

**THIS OPINION IS NOT INTENDED FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE: ) CASE NO. 01-50442  
 )  
ERIK LAMONT THORNTON ) CHAPTER 13  
KATHLEEN GAY THORNTON )  
 )  
DEBTORS ) JUDGE MARILYN  
SHEA-STONUM

**ORDER RE: OBJECTION OF  
T. & J. ACCEPTANCE CORPORATION  
TO VALUATION IN DEBTORS' CHAPTER 13 PLAN**

This matter came before the Court on an objection to the valuation of collateral (the "Objection") [docket #4] filed by T. & J. Acceptance Corporation, dba CarNow Acceptance Company and CNAC ("CNAC") and debtors' Response to the Objection (the "Response") [docket #5]. The Objection is based on debtors' proposed valuation of a 1995 Mercury Mystique with approximate mileage of 109,000 miles.

An evidentiary hearing on the matter was held on May 17, 2001. Appearing at the hearing were Lenza McElrath, Jr., counsel for CNAC; Randall D. Weissfeld, counsel for the debtors, and the debtors, Erik and Kathleen Thornton. During the hearing, CNAC presented evidence as to the value of the Mercury Mystique through N.A.D.A. Official Used Car Guide for February, 2001, Central Edition (the "N.A.D.A. Guide"), which was admitted into evidence without objection. The debtors presented evidence as to the value of the vehicle through testimony of Erik Thornton, the N.A.D.A. Guide and a compilation

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of advertisements for 1995 Mystiques through "AutoTrader.com," which document was also admitted into evidence after CNAC's counsel withdrew his objection. At the conclusion of the hearing the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). Based upon testimony and evidence presented at the evidentiary hearing, the arguments of counsel and the documents of record in this case, the Court makes the following findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52, made applicable to this contested matter by Fed. R. Bankr. P. 9014.

**I. BACKGROUND**

On February 15, 2001, debtors filed a chapter 13 bankruptcy petition which included a proposed chapter 13 plan. On Schedule B - Personal Property, debtors listed the fair market value of the 1995 Mercury Mystique as \$4,162.50. On Schedule D - Creditors Holding Secured Claims, debtors listed CNAC as the holder of an \$8,068.17 claim, listed the value of the vehicle as \$4,162.50, and listed the unsecured portion of the claim as \$3,905.67. Through their plan, debtors propose to pay CNAC \$4,162.50 of its secured claim, but listed no interest rate in the plan.<sup>1</sup> Debtors' plan provides that creditors holding allowed unsecured claims will receive 3 percent of those claims, without interest, over a period not to exceed 60 months.

On March 12, 2001, CNAC filed the Objection contending that the fair market

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<sup>1</sup> At the hearing, the parties agreed that CNAC was entitled to interest and agreed to a rate of 11%.

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value of the Mystique was "in excess of \$5,900.00, based on the N.A.D.A. Appraisal Guide . . . and the market." Objection at 1. The Debtors filed a Response stating that they had properly funded the plan and that the creditor was adequately protected. The only issue before the Court is whether debtors' proposed plan undervalues CNAC's secured claim on the 1995 Mercury Mystique by providing to pay it \$4,162.50 plus the agreed 11 percent interest.

### **II. DISCUSSION**

Pursuant to 11 U.S.C. § 1325(a)(5), the present value of each secured claim must be paid over the life of the plan, unless the creditor agrees to other treatment or the secured property is surrendered to the creditor. The amount of a creditor's secured claim is determined pursuant to 11 U.S.C. § 506(a), which provides in pertinent part:

[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value is to be determined in light of the purpose of the valuation and of the proposed distribution 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.

In *Associates Commercial Corp. v. Rash*, the United States Supreme Court determined that under § 506(a), the proper valuation of property to be retained by chapter 13 debtors is the cost the debtors would incur to obtain a like asset for the same proposed use. 520 U.S. 953, 957-64 (1997). It is this "replacement value" as modified by footnote 6 of *Rash* of the Mercury Mystique that the Court must consider in addressing the issues raised in the Objection. Given that the valuation process is not an exact science, the Court, as trier of fact, must sort through conflicting facts and weigh the evidence presented. See *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 965 n.6 (1997); *In*

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*re Coates*, 180 B.R. 110 (Bankr. D.S.C. 1995); *In re Snook*, 134 B.R. 424 (D. Kansas 1991).

During the evidentiary hearing, debtors presented evidence as to the current value of the Mercury Mystique through the testimony of Erik Thornton, the owner of the car and the debtor/husband. *In re Petrella*, 230 B.R. 829, 834 n. 5 (Bankr. N.D. Ohio 1999)(An owner is competent to give his opinion as to the value of his property. *Citing South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Texas*, 614 F.2d 1056, 1061 (5<sup>th</sup> Cir. 1980)). "[A]n opposing party can attack an owner's opinion on value through cross-examination or independent evidence refuting the owner's estimate." *South Central Livestock Dealers* at 1061. Thornton testified that the value of the vehicle was that listed on his schedules.<sup>2</sup>

Thornton also testified that although the vehicle runs well, it needs some engine/transmission work and that the interior is "average," with the upholstery being torn in places. In addition he informed the Court that the vehicle has power windows, an AM/FM radio and air conditioning, but no compact disc player or sunroof. The debtor also testified concerning an exhibit he offered into evidence and which was admitted. Debtors' Exh. 1. The exhibit consisted of four pages of advertising on AutoTrader.com

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<sup>2</sup> In his opening statement Weissfeld noted that he and the debtors began their valuation by figuring a value midpoint between replacement value and foreclosure value, and then factored in other evidence. Courts have held that this midpoint valuation is valid, *In re Hoskins*, 102 F.3d 311, 316 (7<sup>th</sup> Cir. 1996); *In re Valenti*, 105 F.3d 55, 62 (2<sup>nd</sup> Cir. 1997), although this approach has been cast into doubt by *Rash*, which now leaves to bankruptcy courts identification of the best way of ascertaining replacement value on the basis of the evidence presented. *Rash* at 965 n.6.

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listing twenty-five 1995 Mercury Mystiques for sale by private sellers or by auto dealers. Thornton testified that all of the 1995 Mystiques listed on the computer printout were being advertised for sale for \$4,000.00 or less, even those with lower mileage than the debtors' vehicle.

On cross-examination, Thornton stated that he had purchased the Mystique in question on August 23, 2000 for the asking price of \$8,500.00.

In its Objection, CNAC alleges that the debtors' vehicle should be valued in excess of \$5,900.00 based on the N.A.D.A. Guide and "the market." CNAC's evidence as to this valuation of the Mystique consisted of the N.A.D.A. Official Used Car Guide for February, 2001, Central Edition, sometimes referred to as the "blue book," and the cross-examination of Thornton. The blue book listed the "trade in" value of the vehicle to be \$4,500, the "loan" value to be \$4,050.00, and the "retail" value to be \$5,900.00. However, the Court notes that the blue book instructions at the bottom of page 26, on which those valuations appear, states "Deduct for Reconditioning." In addition, the "High Mileage Table" at page V of the exhibit lists "VALUES SHOWN BELOW TO BE DEDUCTED FROM BASE GUIDEBOOK VALUES" and lists four classifications, delineated as "I" through "IV," and the year of the vehicle. CNAC's counsel appears to have high-lighted class II and the year 1994. However, at the top of this page is also the caption "See beginning of each manufacturer for mileage classifications." The page or pages on which that information was listed were not part of CNAC's exhibit. Thus the court was not informed which class the Mercury was assigned to for the high mileage deduction. Deductions for high mileage for a 1995 vehicle range from \$600.00 to \$1,375. No evidence of any amounts to be deducted for high mileage or for reconditioning were presented at the hearing. The "market" to which CNAC referred in its Objection was not

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identified, and aside from the evidence discussed immediately above no evidence of "market" valuation was received into evidence from CNAC. Cross-examination of Thornton adduced only that the debtors had paid \$8,500.00 for the vehicle in August, 2000.

Unfortunately, neither CNAC nor the debtors had had the vehicle inspected by an experienced vehicle inspector or appraiser.<sup>3</sup>

A debtor seeking reorganization under chapter 13 has the burden of establishing that the plan complies with the statutory requirements for confirmation. *In re Petrella*, 230 B.R. 829, 832 (Bankr. N.D. Ohio 1999); *In re Maras*, 226 B.R. 696 (Bankr. N.D. Okla.1998). However, a party objecting to confirmation bears the burden of proof as to the objection. *In re Brown*, 244 B.R. 603, 607 (Bankr. W.D. Virginia 2000); *In re Petrella* at 832.

Thus CNAC had the burden of establishing the claimed value of its collateral and, under *Rash*, the value to be employed in Chapter 13 cases is replacement value. CNAC appears to have relied only on evidence of the blue book "retail" value of \$5,900.00 to claim the vehicle was worth "in excess of \$5,900.00", with no deductions for reconditioning or high mileage as directed by the blue book itself, and the admission of Thornton that he had paid \$8,500.00 for the vehicle. On this state of the record, the Court

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<sup>3</sup> Since valuation is largely left to the Court's consideration of evidence and testimony presented at the hearing, it would be very useful for parties to obtain appraisals or inspections of vehicles so that the Court would have some guidance as to the condition of the vehicle. Some respected appraisers charge as little as \$25.00, which is not an unreasonable expense for either party, and such appraisals substantially assist the Court in applying the teachings of *Rash*.

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finds that debtors' plan has not been shown to undervalue CNAC's secured claim by listing the Mercury Mystique's value at \$4,162.50.

**III. CONCLUSION**

Based upon the foregoing the Court hereby finds that debtors' plan does not undervalue CNAC's secured claim by listing its value at \$4,162.50 plus an agreed to 11 percent interest rate. Accordingly, for purposes of confirmation of debtors' proposed chapter 13 plan, CNAC holds a \$4,162.50 secured claim bearing interest at a rate of 11 percent and a \$3,905.67 unsecured claim.

**IT IS SO ORDERED.**

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MARILYN SHEA STONUM  
United States Bankruptcy Judge

**DATED: 5/30/01**