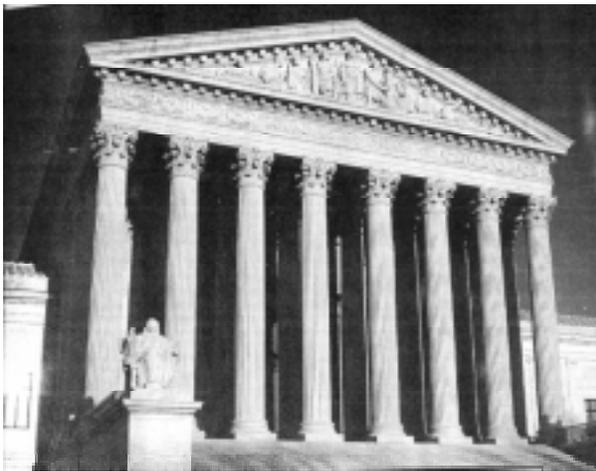

13 NEWS[®]

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**U. S. Supreme Court
Determined That
Replacement Value
Governs Cram Down
of Secured Claims in
Bankruptcy Court**

On June 16, 1997, the United States Supreme Court reversed and remanded the Fifth Circuit's *en banc* decision in **Associates Commercial Corp. V. Rash**, #96-454, ___ U.S. ___, 1997 WL 321231, 1997 U.S. Lexis 3688 (S.Ct.)(8-1)(6/16/97)(Ginsburg, J.) involving the proper standard of valuation of collateral under Bankruptcy Code Section 506(a). The Court of Appeals had held that when the debtor proposed to retain [rather than sell] collateral in a plan foreclosure value was the proper standard because that is all that a secured creditor could expect to recover in a sale of the property.

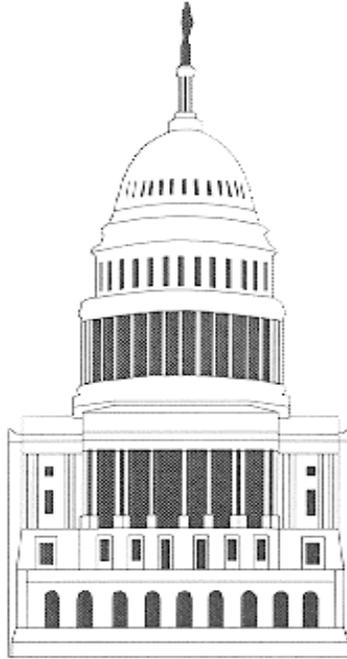
The Supreme Court held that the proper value is replacement value — "i.e., The price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition."

This standard does not agree with "retail value" of the Eighth Circuit decision, **Metrobank v. Trimble**, 50 F.3d 530 (8th Cir. 1995). The higher court opinion "leaves to the bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value." Hence, the decision may raise as many questions as it answers. Since the type of debtor and nature of the property may differ, replacement value might equal retail value, wholesale value, or some other value.

Nebraska Legislature Amends Exemptions

25-1552. Each natural person residing in this state shall have exempt from forced sale on execution the sum of two thousand five hundred dollars in personal property, except wages. The provisions of this section do not apply to the exemption of wages, that subject being fully provided for by section 25-1558. In proceedings involving a writ of execution, the exemption from execution under this section shall be claimed in the manner provided by section 25-1516. The debtor desiring to claim an exemption from execution under this section shall, at the time the request for hearing is filed, file a list of the whole of the property owned by the debtor and an indication of the items of property which he or she claims to be exempt from execution pursuant to this section and section 25-1556, along with a value for each item listed. The debtor or his or her authorized agent may select from the list an amount of property not exceeding the value exempt from execution under this section according to the debtor's valuation or the court's valuation if the debtor's valuation is challenged by a creditor.

Source: Laws 1997, LB 372 § 1.



Effective date: operative three (3) calendar months after adjournment of the legislative session which occurred on Thursday, June 12, 1997. In this case, Monday, September 15, 1997 [as actual date, September 13, 1997 would fall on a **S a t u r d a y**]

25-1556. Specific exemptions; personalty; selection by debtor. No property hereinafter mentioned shall be liable to attachment, execution, or sale on any final

process issued from any court in this state, against any person being a resident of this state: (1) The immediate personal possessions of the debtor and his or her family; (2) all necessary wearing apparel of the debtor and his or her family; (3) the debtor's interest, not to exceed an aggregate fair market value of one thousand five hundred dollars in household furnishings, household goods, household computers, household appliances, books, or musical instruments which are held primarily for personal, family or household use of such debtor or the dependents of such debtor; (4) the debtor's interest, not to exceed an aggregate fair market value of two thousand four hundred dollars, in implements, tools, or professional books or supplies held for use in the principal trade or business; and (5) the debtor's interest in any professional prescribed health aids for such debtor or the dependents of such debtor. The specific exemptions in this section shall be selected by the debtor or his or her agent, clerk, or legal representative in the manner provided in section 25-1552.

Source: Laws 1997, LB 372 § 2.

Effective date: operative three (3) calendar months after adjournment of the legislative session which occurred on Thursday, June 12, 1997. In this case, Monday, September 15, 1997 [as actual date, September 13, 1997 would fall on a **S a t u r d a y**]

25-1557. Actions in which exemptions limited or not allowed; for wages; for money due from attorney. Nothing in this chapter shall be so construed as to exempt any property in this state from execution or attachment for unpaid wages; for money due and owing by an attorney at law for money or other valuable consideration received by such attorney for any person or persons; or for enforcement of an award of or judgment for child support, alimony, or maintenance or a judgment for property division awarded to a former spouse.

Source: Laws 1997, LB 372 § 3.

Effective date: operative three (3) calendar months after adjournment of the legislative session

which occurred on Thursday, June 12, 1997. In this case, Monday, September 15, 1997 [as actual date, September 13, 1997 would fall on a **S a t u r d a y**]

40-101. Homestead, defined; exempted. A homestead not exceeding twelve thousand five hundred dollars in value shall consist of the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner, and not in any incorporated city or village, or, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, and shall be exempt from judgment liens and from execution or forced sale, except as provided in sections 40-101 to 40-116.

Source: Laws 1997, LB 372 § 4.

Effective date: operative three (3) calendar months after adjournment of the legislative session which occurred on

Thursday, June 12, 1997. In this case, Monday, September 15, 1997 [as actual date, September 13, 1997 would fall on a **S a t u r d a y**]

40-103. Homestead; exemption; when inoperative. The homestead is subject to execution or forced sale in satisfaction of judgments obtained (1) on debts secured by mechanics', laborers', or vendors' liens upon the premises; and (2) on debts secured by mortgage or trust deeds upon the premises executed and acknowledged by both husband and wife, or an unmarried claimant.

Source: Laws 1997, LB 372 § 5.

Effective date: operative on effective date which was one (1) day after the bill was signed by the Governor. In this case, May 28, 1997.

Some Chapter 13 Debtors Get The "NOD"

NOD is the acronym for the "Notice of Default" procedure that was set up by *Neb. R. Bankr. P. 3015-4*. Counsel are advised to thoroughly review this rule as the procedural repercussions appear to be dramatic.

Previously, when a Chapter 13 debtor became delinquent, the Chapter 13 Trustee filed a Motion To Dismiss, a Resistance Notice, and an Order if no resistance was filed. Pursuant to the new local court rule, the Chapter 13 Trustee now files a basically identical pleading entitled "Notice of Payment Default" with the additionally required information of the "date on which the next scheduled payment is due."

Further, a "Notice of Trustee's Notice of Payment Default" is filed and includes a notification to the debtor and debtor's counsel that within 20 days of the mailing of the NOD, they must either cure all existing payment defaults, including making the next scheduled payments due before expiration of the 20 day period and file proof of service with the Clerk of the Bankruptcy Court or file a motion with the Clerk requesting that the NOD be set for hearing to permit the debtor to show good cause why the case should not be dismissed. The debtor's motion must be served on the Chapter 13 Trustee and specifically set forth facts showing good cause for the scheduling of a hearing

upon affidavit evidence.

What constitutes good cause? No interpretations have been given yet as the rule is so new

Does the filing of a contested matter by the debtor, such as an amended or modified plan or motion to suspend payments constitute a request for hearing? No, and it shall not, alone, preclude the dismissal of the case. **See** the specific language of the rule and Notice accompanying the NOD. However, the rule further contemplates that any such contested matter or amended plan, if a basis for allegations that the case should not be dismissed, shall be filed within the 20 day period in compliance with Local Rule 9013-1.

What happens if the debtor does not cure all existing defaults? The Chapter 13 Trustee will file an Affidavit establishing that the NOD was properly filed with the Clerk and properly served upon the debtor and debtor's counsel pursuant to *Neb. R. Bankr. P. 3015-4*; that the debtor had not become current and had not filed a proof of payment with the Clerk; and that the debtor had not timely requested a hearing on the NOD. Thereafter, it is expected that the Court will enter an Order dismissing the debtor's case.

In general, do Nebraska Chapter 13 debtors regularly make plan payments?

Yes. The Administrative Office of Courts survey ending in 1990 revealed that Nebraska ranked

fifth (5th) in the nation regarding completion rates in Chapter 13. Moreover, since 1990 dismissals have actually gone down in Nebraska. However, it is always good to try to improve these statistics. A recent query of the Chapter 13 Trustee database revealed that 30% of the cases have had a motion to dismiss [now called NOD] filed. Hence, 70% of our debtors are regular payors!

Chapter 13 studies have consistently shown a correlation between plan completion rates and employer deduction orders. An employer deduction is one way to adjust the spending habits of the debtor and assure timely plan payments as well as plan completion. Structured debtor education programs have also been a suggestion made to the Bankruptcy Review Commission.

EDITOR'S COMMENT

This newsletter is being published to facilitate communication between the Chapter 13 Trustee's Office and the many people we serve. The information is not meant to constitute legal advice to individuals. If you would like to contribute an article, conference or program information, law review article, book review, comment, or question for further feedback from others, please call me directly or mail your item to:

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