Circuit settled the issue for us and agreed with courts holding that the stay terminates only as to property of the debtor. *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019). Note, however, that simply forgoing a Motion to Extend may not be the best idea. If the stay is lifted as to the debtor but not the estate, what happens when the property is exempted and the exemptions are allowed? The stay lifts as to the estate at that point and since it would already be lifted as to the debtor by operation of law, there would be no stay. Also, note that the termination of the stay is not just as to property but as to debts.

As to the third case (or more) pending within one year[53], 11 U.S.C. §362(c)(4) provides that the stay under §362(a) does not go into effect.

Motions to Impose, therefore, do not have the lingering question as to the extent of the automatic stay that Motions to Extend do.

---

[53] Assuming the previous cases were dismissals, and one was not a discharge.

Motions to Confirm

If the debtor does not timely file a Motion to Extend Stay under §362(c)(3) or a Motion to Impose under §362(c)(4), a creditor may file a Motion to Confirm Termination of Stay under 11 U.S.C. §362(j). "Section 362(j) permits any party-in-interest to request the court to determine whether a stay is in effect." *In re Lundquist*, 371 B.R. 183, 189, n. 11 (Bankr.N.D.Tex 2007).

Hearings on Motions to Extend or Impose

With regard to Motions to Impose or Motions to Extend, there are four cases that should be required reading, at least in the districts of Texas. *In re Charles* (*Charles I*), 332 B.R. 538 (Bankr.S.D.Tex. 2005 - Judge Isgur)(pleading requirements); *In re Charles* (*Charles II*), 334 B.R. 207 (Bankr.S.D.Tex. 2005 - Judge Isgur)(burden of proof and examination of good faith requirement); *In re Jenkins*, 435 B.R. 378 (Bankr.N.D.Tex. 2010 - Judge Robert Jones)(objective threshold test and subjective totality of the circumstances test); and *In re Collins*, 335 B.R. 646 (Bankr.S.D.Tex. 2005 - Judge Isgur)(change of circumstances).

See the Charts in the cases of *Charles I* and *Charles II* for a helpful primer on the evidentiary standards, burden of proof, and issue of good faith.

That sneaky co-debtor stay

Creditors should remember that under either §362(c)(3) or (c)(4), the co-debtor stay is not terminated by operation of law.

INSURANCE PROCEEDS

In a number of cases, recently, a secured creditor's collateral (invariably a car) has been damaged post-confirmation and declared a total loss by the insurance company.

Are the proceeds property of the estate?

Generally, since the insured property is property of the estate, the insurance proceeds which arise therefrom are property of the estate. See, *Bradt v. Woodlawn Auto Workers* (*In re Bradt*), 757 F.2d 512, 515 (2d Cir. 1985), *McRoberts v. Associates Commer. Corp.* (*In re Derickson*), 226 B.R. 879, 882 (Bankr. S.D. Ill. 1998), *In re Turnbull*, 350 B.R. 429 (Bankr. N.D. Ill. 2006).

There may be instances, however, where the insurance proceeds are not property of the estate. *See*, *In re Asay*, 184 B.R. 265 (Bankr.N.D.Tex. 1995).[54]

[54] Of course, if the insurance monies are not property of the estate, for whatever reason, then the automatic stay would not apply to those proceeds and the bankruptcy court should not be concerned with such monies. *See, i.e.*, *In re Scott Wetzel Services, Inc.*, 243 B.R. 802 (Bankr.M.D.Fla. 1999).

The proceeds are cash collateral

The insurance proceeds are, however, cash collateral under 11 U.S.C. §363(a) and thus subject to the provisions of 11 U.S.C. §363(c)(2). *See*, *In re Carey*, 202 B.R. 796 (Bankr.M.D.Ga. 1996).

Who is entitled to the insurance proceeds?

Pre-confirmation

If the accident occurred prior to confirmation, then the value of the collateral will be set by the amount of the insurance proceeds (assuming no Motion for Valuation has been filed and decided).

In that case, the creditor should file a Motion for Relief from Stay to allow it to accept and apply the insurance proceeds.

If proceeds are less than the contractual balance, the proceeds will pay down the debt and the deficiency will be an unsecured claim.

If the proceeds are more than the contractual balance, then the proceeds will pay off the claim and the overage will either be payable to the debtor (if the proceeds are exempt) or to the trustee (if they are not).[55]

Post-confirmation - direct pay

If the collateral is being paid for directly by the debtor pursuant to the terms and conditions of the contract, then the creditor should file a motion for relief to apply the funds.

If the proceeds are more than the remaining allowed secured claim, then who gets the overage?

If the collateral is deemed to be property of the estate (or a portion of it is property of the estate), the excess proceeds should go to the trustee to be disbursed on the allowed unsecured claims subject to the exemptions and pursuant to the confirmed plan. *In re Turnbull*, 350 B.R. 429, 434 (Bankr. N.D. Ill. 2006), *In re Kelley*, 2012 WL 5457331 (Bankr. E.D. Ky 2012).

The proceeds are less than the remaining allowed secured claim, as usually the case, then the creditor should file an amended , unsecured

[55] In case of an overage, it is best to contact both the debtor's attorney and the trustee to make sure there is no dispute as to the right to the funds. Generally the debtor and the trustee will agree to some type of solution, lest the creditor seek to deposit the funds in the registry of the court and seek its fees for so doing, depleting the funds.

claim for the deficiency.

Post-confirmation - through the trustee

The rub comes when the claim is being paid through the Chapter 13 Trustee.

If the proceeds are less than the remaining allowed secured claim, the creditor should file a motion for relief from stay with regard to the proceeds.

Some trustees want to receive the insurance proceeds and distribute them themselves, so they can account for the proceeds.

Creditors should object to the trustee seeking to collect their percentage fee from these funds. *See*, *McRoberts v. Associates Commer. Corp*. (*In re Derickson*), 226 B.R. 879 (Bankr. S.D. Ill. 1998)(insurance proceeds did not qualify as payment from the debtor's income or other property and did not result in any trustee's fee being assessed).

Some trustees will simply allow the insurance company to pay the secured creditor directly and simply account to the trustee for the payment, either through an amended claim or as part of an order terminating stay.

Will the creditor have secured or unsecured claim for the deficiency with respect to its allowed secured claim?

The confirmed plan is still res judicata and modification under § 1329 to surrender the property that has been deemed a total loss may not be approved. *In re Torres*, 336 B.R. 839 (Bankr. M.D. Fla. 2005), *In re Cameron*, 274 B.R. 457 (Bankr. N.D. Tex 2002); but, *see In re Davis*, 404 B.R. 183 (Bankr. S.D.Tex 2009) allowing the debtor to surrender collateral in full satisfaction of creditor's claim as a matter of equity.[56]

[56] In *Davis*, however, Judge Bohm noted that generally a debtor would not be allowed to depreciate collateral and then file a modification to surrender, but in that particular case, the creditor's actions in voluntarily repossessing the collateral shifted the equities enough to allow the debtor to modify to surrender and reclassify the claim from secured to unsecured.

> The trustee may have to distribute the insurance proceeds to the creditor and continue to pay the remaining balance of the allowed secured claim after the application of the insurance proceeds.[57]

But what if the proceeds are more than the remaining allowed secured claim? Indeed, what if the allowed secured claim has been paid in full? Is the debtor (or the trustee) simply entitled to the proceeds?

> 11 U.S.C. §1325(a)(5)(B)(I) provides that the secured creditor retains its lien until the earlier of discharge or payment in full of the underlying debt as determined by applicable nonbankruptcy law.
>
> So if the allowed secured claim is paid in full through the insurance proceeds (or has already been paid in full), but the claim as determined under non-bankruptcy law has not been paid in full, the secured creditor still has a lien against those funds.
>
> > One case, *Ridge v. Union Acceptance Corp.* (*In re Ridge*), 2007 WL 7141630 (Bankr.N.D.Ga. 2007), cited pre-BAPCPA case law[58] and ordered the creditor to refund to the trustee the proceeds over-and-above its allowed secured claim.
> >
> > The majority of courts, however, have held that, based on 11 U.S.C. §1325(a)(5)(B)(I), the money should be held in trust until the debtor receives its discharge, or the case dismissed or converts. If the case dismissed or converts, the money is paid to the creditor. If the case is discharged, then the money goes to either the debtor or the trustee. *See*, *In re Kelley*, 2012 WL 5457331 (Bankr.E.D.Ky. 2012)(debtor's attorney to hold the funds); *In re Perry*, 2011 WL 5909065 (Bankr.E.D.N.C. 2011)(Trustee ordered to hold funds); *In re Noreed*, 2011 EL 4433590 (Bankr.D.Ore. 2011)(Trustee to

---

57 Of course, the debtor may simply stop paying the trustee, allow the case to dismiss, and then file a new case and provide for the claim as a purely unsecured claim, something of a pyrrhic victory for the creditor.

58 11 U.S.C. §1325(a)(5)(B)(I) was added by BAPCPA. Before BAPCPA, there was a split of authority as to whether a lien had to be released once the allowed secured claim was paid in full.

hold funds.)[59]

Substitution of collateral

While creditors may chose to allow the use of the proceeds based on a substitution of collateral, creditors typically cannot be forced to do so in a Chapter 13 proceeding. *In re Van Stelle*, 354 B.R. 157 (Bankr. W.D. MI 2006).[60] See also, *In re Huff*, 332 B.R. 661 (Bankr. M.D. Ga. 2005) and *In re Turnbull*, 350 B.R. 429, 435 (Bankr. N.D. Ill. 2006).[61]

---

59 Note that since the proceeds would not be wages, if the trustee holds the funds there should not be an issue with *Harris v. Viegelahn*, ___ U..S. ___, 135 S.Ct. 1829 (2015) in that the insurance proceeds would be property of the estate and therefore the trustee would not be required to return them to the debtor. The language about the Chapter 13 trustee losing authority upon conversion is troubling, however, so perhaps the parties should ask that the funds either be held by the debtor's attorney, the creditor's attorney, or the creditor, in trust.

60 Note that *Van Stelle* turned on the issue of pre- versus post-confirmation and the vesting of the property of the estate. Thus, there may be situations where the court may order a substitution of collateral.

61 Unless the debtor is purchasing substitute collateral outright, it is unlikely that the debtor will find a lender who will allow a superior lien on the new collateral. Even where a debtor may seek to obtain a lien from the same creditor, the debtor would likely have to offer enough of a down payment so as to establish equity in an amount equal to the substitute lien.