NOTES

A LOOK AT DISPARATE APPROACHES TO VALUATION UNDER SECTION 506 AND ITS RELATIONSHIP TO SECTION 1325

INTRODUCTION

Valuation is an integral component of the bankruptcy system.[1] The importance of valuation in bankruptcy stems from its effect on determining what portion of a creditor's claim will be secured rather than unsecured and whether a secured creditor's interest in the underlying collateral is adequately protected.[2] The difference between secured and unsecured claims is critical to creditors. In bankruptcy, a creditor holding a secured claim has a right to be paid the full value of the claim.[3] In contrast, creditors holding unsecured claims are usually paid, at the most, only a small percentage of the claim's actual value and sometimes receive nothing at all.[4]

The value assigned to the debtor's assets is generally a source of great disagreement between creditors and the debtor. The position each party takes regarding the value of an asset depends on the timing and purpose for the valuation. For example, when determining what portion of debt will be secured, as opposed to unsecured, the creditor wants the asset valued as highly as possible. This is because a secured claim is no greater than the value of the asset being used as collateral, and any amount owed beyond the value of the asset is considered an unsecured claim

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[1] *See* 11 U.S.C. § 506 (2006) (addressing role of valuation in bankruptcy). Valuation is the act of estimating and assigning worth to an object or entity. BLACK'S LAW DICTIONARY 1586 (8th ed. 2004) (defining valuation as "[t]he process of determining the value of a thing or entity"). In bankruptcy, the objects being assigned worth are the debtor's assets. *See* 11 U.S.C. § 506 (discussing secured and unsecured claims in terms of worth of item securing debt); Tracy A. Marion, *Confusion Over Bankruptcy Estate Valuations: A Case of Losing the Forest for the Trees*, 36 CUMB. L. REV. 379, 379 (2005–2006) (describing valuation it terms of assigning worth to assets).

[2] 11 U.S.C. § 506 (providing debt only secured to extent of value of collateral and any debt beyond collateral value is unsecured); Jean Braucher, *Getting It for You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After Rash*, 102 DICK. L. REV. 763, 773 (1998) (noting valuation used to determine how much debtor must pay secured creditor); Marion, *supra* note 1, at 379.

[3] *See* Lucian Arye Bebchuk & Jesse M. Fried, *A New Approach to Valuing Secured Claims in Bankruptcy*, 114 HARV. L. REV. 2386, 2397 (2001) ("It is a fundamental principle of bankruptcy law that a secured creditor has a right to receive the value of its collateral, up to the amount owed."); Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361, 374 (2003) (acknowledging secured claims paid first).

[4] *See* Bebchuk, *supra* note 3, at 2397 ("Unsecured claims are generally not paid in full; indeed they are often paid only a small fraction of their face value."); Marion, *supra* note 1, at 379 (stating "unsecured creditors receive little or nothing in the way of debt satisfaction").

and is typically discharged.[5] Therefore, secured creditors want the assets to be valued at high amounts so they can recover a larger portion of the debt owed to them.[6] Conversely, debtors want their assets valued at lower amounts so that a larger portion of their debt is discharged.[7] While creditors and debtors remain at odds in regard to valuation for the purpose of determining adequate protection,[8] their arguments shift. Thus, when addressing adequate protection, creditors argue for lower values to be attached to the debtor's assets in an effort to get the automatic stay lifted.[9] In contrast, debtors argue in favor of higher values in order to keep the automatic stay in place.[10]

The role of valuation in a bankruptcy proceeding is critical to the outcome of a case, thus, it is vital that courts approach it in a consistent and uniform manner. Uniformity and consistency in the bankruptcy system are important because they provide a sense of fairness and predictability to creditors and debtors alike. Creditors take comfort in the notion that courts will maximize distribution of the bankruptcy estate while debtors safely proceed knowing that courts will also

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[5] Marion, *supra* note 1, at 384 (providing debt is unsecured to extent it exceeds value of collateral). The act of splitting a creditor's claim into secured and unsecured portions is referred to as bifurcation. *See In re* Gonzalez, 295 B.R. 584, 587 (Bankr. N.D. Ill. 2003) (explaining bifurcation divides claims into secured and unsecured parts); Shook v. CBIC (*In re* Shook), 278 B.R. 815, 822 (B.A.P. 9th Cir. 2002) (indicating section 506(a) offers bifurcation of claim into secured and unsecured segments).

[6] *See* Bebchuk, *supra* note 3, at 2400 (discussing secured creditor's motive for assigning high value to collateral); Kenneth L. Reich, *Continuing the Litigation of Collateral Valuation in Bankruptcy:* Associates Commercial Corp. v. Rash, 26 PEPP. L. REV. 655, 677 (1999) (explaining creditors seek high value for collateral in cram down situation); Marion, *supra* note 1, at 384 (stating creditors want collateral valued high for purpose of determining bifurcation of claim).

[7] *See* Richard E. Coulson & Alvin C. Harrell, *Consumer Bankruptcy Developments and the Report of the National Bankruptcy Review Commission*, 53 BUS. LAW. 1121, 1138 (1998) (acknowledging "[d]ebtors generally favor using wholesale value . . . because this results in a relatively low lien and secured claim"); Marion, *supra* note 1, at 384 (conveying debtors are advocates for lower collateral value to maximize amount eligible for discharge).

[8] Adequate protection refers to "[t]he protection afforded to a holder of a secured claim against the debtor . . . ." BLACK'S LAW DICTIONARY 42 (8th ed. 2004).

[9] *See* Marion, *supra* note 1, at 384–85 (explaining when valuation determined for purpose of lifting automatic stay creditors advocate for lower values); Reich, *supra* note 6, at 676–77 (conveying creditors seek low values for collateral when trying to lift automatic stay). A court will lift the automatic stay if the creditor can establish that the debtor's equity in the property is so low that it no longer requires adequate protection from creditors. Marion, *supra* note 1, at 384–85 (providing court more likely to lift automatic stay on low valued assets). A debtor's equity interest in their property is equivalent to the amount of the asset's value above the amount of debt it is securing. Hence, if the debt is greater then its collateral, the debtor can be said to have no equity in the property and the creditor is likely to be more successful in getting the automatic stay lifted. *See* Thomas E. Plank, *The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy*, 59 MD. L. REV. 253, 317 (2000) ("In conclusion, if the debtor has equity, the creditor in possession may not obtain relief from the stay. If the debtor has no equity, the creditor in possession may obtain relief from the stay if the property items are not necessary for reorganization."). An automatic stays bars any judicial proceedings or collection efforts against the debtor's assets until the rights of the parties can be determined and the estate can be administered in an orderly fashion. *See* BLACK'S LAW DICTIONARY 1453 (8th ed. 2004).

[10] *See* Marion, *supra* note 1, at 384–85 (discussing debtor's desire for high collateral values in order to maintain automatic stay and retain possession of collateral).

provide them with the fresh start they seek. However, disparate approaches to valuation lend to confusion and inconsistency within the bankruptcy system. Inconsistent valuation methods promote forum shopping among districts and can lead to costly and protracted litigation in bankruptcy cases.[11] A uniform standard of valuation would provide parties with a method of obtaining predictable valuation results in an expeditious and less expensive manner.[12]

Despite the importance of a uniform approach, valuation has been a source of disparity and confusion within the bankruptcy system for many years. In part, this can be attributed to the fact that valuation is a fluid concept.[13] Determining the value of an asset is not as simple as applying the same consistent mathematical formula in each case. Rather, valuation often necessitates evaluating numerous factors and possibilities.[14] Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), courts throughout the country interpreted section 506[15] to allow for the use of various methods to value a debtor's assets in order to determine the status of creditors' claims. These approaches included determining the value of the debtor's collateral based on the amount that would be realized by the creditor at a commercially reasonable disposition,[16] wholesale value,[17] fair market value,[18] or the average between wholesale value and retail value.[19]

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[11] *See* Omer Tene, *Revisiting the Creditors' Bargain: The Entitlement to the Going-Concern Surplus in Corporate Bankruptcy Reorganizations*, 19 BANKR. DEV. J. 287, 368 (2003) (evaluating negative impact of inconsistent valuation approaches).

[12] *Id.* (assessing benefits of uniform valuation methods).

[13] *See, e.g.*, *In re* Stark, 311 B.R. 750, 757 (Bankr. N.D. Ill. 2004) (stating valuation "is still a fluid concept which leaves the precise amount that the creditor should receive unsettled"); *In re* Broomall Printing Corp., 131 B.R. 32, 34 (Bankr. D. Md. 1991) ("Value in the context of § 506 is a fluid concept."); *see* G. Nicholas Herman, *How to Value a Case for Negotiation and Settlement*, 31 MONTANA LAWYER 5, 23 (2005) (describing valuation as fluid concept).

[14] *See* Herman, *supra* note 13, at 23 (explaining valuation involves "a process of weighing multiple factors, probabilities, and preferences together, rather than . . . some rote, mathematical calculation of seemingly independent variables").

[15] 11 U.S.C. § 506(a) (2000) ("An 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, 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.").

[16] *See In re* Frost, 47 B.R. 961, 964 (D. Kan. 1985) (determining "value of the property based on what it would bring if sold in a commercially reasonable manner"); *In re* Johnson, 117 B.R. 577, 581 (Bankr. D. Idaho 1990) (finding value of collateral appropriately determined by probable worth at commercially reasonable disposition); *In re* Petry, 76 B.R. 651, 653 (Bankr. C.D. Ill. 1987) (concluding collateral's worth at commercially reasonable disposition is correct value of property).

[17] *See In re* Maddox, 200 B.R. 546, 553 (D.N.J. 1996) (providing wholesale value should be used to determine value of collateral); *In re* Byington, 197 B.R. 130, 139 (Bankr. D. Kan. 1996) ("[T]he Court concludes that as a matter of law, a wholesale valuation method is mandated by the provisions of Chapter 13 . . . ."); *In re* Ferguson, 149 B.R. 625, 626 (Bankr. D. Idaho 1993) (using wholesale value to determine collateral's value).

In 1997, the United States Supreme Court addressed the problem of disparate valuation approaches in *Associates Commercial Corp. v. Rash*.[20] In its opinion, the Court attempted to bring uniformity to valuation by clarifying the valuation process described in section 506.[21] However, cases decided after the *Rash* decision demonstrate that the Supreme Court did not provide the clarity needed in order for lower courts to address the problem of valuation in a uniform manner. Subsequently, as part of the BAPCPA amendments, Congress attempted to enhance secured creditors' rights and, thereby, resolve the lack of uniformity by codifying an altered form of the *Rash* approach to valuation.[22]

This Comment seeks to investigate the current state of valuation in the bankruptcy system. It will begin by exploring the Supreme Court's decision in *Rash* and its aftermath. Additionally, it will look at the codification of *Rash* in the revised section 506 as well as how the language of section 506 is being interpreted by the legal community. This Comment will then evaluate the post-BAPCPA application of revised section 506 and examine valuation approaches used in recent bankruptcy cases. Moreover, it will provide suggestions for bringing uniformity to the current valuation approaches being used by the courts. Finally, this Comment will discuss the confusing interplay between the language in revised sections 506 and 1325 as well as the methods courts are using to interpret the puzzling relationship between the two provisions. This comment will conclude with suggestions for statutory amendments to both sections 506 and 1325. Specifically, it will be suggested that Congress should: 1) amend section 506 to mandate the use of full retail value as the starting point for valuation; and 2) amend the hanging paragraph of section 1325(a) to clarify that the exclusion of section 506 merely prevents bifurcation and does not effect the status of an otherwise secured claim.

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[18] *See* Taffi v. United States (*In re* Taffi), 68 F.3d 306, 309 (9th Cir. 1995) (determining "fair market value is the proper standard of valuation"); Hobbs v. Gurley Motor Co. (*In re* Hobbs), 204 B.R. 994, 998 (Bankr. D. Ariz. 1997) (assessing methods of determining fair market value to calculate collateral's value); *In re* Chrapliwy, 207 B.R. 469, 475 (Bankr. M.D.N.C. 1996) ("In the present case the court concludes that for purposes of applying § 1325(a)(5)(B) in this Chapter 13 case, the furniture in question should be valued at its market value.").

[19] *See* GMAC v. Valenti (*In re* Valenti), 105 F.3d 55, 62–63 (2d Cir. 1997) (endorsing use of average between retail and wholesale value for purpose of valuation); *In re* Sharon, 200 B.R. 181, 195 (Bankr. S.D. Ohio 1996) (upholding use of mid-point between retail and wholesale value to determine value of collateral); *In re* Mitchell, 191 B.R. 957, 962 (Bankr. M.D. Ga. 1995) ("The averaging between wholesale and retail values of the vehicle provides the court with the flexibility to give meaning to both the first and second sentences of § 506(a) of the Code and will provide an equitable result in a vast majority of cases."); *In re* Rowland, 166 B.R. 172, 176 (Bankr. N.D. Fla. 1994) (holding "proper and most equitable approach is to value the collateral usually at an average between the wholesale and retail amounts").

[20] 520 U.S. 953, 955–56 (1997) (addressing appropriate method for valuing debtor's collateral in chapter 13 cram down).

[21] *Id.* at 965 (acknowledging need for uniformity in bankruptcy valuation).

[22] *See* 11 U.S.C. § 506(a)(2) (2006) (codifying use of replacement value to determine value of debtor's collateral).

I. A *RASH* ADOPTION: BAPCPA'S CODIFICATION OF THE *RASH* DECISION IN SECTION 506

In *Associates Commercial Corp. v. Rash*[23] the Supreme Court held that replacement value should be used to determine the value of an asset.[24] In *Rash*, approximately three years after Mr. Rash ("Rash") purchased a motor vehicle for business purposes he filed for chapter 13 bankruptcy and exercised the cram down option in an effort to retain his truck.[25] At that time, Associates Commercial Corporation ("ACC"), the holder of the loan and lien against the truck, and Rash entered into a dispute over the appropriate method of determining the value of the truck.[26] Rash argued that the appropriate value of the truck was the amount ACC would obtain upon foreclosure and sale of the truck.[27] ACC, on the other hand, argued that the correct value of the truck was the purchase price of a similar vehicle.[28]

In *Rash*, the court recognized three methods of valuation utilized by the lower courts: 1) the foreclosure value standard; 2) the replacement value standard; and 3) the midpoint between foreclosure value and replacement value.[29] In assessing the various valuation methods, the court acknowledged the importance of adopting a simple valuation method that could be applied easily to create uniformity within the bankruptcy system.[30] The court began this process by evaluating the language of, now former but then current, section 506(a). In doing this, the court found that the wording of the first sentence—"the creditor's interest in the estate's interest in such property . . ."[31]—merely states that the claim must be bifurcated, but does not provide direction as to the means of bifurcation.[32] The court went on to interpret the second sentence—"[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . ."[33]—to address the appropriate method of valuation.[34] Finally, the court explained that upon filing

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[23] 520 U.S. 953 (1997).

[24] *Id.* at 965 (holding section 506 mandates use of replacement value standard).

[25] *Id.* at 956–57. The cram down option allows a debtor to retain his property and the creditor to retain its lien provided the debtor pays the creditor the full value of the secured claim over the life of the repayment plan. *See id.* at 957 (explaining debtor's use of cram down option).

[26] *Id.* at 957. As a result of Rash's exercise of the cram down option, ACC wanted to ensure the vehicle was valued at a high worth because ACC's claim is only secured to the extent of the collateral's value. *See id.* at 956; *see also* Marion, *supra* note 1, at 379 (describing effects of valuation); *supra* text accompanying footnotes 3–7.

[27] *Rash*, 520 U.S. at 957.

[28] *Id.*

[29] *Id.* at 959.

[30] *Id.* at 965 (stating straightforward method of valuation needed "to serve the interests of predictability and uniformity").

[31] 11 U.S.C. § 506(a)(1) (2000).

[32] *Rash*, 520 U.S. at 961 ("The first full sentence of § 506(a), in short, tells a court what it must evaluate, but does not say more; it is not enlightening on how to value collateral.").

[33] 11 U.S.C. § 506(a)(1).

[34] *Rash*, 520 U.S. at 961.

for bankruptcy a debtor can either: 1) surrender the collateral to the creditor; or 2) utilize the cram down option to retain the property over the creditor's objection by paying the creditor the present value of the property over the span of the repayment plan.[35]

After assessing the language of the statute and exploring the two options available to debtors upon filing for bankruptcy, the court made several observations regarding the three commonly used valuation standards: the foreclosure value standard, the replacement value standard, and the midpoint between the foreclosure value and the replacement value. First, the court determined use of the foreclosure value standard to be irrational. The court explained that using the foreclosure value to determine the present value of the property under the cram down option would produce the same result as if the debtor chose to surrender the collateral to the creditor, making the cram down option irrelevant.[36] Next, the court concluded there to be no basis within the Bankruptcy Code for using the midpoint between foreclosure value and replacement value to determine the worth of collateral.[37] Finally, the court explained that "[a] replacement-value standard, on the other hand, distinguishes retention from surrender and renders meaningful the key words 'disposition or use.'"[38] Under the replacement value standard, the debtor's use of the property and the creditor's interest in the collateral, in view of the fact that there will be no foreclosure sale, are considered in an effort to arrive at a fair value for the collateral.[39] Therefore, the *Rash* court held the appropriate method of valuation to be the replacement value standard—essentially the cost to the debtor of purchasing similar property.[40]

Although the *Rash* holding attempted to provide guidance to lower courts in an effort to bring consistency to the valuation process, the Supreme Court was unsuccessful in accomplishing this goal. Though the Court held that replacement value should be used, it did not provide a clear definition of replacement value.[41] In fact, the *Rash* Court, in footnote six, opened the door to disparate replacement value approaches by providing that its "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

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[35] *Id.* at 962.

[36] *Id.* ("Applying a foreclosure-value standard when the cram down option is invoked attributes no significance to the different consequences of the debtor's choice to surrender the property or retain it.").

[37] *Id.* at 964 (stating Bankruptcy Code does not call for middle ground approach).

[38] *Id.* at 962.

[39] *Id.* at 963 (explaining replacement value considers debtor's use of property and creditor's interest in collateral given debtor's choice to exercise cram down option).

[40] *Id.* at 965 ("In sum, under § 506(a), the value of property retained because the debtor has exercised the § 1325(a)(5)(B) 'cram down' option is the cost the debtor would incur to obtain a like asset . . . .").

[41] KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY §§ 109.1, 110.1 (3d ed. 2000); Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 461 (2005) ("In *Associates Commercial Corp. v. Rash*, the U.S. Supreme Court failed to give clear guidance on collateral valuation in chapter 13.").

replacement value on the basis of the evidence presented."[42] Interestingly, this statement seems to contradict the sentiment of footnote five in which the *Rash* Court emphasized its intent to "reject a ruleless approach allowing use of different valuation standards based on the facts and circumstances of individual cases."[43]

Additional confusion regarding the replacement value approach outlined by the *Rash* Court stems from the list of items identified in footnote six as excludable when calculating replacement value. This list provides that creditors should not benefit from the inclusion of items such as warranties, inventory storage, reconditioning, and property modifications.[44] The Court reasoned that while retailers increase the price of vehicles to include the cost of the aforementioned items, a debtor does not receive the benefit of such items when retaining his vehicle and thus creditors should not be allowed to include these costs when determining the vehicle's value.[45] While the basis for excluding these items from the replacement value is sound, it leaves open the question of whether the list provided by the court was meant to be all-encompassing.[46] Thus, it appeared post-*Rash* that bankruptcy courts were destined to remain in much the same position as they were pre-*Rash*—left to wade independently through a variety of methods for approaching an ambiguous valuation standard.

Post-*Rash* cases demonstrated that the lack of an express definition of replacement value served to maintain rather than eliminate the use of different valuation methods within the bankruptcy system.[47] In the wake of *Rash*, bankruptcy courts primarily began using one of three approaches for determining the worth of collateral under the replacement value approach. Some courts held retail value to be the correct starting point for calculating replacement value.[48] Other courts used

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[42] *Rash*, 520 U.S. at 965 n.6. *See* Braucher, *supra* note 2 at 771–72 (recognizing broad language in footnote five of *Rash* decision).

[43] *Rash*, 520 U.S. at 965 n.5. *See In re* Gonzalez, 295 B.R. 584, 590 (Bankr. N.D. Ill. 2003) ("Footnote six, critics assert, establishes the very fact-dependent, case-by-case approach that footnote five declares objectionable."); Braucher, *supra* note 2 at 771–72 (acknowledging difficulties in making sense of contradictions between footnotes five and six of *Rash* decision).

[44] *Rash*, 520 U.S. at 965 n.6 ("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. Nor should the creditor gain from modifications to the property . . . .").

[45] *Id.*

[46] *See* Gary Klein, *Opinion Raises More Questions Than It Answers*, 16-JUL/AUG AM. BANKR. INST. J. 18, 18–19 (1997) (pointing to footnote six of *Rash* decision as providing confusion to replacement value approach); Reich, *supra* note 6, at 671 ("Because the Court included in footnote six a list of costs that should be deducted from an established replacement value, there is a question as to whether any other costs outside of that list exist.").

[47] *Gonzalez*, 295 B.R. at 591–93 (determining vehicle value by starting with retail value and then making deductions at discretion of court); *In re* Richards, 243 B.R. 15, 19–20 (Bankr. N.D. Ohio 1999) (using average between retail and wholesale value as starting point for determining replacement value); *In re* Dunlap, 215 B.R. 867, 870 (Bankr. E.D. Ark. 1997) (finding retail value to be appropriate method of valuation).

[48] *See, e.g.*, *In re* Russell, 211 B.R. 12, 12–13 (Bankr. E.D.N.C. 1997) ("The court believes that the NADA retail value most accurately reflects the replacement-value standard . . . ."); *Dunlap*, 215 B.R. at 870

the mean between retail and wholesale value to begin determining replacement value.[49] A third group of courts found the current price in any market available to consumers to be a proper starting point for computing replacement value.[50]

Examples of the three methods for determining replacement value are illustrated by cases decided in the years following the *Rash* decision. For instance, in *In re Knowles*[51], the court found retail value to be the most appropriate starting point for determining the replacement value of the debtor's collateral.[52] In its opinion the court recognized the different methods for determining replacement value, but noted that each bankruptcy court is permitted to use its discretion in choosing the correct method for determining replacement value.[53] This is interesting because while the *Knowles* court believed it was following the direction of *Rash*, it in fact was counteracting the Supreme Court's efforts to bring uniformity to the valuation process. Likewise, in *In re Gonzalez*[54] the court held retail value to be the most appropriate starting point for replacement value.[55]

In contrast, in *First Merit N.A. v. Getz (In re Getz)*,[56] another approach was used to determine the replacement value of the debtor's collateral. Here, the court concluded that the correct starting point for replacement value was the average between retail value and wholesale value.[57] Additionally, like in *Knowles*, the *Getz* court acknowledged the discretion of bankruptcy courts in calculating replacement value.[58] Similarly, the court in *In re Marquez*[59] agreed with the *Getz* court and adopted the average of wholesale and retail value as the starting point for replacement value.[60]

(characterizing *Rash* as requiring retail valuation); *see also* Braucher, *supra* note 2, at 776 (describing retail value method used to determine replacement value).

[49] *See, e.g.*, *In re* Glueck, 223 B.R. 514, 519–20 (Bankr. S.D. Ohio 1998) (asserting that average was appropriate "starting point" to determine replacement value); *In re* Franklin, 213 B.R. 781, 783 (Bankr. N.D. Fla. 1997) (using average of retail and wholesale values to find replacement value); *see also* Braucher, *supra* note 2, at 776 (explaining use of average between retail and wholesale value to figure replacement value).

[50] *See In re* McElroy, 210 B.R. 833, 835 (Bankr. D. Or. 1997) ("[V]aluation should be based on prices paid in the market that is accessible to the debtors . . . . That market is broader than the 'retail' market."); *see also* Braucher, *supra* note 2, at 776 (conveying some courts use any current market price to determine replacement value).

[51] 253 B.R. 412 (Bankr. E.D. Ky. 2000).

[52] *Id.* at 414 ("This Court therefore concludes that the proper starting point for determining replacement value in the instant matter is the N.A.D.A. retail value, with appropriate adjustments to be made.").

[53] *Id.* (acknowledging lower courts have discretion to adopt own replacement value rule).

[54] 295 B.R. 584 (Bankr. N.D. Ill. 2003).

[55] *Id.* at 591–93 (using retail value as starting point for replacement value).

[56] 242 B.R. 916 (B.A.P. 6th Cir. 2000).

[57] *Id.* at 919–20 (finding that use of average between retail and wholesale value to determine replacement value is consistent with *Rash*).

[58] *Id.* at 919 (noting *Rash* "recognized the discretion of the trial judge to adopt a rule for replacement valuation").

[59] 270 B.R. 761 (Bankr. D. Ariz. 2001).

[60] *Id.* at 766 (determining average of retail and wholesale value to be appropriate starting point for replacement value).

On the other hand, in *In re Renzelman*,[61] the court developed another replacement value approach. In *Renzelman*, the court created a "five percent rule" by holding the starting point for determining replacement value to be retail value less five percent.[62]

All of the above cases provided clear evidence of the confusion left by the *Rash* decision. It was the continued use of disparate valuation methods in cases such as these which worked to maintain a pattern of inconsistencies and unpredictability within the bankruptcy system.

Despite the fact that the *Rash* decision was unsuccessful in bringing uniformity to the valuation process, Congress chose to utilize the concept of the Supreme Court's decision when revising section 506 of the Bankruptcy Court. The new section 506(a) provides:

> (1) An 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 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.*[63]

The first paragraph of section 506 remains identical to the former version. However, Congress codified the *Rash* decision by adding the second paragraph to the revised statute. It is this newly added second paragraph that provides for the use of replacement value when determining the worth of a debtor's assets. While the newly amended statute does not create a single uniform valuation standard for all

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[61] 227 B.R. 740 (Bankr. W.D. Mo. 1998).

[62] *Id.* at 742 (holding replacement value to be five percent less than Blue Book value). The *Renzelman* Court rationalized that Blue Book value is not necessarily the same as retail value because debtors' have access to non-dealership options for purchasing vehicles and thus could spend less than the amount listed in the Blue Book. *Id.*

[63] 11 U.S.C. § 506(a) (2006) (emphasis added).

situations, it does provide one standard for use in business cases and individual chapter 11 cases and another standard for individual chapter 7 and 13 cases.

Since the enactment of the revised section 506, legal commentators have been interpreting the section's new language.[64] First, section 506(a)(2) makes clear that it applies to both individual chapter 7 and chapter 13 debtors. Additionally, while section 506(a)(2) addresses an individual's assets, the first half of the section has been interpreted to apply to an individual debtor's business assets and the second half is said to apply to the debtor's personal assets.[65] In regard to business assets, the revised section calls for the use of replacement value including the cost of sale or marketing. This sentence has been understood to overrule part of the *Rash* decision because it expressly forbids the deduction of sales or marketing, whereas the Court in *Rash* seemed to support such deductions from the replacement value.[66] In comparison, when dealing with personal assets, 506(a)(2) explicitly requires the use of retail value for goods in like condition. Furthermore, even though the first sentence, unlike the second sentence, does not explicitly reference that the replacement value should be for goods in similar condition, the requirement of similar goods has been inferred by the wording "such property."[67]

The revised section 506(a)(2) has been criticized as having several faults. First, although the retail value of a debtor's vehicle is arguably determinable based on industry books such as the Kelley Blue Book or the National Automobile Dealers Association ("NADA"), the valuation method prescribed by section 506(a)(2) is problematic when applied to other types of collateral because there is no industry book value available to provide a starting point.[68] Additionally, while section 506(a)(2) addresses the process of determining replacement value for business assets and for personal assets, it makes no mention of how to appropriately determine the replacement value of assets that are used both professionally and personally.[69] Finally, some of the language within section 506(a)(2) is ambiguous. Examples of such ambiguous language include the use of "retail merchant" in the second sentence and the failure to disallow deductions for the cost of sale or marketing in sentence two as it does in sentence one.[70] Flaws such as these have

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[64] LUNDIN, *supra* note 41, at § 450.1; Braucher, *supra* note 41, at 465–66 (evaluating language of revised section 506(a)).

[65] Braucher, *supra* note 41, at 465–66 (parsing out differences between first and second sentence of section 506).

[66] LUNDIN, *supra* note 41, at § 450.1 (interpreting 506(a)(2) to partially overrule *Rash*); Braucher, *supra* note 41, at 466 (considering difference between language of section 506(a)(2) and *Rash* holding).

[67] Braucher, *supra* note 41, at 466 (reading first sentence of section 506(a)(2) to imply that value should be based on goods in similar condition).

[68] *Id.* at 467 (acknowledging difficulties in determining retail value of assets other than vehicles).

[69] LUNDIN, *supra* note 41, at § 450.1 (acknowledging all types of debtor's property not addressed within section 506(a)(2)); Braucher, *supra* note 41, at 466 ("Nothing is said in paragraph 506(a)(2) about collateral acquired by individuals for mixed business and consumer purposes.").

[70] LUNDIN, *supra* note 41, at § 450.1 (assessing wording of section 506(a)(2)).

ultimately led to the courts' continued use of disparate approaches to assessing replacement value under the revised section 506(a).

II. VARYING INTERPRETATIONS OF THE NEW SECTION 506(A)(2)

Since the implementation of BAPCPA in October 2005, the legal community has waited to see how courts will apply the new language of section 506. Now, approximately two years later, the bankruptcy courts have had many opportunities to interpret section 506.

A. Valuation Approaches Post-BAPCPA

Discrepancies in valuation methods continue to exist amongst the bankruptcy courts, albeit to a lesser extent. Within the cases decided under the revised section 506, several valuation approaches have emerged. It is worth noting at the outset that most, if not all, of the recent valuation case law involves determining the replacement value of motor vehicles. This is probably because motor vehicle loans are the most likely to raise contested valuation issues in a cram down scenario.[71] In contrast, debtors cannot typically cram down home loans because section 1322(b)(2) of the Bankruptcy Code prohibits modifications of loans secured by the debtor's main residence and most assets other than cars and homes are of insufficient value to justify litigation.[72] The courts, in determining the appropriate method of calculating vehicle replacement value, use one of three approaches: 1) retail value less necessary deductions resulting from the condition of the specific vehicle being valued; 2) retail value minus some fixed percentage; or 3) the average between retail value and trade-in value. In order to understand why valuation discrepancies still exist and how they can best be resolved, it is necessary to examine the courts' different approaches and rationales to determining replacement value.

The courts in *In re Brown*[73] and *In re Eddins*[74] determined retail value to be the proper starting point for calculating replacement value.[75] In *Brown*, the court was faced with determining the appropriate value of a chapter 7 debtor's vehicle in light of *Rash* and BAPCPA.[76] The court recognized that *Rash* and revised section

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[71] Braucher, *supra* note 2, at 776.

[72] *See* 11 U.S.C. § 1322(b)(2) (2006) (providing plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence"); Braucher, *supra* note 2, at 776 (rationalizing common involvement of motor vehicles in cram down cases).

[73] No. CIV.A.06-00197JW, 2006 WL 3692609 (Bankr. D.S.C. Apr. 24, 2006).

[74] 355 B.R. 849, 852 (Bankr. W.D.Okla. 2006).

[75] *Brown*, 2006 WL 3692609, at *3 ("[I]t appears that a retail value or retail price is the appropriate standard by which to determine replacement value."); *Eddins*, 355 B.R. at 852 ("[T]his court agrees that 'replacement value' within the meaning of § 506(a)(2) is the NADA retail value.").

[76] *Brown*, 2006 WL 3692609, at *1–2.

506(a)(2) clearly mandate the use of retail value to determine replacement value; however, the court also rationalized that the second sentence of section 506(a)(2) left courts with the ability to adjust the replacement value in accordance with the condition of the vehicle in question.[77] In *Brown*, because the debtor offered no evidence requiring a significant adjustment to the retail value, the court held the creditor's retail value less necessary repairs to be the replacement value of the vehicle.[78] Similarly, in *Eddins*, the issue before the court was how to determine accurately the value of a chapter 13 debtor's motor vehicle.[79] The *Eddins* court agreed with the *Brown* holding that replacement value should begin with retail value and only be adjusted to the extent mandated by the condition of the vehicle in question.[80] Here, the court arrived at the replacement value for the debtor's vehicle by beginning with retail value, as determined by NADA, and then making deductions to account for excessive mileage and the amount of necessary repairs proven by the debtor.[81]

In *In re McElroy*,[82] the court addressed the proper method of valuing two vehicles owned by debtors who were attempting to retain them through a chapter 13 cram down.[83] The court held that the proper starting point for replacement value is retail value, as determined by NADA, minus 5%.[84] In addition to the automatic 5% deduction, the court went on to provide that the replacement value could face more modification based on party evidence establishing the need for further adjustment.[85] The court justified its 5% deduction by explaining that NADA values are often too high due to their inclusion of items such as warranties and reconditioning.[86] Thus, it appears the court allowed a 5% subtraction to account for the condition in which average debtors maintain their cars in comparison to the auto dealers considered by NADA. However, while a deduction based on vehicle maintenance by the average owner as opposed to a dealership seems reasonable on its face, the court offered no explanation for how it determined 5% to be the appropriate or accurate amount of such deductions.

The court in *In re Mayland*[87] adopted an approach similar to that of *McElroy*. In *Mayland*, the issue was how to calculate properly the replacement value of a

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[77] *Id.* at *3 (determining modification to replacement value based on vehicle condition allowed under section 506(a)(2)).

[78] *Id.*

[79] 355 B.R. at 849–50.

[80] *Id.* at 852 (agreeing starting point for replacement value is retail value).

[81] *Id.* at 852–53 (clarifying court's method of determining replacement value for debtor's vehicle).

[82] 339 B.R. 185 (Bankr. C.D. Ill. 2006).

[83] *Id.* at 186–87.

[84] *Id.* at 189 ("[T]he Court finds that a 5% discount from the NADA retail values presented would be appropriate to determine the vehicles' replacement value for purposes of cramdown.").

[85] *Id.* (proposing possibility of adjustments to replacement value beyond initial 5% subtraction).

[86] *Id.* (explaining why NADA values may be higher than replacement value).

[87] No. 06-10283, 2006 WL 1476927 (Bankr. M.D.N.C. May 26, 2006).

debtor's personal motor vehicle in a chapter 7 filing under BAPCPA.[88] The court acknowledged that *Rash* and the revised section 506(a)(2) require the use of replacement value when assessing the worth of the debtor's vehicle.[89] The court then held the correct starting point for replacement value to be retail value, as determined by NADA, minus 10%.[90] The court rationalized that a 10% deduction from the NADA retail value was appropriate because NADA assumes vehicles have been maintained in, or restored to, peak condition by dealers preparing them for sale; however, average debtors trying to retain their vehicles do not keep them in top condition because they are not trying to resell the vehicle.[91] Much like the *McElroy* court, the *Mayland* court left open the possibility of additional adjustments to replacement value based on the unique condition of each individual debtor's motor vehicle.[92] Also like the *McElroy* opinion, the court in *Mayland*, while justifying the need to reduce the NADA value to some extent, did not address how or why it arrived at 10% as the appropriate deduction from the NADA vehicle value.

In *In re Nice*,[93] the court developed yet another approach to valuing debtor's vehicles while addressing the issue of how to correctly value a chapter 13 debtor's motor vehicle. Here, the court held replacement value to be equivalent to the average between retail value and trade-in value.[94] In coming to this determination, the court acknowledged that some deduction from retail value will always be necessary in order to account for the condition of the vehicle in question.[95] In addition, the *Nice* court interpreted *Rash* to have intentionally left determination of appropriate replacement value to the discretion of the lower courts.[96] Moreover, *Nice* did not read revised section 506(a)(2) to alter the ability of courts to adjust replacement value to reflect the condition of the vehicle in question.[97] Thus, in an exercise of its discretion, the *Nice* court "adopted a replacement valuation standard based on the average between the N.A.D.A. retail and trade-in values" but left open the possibility of modifying the replacement value in accordance with evidence

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[88] *Id.* at *1 ("The Court is called upon to determine the proper valuation standard of a vehicle under Section 506(a)(2) of the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 ("BAPCPA"), which became effective in cases filed after on October 17, 2005.").

[89] *Id.* at *1–2.

[90] *Id.* at *3 (holding "the value of the Vehicle is ninety percent (90%) of its NADA retail value as of the petition date").

[91] *Id.*

[92] *Id.* at *1 ("Moreover, if there are particular characteristics of the vehicle in question that would affect its value, such as high mileage or special features, then evidence of the same may be introduced and may affect the value ultimately determined by the Court.").

[93] 355 B.R. 554, 555–56 (Bankr. N.D.W.Va. 2006).

[94] *Id.* at 557 (finding replacement value determined by averaging retail and trade-in value).

[95] *Id.* at 556 (explaining need to reduce retail value of vehicle to account for vehicle's current condition).

[96] *Id.* (referencing *Rash* language allowing lower courts to adjust replacement value according to situation at hand).

[97] *Id.* at 557 (determining 506(a)(2) to only slightly alter *Rash* decision).

presented at the hearing.[98] Although this particular case was filed prior to the effective date of BAPCPA, the court made clear its intent to continue determining replacement value by averaging retail and trade-in values for cases filed under the BAPCPA revisions.[99] Interestingly, much like *McElroy* and *Mayland*, the court in *Nice*, though explaining the need to reduce retail value, offered no explanation as to the accuracy of or basis for its decision to average retail and trade-in values to arrive at replacement value.

The above cases demonstrate that, while section 506 has brought courts closer to a uniform valuation approach, there is still disparity amongst the lower courts in the methods used to determine replacement value. This continued disparity keeps the *Rash* ideal of a simple valuation approach that can be applied uniformly, a distant goal. Additionally, the persistent inconsistencies in replacement value calculations result in a sustained uncertainty for creditors and debtors within the bankruptcy system.

B. Bringing Uniformity to Post-BAPCPA Valuation Approaches

In determining the most effective means of establishing a uniform valuation standard, the type of valuation evidence typically considered by the court must first be examined. One common form of evidence admitted by bankruptcy courts for valuation purposes in regard to motor vehicles is NADA prices.[100] NADA provides used vehicle valuation services to consumers and professionals within the automotive industry.[101] NADA analyzes massive amounts of sales and industry data along with auction and dealer sales data in order to produce the NADA Appraisal Guides.[102] These appraisal guides provide consumers and professionals with information pertaining to the national average price of new and used vehicles.[103] When courts recognize NADA as a reliable source for determining the price of a vehicle, they are accepting NADA as evidence. Additionally, NADA prices often withstand hearsay objections because they are considered to be market reports

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[98] *Id.* at 557, 557 n.6.

[99] *Id.* at 557 n.6 ("[T]he court does not foresee any reason to depart from this presumptive valuation standard at this time for cases filed on or after October 17, 2005.").

[100] *See In re* Eddins, 355 B.R. 849, 852 (Bankr. W.D.Okla. 2006) ("[T]his court agrees that 'replacement value' within the meaning of § 506(a)(2) is the NADA retail value."); *In re* Mayland, No. 06–10283, 2006 WL 1476927, at *2 (Bankr. M.D.N.C. May 26, 2006) (acknowledging NADA as evidence of vehicle's value); *In re* McElroy, 339 B.R. 185, 189 (Bankr. C.D. Ill. 2006) (using NADA to assist with determining replacement value); *In re* Roberts, 210 B.R. 325, 330 (Bankr. N.D. Iowa 1997) ("NADA values are widely used in the auto industry and the courts to simplify and expedite the valuation process.").

[101] National Automobile Dealers Association, http://www.nada.org/AboutNADA/WhatWeDo/WhatWeDo.htm (last visited Oct. 26, 2007).

[102] National Automobile Dealers Association, http://nadaguides.mediaroom.com/index.php?s=faqs (last visited Oct. 26, 2007).

[103] *Id.*

under section 803(17).[104] If no other party has additional evidence as to a more accurate value for the specific vehicle in question, then NADA consequently becomes the sole source of evidence regarding the price of the vehicle.[105]

As previously discussed, a uniform method of determining replacement value is necessary in order to bring consistency and reliability to the bankruptcy system. The true purpose behind Congress's decision to codify a slightly altered version of the Supreme Court's decision in *Rash* is unknown due to a scarce legislative history. The legislative history accompanying section 506(a)(2) provides no insight or clarification as to the language used in the statute or the meaning of the term "replacement value." Regardless of the intent behind Congress's adoption of the *Rash* holding, recent case law demonstrates that a uniform approach to valuation has yet to be achieved. The latest valuation cases reflect that courts continue to struggle with three approaches to determining the starting point of replacement value: 1) retail value; 2) retail value minus a predetermined percentage accounting for current vehicle condition; and 3) the average between retail value and trade-in value.

The use of the average between retail and trade-in value when determining replacement value, as was the case in *Nice*, misses the mark of what seems to be intended by the language of section 506(a)(2). The averaging of retail and trade-in values for vehicles appears suspiciously similar to the concept of averaging replacement and foreclosure values. As previously stated, the Supreme Court in *Rash* explicitly prohibited the averaging of replacement and foreclosure value for the purpose of valuation.[106] These concepts are remarkably analogous because they would produce similar results. Just as retail value is said to be equivalent to

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[104] *See* FED. R. EVID. 803(17) (indicating "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations" are hearsay exception); *Roberts*, 210 B.R. at 330 (explaining NADA values fit into hearsay exception).

[105] *See Roberts*, 210 B.R. at 328 (providing NADA price may be accepted as prima facie evidence of vehicle's value); Kathryn R. Heidt & Jeffrey R. Waxman, *Supreme Court's Rash Decision Fail to Scratch the Valuation Itch*, 53 BUS. LAW. 1345, 1360–61 (1998) (explaining that if no other evidence is admitted courts will accept NADA information as prima facie evidence of vehicle's price).

Although beyond the scope of this Comment, it bears noting that even the term "price" is arguably ambiguous and could lend confusion to the valuation process. This is because "price" can mean cash price or credit price. The distinction between the cash price of a vehicle as opposed to the credit price could be immense. For instance, if the sticker price for a vehicle is $10,000 and the buyer pays in cash, then the "price" of that vehicle was $10,000. But, what if the buyer needed to acquire financing in order to purchase the vehicle? For the purposes of mathematical simplicity, assume the terms of the loan include a 10% interest rate over the course of one year. Then the "price" of the same car for that buyer is $11,000. Although in this over simplified scenario the difference between the cash and credit price is only $1000, when viewed in a real world context with greater loan amounts, higher compounding interest rates, and longer loan periods, it becomes clear that the difference between the cash price and credit price could easily become several thousands of dollars.

[106] 520 U.S. 953, 965 (1997) ("Applying a foreclosure-value standard when the cram down option is invoked attributes no significance to the different consequences of the debtor's choice to surrender the property or retain it.").

replacement value, trade-in value could be considered the equivalent of foreclosure value because, much like the amount obtained in a foreclosure, the amount received when trading-in property is often the base amount one would pay for such property. Therefore, the process of averaging retail value and trade-in value cannot be seen as attempt to merely adjust the NADA value from the price of the average somewhat similar car to the price of the vehicle in question, but instead is more accurately viewed as an attempt to obtain lower vehicle values than what was provided for under *Rash* and section 506(a)(2). Thus, averaging retail and trade-in value for the purpose of valuing property in accordance with the replacement value standard is inappropriate.

Similarly, the deduction of a set percentage from retail value, as was done by the courts in *McElroy* and *Mayland*, also misses the mark of what is intended by section 506(a)(2). The revised section 506(a)(2) requires the use of retail value when determining the replacement value of the debtor's collateral. As previously stated, most courts accept the NADA value as evidence of the average price for cars somewhat similar to the vehicle in question. However, the *McElroy* and *Mayland* courts, while accepting NADA as evidence, held that the starting point for valuation was the NADA price minus the deduction of a set percentage. Had Congress believed the deduction of a predetermined percentage from retail value to be necessary, it would have identified the appropriate percentage and provided for such deduction within the text of the statute. Not only is there no basis within the statute for deducting a pre-set percentage from retail value, but such a deduction is in direct contradiction with the language of the statute. Section 506(a)(2) allows for consideration of "age and condition of the property." This allowance should be understood to account for the fact that the condition of the debtor's property, in these cases motor vehicles, may not be the same as the property in the possession of a merchant. For instance, merchants are likely to sell property in a repaired or reconditioned state with attached warranties. However, a pre-set deduction cannot adequately account for such differences because the amount of deduction necessary will change from vehicle to vehicle. Therefore, while these courts were perhaps trying to create a consistent way of determining the actual retail price the vehicle in question would yield, they in fact likely implemented an improper reduction of the vehicle's value to a starting point below that of actual retail price.

Although the *McElroy* and *Mayland* courts may have been trying to account for the differences in "age and consideration of the property," the automatically deducted percentage from the starting point of retail value goes too far. Not only do the stated percentages appear to be arbitrarily chosen, but they also fail to account for the occasional debtor that maintains his property in mint condition. In the case of a car maintained in mint condition, the average retail price found in NADA is likely already lower than the value of the vehicle in question. Therefore, even though these courts may subsequently make upward adjustments to account for the car's pristine condition, the initial deduction of pre-set percentage from the NADA value will have already yielded too low of a starting point for a mint condition

vehicle. Creditors should not benefit from the subtraction of a pre-determined percentage where no such reason for the deduction exists. Therefore, in light of the language of section 506(a)(2), no pre-set percentage should be deducted from retail value for the purpose of determining the replacement value of the debtor's collateral; instead, courts should begin with the average retail value of somewhat similar vehicles, as found in sources such as NADA, and then only make adjustments as necessary for the specific vehicle in question.

The courts in *Brown* and *Eddin* utilized the most sound approach to valuation and should be viewed as the model for calculating replacement value in bankruptcy proceedings. These courts, in accordance with the plain language of section 506(a)(2), used average retail value for reconditioned cars as the starting point for replacement value and then made adjustments to the value based on the condition of the property in question.[107] No valuation approach will ever produce the same results in every case because no two pieces of property are exactly alike. However, the consistent use of the average retail value as the starting point for determining replacement value will go a long way in providing predictability and uniformity to debtors and creditors entering the bankruptcy system. Thus, while two debtors' possessing vehicles of the same make, model, and year may end up with different value assessments based on the condition in which each individual maintained his vehicle, each can be assured that the starting point for the vehicle's worth will be the average retail value as determined by NADA.

The key to bringing uniformity to the replacement value approach mandated by *Rash* and Congress can be found in the plain language of section 506(a)(2). The first sentence of section 506(a)(2) mandates that "value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property . . . without deduction for costs of sale or marketing."[108] Likewise, the second sentence of section 506(a)(2) more specifically mandates that when addressing the personal property of the debtor "replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property."[109]

Just as the language "age and condition of the property" from the second sentence has been read into the wording of the first sentence, the second sentence's definition of replacement value as retail value should also be read into the first sentence's mandate for the use of replacement value. While the second sentence defines replacement value for consumer goods, when its definition of replacement value is read into the first sentence the statute becomes much clearer. When utilizing this approach, the first sentence can be understood to mean that such value

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[107] *In re* Eddins, 355 B.R. 849, 852 (Bankr. W.D.Okla. 2006) ("[T]his court agrees that 'replacement value' within the meaning of § 506(a)(2) is the NADA retail value."); *In re* Brown, No. CIV.A.06-00197JW, 2006 WL 3692609, at *3 (Bankr. D.S.C. Apr. 24, 2006) ("[I]t appears that a retail value or retail price is the appropriate standard by which to determine replacement value.").

[108] 11 U.S.C. § 506(a)(2) (2006).

[109] *Id.*

"shall be determined based on the [price a retail merchant would charge] without deduction for costs of sale or marketing." Then courts would only be left to determine what is included in the "costs of sale or marketing." Thus, a plain meaning interpretation of section 506(a)(2) requires that retail value be used as the starting point for determining replacement value.

III. THE INTERPLAY BETWEEN SECTION 506 AND SECTION 1325

A. The Relationship Between Section 506 and Section 1325

As this comment has already established, the value of a secured claim is determined by section 506(a).[110] To comply with section 1325(a)(5)(B), the debtor must pay no less than the present value of the allowed secured claim.[111] However, the hanging paragraph of section 1325(a) provides that section 506 will not apply to certain types of debt, such as vehicles purchased within 910 days or personal property purchased within one year of filing for bankruptcy.[112] The addition of the hanging paragraph in section 1325(a) creates the issue of how the types of debt contemplated in that paragraph will become allowed secured claims under section 1325(a)(5)(B) without first applying section 506, which is expressly disallowed by the hanging paragraph.[113] Courts throughout the country have used different approaches to tackle the confusing interplay between these statutes and the various approaches have resulted in disparate outcomes within the jurisdictions.

B. Varying Approaches to Resolving the Conflict Between Section 506 and Section 1325

Most courts have come to one of three conclusions when interpreting the unusual relationship between sections 506 and 1325: 1) claims under the hanging paragraph cannot be bifurcated and thus creditors with these claims possess fully secured claims; 2) creditors with claims falling under the hanging paragraph hold entirely unsecured claims; or 3) although creditors with claims under the hanging

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[110] 11 U.S.C. § 506(a).

[111] 11 U.S.C. § 1325(a)(5)(B) (2006).

[112] 11 U.S.C. § 1325(a) ("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 that 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 . . . .").

[113] Henry E. Hildebrand, III, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 386–87 (Spring 2005) (discussing hanging paragraph's exclusion of section 506); LUNDIN, *supra* note 41, at § 451.1; Keith M. Lundin and Henry Hildebrand, III, *Section by Section Analysis of Chapter 13 After BAPCPA*, SLO68 ALI-ABA 65, 97 (2005) (questioning impact of section 506 exclusion on hanging paragraph).

paragraph are not secured due to section 1325(a)'s bar against the application of section 506, these creditors are still entitled to the greater of either payment of the entire debt or payment of the amount of debt that would have been secured had the claim been bifurcated. To understand how the various holdings impact parties in bankruptcy proceedings and how a uniform approach to the problem can be achieved, it is necessary to examine the courts' different approaches and rationales to reconciling the relationship between sections 506 and 1325.

1. The Majority Approach

The majority of courts interpret the peculiar relationship between sections 506 and 1325 to mean that bifurcation of items falling under the hanging paragraph is not allowed.[114] In keeping with the lack of uniformity associated with other areas of valuation, courts implementing this approach tend to produce slightly different outcomes from one another. However, the majority of these courts have held creditors with claims under the hanging paragraph to possess fully secured claims.[115] This holding has a vast impact on debtors because it results in debtors being pressured to pay off the entire underlying debt in order to retain the collateral.

The roots of the majority approach stem from *Dewsnup v. Timm*.[116] In this case, the Supreme Court declined to read "allowed secured claim" as a single term of art

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[114] *In re* Bufford, 343 B.R. 827, 831 (Bankr. N.D. Tex 2006) ("No doubt, the drafters of the 910-day provision intended to eliminate the ability of debtors to bifurcate, or 'strip down' secured claims on these recently purchased vehicles."); *In re* Brooks, 344 B.R. 417, 421 (Bankr. E.D.N.C. 2006) (finding claims under section 1325(a)'s hanging paragraph are excluded from bifurcation under section 506(a)); *In re* Ezell, 338 B.R. 330, 340 (Bankr. E.D. Tenn. 2006) ("The Anti-Cramdown Paragraph serves to eliminate Revised § 506 from the allowed secured/unsecured claim bifurcation treatment otherwise mandated by Revised § 506 . . . ."); *In re* Gentry, No. 06-50204, 2006 WL 3392947, at *4 (Bankr. E.D. Tenn. 2006) (eliminating application of section 506 to claims falling under hanging paragraph); *In re* Sparks, 346 B.R. 767, 771 (Bankr. S.D. Ohio 2006) ("Consistent with the majority of the case law, we find that the provisions of § 1325(a) are mandatory and where the debt meets the parameters of the hanging paragraph, the Debtors are prevented from cramming down the secured debt of HSBC."); *In re* Turner, 349 B.R. 437, 442 (Bankr. D.S.C. 2006) ("[T]he Court finds that the flush language of § 1325(a) prevents a Chapter 13 debtor from 'stripping down' purchase money security interests in automobiles acquired for a debtor's personal use within the 910-day period preceding that debtor's bankruptcy filing."); *In re* Vega, 344 B.R. 616, 620 (Bankr. D. Kan. 2006) (acknowledging elimination of bifurcation under hanging paragraph).

[115] *Bufford*, 343 B.R. at 833 (maintaining creditors claims are fully secured despite inapplicability of section 506); *Brooks*, 344 B.R. at 421 ("Based on the plain language of § 506(a) and the United States Supreme Court's interpretation of the statute, this court finds that a 910 claim may be an 'allowed secured claim' for the purposes of § 1325(a)(5), regardless of the inapplicability of § 506."); *Ezell*, 338 B.R. at 340 (finding creditors to be fully secured under hanging paragraph in section 1325(a)); *Gentry*, 2006 WL 3392947 at *5 ("Therefore, a creditor whose claim falls within the scope of the [Hanging] Paragraph is fully secured under Revised § 1325(a)(5)(C) . . . ."); *Turner*, 349 B.R. at 442 ("Furthermore, the Court also concludes that secured creditors subject to the flush language of § 1325(a) are fully secured for the entire amount of their claims and must be repaid in full through a Chapter 13 plan if debtors wish to retain the collateral securing the claim.").

[116] 502 U.S. 410 (1992).

within section 506(a).[117] Instead, the Court explained "the words should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured."[118] Therefore, based on this decision, the case law from courts following the majority approach tend to hold that:

> [A] claim may be an "allowed secured claim" without reference to the valuation process of § 506. Therefore, while the hanging paragraph prevents § 506(a) from operating to value a 910-claim as an allowed secured claim only to the extent of the value of the collateral securing the claim, it does not prevent the 910-claim from being considered an allowed secured claim for purposes of the required treatment in § 1325(a)(5).[119]

In *In re Turner*[120] the court was faced with interpreting the language of the hanging paragraph in section 1325(a).[121] The *Turner* court found that the language of section 1325(a) prohibited the bifurcation of the secured creditor's claim.[122] However, this court went on to hold that the absence of bifurcation had the effect of leaving creditors fully secured.[123] The court justified its holding by looking to legislative history and the structure of the Bankruptcy Code. The court noted that nothing in the Code or the legislative history implied intent to disfavor secured creditors.[124]

Next, the court in *In re Brooks*[125] tackled the language of section 1325(a).[126] This court held that, although claims falling under the hanging paragraph of section 1325(a) are unable to be bifurcated, they are not prevented from being considered fully secured.[127] The court explains its holding by looking to the plain meaning of section 506. The court provided that section 506 addresses the bifurcation of claims; however, it does not dictate whether a claim is considered secured.[128]

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[117] *Id.* at 415 ("[T]he words 'allowed secured claim' in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a), which by its terms is not a definitional provision.").

[118] *Id.*

[119] *In re* Wilson, 374 B.R. 251, 255–256 (B.A.P. 10th Cir. 2007). *See Bufford*, 343 B.R. at 832–33 ("Section 506 does not define an 'allowed secured claim' for purposes of § 1325(a)(5)."); *Brooks*, 344 B.R. at 420–21 (noting section 506 makes no mention of whether claims may be secured without its application).

[120] 349 B.R. 437 (Bankr. D.S.C. 2006).

[121] *Id.* at 438 ("In this case, the Court must determine the effect and meaning of the flush language of § 1325(a).").

[122] *Id.* at 442 ("[T]he Court finds that the flush language of § 1325(a) prevents a Chapter 13 debtor from 'stripping down' purchase money security interests in automobiles acquired for a debtor's personal use within the 910-day period preceding that debtor's bankruptcy filing.").

[123] *Id.* (holding creditors with claims affected by hanging paragraph are fully secured).

[124] *Id.* at 441 (interpreting Code and legislative history to support secured creditors).

[125] 344 B.R. 417 (Bankr. E.D.N.C. 2006).

[126] *Id.* at 419 (describing need to evaluate section 1325 in light of section 506).

[127] *Id.* at 421 (explaining hanging paragraph claims are not bifurcated but are secured).

[128] *Id.* at 420–21 (noting section 506 makes no mention of whether claims may be secured without its application).

Moreover, the court supported its holding by rationalizing that because state law applies when left unaltered by the Bankruptcy Code, a creditor with a claim under the hanging paragraph maintains a fully secured claim because its secured status is left unaltered by the bifurcation process of section 506.[129]

In *In re Bufford*,[130] the court joined other districts by addressing the interplay between sections 1325 and 506. This court, like those in *Turner* and *Brooks*, held that claims under the hanging paragraph of section 1325(a) are not bifurcated under section 506, but the creditors holding such claims remain fully secured such that the debtor must repay the entire amount owed in order to retain the collateral.[131] This court justified its interpretation of the relationship between sections 1325(a) and 506 by looking to the language of those statutes as well as other sections of the Bankruptcy Code. The court noted that section 506(a) merely addresses the bifurcation of secured claims; but, "[c]laims are [not] allowed or disallowed under . . . § 506 . . . ."[132] Moreover, the court pointed to section 502 as being the provision of the Bankruptcy Code that determines whether a claim is allowed and section 101 as being the section defining whether a claim is secured by a lien.[133] Thus, according to the ruling of *Bufford*, creditors with claims under the hanging paragraph can maintain their secured status despite the inapplicability of section 506.[134]

Finally, in *In re Gentry*,[135] the court faced the issue of reconciling the language of the hanging paragraph in section 1325(a) with that of section 506.[136] Here, the court rationalized that the effect of the hanging paragraph was to eliminate the bifurcation, and thus the cram down option under section 506(a).[137] However, the court, like many courts before it, went on to agree with the principle that, just because bifurcation is eliminated, claims filed as secured are not prohibited from remaining fully secured.[138] Thus, the *Gentry* court held that while bifurcation under

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[129] *Id.* at 422 (considering impact of state law in absence of section 506).

[130] 343 B.R. 827 (Bankr. N.D. Tex 2006).

[131] *Id.* at 831–32 (explaining effect of interaction between section 1325(a)'s hanging paragraph and section 506).

[132] *Id.* at 832 (examining purpose of section 506(a).

[133] *Id.* at 832–33; *see* 11 U.S.C. § 502 (2006) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects."); 11 U.S.C. § 101(37) ("The term 'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation.").

[134] *Bufford*, 343 B.R. at 831–32.

[135] No. 06-50204, 2006 WL 3392947 (Bankr. E.D. Tenn. Nov. 22, 2006).

[136] *Id.* at *1 ("The objection to confirmation of the debtors' proposed chapter 13 plan presently before the court presents an issue arising out of BAPCPA: whether a '910 secured creditor' whose collateral is being surrendered in full satisfaction of the debt under § 1325(a)(5) of the Bankruptcy Code is also an unsecured creditor entitled to the protection afforded by § 1325(a)(4).").

[137] *Id.* at *3–4 (deciding hanging paragraph eliminates section 506(a) bifurcation).

[138] *Id.* (explaining barred application of section 506(a) does not affect secured status of creditor's claim).

section 506 is barred by the hanging paragraph in section 1325(a), the creditor's claim remains fully secured.[139]

2. A Second Approach

Other bankruptcy courts have approached the interplay between sections 506 and 1325 in a different manner. These courts held that the combined language of the two statutes can be read to mean that creditors of claims falling under the hanging paragraph may hold unsecured claims.[140] The courts rationalize that, because a claim only becomes secured once it passes through the section 506 process, claims subject to the 506 prohibition must remain unsecured.[141] Therefore, the main difference between this approach and the majority approach is whether secured claims should be viewed as coming from section 506(a), this approach, or from sections 502 and 101, the majority approach.

In *In re Taranto*,[142] the court was called upon to interpret the unnumbered provision of section 1325(a). This court noted that the limited legislative history provided no indication of intent to favor creditors falling under the 1325(a) hanging paragraph.[143] Thus, the court held that the hanging paragraph's bar on section 506 bifurcation served to prevent creditors' claims from becoming secured beyond the value of the debtor's collateral.[144]

Similarly, in *In re Wampler*,[145] the court addressed the unique relationship between the hanging paragraph and section 506. This court began by explaining that the only way for a claim to become an allowed secured claim is through the combined application of sections 502 and 506.[146] The court also acknowledged that the hanging paragraph of section 1325(a) barred the application of section 506.[147] The court went on to state that "[b]ecause § 506 does not apply . . . under . . . the 910 Language and the only means by which said creditors are entitled to an allowed secured claim is by determination under the provisions of § 506, those creditors

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[139] *Id.* at *5 ("[T]he court finds that the [Hanging] Paragraph, as mandated by its terms, applies equally to both Revised § 1325(a)(5)(B) and Revised § 1325(a)(5)(C). Therefore, a creditor whose claim falls within the scope of the [Hanging] Paragraph is fully secured under Revised § 1325(a)(5)(C), regardless of the amount it might realize from the liquidation of its collateral upon surrender.").

[140] *See In re* Taranto, 344 B.R. 857, 861 (Bankr. N.D. Ohio 2006), *rev'd*, 365 B.R. 85 (B.A.P. 6th Cir. 2007); *In re* Wampler, 345 B.R. 730, 736 (Bankr. D. Kan. 2006).

[141] *Taranto*, 344 B.R. at 861; *Wampler*, 345 B.R. at 736.

[142] 344 B.R. 857 (Bankr. N.D. Ohio 2006), *rev'd*, 365 B.R. 85 (B.A.P. 6th Cir. 2007).

[143] *Id.* at 861.

[144] *Id.* ("There is no evidence in the legislative history, however, that Congress intended that the 910 Claim, which, by the very operation of the 910 Provision, is not an 'allowed secured claim,' should also receive the present value protection provided for in § 1325(a)(5)(B)(ii) on the 910 Claim amount where the value of the collateral securing the 910 Claim is less than the amount of the 910 Claim.").

[145] 345 B.R. 730 (Bankr. D. Kan. 2006).

[146] *Id.* at 736 ("The provisions of §§ 502 and 506, read together, establish the only means by which a court may determine that an allowed claim should be allowed as a secured claim.").

[147] *Id.* (stating section 506 does not apply to claims falling under hanging paragraph of section 1325(a)).

cannot hold allowed secured claims . . . ."[148] Moreover, the court determined that considering a creditor's claim to be fully secured in light of the hanging paragraph would produce an absurd result.[149] Therefore, the court held that the language of the hanging paragraph in section 1325(a) renders section 506 inapplicable to claims falling under its umbrella and thus does not require these claims be treated as secured.[150]

3. A Third Option

One court has, in two separate cases, developed yet another option for interpreting the relationship between sections 506 and 1325. This court found that, while creditors with claims falling under the hanging paragraph are not secured due to section 1325(a)'s bar against the application of section 506, these creditors are still entitled to a fair resolution of their claims.[151]

In *In re Carver*,[152] the court first addressed the appropriate interpretation of the hanging paragraph in section 1325(a). The court reasoned that fair treatment of creditors requires the greater of either payment of the entire debt less interest or payment of the amount of debt that would have been secured had the claim been bifurcated.[153] The court conceded that the language of the hanging paragraph served to bar section 506 from certain claims and consequently prevented those claims from being considered secured according to section 506.[154] However, the court argued that it is doubtful Congress intended to disfavor certain creditors and more likely wanted to benefit certain creditors.[155] Therefore, the court concluded that the most rational interpretation of the interplay between the language of sections 1325 and 506 is to allow creditors of claims falling under the umbrella of the hanging paragraph to receive the greater of either: "(1) the full amount of the claim without interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down . . . ."[156]

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[148] *Id.*

[149] *Id.* at 739 ("If the phrase 'allowed secured claim,' as contemplated by § 1325(a)(5), means only, as the Court in *Brown* suggests, that a claim allowed under § 502 is secured by a lien as defined by § 101(37), an absurd result ensues: Chapter 13 debtors would be required to pay through their plan for every secured creditor its entire claim, both the secured and unsecured portions, no matter how small or insignificant the worth of the collateral upon which the underlying lien attaches.").

[150] *Id.* at 740 ("The 910 Language requires that the allowed claim be paid in full, but by making the provisions of § 506 inapplicable, does not mandate treatment of the claim as an allowed secured claim requiring the payment of postpetition interest under § 1325(a)(5)(B)(ii).").

[151] *In re* Carver, 338 B.R. 521, 528 (Bankr. S.D. Ga. 2006); *In re* Green, 348 B.R. 601, 611 (Bankr. M.D. Ga. 2006).

[152] 338 B.R. 521 (Bankr. S.D. Ga. 2006).

[153] *Id.* at 528.

[154] *Id.* at 526.

[155] *Id.* at 527 (acknowledging Congress's right to favor or disfavor certain creditors as they see fit).

[156] *Id.* at 528.

Next, in *In re Green*,[157] the court once again addressed the unusual relationship between sections 1325 and 506. Here, although acknowledging that no other courts agreed with the *Carver* decision, the court affirmed its holding.[158] The court maintained that it has a duty to follow the plain language of the statute. The court interpreted the plain meaning of the hanging paragraph to bar application of section 506 to claims within its realm and consequently prevent such claims from being bifurcated.[159] Additionally, the court noted a clear legislative intent to provide fair treatment to creditors.[160] As a result of this interpretation and the legislative intent, the court held that "*Carver* is correctly decided . . . a 910 claim must receive the greater of (1) the full amount of the claim without interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down . . . ."[161]

C. Reconciling the Relationship Between Section 506 and Section 1325

Uniformity in understanding the relationship between sections 1325 and 506 is of vital importance to those involved in the bankruptcy process. As demonstrated by the above cases, the court's interpretation of this unusual relationship can mean the difference between a creditor's claim being fully secured or, at the other end of the spectrum, completely unsecured. Because this range of possibilities can result in drastically different effects on the bankruptcy estate, both creditors and debtors alike have a vested interest in ensuring uniformity amongst the courts in an effort to obtain consistency and predictability within the system.

Finding the hanging paragraph of section 1325(a) to render all claims falling within its scope unsecured creates an absurd result. While the legislative history addressing these sections is sparse, there is certainly no indication that Congress intended to disserve creditors by preventing them from obtaining secured claims. Because statutes should not be interpreted to lead to absurd results, the second method of understanding the interplay of sections 506 and 1325 should not be used. Similarly, finding that creditors are entitled to payment despite the claims being unsecured lacks a statutory basis within the Code. To determine that a creditor is entitled to either full payment of the secured debt minus interest or payment of the amount that would have been secured through bifurcation under the cram down option renders the hanging paragraph of section 1325(a) superfluous because it creates the same result as if the hanging paragraph had not been added to section

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[157] 348 B.R. 601 (Bankr. M.D. Ga. 2006).

[158] *Id.* at 606 (recognizing contradicting opinions of other courts). *See In re* Brooks, 344 B.R. 417, 422 (Bankr. E.D.N.C. 2006) (rejecting holding in *Carver* for several reasons); *In re* DeSardi, 340 B.R. 790, 812 (Bankr. S.D. Tex. 2006) (noting "[t]his Court does not agree with the conclusions in *Carver*").

[159] *Green* 348 B.R. at 610 ("I decline to adopt the conclusion that a 910 claim is a secured claim and continue to hold that § 506 is the one and only path to the establishment of a secured claim for bankruptcy purposes.").

[160] *Id.* at 611 (commenting on Congressional intent to provide fair treatment to creditors).

[161] *Id.*

1325(a). Because Congress should not be understood to pass meaningless provisions, the third option should not be used to interpret the relationship between sections 1325 and 506. Thus, the first option, which is the majority opinion, should be used to understand the interaction between sections 1325 and 506. This option applies the plain meaning interpretation of the statutes as described below. Additionally, this method does not lead to an absurd outcome and supports the legislative intent, identified by *Carver* and *Green*, to provide fair treatment to creditors.[162]

As with the various approaches to valuation, the key to establishing uniformity in the interpretation of the interplay between sections 506 and 1325 lies within the plain meaning of the statutory language. When the plain meaning of the Bankruptcy Code's statutory language is properly interpreted, the correct understanding of the relationship between sections 1325 and 506 becomes evident. Section 506 begins with "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . ."[163] This sentence implies that the statute addresses claims which have already been determined to be allowed and secured. The statute goes on to explain that such claims will be bifurcated into secured and unsecured claims based on the value of the debtor's collateral.[164] This additional information leads to the conclusion that the purpose of section 506 is to establish the process of bifurcation, not to address whether a claim is allowed or secured. This theory is supported further by the Supreme Court's decision in *Dewsnup* in which it was held that "the words 'allowed secured claim' in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a), which by its terms is not a definitional provision. Rather, the words should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured."[165]

Unlike section 506, a plain meaning reading of sections 101 and 502 should be interpreted to provide the basis for establishing allowed and secured claims. Section 101(37) provides that "[t]he term 'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation."[166] Additionally, section 502 provides "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case

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[162] *In re* Carver, 338 B.R. 521, 527 (Bankr. S.D. Ga. 2006) ("Possibly, Congress intended the 910 claim to be treated as wholly unsecured, but it is unlikely that Congress singled out the creditor with a 910 claim in order to punish it. More likely is that Congress intended to treat such claims better than they would have been treated under former law."); *In re* Green, 348 B.R. 601, 611 (Bankr. M.D. Ga. 2006) (noting Congressional intent to provide fair treatment to creditors).

[163] 11 U.S.C. § 506(a) (2006).

[164] *Id.*

[165] Dewsnup v. Timm, 502 U.S. 410, 415 (1992).

[166] 11 U.S.C. § 101(37) (2006).

under chapter 7 of this title, objects."[167] When read together, these sections can be interpreted to provide for obtaining both a secured claim and an allowed claim.

Thus, while it is true that the plain meaning of the hanging paragraph in section 1325(a) effectively bars the application of section 506 to certain claims,[168] this bar is not as devastating as some courts have determined it to be. In fact, by barring the application of section 506, the sole accomplishment of the hanging paragraph is to prevent the claim from being bifurcated into secured and unsecured portions. It does not prevent a claim from being deemed allowed or secured under another section of the Bankruptcy Code. Therefore, the most logical interpretation of the relationship between sections 506 and 1325 is that because claims under the hanging paragraph cannot be bifurcated, creditors possessing these claims are fully secured. This approach to the interplay between sections 1325 and 506 should be uniformly adopted in an effort to provide debtors and creditors with a sense of predictability and consistency within the bankruptcy system.

CONCLUSION

Although in some ways the courts have moved closer to a uniform system of valuation, in other ways they still experience great variance. Unfortunately, despite the recent efforts of the Supreme Court in its *Rash* decision and Congress in its revision of section 506, valuation still lacks the uniformity needed for an efficient and reliable bankruptcy system. This lack of uniformity continues to produce confusion and frustration for creditors, debtors, and practitioners involved in the bankruptcy process. It is the need for consistency that necessitates a demand for clearer legislation or judicial resolution to the imprecise and puzzling valuation process. For without a judicial or statutory resolution, the courts will continue to use independent judgment in deciphering the valuation process and are unlikely to ever reach a unanimous conclusion.

The current state of section 506 and its interplay with section 1325 makes it seem inevitable that valuation issues will again reach the Supreme Court. When the Supreme Court next addresses valuation issues, it should seize the opportunity to stipulate that section 506 requires the starting point for determining replacement value of the debtor's personal property to be the full average retail value and that this value should only be adjusted to reflect the current state of the property in question. Additionally, if given the opportunity, the Court should hold that the exclusion of section 506 under the hanging paragraph in section 1325(a) only serves to prohibit bifurcation of applicable claims but does not affect the fully secured status of such claims.

In the meantime, Congress maintains the power to adjust the language of section 506 for the benefit of all involved in the bankruptcy process. While,

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[167] 11 U.S.C. § 502(a) (2006).
[168] 11 U.S.C. § 1325(a) (2006).

through the enactment of BAPCPA, Congress rightfully acknowledged the need for bankruptcy reform and aimed to better the system, it is equally important that Congress monitor the changes it mandated to ensure they are achieving their desired result. Surely, in revising section 506 and adding the hanging paragraph to section 1325(a), Congress did not intend to further perpetuate the confusion and inconsistencies plaguing the valuation process. Yet, this has been the result. Thus, Congress should further revise the language of sections 506 and 1325 to resolve the existing disparities. Section 506 should be amended to include language indicating that the full average retail value shall be used as the starting point for determining the replacement value of all personal property of the debtor and that the average retail value shall only be reduced, on a case by case basis, to fairly reflect the current condition of the property in question. Additionally, the hanging paragraph of section 1325(a) should be amended to include language indicating that the exclusion of section 506 only serves to prevent bifurcation of creditors' claims and does not otherwise alter the status of claims deemed to be allowed and fully secured under sections 101(37) and 502 of the Code. It is only through revisions such as these that the valuation process will ever achieve the uniformity and consistency needed by those involved in the bankruptcy process.

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