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## **Balancing the Till: Finding the Appropriate Cram Down Rate in Bankruptcy Reorganizations After *Till v. SCS Credit Corporation***

The judicial determination of the interest rate a debtor must pay on secured claims in a bankruptcy reorganization is often the decision with the most financial ramifications for both debtors and creditors.<sup>1</sup> This interest rate is known as the cram down rate because both Chapters 11 and 13 of the Bankruptcy Code give a bankruptcy court “cram down” powers, which allow it to confirm a debtor’s reorganization plan over the objection of dissenting creditors.<sup>2</sup> For debtors, the “cram down rate” may be a deciding factor in whether a reorganization plan is feasible.<sup>3</sup> For creditors, the cram down rate is a major factor in deciding whether to accept or reject a proposed plan.<sup>4</sup> Due to its importance, the proper method of determining the cram down rate has been debated for decades and has caused conflict among the circuits.<sup>5</sup> The Supreme Court finally undertook to settle the matter when it granted certiorari in *Till v. SCS Credit Corporation*.<sup>6</sup> Unfortunately, like the circuit courts before it, the Court could not fully agree on the proper method of determining the cram down rate. The decision produced three opinions, each of which endorsed a different approach and none of which garnered the support of a majority.

After considering and rejecting a number of alternative approaches,<sup>7</sup> the plurality (Justices Stevens, Souter, Ginsburg, and Breyer) upheld the decision of the bankruptcy judge by adopting a

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1. See Monica Hartman, Comment, *Selecting the Correct Cramdown Interest Rate in Chapter 11 and Chapter 13 Bankruptcies*, 47 UCLA L. REV. 521, 522 (1999) (“The interest rate that debtors must pay on claims existing at the time of a bankruptcy reorganization is arguably the most debated economic issue in bankruptcy litigation.”).

2. See C. Frank Carbiener, *Present Value in Bankruptcy: The Search for an Appropriate Cramdown Discount Rate*, 32 S.D. L. REV. 42, 42 (1987). To be confirmed over objection, the cram down interest rate, when added to the plan payments, must equal or exceed the present value of the creditor’s allowed secured claim. See *id.* (explaining the provisions of 11 U.S.C. § 1129(b) and 11 U.S.C. § 1325(b) (2004)).

3. *Id.* at 43.

4. *Id.*

5. See *id.* at 42 (explaining that authority exists to support almost any method of calculating the cram down rate); see also *infra* note 35.

6. 124 S. Ct. 1951 (2004).

7. See *infra* notes 36–52 and accompanying text (discussing alternative approaches to determining the cram down rate).

method utilizing the national prime rate as a base and adding a risk premium determined by the facts of the case (the “prime-plus” formula approach).<sup>8</sup> Justice Thomas advocated compensating the creditor only for the time delay in payment and not for any risk of default (the “risk-free” rate), but nonetheless concurred in the judgment because he found that the interest rate approved by the bankruptcy judge was sufficient to satisfy the requirements of the statute<sup>9</sup> since it was higher than the risk-free rate.<sup>10</sup> The dissenters (Chief Justice Rehnquist and Justices Scalia, O’Connor, and Kennedy) advocated adopting the contract rate as a presumption that the bankruptcy judge could adjust on motion (“presumptive contract” rate).<sup>11</sup>

While the Court provided a thorough analysis of the options, it failed to produce a majority opinion adopting a single approach and left practitioners with little guidance as to the decision’s implications. This Recent Development examines the Supreme Court’s decision in *Till* and concludes that, although the decision produced no clear holding, lower courts will generally follow the plurality’s prime-plus formula approach.

First, this Recent Development discusses the importance of the cram down rate and examines the judicial approaches employed prior to *Till*. Second, this Recent Development analyzes the areas of agreement and disagreement among the three opinions in *Till* and applies the test for determining the holding of a fragmented Court from *Marks v. United States*<sup>12</sup> to conclude that the *Till* decision produced no clear holding to bind lower courts. Third, this Recent Development argues that lower courts will generally follow the plurality’s prime-plus formula approach and discusses the application of that approach. This Recent Development concludes by suggesting that courts following the prime-plus formula approach adopt presumptive risk premium points to simplify the determination of the appropriate risk adjustment.

Because setting the interest rate in a reorganization plan is often one of the most significant financial decisions in the case and may determine whether the plan is feasible, choosing the proper method has led to substantial disagreement.<sup>13</sup> Bankruptcy courts can confirm

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8. *Till*, 124 S. Ct. at 1960–62.

9. 11 U.S.C. § 1325(a)(5)(B)(ii) (2004).

10. *Till*, 124 S. Ct. at 1965–66 (Thomas, J., concurring).

11. *Id.* at 1968 (Scalia, J., dissenting).

12. 430 U.S. 188 (1977).

13. See Hartman, *supra* note 1, at 522.

a reorganization plan that modifies the rights of a secured creditor over that creditor's objection.<sup>14</sup> Such a modification has become known as "cram down" and involves two separate valuation issues.<sup>15</sup> Courts must determine both the value of the collateral securing the claim<sup>16</sup> and the value of the deferred payments proposed by the plan.<sup>17</sup>

The Bankruptcy Code ("Code") requires that plan payments on a secured claim in both Chapters 11<sup>18</sup> and 13 be of a "value, as of the effective date of the plan," that equals or exceeds the value of the creditor's allowed secured claim."<sup>19</sup> This means that the total

14. See 11 U.S.C. § 1325(b)(2) (2004) (authorizing a court, under certain circumstances, to approve a plan that is objected to by a "trustee . . . or holder of an allowed secured claim"); see also David G. Epstein, *Don't Go and Do Something Rash About Cram Down Interest Rates*, 49 ALA. L. REV. 435, 437 (1998) ("[T]he plan can be 'crammed down' over the objection of the secured creditor."). To be modified over objection, the creditor's security interest must be "in anything other than 'real property that is the debtor's principal residence.'" *Till*, 124 S. Ct. at 1959 (quoting 11 U.S.C. § 1322(b)(2) (2004)).

15. See Epstein, *supra* note 14, at 437-38.

16. The proper method for determining the value of the collateral in Chapter 13 cases was settled by the Supreme Court in *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 965 (1997) ("[T]he 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 for the same 'proposed . . . use.'").

17. Epstein, *supra* note 14, at 438.

18. Whether *Till* is equally applicable to reorganization plans under Chapters 11 and 13 of the Bankruptcy Code is unclear. The Court considered the matter in a Chapter 13 case and made arguably conflicting statements as to its applicability in Chapter 11 cases. Compare *Till*, 124 S. Ct. at 1958-59 ("We think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions."), with *id.* at 1960 n.14 ("[W]hen picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce."). Because "courts and commentators have generally treated the question of how the cram down interest rate should be determined as a question that is answered the same in Chapter 11, 12, and 13 cases," Epstein, *supra* note 14, at 441, it is likely that they will continue to do so. However, this Recent Development does not discuss that issue. For a discussion of *Till*'s applicability to other Chapters of the Bankruptcy Code, see generally Daniel J. Carragher, *News at 11: What the Supreme Court's Prime Plus Ruling Means for Chapter 11*, AM. BANKR. INST. J. 26 (July/Aug. 2004), which suggests why the Court's ruling in *Till* should not affect existing Chapter 11 precedent. Not all commentators agree on the implications of *Till*. See, e.g., Thomas J. Yerbich, *How Do You Count the Votes—or Did Till Tilt the Game?*, AM. BANKR. INST. J. 10, 59 (July/Aug. 2004) (concluding that "bankruptcy judges will likely apply the *Till* formula approach to § 1129").

19. *Till*, 124 S. Ct. at 1958 (quoting 11 U.S.C. § 1325 (a)(5)(B)(ii)(2004)); see also *id.* at 1959 n.10 (noting parallel provisions in several parts of Chapter 11). The cram down provision of Chapter 13 requires, in part, that "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim." 11 U.S.C. § 1325(a)(5)(B)(ii) (2004). The Chapter 11 cram down provision requires, in part:

payments made to secured creditors under the plan must equal or exceed the present value of their allowed secured claim.<sup>20</sup> Because the right to a future payment is worth less than immediate payment of that same amount, courts must determine what interest rate will adequately compensate for the delay in payment and provide the creditor with the present value required by the Code.<sup>21</sup> The proper method for determining this cram down interest rate has divided courts<sup>22</sup> and provided ample fodder for Law Review articles.<sup>23</sup> The absence of guidance from the Code<sup>24</sup> or legislative history<sup>25</sup> has further fostered the debate.

The dispute in *Till* arose when a secured creditor objected to the cram down rate proposed in the debtor's Chapter 13 plan and argued that under the "coerced loan" approach it was entitled to interest at the rate of 21%.<sup>26</sup> The Tills had purchased a used truck in October 1998 and entered into a retail installment contract for payment of \$6,425.75 of the purchase price at 21% interest per year for 136 weeks.<sup>27</sup> The contract was immediately assigned to SCS Credit Corporation ("SCS") and SCS retained a purchase money security interest giving it the right to repossess the vehicle if the Tills defaulted under the contract.<sup>28</sup> The Tills filed a petition for relief under Chapter 13 of the Bankruptcy Code in October 1999, which

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[T]hat each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property.

11 U.S.C. § 1129(b)(2)(A)(i)(II) (2004).

20. See Matthew Y. Harris, Comment, *Chapter 13 Cram Down Interest Rates: Another Day, Another Dollar—A Cry for Help in Ending the Quest for the Appropriate Rate*, 67 MISS. L.J. 567, 569 (1997) (noting that the objective of the legislation is to place secured creditors in the same position they would have been if they had been allowed to repossess their collateral and sell it at the time of filing).

21. See John K. Pearson et al., *Ending the Judicial Snipe Hunt: The Search for the Cramdown Interest Rate*, 4 AM. BANKR. INST. L. REV. 35, 36–37 (1996).

22. See *infra* note 35 and accompanying text.

23. See *supra* notes 1–2, 15, 20–21.

24. See *Till*, 124 S. Ct. at 1958 ("The Bankruptcy Code provides little guidance as to which of the rates of interest advocated by the four opinions in this case . . . Congress had in mind when it adopted the cram down provision."); Harris, *supra* note 20, at 569 ("Much to the consternation of courts, 11 U.S.C. § 1325(a)(5)(B)(ii) gives no guidance as to what the interest rate should be.").

25. See Hartman, *supra* note 1, at 526–27 (surveying the legislative history of the cram down provisions and finding that it does not provide much guidance on how to set the interest rate for the secured creditor's claim).

26. See *Till*, 124 S. Ct. at 1957.

27. *Id.* at 1956.

28. *Id.*

automatically stayed any debt collection activities by creditors.<sup>29</sup> At the time of filing, the outstanding balance owed to SCS under the contract was \$4,894.89; however, by agreement of the parties, the value of the truck was only \$4,000.<sup>30</sup> Accordingly, SCS's secured claim was limited to \$4,000 (the value of the truck) and the remaining \$894.89 was unsecured.<sup>31</sup> The Tills' proposed plan provided for cram down interest of 9.5% per year on the secured portion of SCS's claim.<sup>32</sup> This cram down rate was arrived at using the prime-plus formula approach.<sup>33</sup>

The history of disagreement over the appropriate cram down approach is demonstrated by the lower court decisions in *Till*.<sup>34</sup> The four approaches advocated by the lower courts in *Till*—the formula, coerced loan, presumptive contract rate and cost of funds approaches—are the primary approaches adopted by various courts throughout the country.<sup>35</sup> The bankruptcy court approved of the prime-plus formula approach as proposed by the debtors' plan and supported by the bankruptcy trustee.<sup>36</sup> This approach provided a cram down rate of 9.5% based on the national prime rate of 8% plus 1.5% to account for the risk of default.<sup>37</sup> Courts that have applied the formula approach begin with a base rate determined independent of the bankruptcy and adjust that rate upward using a risk premium based on the particular facts of the case before the court.<sup>38</sup> Base rates that have been utilized include the prime rate<sup>39</sup> (the "prime-plus" formula approach) and the rate on a United States Treasury

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1957.

33. *Id.*

34. *See id.* at 1956 ("The proceedings in this case that led to our grant of certiorari identified four different methods" of determining the cram down rate).

35. *See Harris, supra* note 20, at 580 (noting that the circuit courts are split on the proper approach for determining the cram down rate, with the Third, Sixth, and Fifth Circuits following the "coerced loan" theory, the Seventh Circuit (in the Chapter 12 context) and several lower courts following the "cost of funds" approach, and the Second Circuit following the "treasury rate" formula approach). For courts adopting the presumptive contract rate approach, *see infra* note 46. *See generally* Epstein, *supra* note 14 (discussing approaches adopted by various courts).

36. *See Till*, 124 S. Ct. at 1957.

37. *Id.*

38. *See Pearson, supra* note 21, at 50 ("[T]he formula approach requires the court to adopt a risk-free market rate as a base, and then add a risk premium corresponding to the court's determination of the riskiness of the reorganization plan.").

39. For a case adopting the prime-plus formula approach, *see In re Fowler*, 903 F.2d 694, 698 (9th Cir. 1990).

instrument<sup>40</sup> (the “treasury rate” formula approach). The determination of the appropriate risk premium is dependent on the particular facts of the case.<sup>41</sup> Courts have generally considered such factors as the debtor’s circumstances, prior credit history, and the viability of the reorganization plan.<sup>42</sup>

The district court in *Till* reversed the bankruptcy court’s prime-plus formula approach and endorsed the “coerced” or “forced loan” approach, explaining that cram down interest rates should be set at the level the creditor could have received had it sold the collateral and reinvested the sale proceeds.<sup>43</sup> The origin of the coerced loan approach has been credited to a *Collier’s on Bankruptcy* statement that “deferred payment of an obligation under a plan is a coerced loan and the rate of return with respect to such loan must correspond to the rate which would be charged or obtained by the creditor making a loan to a third party with similar terms, duration, collateral, and risk.”<sup>44</sup> Employing this approach, the district court in *Till* found that 21% was the appropriate cram down rate based on the creditor’s testimony about the rate available for subprime market loans.<sup>45</sup>

The Seventh Circuit majority agreed generally with the district court’s rationale but endorsed a modified version of the coerced loan approach using the contract rate (here, 21%) as a presumptive cram down rate that either party could challenge.<sup>46</sup> Courts that have adopted a presumptive contract rate point to its simplicity and ability to reduce litigation costs as reasons for doing so.<sup>47</sup> The creditor may rebut the presumptive rate by showing that interest rates or other costs have increased since the making of the contract, or the debtor may rebut the presumptive rate by showing that such costs have

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40. Pearson, *supra* note 21, at 50. For a case adopting the treasury rate formula approach, see generally *Gen. Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55 (2d Cir. 1997).

41. Pearson, *supra* note 21, at 50.

42. See *Harris, supra* note 20, at 578 (reviewing a Second Circuit case in which the court considered these factors).

43. See *Till v. SCS Credit Corp.*, 124 S. Ct. 1951, 1957 (2004).

44. Pearson, *supra* note 21, at 44 (quoting 5 COLLIER’S ON BANKRUPTCY ¶ 1129.03, at 1129–104 (Lawrence P. King ed., 15th ed. 1995)). For cases adopting the coerced loan approach, see *In re Smithwick*, 121 F.3d 211, 214 (5th Cir. 1997) and *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 71 (3d Cir. 1993).

45. See *Till*, 124 S. Ct. at 1957. Subprime market loans are higher-interest loans to consumers with impaired or non-existent credit histories. Sue Kirtchoff & Sandra Block, *Subprime Loan Market Grows Despite Troubles*, USA TODAY, Dec. 7, 2004, B1.

46. See *Till*, 124 S. Ct. at 1958; *In re Till*, 301 F.3d 583, 592 (7th Cir. 2002). For other cases adopting the contract rate rebuttable presumption, see *Smithwick*, 121 F.3d at 214–15 and *Jones*, 999 F.2d at 70–71.

47. See *Jones*, 999 F.2d at 70–71; *Harris, supra* note 20, at 572.

decreased.<sup>48</sup>

The Seventh Circuit dissent in *Till* advocated adopting either the formula approach or a cost of funds approach, which focuses on the creditor's cost of replacing "the collateral with money from another source."<sup>49</sup> The cost of funds approach is based on the rationale that "since the creditor in a cram down is deprived of the opportunity to sell the collateral and reinvest the proceeds, it is only just that the creditor receive the same rate of interest necessary to borrow the same amount."<sup>50</sup> Although this approach has been adopted by some bankruptcy courts,<sup>51</sup> circuit courts have generally rejected it on the ground that it undercompensates creditors by excluding transaction costs from the cram down rate.<sup>52</sup>

The risk-free approach advocated by Justice Thomas in *Till* has never been a serious contender in the search for the appropriate cram down rate.<sup>53</sup> Justice Thomas himself admitted that a risk-free approach (or even the prime-plus approach) may systematically undercompensate secured creditors for the actual risk of default.<sup>54</sup> Although Justice Thomas agreed with the plurality and dissent that the promise of future payments involves a risk of nonpayment, in his view such a risk is not contemplated by the statute, because the statute refers to the value of property rather than the value of a promise to pay.<sup>55</sup> Under this view, the plan need only include an interest rate sufficient to compensate the creditor for the time delay in payment; no consideration is given for the risk of default.<sup>56</sup> Justice Thomas accused the plurality and dissent of ignoring the plain language of the statute to ensure that secured creditors are not undercompensated.<sup>57</sup> Based on his reading of the statute, the possibility of undercompensation is a matter to be addressed by

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48. See *Till*, 124 S. Ct. at 1957–58.

49. *In re Till*, 301 F.3d at 595–96 (Rovner, J., dissenting).

50. Harris, *supra* note 20, at 575.

51. See, e.g., *In re Jordan*, 130 B.R. 185, 192 (Bankr. D. N.J. 1991) (adopting cost of funds approach).

52. See Harris, *supra* note 20, at 574–77.

53. See *Till*, 124 S. Ct. at 1964 (noting that "many judges who have considered the issue . . . have rejected the risk-free approach"); *id.* at 1976–77 (Scalia, J., dissenting) ("Circuit authority uniformly rejects the risk-free approach. While Circuits addressing the issue are divided over *how* to calculate risk . . . all of them require some compensation for risk, either explicitly or implicitly.").

54. See *id.* at 1966 (Thomas, J., concurring).

55. See *id.* at 1965 (Thomas, J., concurring).

56. See *id.* at 1966 (Thomas, J., concurring).

57. See *id.* at 1965 (Thomas, J., concurring).



Congress rather than resolved by the Court.<sup>58</sup>

Although the plurality in *Till* agreed that the text of Section 1325(a)(5)(B)(ii) may be read to support Justice Thomas's conclusion that Congress did not intend the cram down rate to include compensation for the risk of default, they contended that the statute "is better read to incorporate all of the commonly understood components of 'present value,' including any risk of nonpayment."<sup>59</sup> Thus, the *Till* plurality, like the lower courts before it, declined to interpret the statute as disallowing compensation to secured creditors for the risk of default inherent in a bankruptcy case.

Despite the disagreements regarding the proper method for determining the cram down rate, courts have consistently agreed that the cram down rate must be based on a market interest rate.<sup>60</sup> It appears that the Supreme Court Justices also agreed on this point. The prime plus formula approach is clearly based on a market rate. As the *Till* plurality explained, "the [prime-plus formula] approach begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default."<sup>61</sup> The presumptive contract rate endorsed by the dissent is based on the market rate available to the debtor at the time of the loan.<sup>62</sup> Whether Justice Thomas's "risk-free" approach is based on a market interest rate is unclear, because he never explicitly stated how the risk-free rate should be determined. Based on his comment in a footnote that "[t]he prime rate is '[t]he interest rate most closely approximating the riskless or pure rate for money,'"<sup>63</sup> it may be inferred that he approves of the use of the prime rate. Of course, although the prime rate factors in the effect of some types of risk, it does not take into account the risk of nonpayment by a particular debtor.<sup>64</sup> The treasury rate is a risk-free rate for money;<sup>65</sup> thus, if Justice Thomas does not approve of the prime rate, his risk-free rate would likely be based on

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58. *See id.* at 1967 (Thomas, J., concurring).

59. *See id.* at 1963-64.

60. *See Hartman, supra* note 1, at 528 ("[E]very court to address this issue agrees that these code sections require debtors to use the market interest rate in their plans. . .").

61. *Till*, 124 S. Ct. at 1961.

62. *See id.* at 1968-69 (Scalia, J., dissenting).

63. *Id.* at 1967 n.2 (Thomas, J., concurring) (quoting *ENCYCLOPEDIA OF BANKING & FINANCE* 830 (9th ed. 1991)).

64. *See Harris, supra* note 20, at 581-82.

65. *Id.* at 579.

the treasury rate, which is also a market rate. Assuming Justice Thomas approves of the use of the prime or treasury rate, the one area of agreement among the nine Justices is the use of a market rate. Unfortunately, adoption by the Court of the use of an undefined “market rate” does little to settle the disagreement over the appropriate method for determining the cram down rate, since lower courts already agreed on this point.

The plurality and dissent agreed that the appropriate cram down rate approach includes consideration of the risk of default posed by the debtor.<sup>66</sup> The areas of disagreement were the beginning point for setting the rate and the determination of which party should bear the burden of adjusting the base rate.<sup>67</sup> The plurality’s approach begins with the “concededly low” prime rate and places the “burden squarely on the creditor” to prove the appropriate upward adjustment.<sup>68</sup> The dissent advocated beginning with the contract rate as a presumption that could be adjusted on motion of either party.<sup>69</sup> Whichever party sought to adjust the presumptive contract rate would bear the burden of proving the appropriate adjustment. Since Justice Thomas disagreed with including a risk premium and instead advanced a risk-free rate,<sup>70</sup> he had no burden of proof to consider because all debtors would pay whatever the risk-free rate was on the effective date of their plans.

Although a majority of the Court agreed with the bankruptcy court’s approval of the Tills’ proposed cram down rate, only a plurality agreed with the method used in reaching it and only a plurality placed the burden on the creditor. However, the Court has given guidance as to finding a holding in such a fractured decision. In *Marks v. United States*,<sup>71</sup> the Court stated that “when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’”<sup>72</sup> Since the dissenters did not expressly concur in any aspect of the judgment, it appears that

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66. See *Till*, 124 S. Ct. at 1968 (Scalia, J., dissenting) (“We agree [with the plurality] that any deferred payments to a secured creditor must fully compensate it for the risk that [plan] failure will occur.”).

67. See *Yerbich*, *supra* note 18, at 10.

68. See *Till*, 124 S. Ct. at 1961.

69. See *id.* at 1968 (Scalia, J., dissenting).

70. See *id.* at 1965–66 (Thomas, J., concurring).

71. 430 U.S. 188 (1977).

72. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 (1976)).

any agreement they had with the plurality is not relevant to determining the Court's holding.

Justice Thomas concurred in the judgment because the 9.5% interest rate approved by the bankruptcy court was higher than the risk-free rate he advocated and would, therefore, adequately compensate the creditor for the delay in payment.<sup>73</sup> He did not concur in any part of the plurality's opinion and expressly rejected the rationale endorsed by the plurality.<sup>74</sup> The only possible ground for agreement by Justice Thomas with the plurality's rationale is the utilization of a market rate and, specifically, the prime rate. However, only four Justices, those in the plurality, agreed that the prime rate should be adjusted for the risk of default. Under *Marks*, it is unlikely but possible that the prime rate with no risk adjustment is the applicable cram down rate, since this holding is arguably the narrowest grounds of concurrence.

Resolving the issue of whether there is a binding holding in *Till* centers on whether either the plurality opinion or the concurrence is a "logical subset" or "common denominator" of the other opinion.<sup>75</sup> As previously noted, it can be inferred that Justice Thomas approved of the use of the prime rate as the appropriate risk-free rate.<sup>76</sup> If this is accepted as fact, then the use of the prime rate is the common denominator between the plurality opinion and the concurrence. Under this approach, Justice Thomas's unadjusted prime rate is a

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73. See *Till*, 124 S. Ct. at 1968 (Thomas, J., concurring).

74. See *id.* at 1965 (Thomas, J., concurring).

75. The determination of whether a holding is a "logical subset" or a "common denominator" has been explained by the Second Circuit as follows:

This rule [in *Marks*] only works in instances where one opinion can meaningfully be regarded as "narrower" than another—only when one opinion is a logical subset of other, broader opinions, that is to say, only when that narrow opinion is the common denominator representing the position approved by at least five Justices. When it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court.

United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003) (citations and internal quotation marks omitted) *cert. denied*, 540 U.S. 1103 (2004). The Supreme Court has acknowledged that the *Marks* test may be easier to state than to apply. See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

The Second Circuit attempted to apply the *Marks* test to the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and found that "[b]ecause the substantive due process reasoning presented in Justice Kennedy's concurrence is not a logical subset of the plurality's takings analysis, no "common denominator" can be said to exist among the Court's opinions." *Alcan Aluminum Corp.*, 315 F.3d at 198.

76. See *supra* note 63 and accompanying text.

logical subset of the plurality's prime-plus approach. Acceptance of this argument would make the unadjusted prime rate the "law of the land" for determining cram down interest.<sup>77</sup>

A different view of the opinions results in no common denominator regarding the usage of the unadjusted prime rate as the cram down rate. While the plurality's approach begins with the prime rate, the opinion states that the formula approach "requires a bankruptcy court to adjust the prime rate" for the greater risk of nonpayment posed by bankrupt debtors.<sup>78</sup> Thus, the plurality's formula approach is dependent on the ability of the bankruptcy court to add a risk premium,<sup>79</sup> whereas the concurrence maintains that no risk premium is intended under the Code.<sup>80</sup> Simply interpreting Justice Thomas's risk-free rate as the prime rate may not be enough to reconcile the fundamental differences between the two opinions on the need for a risk premium—Justice Thomas specifically rejected the addition of a debtor-specific risk adjustment,<sup>81</sup> and the plurality specifically rejected a risk-free rate.<sup>82</sup> Justice Thomas concurred in the judgment reversing the Seventh Circuit's use of the presumptive contract rate,<sup>83</sup> not because he endorsed the rationale adopted by the bankruptcy court and the plurality, but because he concluded that the debtors' proposed cram down rate would sufficiently compensate the creditor since it exceeded the risk-free rate, leaving the creditor with "no cause for complaint."<sup>84</sup> Based on the fundamental differences between the plurality's opinion and the concurrence, one opinion is not a clear, logical subset of the other. Under this analysis, there is no common denominator and thus no "law of the land."<sup>85</sup>

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77. See *Yerbich*, *supra* note 18, at 10 (suggesting that the appropriate cram down rate under a *Marks* analysis may be the prime rate without adjustment). Of course, Justice Thomas never explicitly approved of the use of the prime-rate as his risk-free rate. If Justice Thomas's risk-free rate is something other than the prime rate, then any grounds for a common denominator under this approach vanish.

78. *Till*, 124 S. Ct. at 1961.

79. *See id.*

80. *See id.* at 1966–67 (Thomas, J., concurring).

81. *See id.* at 1965 (Thomas, J., concurring).

82. *See id.* at 1964.

83. *See id.* at 1968 (Thomas, J., concurring).

84. *See id.* at 1978 (Scalia, J., dissenting) (explaining that Justice Thomas disagrees with the other Justices on the need for a risk premium and "would reverse because the rate proposed here, being above the risk-free rate, gave respondent no cause for complaint").

85. Where no common denominator is found in a fragmented decision, the authority of the holding is limited to its specific result. *See United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) ("The only binding aspect of such a splintered decision is its specific result, and so the authority of *Eastern Enterprises* is confined to its holding that

Still another argument endorses the plurality's rationale as the Court's definitive holding. Under this argument, the dissenting opinion is viewed as concurring in part, to the extent that it agreed with the plurality that the risk of default must be taken into account.<sup>86</sup> This argument gives eight votes to the inclusion of a risk premium.<sup>87</sup> Conceding that Justice Thomas's risk-free rate is the prime rate, the use of a prime rate would have five votes.<sup>88</sup> Tallying the votes results in a base prime rate with a risk premium—the plurality's formula approach. This argument must fail, however, because it is not reconcilable with the rule in *Marks*, which looks only to those members of the Court who concurred in the judgment.<sup>89</sup> The dissent acknowledged its agreement with the plurality on the need for a risk premium<sup>90</sup> but did not expressly concur in any part of the judgment. Therefore, pursuant to *Marks*, the dissent cannot be considered in determining the Court's holding.

As shown, conducting the *Marks* analysis uncovers no basis for a finding that the prime-plus method is the Court's holding. The prime-plus rationale did not receive the assent of five Justices, nor does the concurrence support the inclusion of a risk premium. Therefore, there are no grounds of concurrence to endorse the prime-plus method as the Court's holding. A stronger argument may be made to endorse the unadjusted prime rate as the narrowest grounds of concurrence. However, this approach should also be rejected because it is not clear that Justice Thomas approved of the use of the prime rate, and even assuming that he did, the narrow level of agreement between the plurality and concurrence on the use of the prime rate should not be enough to overcome the fundamental disagreement on the need for a risk adjustment. Additionally, lower courts would likely reject an interpretation of *Till* resulting in the unadjusted prime rate as the Court's holding due to the longstanding rejection of a risk-free rate and because such an outcome seems anomalous since only

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the Coal Act is unconstitutional as applied to Eastern Enterprises."), *cert. denied*, 540 U.S. 1103 (2004).

86. See *Till*, 124 S. Ct. at 1968 (Scalia, J., dissenting) ("We agree that any deferred payments to a secured creditor must fully compensate it for the risk that such a failure [of a Chapter 13 bankruptcy plan] will occur.").

87. Yerbich, *supra* note 18, at 10.

88. See *id.*

89. See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (emphasis added) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

90. *Till*, 124 S. Ct. at 1968 (Scalia, J., dissenting).

one of nine Justices advocated for a risk-free approach. Accordingly, the fragmented decision in *Till* produced no “law of the land because no one standard command[ed] the support of a majority of the Supreme Court.”<sup>91</sup>

Despite the fact that the Supreme Court’s decision in *Till* failed to produce a clear, binding holding, as a practical matter, courts will likely view the plurality’s decision as the controlling opinion and follow the prime-plus formula approach. Four Justices clearly advocated this approach and one additional Justice found enough agreement with the outcome it produced to concur in the judgment. Because the outcome produced by the bankruptcy court’s acceptance of the prime-plus formula approach garnered the votes of a majority, lower courts may reasonably conclude that if the issue were before the Court again, those same five votes would uphold the prime-plus formula approach. The same cannot be said of the risk-free or contract rate approaches. Thus, although the *Marks* test does not endorse the prime-plus approach as the Court’s holding, lower courts may find the plurality approach more attractive than a single Justice’s concurrence or a four Justice dissent. This conclusion is demonstrated by decisions discussing *Till*, which accept without question that the Supreme Court adopted a prime-plus formula rate.<sup>92</sup> Additional proof is found in *Collier’s on Bankruptcy*, which states: “*Till* holds that a formula approach based upon the prime rate of interest best carries out the intentions of Congress . . . .”<sup>93</sup> Assuming that lower courts will follow the plurality’s opinion, the question

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91. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003).

92. *See, e.g., In re Bivens*, 317 B.R. 755, 764 (Bankr. N.D. Ill. 2004) (“[T]he Court held that the proper approach that bankruptcy courts must take in determining the adequate rate of interest on cram down loans in Chapter 13 proceedings is the formula or “risk plus” approach.”); *In re Scrogum*, No. 04-72289, 2004 Bankr. LEXIS 1376, at \*3-4 (Bankr. C.D. Ill. 2004) (“The United States Supreme Court has recently determined that the formula approach—taking the national prime rate, then adjusting it to compensate the lender for the risk incurred in making the loan—is the appropriate method for determining the adequate rate of interest on crammed down loans pursuant to a Chapter 13 plan.”); *In re Berksteiner*, No. 03-13203, 2004 Bankr. LEXIS 1576, at \*3 (Bankr. S.D. Ga. 2004) (“In *Till*, the Supreme Court adopted the formula approach. . . .”); *In re Pokrzywinski*, 311 B.R. 846, 849 (Bankr. E.D. Wis. 2004) (“[T]he Supreme Court adopted a formula rate for cram down interest based on the prime rate plus an appropriate adjustment to account for the risk of nonpayment.”); *In re Smith*, 310 B.R. 631, 633 (Bankr. D. Kan. 2004) (“[T]he Supreme Court held that the formula approach, requiring an adjustment of the prime national interest rate based on risk of nonpayment, was the appropriate method. . . .”); *In re Harken*, No. 04-02914, 2004 WL 3019467, at \*2 (Bankr. N.D. Iowa 2004) (“[T]he Supreme Court adopted the “formula approach” to determine the appropriate [cram-down] interest rate to apply. . . .”).

93. COLLIER’S ON BANKRUPTCY ¶ 1129.06(1)(c)(i) (Alan N. Resnick et al. eds., 15th ed. revised 2004).

becomes: Where does the prime-plus formula approach leave the cram down rate?

While adoption of the prime-plus formula method may be viewed as a landslide victory for debtors, there were more debtor-friendly options available to the Court in *Till*. Undeniably, Justice Thomas's risk-free approach is more debtor-friendly since it would give debtors a "risk-free" rate with no risk adjustment whatsoever.<sup>94</sup> Also more debtor-friendly is the treasury rate formula method adopted by the Second Circuit that uses the rate on a United States Treasury instrument as the base.<sup>95</sup> The rate on a treasury bond is risk-free,<sup>96</sup> and therefore this method would consistently result in a lower cram down rate than one based on the prime rate.<sup>97</sup>

Accordingly, while no one would contend that the plurality decision in *Till* is a victory for creditors, it could have been worse. Unlike the treasury rate, the prime rate includes a built-in risk premium to account for the inherent risk that even the most creditworthy borrowers may default.<sup>98</sup> Additionally, while it may provide little solace to creditors, as Justice Thomas points out, the Supreme Court's decision in *Associates Commercial Corp. v. Rash*<sup>99</sup> provides some risk cushion by adopting a creditor-friendly replacement-value standard for the valuation of the secured claim.<sup>100</sup> Of course, how well the formula approach actually compensates creditors will depend on the prime rate at the time of the plan and the level of additional risk premium courts will allow.

Under the *Till* plurality's prime-plus formula approach, creditors bear the burden of proving the appropriate risk premium to be added to the prime rate.<sup>101</sup> The plurality explained that the size of the risk

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94. See *Till*, 124 S. Ct. at 1966 (Thomas, J., concurring).

95. See *Gen. Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55, 64 (2d Cir. 1997).

96. Harris, *supra* note 20, at 579.

97. Whereas the rate on a treasury bond is risk-free, the prime rate includes a risk premium to reflect the inherent risk of default present in a loan to the most creditworthy borrower. *Id.* at 581-82. The prime rate has typically exceeded the three-month treasury bill rate by 2% to 3.5%. See Federal Reserve Board, Selected Interest Rates, Historical Data, at <http://www.federalreserve.gov/releases/h15/data.htm> (last visited Jan. 10, 2005) (listing historical data on selected interest rates) (on file with the North Carolina Law Review). At the time of the *Tills'* bankruptcy filing, the prime rate was 2% higher than the treasury rate. *Till*, 124 S. Ct. at 1974 n.10 (Scalia, J., dissenting). Courts could avoid the treasury rate resulting in a consistently lower cram down rate by increasing the risk premium to account for the difference between the treasury rate and prime rate.

98. See Harris, *supra* note 20, at 581-82.

99. 520 U.S. 953 (1997).

100. See *Till*, 124 S. Ct. at 1967 (Thomas, J., concurring).

101. See *id.* at 1961 (stating that the formula approach "places the evidentiary burden

adjustment is dependent on such factors as “the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan.”<sup>102</sup> The plurality further explained that some evidence of the appropriate risk adjustment will be included in the debtor’s bankruptcy filings, but “[t]he court must . . . hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment.”<sup>103</sup> Thus, in every case where the creditor disagrees with the prime rate as the cram down rate and the parties cannot agree on a risk premium, a hearing will be necessary. The necessity of a hearing seems contradictory to the plurality’s assertion that “the formula approach . . . minimizes the need for potentially costly additional evidentiary proceedings.”<sup>104</sup> Although expert testimony may not be required as it has been under other approaches, the necessity of a hearing places a burden on a debtor whose funds should be preserved for the plan and a creditor whose recovery is limited.

The *Till* plurality also declined to set a scale for the risk adjustment and merely noted that “courts have generally approved adjustments of 1% to 3%.”<sup>105</sup> This represents a small victory for creditors and for judicial discretion. Although most courts will remain within the “safe range” of 1% to 3%, they should not feel compelled to do so because the plurality opinion does not require adherence to a set range.<sup>106</sup> However, the plurality did caution against setting an interest rate “so high as to doom the plan.”<sup>107</sup> It suggested that a plan so likely to fail that it “necessitate[s] an ‘eye-popping’ interest rate . . . probably should not be confirmed.”<sup>108</sup>

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squarely on the creditors”).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1962.

106. See *In re Bivens*, 317 B.R. 755, 769 (Bankr. N.D. Ill. 2004) (“The Court hastens to note . . . that the 1% to 3% range suggested in *Till* is not necessarily a cap and emphatically rejects a rule of thumb with respect to risk factors to be added to risk-free discount rates.”).

107. See *Till*, 124 S. Ct. at 1962.

108. *Id.* (quoting *In re Till*, 301 F.3d 583, 593 (7th Cir. 2002) (Rovner, J., dissenting)). In rebutting what it viewed as the dissent’s belief that a pre-bankruptcy default translates into a high probability of default under the plan, the plurality explained that:

Congress intended to create a program under which plans that qualify for confirmation have a high probability of success. Perhaps bankruptcy judges currently confirm too many risky plans, but the solution is to confirm fewer plans, not to set default cram down rates at absurdly high levels, thereby increasing the risk of default.



Thus, a court following the plurality's formula approach could safely set the risk adjustment at any rate that did not doom an otherwise feasible plan.

Beyond noting the general factors that a court may consider in making risk adjustments, the *Till* plurality provided little guidance as to how creditors should actually go about proving the risk factors and how a court should allocate risk premium points to those factors. Unfortunately, most cases prior to *Till* adopting a variation of the formula approach are equally vague in discussing how courts should ultimately determine the appropriate risk premium.<sup>109</sup> While such vagueness may be positive in terms of permitting bankruptcy judges to exercise discretion in setting the cram down rate, it provides practitioners with little guidance as to how courts will conduct a cram down analysis.<sup>110</sup>

A review of bankruptcy court cases that apply risk premium points to a base rate may provide some guidance. In a case adopting the treasury rate formula approach, a Florida bankruptcy court discussed the factors it considered in deciding that a risk premium of 5% was appropriate to add to the base five-year treasury bill rate of 6.750%.<sup>111</sup> The court based its determination on the debtor's circumstances, credit history, and the feasibility of his plan.<sup>112</sup> The court noted that the debtor defaulted in his payments almost immediately after purchasing the vehicle securing the loan.<sup>113</sup> Additionally, the vehicle was repossessed two weeks prior to the debtor's Chapter 13 filing, and although the debtor made the required plan payments, not all were timely.<sup>114</sup> Despite finding that the debtor "exhibited past problems in making timely payments," the court

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*Id.* at 1963. Thus, the plurality suggests that bankruptcy judges give more consideration to feasibility when selecting the cram down rate and confirming the plan. *See id.*

109. *See, e.g.,* Gen. Motors Acceptance Corp. v. Valenti (*In re Valenti*), 105 F.3d 55, 64 (2d Cir. 1997) (adopting the treasury rate formula method and noting that "[t]he actual rate will depend upon the circumstances of the debtor," but providing little guidance to lower courts as to how to specifically determine the premium); Fleet Fin., Inc. v. Ivey (*In re Ivey*), 147 B.R. 109, 118 (Bankr. M.D.N.C. 1992) (adopting treasury rate formula method and instructing courts to "explicitly focus on the rights of the parties, balancing the interests sought to be furthered by bankruptcy law").

110. Such guidance is important because it provides debtors with a standard by which to propose a cram down rate that the court would likely approve over objection, and it provides creditors with a standard by which to determine whether objection to the debtor's proposed rate is likely to be productive. Such guidance allows both debtors and creditors to reduce the costs of disputing the proposed cram down rate.

111. *In re Chiodo*, 261 B.R. 499, 504 (Bankr. M.D. Fla. 2000).

112. *Id.*

113. *Id.*

114. *Id.*

noted that the debtor appeared to “have the financial ability to make all future payments.”<sup>115</sup> This analysis led the court to apply a “high-risk premium of 5%” due to the possibility of future financial problems and to protect the creditor from “any loss due to the depreciating value of the car in the event [the debtor] fail[ed] to make his Chapter 13 payments.”<sup>116</sup>

A Massachusetts bankruptcy court adopted a variation of the formula approach in determining the appropriate cram down rate for a mortgage loan.<sup>117</sup> The court used as a base rate “the average annual interest rate for thirty year fixed residential mortgages,” which was 7.82%.<sup>118</sup> To this base, the court added the following risk premium points: (1) “one percentage point because of the Debtors’ history of defaults in payment of the mortgage;” (2) “one point because of the substantial prepetition mortgage arrearage;” and (3) “one percentage point because of the Debtors’ proposed balloon payment.”<sup>119</sup> The court declined to add any further risk premium points because of testimony that the collateral would likely appreciate and the fact that the duration of the plan was less than the original maturity date of the loan.<sup>120</sup>

The few decisions that have been issued since *Till* generally adopt the plurality’s prime-plus formula approach without providing a thorough analysis of its application. However, an Illinois bankruptcy court decision applying the *Till* prime-plus approach to uphold the debtor’s proposed cram down rate of 7% did provide a thorough analysis of the circumstances considered in reaching that decision.<sup>121</sup> In summary, the court noted that “many of the most significant risk factors strongly favor plan confirmation: [The debtor] has worked steadily for the past several years, receives regular child support payments from her husband, is on payroll control, and has made all plan payments to date.”<sup>122</sup> The court found that the creditor “failed to satisfy its burden to establish the need for an interest rate

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115. *Id.*

116. *Id.*

117. *In re* St. Cloud, 209 B.R. 801, 808 (Bankr. D. Mass. 1997). Although 11 U.S.C. § 1322(b)(2) (2000) limits the applicability of the cram down rate to claims secured by anything other than “real property that is the debtor’s principal residence,” it appears that in this case the mortgage was secured by rental property. *See id.* at 804 (“The Debtors also reported receiving \$600.00 per month in rental income. . .”).

118. *Id.* at 808.

119. *Id.* at 808–09.

120. *See id.* at 809.

121. *In re* Bivens, 317 B.R. 755, 769 (Bankr. N.D. Ill. 2004).

122. *Id.*

higher than the one proposed” by the debtor and concluded that “the proposed interest rate of 7% will fairly compensate [the creditor] for any risk factor inherent in” the debtor’s plan.<sup>123</sup> Based on the applicable national prime rate of 4.75%, the debtor’s plan provided for a risk premium of 2.25%.<sup>124</sup>

Although two of the foregoing cases, *Chiodo* and *St. Cloud*, did not apply the prime-plus formula approach adopted by the plurality, the reasoning used in determining the appropriate risk premium is generally applicable to such an approach. Each of these cases illustrate how a court may go about analyzing specific risk factors; however, only the Massachusetts bankruptcy court translated those factors into individual premium points. The Florida bankruptcy court merely added a single premium without explaining which factor necessitated what proportion of the premium. Similarly, the Illinois bankruptcy court provided a thorough analysis of the debtor’s circumstances but did not explain what proportion of the 2.25% risk premium was required by which factors. While these opinions provide practitioners with a general idea of how a cram down rate may be determined using a formula approach, they provide minimal guidance as to how future cases may be decided because they are very fact-specific and do not set forth standard risk premiums that may be relied on in setting a cram down rate. Providing clear guidance to debtors and creditors as to the proposed risk premium that would be acceptable to a court could allow the parties to reach agreement on the cram down rate prior to litigation and avoid the time and expense of an evidentiary hearing.

This Recent Development suggests that courts set presumptive risk premium points<sup>125</sup> applicable to certain standard factors in order to guide debtors and creditors in determining an acceptable cram down rate. Presumptive risk premium points would ensure that each debtor would pay an equal premium for the same risk factor, while tailoring the total risk premium to the facts of the particular case. A presumptive rate could be set for factors common to most plans, such as the inherent risk of non-payment in a bankruptcy case,<sup>126</sup> the standard types of collateral, and the duration of the plan beyond the original maturity date of the loan.<sup>127</sup> Courts could conduct an en banc

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123. *Id.*

124. *Id.* at 764.

125. *See Harris, supra* note 20, at 581–82 (suggesting adoption of the prime-plus method and allowing courts to set a presumptive risk premium by local rule).

126. *See id.* at 582.

127. *See Till v. SCS Credit Corp.*, 124 S. Ct. 1951, 1961 (2004) (listing the nature of the

hearing on the issue and allow participation by interested parties<sup>128</sup> in order to receive information from local debtor and creditor representatives as to what they view as proper standard factors and proper presumptive risk premiums for those factors. The en banc decision issued pursuant to the hearing would then set forth presumptive premiums for certain standard factors that would apply to all applicable cases in the district.

To demonstrate, after hearing from interested parties, a court may issue an en banc decision allocating presumptive risk premium points to the following standard factors: (1) 1% for inherent risk of non-payment; (2) 1% for depreciable assets such as a vehicle; (3) 0.10% for every year the plan extends beyond the original loan maturity date.<sup>129</sup> Using the decision setting forth these presumptive rates as a guide, a debtor could calculate the appropriate proposed cram down rate. If the debtor desired to retain an automobile with a loan maturity date of three years and proposed a five year plan, the cram down rate would begin with the prime rate and include presumptive risk premium points of 2.20%. Thus, if the prime rate on the effective date of the plan was 6%, the debtor would propose a

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security and the duration of the plan as factors to be considered in determining the appropriate risk adjustment). The *Till* plurality noted that in determining the appropriate risk adjustment “the debtor and creditors may not incur significant additional expense” because “[s]ome of [the relevant] evidence will be included in the debtor’s bankruptcy filings.” *Id.* By applying presumptive risk premium points to standard factors that are evidenced in the debtor’s bankruptcy filings, debtors and creditors may avoid incurring any expense with regard to those factors.

128. See Administrative Order Regarding Interest Rates in Chapter 13 Cases (Jan. 27, 2005) [hereinafter Administrative Order] (adopting specific guidelines to be followed in Chapter 13 cases filed in the Western District of North Carolina after “confer[ring] with the Chapter 13 Trustees and the bankruptcy bar” at an en banc hearing regarding the application of the Supreme Court’s decision in *Till*), available at <http://www.ncwb.uscourts.gov/adminorders/ao663.pdf> (on file with the North Carolina Law Review).

129. These factors and risk premiums are for illustrative purposes only and are not intended to represent a complete listing of the factors courts should consider or the appropriate level for each risk premium. The court would be aided in making those determinations by holding an en banc hearing and allowing participation by Chapter 13 trustees and the local bankruptcy bar. An Illinois bankruptcy court applying the *Till* plurality’s prime-plus approach enumerated some additional factors courts may consider, noting that “[t]he determination [of the proper risk adjustment] may be assisted by evidence included in the debtor’s bankruptcy filings, such as work history, job stability, cash flow, disposable income, the existence or absence of *prior* bankruptcy filings, and the contents of the Chapter 13 plan.” *Bivens*, 317 B.R. at 764 (emphasis added). However, the *Till* plurality indicated that the risk premium should not include consideration of “the creditor’s circumstances or its prior interactions with the debtor.” *Till*, 124 S. Ct. at 1961. See *Bivens*, 317 B.R. at 769 (“The Supreme Court has unequivocally noted that in selecting a cram down rate, bankruptcy courts need not consider a creditor’s prior interactions with a debtor.”).

cram down interest rate of 8.20%.

Providing presumptive standard risk premiums would encourage agreement by the parties, thereby reducing the need for evidentiary hearings and reducing costs to both debtors and creditors. The *Till* plurality placed the burden on creditors to prove the appropriate risk adjustment.<sup>130</sup> Under this structure, debtors could simply propose the use of the flat prime rate, forcing creditors to object to the proposed plan and argue for the addition of a risk premium at an evidentiary hearing. Because the *Till* plurality indicated that the prime rate requires a risk premium adjustment in every case, leaving the amount of such premium as the only issue for determination,<sup>131</sup> it would be nonsensical for a secured creditor to accept an unadjusted prime rate. Likewise, it is nonsensical to require creditors and debtors to bear the expense of an evidentiary hearing in every case.

With an en banc decision as a guide, debtors could calculate the presumptive rate applicable to their specific cases by totaling the assigned premium points for standard factors. Generally, only creditors who felt entitled to a higher rate based on additional circumstances of the particular case (those outside the presumptive rate factors), and who could not come to an agreement with the debtor, would insist on an evidentiary hearing. Because the presumptive risk premiums are merely presumptive, creditors would be free to object to those as well. However, such objections would be rare since the court previously approved of the presumptive premiums and would not be likely to overrule itself, thus, creditors would generally be unwilling to incur the costs of an objection that is unlikely to be sustained. Such an approach thereby advances the plurality's desire to "minimize . . . the need for potentially costly additional evidentiary proceedings."<sup>132</sup>

Some courts following the *Till* plurality approach have set a flat presumptive risk premium applicable to every case.<sup>133</sup> While setting a single default premium is the simplest way to provide guidance to debtors and creditors and to avoid an evidentiary hearing in every

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130. See *Till*, 124 S. Ct. at 1961.

131. See *id.* ("Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then *requires* a bankruptcy court to adjust the prime rate accordingly.") (emphasis added).

132. *Id.*

133. See Administrative Order, *supra* note 128 (adopting a default cram down interest rate of prime plus 2% in light of the Supreme Court's decision in *Till*); see also *In re Berksteiner*, No. 03-13203, 2004 Bankr. LEXIS 1576, at \*5 (Bankr. S.D. Ga. 2004) (applying the plurality's opinion in *Till* and upholding a default rate of 12% provided by Local Bankruptcy Rule 3001-2).

case, it fails to comply with the plurality's indication that determination of the appropriate risk premium must be made on a case-by-case basis.<sup>134</sup> However, using the suggested presumptive risk premiums for standard factors requires individual analysis of the circumstances of each case to calculate the total presumptive premium. Such individual analysis better complies with a requirement of case-by-case determinations. The case-by-case application of the presumptive risk premium points and availability of an evidentiary hearing if the parties fail to agree or desire to present evidence of other relevant circumstances of the case should satisfy the plurality's suggestion of case-by-case determinations and the need for an evidentiary hearing.

Although the Court's decision in *Till* is difficult to interpret when searching for a holding to bind lower courts, as a practical matter, courts will view the bankruptcy court's prime-plus formula approach as receiving the votes of five Justices, making the plurality's prime-plus formula method the controlling opinion. While the decision may have failed to produce a binding holding under the *Marks* test, the search for the appropriate cram down rate has been settled to the extent that lower courts continue to accept the plurality's prime-plus formula method. Adoption of this method will result in a uniform approach and a fairly predictable cram down rate. The rate will be made even more predictable and straightforward if courts adopt presumptive risk premium points to aid debtors in proposing an acceptable cram down rate.

The history of disagreement over the cram down rate, of which legislators were certainly aware, was not enough to force Congress to enact remedial legislation prior to *Till*, and it seems equally unlikely that Congress will enact legislation to resolve the matter now. As the plurality points out, Congress did consider and reject legislation endorsing the presumptive contract rate approach; thus, if remedial legislation is enacted, it is highly unlikely that it would endorse the

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134. See *Till*, 124 S. Ct. at 1961 ("The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan."); *Bivens*, 317 B.R. at 769 (applying the Supreme Court's decision in *Till* and noting that "the issue of the proper risk premium must be made on a case-by-case basis, taking into account the totality of the circumstances"); *In re Smith*, 310 B.R. 631, 634 (Bankr. D. Kan. 2004) (applying the Supreme Court's decision in *Till* to require the Bankruptcy Court to conduct case-by-case evidentiary hearings to determine the appropriate risk premium for each case and reversing the Bankruptcy Court's uniform application of an "Agreed Formula," consisting of the T-bill rate plus a 3% risk adjustment, to every Chapter 13 case).

dissent's approach.<sup>135</sup> As long as courts follow the plurality opinion, the Supreme Court is unlikely to revisit the issue. Accordingly, unless Congress acts, the plurality's prime-plus formula approach will be adopted as the "law of the land."

APRIL E. KIGHT

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135. See *Till*, 124 S. Ct. at 1962 n.19 (citing H.R. 1085, 98th Cong., § 19(2)(A) (1983); H.R. 1169, 98th Cong., § 19(2)(A) (1983); H. R. 4786, 97th Cong., § 19(2)(A) (1981)).