CHAPTER 13 HYPOTHETICALS

HYPOTHETICAL #1

Your prospective chapter 13 client advises that he owns two vehicles solely in his name. Both vehicles are financed. The first vehicle he uses for work is a 2003 GMC truck he purchased 24 months ago. The payoff on the loan is $18,000.00, at a 12% interest rate. According to NADA, the current retail value for the truck is $14,500.00. The second financed vehicle, a 2004 Chrysler minivan (purchased 18 months ago), is driven solely by his wife (who will not be a party in the bankruptcy). The payoff for the minivan is $16,000.00 and the current retail value is $8,500.00. The interest rate for the van is 18%. The prime interest rate is 7%. Can the debtor cram down either of the two car loans now, or will the debtor have to wait? What considerations would you need to learn to better answer this question? Assuming you could cram down the vehicles, explain the formula to accomplish this.

HYPOTHETICAL #2

A prospective chapter 13 client and her husband (the "clients") meet with you to discuss filing a bankruptcy petition. They explain that there is a sheriff's sale scheduled for their jointly-owned home in three weeks. They further advise that in 2001, because the wife lost her job due to firm downsizing, they jointly filed a chapter 13 bankruptcy petition, which was dismissed ten months ago. The wife has since obtained employment at a higher salary than her previous position. Four months ago, the husband, who was represented by schlock lawyer, solely filed a second chapter 13 bankruptcy; however, the case was dismissed due to the lawyer's failure to file an amended plan. The clients would now like to file another joint chapter 13 bankruptcy petition to stop the sheriff's sale. You confirm the information on Pacer, and also confirm that there is no bar order. Should one or both individuals file a new chapter 13 bankruptcy? Is additional information required involving the change in the clients' circumstances? Assuming that you do file a chapter 13 bankruptcy petition, is the automatic stay in effect upon the filing? What steps must you take to impose or extend the automatic stay? *See* 11 U.S.C. §362(c)(3)&(4).

HYPOTHETICAL #3

A former client for whom you previously filed a chapter 7 bankruptcy petition explains to you that two weeks ago his mortgage company commenced a foreclosure action against him for non-payment. Three years ago you represented the debtor in a successful chapter 7 case, and the debtor received a discharge. It was his intent to continue to keep his home and pay the mortgage on a regular basis which he was doing, until he was laid off by his former employer, Scary Airlines. He did not sign a reaffirmation agreement in his prior case. Amazingly, the client took your advice and has not incurred any new credit card debt. Is the client eligible to file a chapter 13 bankruptcy now? *See* 11 U.S.C. §1328(f)(1). If eligible, does he receive all the benefits of the chapter 13? Does it matter? What additional information is required to determine if he should file a chapter 13 bankruptcy petition now? If the debtor is not employed and has no other source of income what other steps could be taken to protect his interest in keeping the home?

HORNBOOK

I. CRAM DOWN LOANS

Pursuant to § 1322(b)(2), a debtor who files a chapter 13 bankruptcy may file a plan of reorganization which modifies (*i.e.* "crams down") the rights of holders of secured claims, except for those claims which are secured only by the debtor's principal residence, (*i.e.* typical residential mortgages), subject to the requirements set forth in § 1325(a)(5) of the Bankruptcy Code.

Prior to the enactment of the 2005 Act it was understood that § 1325(a)(5) allowed a debtor to pay the allowed secured claim of a creditor, and to modify both the payment terms and the interest rate of the loan. Under § 506 the secured claim is allowed as *a secured claim only* to the extent of the value of the collateral. *Colliers on Bankruptcy 15th Edition*, § CS19.01, Henry J. Sommer. The unsecured portion of the claim would be treated as an unsecured claim in the bankruptcy plan. *Id.*

The most common cram down scenario in a chapter 13 case involves car loans. The first step in cramming down a car loan is valuing the vehicle. The Supreme Court established the standard for establishing the value of a car for a cram down in *Associates Commercial Corporation v. Rash, 520* U.S. *953,* 117 S.Ct. 1879 (1997). There, the Court rejected both a car's wholesale value and the average of the wholesale and retail "book" value of a vehicle as formulas for fixing the value of a car. The court held that the creditor must receive the "replacement value" of secured property, which means "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, 117 S.Ct. at 1884, and set forth the following method:

> 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. [In re Rash,]* 90 F.3d [1036,] at 1051-1052 [(5th Cir.1996) (en banc)]. 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 520 U.S. at 965 n. 6, 117 S.Ct. at 1886-87 n.6.

Two years ago in *In re King,* 2003 WL 22110779 (Bankr. E.D.Pa. 2003) (Sigmund), our local bankruptcy court was required to value a used car for a cram down. It noted, "given the lack of guidance in *Rash,* several courts have utilized an average between wholesale and retail prices found in guide books like N.A.D.A. as a starting point for their analysis and where the evidentiary record is as inconclusive as is typical of disputes of this kind, the ending point as well. *See, e.g., In re Getz,* 242 B.R. 916,919-20 (6th Cir. BAP 2000); *In re Lyles,* 226 B.R. 854, *856-57* (Bankr.W.D.Tenn.l998); *In re Glueck,* 223 B.R. 514, 519 (Bankr.S.D.Ohio 1998); *In re Oglesby,* 221 B.R. 515, 519 (Bankr.D.Col.1998); *In re Younger,* 216 B.R649, 656-57 (Bankr.W.D.Okla.1998). *But see In re Gonzalez,* 2003 Bankr. LEXIS 473, at *15-16 (Bankr.N.D.Ill. May 27, 2003) . . ."

The court selected a valuation that was slightly less than retail to account for the availability of a private sale option. *Id,* supra. The court, in its rational quoted *In re Glueck,*

> In the experience of this Court, debtors in Chapter 13 proceedings, when faced with the need to purchase an automobile, do not routinely make that purchase from an automobile dealership. There are numerous other sources for debtors to obtain automobiles at lower costs, avoiding the overhead costs inherent in purchases from automobile dealerships. Debtors are able to purchase automobiles at auctions, from private individuals, from used car lots, from family members, or from rental car companies, just to name a few options. That market is clearly broader than a purely retail market. McElroy, 210 B.R. at 835. The Court believes that a willing "non-dealership" seller would accept, in many cases, a lower price for a comparable vehicle than would an automobile dealership. While it would be easier for this Court to

> accept the analyses of the courts that equate "retail value" with "replacement value," the Court does not believe this to be mandated by Rash. The Court finds that "retail value" and "replacement value" are not synonymous. (citations omitted).

223 B.R. 519.

Nevertheless, despite the above case law, prior to the 2005 Act, the standard practice in the Eastern District of Pennsylvania was to continue to value used cars by averaging the difference between the retail and wholesale values as represented in the auto guides, as adjusted for mileage and wear and tear.

The appropriate time for the valuation was at the date of confirmation. See *In re Winston,* 236 B.R. 167 (E.D.Pa. 1999)(Scholl); see also *In re King,* 2003 WL 22110779 (Bankr. E.D. Pa. 2003)(Sigmund).

Once the value of the car would be determined, the interest rate would be modified from the contract rate of interest (which could be as high as 21%) to a lower interest rate of prime interest rate plus 1-3% formula as set forth in the recent case, *Till v. SCS Credit Corp., 124* S.Ct. 1951, 1956, 158 L.Ed.2d. 787 (2004).

In *Till,* the Court addressed the issue of what interest rate should be charged when a debtor was cramming down a car loan. The court reviewed and rejected a number of formulas, including the presumptive contract rate (rate listed in the loan agreement), the coerced loan approach (the interest rate the creditor would voluntarily accept for a loan of a similar character, amount and duration made in the region at the time of the effective date of the plan (i.e. the contract rate) (prior to the ruling in *Till,* this was the approach used in the 3rd Circuit. *See General Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 67-68 (3d Cir. 1993)), and the "cost of funds approach", which focused on the creditworthiness of the creditor rather than the debtor.

The court, in a plurality decision, applied a "prime-plus" formula, and selected an interest rate of 9.5% (prime plus 1.5%) on a vehicle loan "cram down" in a 36 month chapter 13 plan, rather than the contract rate of 21%. The court selected the prime plus formula for a number of reasons. First this approach entitled a straightforward, familiar objective inquiry, and minimized the need for costly evidentiary proceedings. The "plus" component of the formula does allow for an adjustment of (1-3%) based upon the circumstances of the bankruptcy estate and the

characteristics of the loan.

The *Till* holding made an immediate impact in the Eastern District of Pennsylvania. First, instead of using the contract rate of interest as was the rule set forth in *General Motors Acceptance Corp. v. Jones,* a lower interest rate can be used. This made cramming down much more attractive for a debtor as the debtor could save thousands of dollars on a cram down. Second, it made litigating a cram down almost non-existent, as it was not economically feasible for creditors to hire counsel to litigate an interest rate spread of 1-3% on these car loans.

Once the value of the car can be selected, and the interest rate chosen, then the debtor can amortizethe payments over the life of the plan. A popular amortization table can be found at www.bankrate.com. The debtor then determines the total amount of the money due and includes that amount to be paid in the chapter 13 plan.

<u>2005 Act Limits Cram Downs</u>

Section 1325, as amended, states in relevant part:

> (a) Except as provided in subsection (b), the court shall confirm a plan if-
>
> (5) with respect to each allowed secured claim provided for by the plan-
>
> (B)(i) the plan provides that –
>
> (I) *the holder of such claim retain the lien securing such claim until the earlier of –*
>
> *(aa) the payment of the underlying debt determined under nonbankruptcy law; or*
>
> *(bb) discharge under section 1328; and*
>
> (II) *if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;*
>
> (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; ….

. . . .

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

11 U.S.C. § 1325.

Section 506 was also amended which added (a)(2), which 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 upon 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 a persona, family or household purpose, 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.

11 U.S.C. § 506(a)(2).

One can argue that the recent amendments limit cram downs in a number of ways. First, a debtor is prohibited from cramming down a car loan for his or her own vehicles purchased within

910 days (2-1/2 years) of the date of the petition. Thus, the debtor would be compelled to pay the full balance of the car loan for a car purchased within that time period. This restriction, even if accepted by the courts, should only apply to cars acquired for the personal use of the debtor only. The reason for this is inclusion of the modifying phrase "acquired for the personal use of the debtor" which limits the restriction.

When interpreting a statute, there is an understanding that Congress says what it means and means what it says. *Hartford Underwriters Ins. Co. v. Union Planters Bank,* N.A., 530 U.S. 1, 120 S.Ct. 1942, 1947 (2000). Words are given their ordinary, contemporary, common meaning unless there is an indication that Congress intended the words to bear some different import. *Williams v. Taylor,* 529 U.S. 420, 120 S.Ct. 1479, 1488 (2000); *First Merchants Acceptance Corp. v. J. C. Bradford & Co.,* 198 F.3d *394,*397-399 (3d Cir.1999) (statute unambiguous based on definitions included within statutory scheme). We must give effect, if possible, to every word and clause of a statute. *Alexander v. Riga,* 208 F.3d 419, 430 (3d Cir. 2000) (quoting *Bennett v. Spear,* 520 U.S.154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)).

Accordingly, applying the plain language of the statute, if the purchase was **not** for the personal use of the debtor, *i.e*. purchased for the debtor's business, or for someone other than the debtor, such as a debtor's family member, then the cram down restriction should not apply. One can argue that either a one-year prohibition or no prohibition would apply in that case. Thus, a debtor may be able to cram down such a loan.

Also, it is clear that the 2005 amendments to § 506 codify the *Rash* decision, that the value of the personal property under § 506 is the replacement value of the property, without deduction of costs of sale or marketing. Section 506(a)(2), as amended, further clarifies that replacement value for cars used by "personal, family and household uses" shall mean the "price a retail merchant would charge for the property of that kind considering the age and condition of the property, at the time value is determined." Thus, it is clear that averaging the difference between the retail and wholesale prices is unacceptable. It is still not clear whether the 2005 Act requires the use of the straight retail price. The reason for the uncertainty is that most retail prices include the cost of reconditioning and warranties. Thus, one could argue that the amendments may allow for a value less than retail to account for the lack of reconditioning and the lack of warranties.

Interestingly, the 2005 Act does not overrule the *Till* decision. Therefore, in cases, where a debtor can cram down a car loan, the debtor is still free to use the prime plus formula as endorsed in *Till.*

II. <u>SERIAL FILINGS AND THE AUTOMATIC STAY</u>

In 2004, according the Office of the Standing Chapter 13 Trustee, approximately one-half of all chapter 13 bankruptcies filed in the Eastern District of Pennsylvania were repeat cases. Although there was initial hype that the 2005 Act would bar serial filings, after a close review, it is apparent that while the 2005 Act places a greater burden on the debtor, the protections of the bankruptcy court, including the automatic stay, may still be available to the consumer debtor filing more than once.

Even before the 2005 Act took effect, our courts in this district had started to take a strong stand against bad faith filers. In 1993, the Third Circuit ruled that a chapter 13 petition filed in bad faith can be dismissed for cause pursuant to § 1307(c) of the Bankruptcy Code. *In re Lilley*, 91 F.3d 491, 496 (3rd Cir. 1997); *In re Dami*, 172 B.R. 7, 10 (Bankr. E.D. Pa. 1994). Under the old case law a creditor who challenged a debtor's filing had the initial burden to put the debtor's good faith into dispute. *See In re Krebs*, No. 01-12942F, Slip op. at 8 (Bankr. E.D. Pa. April 27, 2001; *In re Barr*, No. 01-12811KJC, Slip op. at 2 (Bankr. E.D. Pa. June 22, 2001). The creditor could satisfy that burden by demonstrating a debtor's history of serial filings. The burden of persuasion would then shift to the debtor who was required to offer evidence showing that the bankruptcy process was not being misused. *See In re Barr*, 266 B.R. 496, 498 n.6 (Bankr. E.D. Pa. 2001). Accordingly, although the initial burden was that of the creditors' the debtor had the ultimate burden to prove good faith. *See In re Krebs, supra* relying on *In re SGL Cardon Corp.*, 200 F.3d 154, 162 n. 10 (3rd Cir. 1999) and *In re Tamecki*, 229 F.3d 205, 207 (3rd Cir. 2000).

In *Lilly*, the Third Circuit ruled that good faith in a chapter 13 case must be assessed on a case-by-case basis in light of the totality of the circumstances. *Lilly*, 91 F.3d at 496, Burr, 266 B.R. at 498. The good faith inquiry is a fact intensive inquiry left to the discretion of the bankruptcy court. *Lilley*, 91 F.3d at 496. The court can consider the following factors,

including, but not limited to: the nature of the debt, the timing of the petition, how the debt arose, the debtor's motive in filing the petition, the effect on creditors, the debtor's treatment of creditor's pre and post-petition, and whether the debtor has been forthcoming with the bankruptcy court. *Id.*

Our courts have held that a history of serial filings and dismissal can be evidence of bad faith. *Lucabaugh v. I.R.S.*, 2001 WL 997416 at *3 (E.D. Pa. 2001); *Dami*, 172 B.R. at 10. There are a number of factors courts consider whether a serial filing is in bad faith. Those factors include:

1. The length of time between the prior cases and the present one;

2. Whether the successive cases were filed to obtain favorable treatment afforded by the automatic stay;

3. The effort made to comply with prior case plans;

4. The fact that Congress intended the debtor to achieve its goals in a single case; and

5. Any other facts the court finds relevant to the debtor's purpose in making a successive filing.

Dami, 172 B.R. at 10 n.5 (quoting *In re Oglesby*, 158 B.R. 602, 606 (E.D. Pa. 1993).

On of the most important factors to be considered is whether a material change in the debtor's circumstances has occurred since the previous filing which warrants a fresh start. *See In re Oglesby*, 158 B.R. 602, 606; *Dami*, 175 B.R. at 10. Can the debtor show a confirmable plan? *In re Barr*, 266 B.R. at 498 and does the debtor's history of prior filings reflect an intent to assure the bankruptcy system through a strategy of successive filings without any real intent of reorganization? *See Lucabaugh*, 2001 WL 997416 at *3; *Oglesby*, 158 B.R. at 606; *Dami*, 172 B.R. at 10.

Moreover, in almost all circuits, but the Tenth, bankruptcy courts and district courts invariably derive from §§ 105(a) and 349(a) of the Bankruptcy Code . . . the power to sanction bad faith serial filers . . . by prohibiting further filings for longer periods than the 180 days specified by § 109(g)." *In re Casse*, 198 F.3d 327, 337-338 (2nd Cir. 1999).

The 2005 Act does not bar serial filings. Certainly if Congress intended to bar a serial filing, it would have made a debtor ineligible for filing a second case under § 109. Instead, the 2005 Act only limits the automatic stay in certain cases and places a greater burden on the debtor to show good faith.

The first limitation is listed in new § 362(c)(3). If a debtor in a chapter 7, 11 or 13 was a debtor in one case within one year before the latest petition was filed (except in a case dismissed under § 707(b)), the automatic stay under § 362(a) expires thirty days after the petition was filed unless it is extended by the court.

If the debtor desires for the automatic stay to continue the stay in effect without interruption, the debtor must file a motion and the court must hold a hearing within thirty days to extend the stay. Without a new local rule in effect, it is recommended that debtor's counsel file expedited motions to insure (and properly notice all creditors) that the court is able to timely rule to continue the automatic stay within thirty days.

In order to continue the automatic stay, the movant (usually debtor) has the burden to show that the case was filed in good faith. The provision codifies the case law already in effect in our district that it was the debtor's ultimate burden to prove good faith. *See In re Krebs, supra*.

The case is presumptively not filed in good faith if the following occurs:

1. More than one prior case involving the debtor was pending in a year before the petition was filed (i.e. debtor received a discharge, then filed second case within a year);

2. A debtor's prior case was dismissed within the preceding year after failure to file required documents, provide adequate protection payments or perform terms of a plan. The 2005 Act states that while inadvertence or negligence of the debtor is not an excuse, negligence of the debtor's attorney can be a proper excuse. *See* § 362(c)(3).

The debtor can overcome the presumption by clear and convincing evidence showing substantial change of circumstances. 11 USC §363(c)(3)(i)(III). It does not appear that the required evidence would be any different to show good faith than under the prior law. A debtor

should be expected to explain why the last case was dismissed, i.e. the debtor lost a job, was downsized or ill. But now the debtor has sufficient income to propose a feasible plan. The debtor should expect to produce documents, such as pay stubs or medical bills, to substantiate his or her assertions. The debtor should also explain why the automatic stay should be extended to all creditors, not just a mortgage company. *See In re Charles*, 322 B.R. 538 (S.D. TX 2005). The honest debtor making a second attempt to save a home or obtain bankruptcy relief should be considered in good faith by most courts under the 2005 Act.

If an individual debtor has had two or more cases dismissed within the year before the petition is filed, § 362(c)(4) of the 2005 Act provides that the automatic stay under § § 362(a) does not go into effect upon the filing of the case (other than a case refilled under § 707(b).

A debtor must file a motion and have it heard within 30 days after filing to have the court impose the automatic stay. The movant must demonstrate that the case was filed in good faith as to the creditor stayed. As is the cases under § 362(c)(3), again there is a presumption that the case was filed in bad faith, subject to the rebuttal of the debtor, by clear and convincing evidence to the contrary.

Filings in Violation of 109(g) or a Prior Court Order

Under § 362(b)(21) of the 2005 Act, if a debtor files a new petition during a period when the debtor is ineligible for relief under § 109(g) or filed the case in violation of a prior order limiting new filings, the stay is inapplicable. This new provision applies to limited types of creditors – enforcement of real property liens. Nevertheless, a creditor relying on this exception based on § 109(g) acts at its peril. There may be factual or legal disputes about whether the debtor is eligible for relief and if the debtor prevails the creditor's action is likely to be found a willful violation of the stay.

In-rem Stay Orders

Creditors with claims secured by real property may seek in-rem stay relief under § 362(d)(4). However, the in-rem relief may only be granted if the creditor proves that the filing of the petition was part of a scheme to hinder, delay or defraud creditors and the scheme

involved the transfer of full or partial interests in the property without creditor or court approval or multiple bankruptcies involving the same property. Thus, it seems that this provision cannot be imposed during the first bankruptcy involving the property. Also prior filings in the more distant past would not likely be considered a part of a scheme to hinder, delay or defraud. This provision codifies the case law authorizing in-rem orders in certain cases.

One can argue that since the 2005 Act now sets a bright line rule for in-rem stay relief, courts should not grant it in other circumstances, especially where it is the first filing involving a property. It also should not be granted in a later case unless the case meets the requirements of being part of a scheme to hinder, delay or defraud creditors.

Filing Cases After Receiving a Bankruptcy Discharge

Section 727(a)(8) changes the time period a debtor may obtain a subsequent chapter 7 discharge from six to eight years after which a debtor received a prior chapter 7 discharge.

A new chapter 13 discharge cannot be entered if a debtor received a chapter 7, 11 or 12 case that was filed four years prior to the filing of the chapter 13 case.

There appears to be a drafting error involving the limitations on obtaining a chapter 13 discharge after a prior chapter 13 case. A debtor is unable to receive a chapter 13 discharge only if he received a chapter 13 discharge in a prior case **filed** two years before the present case, which will almost never be a bar for a second chapter 13 as most chapter 13 cases are at least 36 months. However, it is the plain meaning of the statute, and there are cases where a debtor can obtain a chapter 13 discharge within two years of filing.

It is important to recognize that it is still possible to file a second case even if a discharge is not granted. A chapter 13 may be used to cure a mortgage default or other default. The automatic stay can stop collection activity, foreclosures and repossessions.

NOTE: Written using materials from Henry Sommer, with permission.

<u>CASE SUMMARIES</u>

Associates Commercial Corporation v. Elray Rash, 520 U.S. 953 (1997)

Debtors' chapter 13 plan invoked the cram down power under § 1325(a)(5)(B). It proposed that debtors retain a tractor truck for use in a freight-hauling business, and pay the secured creditor, over 58 months, an amount equal to its present value, which they alleged was $28,500. The secured creditor objected to the plan and filed a proof of claim alleging that the claim was fully secured in the amount of $41,171, which was the balance on the loan at the time of the bankruptcy filing. Debtors filed an objection to the claim.

The bankruptcy court held an evidentiay hearing on the truck's value, agreed with the debtors and fixed the value at $31,875. Both the United States District Court and the Court of Appeals for the Fifth Circuit agreed that the creditor's allowed secured claim was limited to $31,875, the net foreclosure value of the truck.

The Supreme Court held that the "replacement-value standard" determines the value of a secured claim in cram down cases. Tying valuation to the actual "disposition or use" of the property points away from a foreclosure-value standard when a chapter 13 debtor invoking the cram down power, retains and uses the property." If a debtor retains the property and continues to use it, the creditor obtains neither the property nor its value and is at risk for a subsequent default or depreciation of the property. The "replacement-value standard" values the creditor's interest in the collateral in light of the fact that there is no foreclosure and the debtor continues to derive an economic benefit from its use.

When a chapter 13 plan proposed to retain collateral for use in a debtor's trade or business over a creditor's objection in the context of a "cram down," the Court held that the value of the collateral to be applied under § 506(a) is "the price a willing buyer in debtor's trade, business or situation would pay to obtain like property from a willing seller."

It is significant to note that the Court did not decide how to determine replacement value under § 506(a), stating "whether replacement value is the equivalent of retain value, wholesale value, or some other value will depend on the type of debtor and the nature of the property."

In re Schlupp, 2005 WL (Bankr. E.D. Pa.)

Debtor and his wife were serial filers with a total of six bankruptcy cases filed between them over a five-year period. A Stay Motion was filed by buyers who had purchased the debtor's property at sheriff sale. They had been prevented from obtaining a deed to the property because two hours after the sale, the debtor filed a pro se petition. A Motion to Dismiss was filed by the lender, who had been stayed from receiving foreclosure proceeds from the sheriff as a result of a state court challenge, followed by the bankruptcy stay. The court granted the dismissal motion, with a bar against the debtor and his wife from filing further bankruptcy relief without leave of the court, finding that the use of the bankruptcy law to stay foreclosure of property for five years without any effort to address the mortgage obligation was evidence of abuse.

In re Bailey, 321 B.R. 169 (2005)

Debtor and her husband were serial filers, have filed 9 prior bankruptcy petitions between them over a ten-year period. Debtor informed her new attorney of only one prior bankruptcy. Counsel performed a PACER search of the prior case only, discovering a Bar Order which had expired.

Judge Sigmund articulated the "reasonable inquiry" standard for debtor's counsel under Fed. R. Bankr. P. 9011 in cases where debtors are serial filers. The court found that failure to identify prior cases on the petition, and the filing of the prohibited petition itself, which would have been apparent had debtor's counsel undertaken a "reasonable inquiry," violated Rule 9011. "Where the client identifies a prior case, and in particular where a review of the docket in that case discloses a bar order, failure to further investigate the client's bankruptcy history is inexcusable." The court imposed monetary and non-monetary sanctions against debtor's counsel for failure to perform a complete search of PACER records, which would have revealed numerous prior cases in addition to the one prior filing counsel identified on the petition, and the imposition of a subsequent Bar Order against the debtor. "When a petition to be filed represents the tenth automatic injunction on the exercise of a creditor's state law rights, an attorney has a heightened duty of inquiry. Since the filing of a petition after such a succession of unsuccessful cases is an extraordinary privilege, it is incumbent on counsel to satisfy himself that it is

proposed in good faith, *i.e*. for a valid bankruptcy purpose and not merely to stay a sale. All benefit of doubt normally accorded the debtor should be replaced by a healthy skepticism, and the client should be required to prove his ability to perform **before** the case is filed."

CASES