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# Till v. SCS Credit Corp.: Can You "Till" Me How to Cram This Down? The Supreme Court Addresses the Proper Approach to Calculating Cram Down Interest Rates

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# ***Till v. SCS Credit Corp.: Can You “Till” Me How to Cram This Down? The Supreme Court Addresses the Proper Approach to Calculating Cram Down Interest Rates***

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### I. INTRODUCTION

The number of consumer bankruptcy filings has hit yet another all-time high. Since 1980, the number of bankruptcy filings in the United States has increased by over 565% to a record number of 1,660,245 in 2003.<sup>1</sup> Even more amazing is the fact that consumer bankruptcy accounts for nearly 98%

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1. See American Bankruptcy Institute, *U.S. Bankruptcy Filings 1980-2003 (Business, Non-Business, Total)*, <http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=12324> (last visited Sept. 30, 2005).

of all bankruptcy filings.<sup>2</sup> In fact, one out of every seventy-two American households filed for bankruptcy in the twelve-month period ending March 2004.<sup>3</sup>

With the growing prevalence of consumer bankruptcy, many consumers are turning to debt adjustment under Chapter 13 of the Bankruptcy Code ("Code").<sup>4</sup> Chapter 13 permits individuals with regular income to develop a court-supervised plan that allows them to repay their debts over an extended period of time.<sup>5</sup> Under a Chapter 13 repayment plan, the debtor is required to provide for repayment to both secured and non-secured creditors.<sup>6</sup> With respect to secured creditors, the Code protects their interests in one of three ways. First, the secured creditor can merely consent to the debtor's proposed repayment plan.<sup>7</sup> Second, the debtor can choose to surrender the property that secured the claim.<sup>8</sup> Finally, the debtor can force the secured creditor to retain a lien on the property and accept payments that equal the present value of the secured creditor's allowed claim.<sup>9</sup> This final option is commonly referred to as the "cram down" provision because it allows the debtor to cram a repayment plan down on the creditor.<sup>10</sup>

While the Code specifically provides for cram down, it fails to disclose the proper method by which to calculate the interest rate that the debtor should pay the secured creditor.<sup>11</sup> This ambiguity has sparked a plethora of litigation that eventually led to the Supreme Court's recent decision in *Till v. SCS Credit Corp.*<sup>12</sup> While many anticipated a resolution of the issue, the decision in *Till* resulted in a 4-1-4 split, with no majority opinion.<sup>13</sup> Thus, many questions still linger over *Till* and its application to Chapter 13.<sup>14</sup>

2. *Id.*

3. American Bankruptcy Institute, *Households Per Filing, Rank During the 12-Month Period Ending March 31, 2004*, <http://www.abiworld.org/statcharts/HouseRank.htm> (last visited Sept. 30, 2005).

4. In 2003, over 28% of those consumers who filed for bankruptcy chose reorganization under Chapter 13. See Press Release, U.S. Bankr. Courts, *Table F-2, Business and Nonbusiness Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2003*, [http://www.uscourts.gov/Press\\_Releases/1203f2.xls](http://www.uscourts.gov/Press_Releases/1203f2.xls) (last visited Sept. 30, 2005).

5. H.R. REP. NO. 95-595, at 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6079.

6. See generally 11 U.S.C. § 1322 (2000) (describing the contents of a bankruptcy plan). A secured claim is defined as a "claim held by a creditor who has a lien or a right of setoff against the debtor's property." BLACK'S LAW DICTIONARY 265 (8th ed. 2004). A creditor holds an unsecured claim if there is no lien or right of setoff against property held by the debtor. *Id.*

7. 11 U.S.C. § 1325(a)(5)(A) (2000).

8. 11 U.S.C. § 1325(a)(5)(C) (2000).

9. 11 U.S.C. § 1325(a)(5)(B) (2000).

10. See *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 956-57 (1997); see also *infra* notes 104-07 and accompanying text (explaining the cram down provision).

11. See 11 U.S.C. § 1325(a)(5)(B)(ii) (2000).

12. 541 U.S. 465 (2004) (plurality opinion).

13. *Id.*

14. See discussion *infra* Part VII.

Additionally, many commentators question *Till*'s impact on Chapter 11, which contains a similar cram down provision.<sup>15</sup>

This note will examine the Court's decision in *Till v. SCS Credit Corp.* Part II will provide a brief historical background of federal bankruptcy legislation.<sup>16</sup> Part III will examine the policy, evolution, and process of Chapter 13 debt adjustment.<sup>17</sup> Part IV will discuss the cram down provision and the various methods of computing the cram down rate.<sup>18</sup> Part V will provide the facts and procedural history of *Till*.<sup>19</sup> Part VI will analyze and critique the plurality, dissenting, and concurring opinions of *Till*.<sup>20</sup> Finally, Part VII will discuss the legal impact of *Till* and what the case means for the average consumer.<sup>21</sup>

## II. HISTORICAL BACKGROUND OF FEDERAL BANKRUPTCY LEGISLATION

The genesis of federal bankruptcy legislation can be traced back to the Constitution, which grants Congress the power to "establish . . . uniform Laws on the subject of Bankruptcies."<sup>22</sup> Under this power, Congress passed a handful of formal bankruptcy acts, beginning in the nineteenth century with the Bankruptcy Act of 1800,<sup>23</sup> and followed by the Bankruptcy Acts of 1841<sup>24</sup> and 1867.<sup>25</sup> While these acts attempted to establish permanent federal bankruptcy legislation, each was repealed not long after its enactment.<sup>26</sup> The reason for this pattern of enactment and repeal may be seen in the impetus that spurred each attempt at forming a uniform bankruptcy system: financial panic.<sup>27</sup> Each bankruptcy law lasted only as long as the financial crisis that sparked its enactment.<sup>28</sup> It was not until the Bankruptcy Act of 1898, which remained in place for eighty years, that permanency came to bankruptcy legislation.<sup>29</sup>

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15. See discussion *infra* Part VII.C.

16. See discussion *infra* Part II.

17. See discussion *infra* Part III.

18. See discussion *infra* Part IV.

19. See discussion *infra* Part V.

20. See discussion *infra* Part VI.

21. See discussion *infra* Part VII.

22. U.S. CONST. art. I, § 8, cl. 4.

23. Bankruptcy Act of 1800, ch. XIX, 2 Stat. 19, 19-36 (1800) (repealed 1803).

24. Bankruptcy Act of 1841, ch. IX, 5 Stat. 440, 440-49 (1841) (repealed 1843).

25. Bankruptcy Act of 1867, ch. CLXXVI, 14 Stat. 517 (1867) (repealed 1878).

26. See *supra* notes 23-25.

27. DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 24 (2001).

28. *Id.* at 24. For example, the 1800 Act came in the wake of a depression that started in 1793, yet it was repealed three years later. *Id.* at 25. The "Panic of 1837" prompted Congress to pass the Act of 1841, which lasted only two years. *Id.* Finally, the "Panic of 1857" paved the way for the Act of 1867, which lasted for eleven years. *Id.*

29. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23 (1995).

Although the 1898 Act enjoyed a long tenure, it was amended several times—most notably by the Chandler Act of 1938.<sup>30</sup> Yet these amendments were not enough to sustain the 1898 Act, and with a significant increase in bankruptcy filings in the 1960s, the need for bankruptcy reform became apparent.<sup>31</sup> In response to this need, Congress created a Bankruptcy Commission in 1970 whose purpose was to “study, analyze, evaluate, and recommend changes to the [1898] Act . . . in order for such Act to reflect and adequately meet the demands of present technical, financial, and commercial activities.”<sup>32</sup> Three years later, the Commission filed a report<sup>33</sup> that prompted Congress to pass the Bankruptcy Reform Act of 1978.<sup>34</sup>

Commonly referred to as the “Code,”<sup>35</sup> the 1978 Act has “brought the full flowering of bankruptcy law in the United States.”<sup>36</sup> Despite the significant impact it had on establishing the current Bankruptcy Code, the 1978 Act has not survived unscathed and has been amended numerous times by Congress.<sup>37</sup> Yet the 1978 Act has proven resilient, and it—along with Congress’s legislative adjustments—survives today as the Bankruptcy Code.<sup>38</sup>

### III. CHAPTER 13 DEBT ADJUSTMENT

#### A. *The Advantages and Policy Behind Consumer Debt Adjustment Bankruptcy*

Today’s Code allows for different types of bankruptcy proceedings including commercial liquidation under Chapter 7<sup>39</sup> and commercial reorganization under Chapter 11.<sup>40</sup> Yet in recent years, consumer bankruptcy has dominated federal bankruptcy proceedings, accounting for

30. Act of June 22, 1938, ch. 575, 52 Stat. 840 (repealed 1978); Tabb, *supra* note 29, at 23.

31. SKEEL, *supra* note 27, at 131-32.

32. Act of July 24, 1970, Pub. L. No. 91-354, § 1(b), 84 Stat. 468, 468 (1970).

33. COMM’N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pts. I and II (1973).

34. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (current version at 11 U.S.C. §§ 101-1330 (2000)).

35. Tabb, *supra* note 29, at 32 n.232.

36. SKEEL, *supra* note 27, at 131.

37. Tabb, *supra* note 29, at 37 n.266. Professor Tabb believes that bankruptcy legislation since 1978 has been influenced by six factors: (1) Supreme Court and lower court decisions, (2) credit industry lobbying, (3) the farm crisis of the early 1980s, (4) the use of the bankruptcy court as a forum for complex social issues, (5) the influence of special interests groups, and (6) the sharp increase of bankruptcy cases since 1978. *Id.* at 37-38.

38. Tabb, *supra* note 29, at 33 n.232, 37 n.266.

39. *See generally* 11 U.S.C. §§ 701-784 (2000).

40. *See generally* 11 U.S.C. §§ 1101-1174 (2000).

nearly 98% of all filings.<sup>41</sup> With respect to consumers who have regular income, two general options are available: straight liquidation under Chapter 7<sup>42</sup> or debt adjustment under Chapter 13.<sup>43</sup> Chapter 7 liquidation offers consumers a fresh start and a solution to their indebtedness by quickly discharging their obligation to repay their nonexempt debts.<sup>44</sup> Chapter 13, however, does not provide for liquidation and instead calls for an approved repayment plan that is more manageable than the consumer's prebankruptcy payments.<sup>45</sup> Initially, Chapter 7's liquidation feature may seem to be the more appealing option. Yet Chapter 13 presents a few advantages for both creditors and debtors that are lacking in Chapter 7.

First, creditors generally receive more money under a repayment plan than in liquidation.<sup>46</sup> Second, debtors are allowed to retain assets that may have a low resale value but a high replacement cost.<sup>47</sup> Third, the debtor's credit rating is protected because creditors look more favorably on debtors following a Chapter 13 repayment plan than on those liquidating under Chapter 7.<sup>48</sup> Finally, because the debtor retains the responsibility of repayment, feelings of failure may be avoided and replaced with debtor confidence.<sup>49</sup>

The overall purpose of Chapter 13 is to "enable an individual . . . to develop and perform under a plan for the repayment of his debts over an extended period [of time]" and to enable "him to support himself and his dependents while repaying his creditors at the same time."<sup>50</sup> Thus, the underlying policy of Chapter 13 is to encourage the repayment of debt rather than simply discharging a debtor's obligations.<sup>51</sup>

## B. *The Evolution of Chapter 13 Debt Adjustment Bankruptcy*

While the concept of debt adjustment was explored by Congress in the early years of bankruptcy legislation,<sup>52</sup> a permanent debt adjustment

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41. See American Bankruptcy Institute, *U.S. Bankruptcy Filings 1980-2003 (Business, Non-Business, Total)*, <http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=12324> (last visited Sept. 30, 2005).

42. See generally 11 U.S.C. §§ 701-784 (2000).

43. See generally 11 U.S.C. §§ 1301-1330 (2000).

44. See 11 U.S.C. § 727(b) (2000). A nonexempt debt is any debt not listed as exempt under 11 U.S.C. § 523 (2000).

45. See generally 11 U.S.C. §§ 1301-1330 (2000) (providing for adjustment of debts and setting forth the requirements for a plan under Chapter 13).

46. See H.R. REP. NO. 95-595, at 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6079.

47. Hon. Roger M. Whelan et al., *Consumer Bankruptcy Reform: Balancing the Equities in Chapter 13*, 2 AM. BANKR. INST. L. REV. 165, 166 (1994); see H.R. REP. NO. 95-595, at 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6079.

48. See H.R. REP. NO. 95-595, at 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6079.

49. Whelan et al., *supra* note 47, at 166; see H.R. REP. NO. 95-595, at 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6079.

50. H.R. REP. NO. 95-595, at 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6079.

51. See ALAN N. RESNICK, *BANKRUPTCY LAW MANUAL* § 10.1, at 1079 (5th ed. 2003).

52. See *In re Scher*, 12 B.R. 258, 261-62 (Bankr. S.D.N.Y. 1981).

provision was not introduced until the Bankruptcy Act of 1898 was amended by the Chandler Act of 1938,<sup>53</sup> which introduced a debt adjustment provision as Chapter XIII.<sup>54</sup> Chapter XIII was not perfect, however, and often led to unmanageable debt loads causing individuals to opt for the clean slate provided under liquidation proceedings.<sup>55</sup> An observation of some of its problems reveals why Chapter XIII was an unpopular choice among debtors. First, creditors had the power to veto even the most generous of plans.<sup>56</sup> Second, Chapter XIII was available only to those who earned wages and not to the self-employed.<sup>57</sup> Finally, Chapter XIII left the door open for creditors to seek payment from persons who cosigned the debtor's promissory notes.<sup>58</sup>

In an effort to remedy these problems and make consumer repayment plans more attractive, Congress revamped Chapter XIII with an intention to allow the debtor the freedom to formulate a realistic and manageable plan without the intervention or approval of creditors.<sup>59</sup> Today, we are left with the current Chapter 13 which represents a "viable and popular alternative that should be seriously considered by individuals seeking relief from severe financial pressures."<sup>60</sup>

### C. *The Process of Filing for Chapter 13*

The Chapter 13 debt adjustment process can be broken down into four basic steps. The first step is to file for relief under Chapter 13.<sup>61</sup> When relief is granted, an automatic stay protects debtors and co-debtors from debt

53. Whelan et al., *supra* note 47, at 166.

54. Act of June 22, 1938, ch. 575, 52 Stat. 840 (repealed 1978). Those who drafted the debt adjustment provision chose to use Roman numerals to label their chapters. *See id.* The current Code, however, lists its chapters with Arabic numerals. Thus, references to "Chapter XIII" in this article refer to the Bankruptcy Act of 1898 as amended by the Chandler Act. References to "Chapter 13" refer to the current Bankruptcy Act of 1978.

55. Whelan et al., *supra* note 47, at 166.

56. *See* Act of June 22, 1938, ch. 575, §§ 651, 652(1), 52 Stat. 934 (repealed 1978); *see also* RESNICK, *supra* note 51, § 10.1, at 1079-80. This requirement of creditor acceptance was seen as the reason for the downfall of most Chapter XIII filings. *See In re Scher*, 12 B.R. at 265.

57. *See* Act of June 22, 1938, ch. 575, § 606(3), 52 Stat. 930 (repealed 1978); RESNICK, *supra* note 51, § 10.1, at 1080.

58. RESNICK, *supra* note 51, § 10.1, at 1080.

59. H.R. REP. NO. 95-595, at 123 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6084.

60. RESNICK, *supra* note 51, § 10.1, at 1080.

61. 11 U.S.C. §§ 301, 302 (2000). It is important to note that Chapter 13 filings are voluntary and a debtor cannot be forced into an involuntary debt adjustment plan. 11 U.S.C. §§ 301-03 (2000). The reason for insisting on voluntary filings under Chapter 13 is to avoid the possibility of unconstitutional involuntary servitude. U.S. CONST. amend. XIII, § 1; H.R. REP. NO. 95-595, at 120-21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6080-82. The procedural requirements for filing a Chapter 13 case are very similar to those requirements under Chapters 7 and 11 and are governed under Chapter 3. 11 U.S.C. §§ 103(a), 301-66 (2000); RESNICK, *supra* note 51, § 10.5, at 1091.



collection and lien enforcement.<sup>62</sup> The second step is for the debtor to formulate and file a plan for repayment.<sup>63</sup> The third step takes the form of a confirmation hearing held in court to determine whether the plan is appropriate.<sup>64</sup> Finally, when the plan is confirmed by the court it becomes binding on both the debtor and the creditor, and the debtor begins to make payments pursuant to the plan.<sup>65</sup>

#### D. The Debt Adjustment Plan

At the core of Chapter 13 is the debt adjustment plan, which determines how debtors will repay creditors.<sup>66</sup> Unique to Chapter 13 is the right of the debtor to make the sole determination of the contents of the proposed plan.<sup>67</sup> Although the debtor maintains substantial control over the plan, the Bankruptcy Code provides requirements and guidance for formulating a plan. These guidelines are outlined in § 1322 of the Bankruptcy Code which contains mandatory, prohibited, and optional provisions.<sup>68</sup>

##### 1. Mandatory Provisions

The first mandatory provision that must be included in the plan calls for the “submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.”<sup>69</sup> This means that the debtor must turn over to the trustee an amount of future earnings sufficient to satisfy the repayment plan.<sup>70</sup> Whatever money is left after this submission remains in the debtor’s hands for his or her personal support.<sup>71</sup> While a Chapter 13 plan may be drafted so that the debtor can take advantage of making periodic payments to certain creditors, it also allows a debtor to liquidate a portion of his assets in order to satisfy other creditors.<sup>72</sup> Thus, Chapter 13 allows the debtor the flexibility of choosing a middle ground between repayment and liquidation.

The second mandatory provision requires the debtor to “provide for the full payment, in deferred cash payments, of all claims entitled to priority

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62. 11 U.S.C. §§ 362, 1301 (2000). This automatic stay provides debtors with relief from the pressures of creditors and lasts at least until the debt adjustment plan is confirmed and may continue beyond confirmation. RESNICK, *supra* note 51, § 10.6, at 1092.

63. 11 U.S.C. § 1321 (2000). Once filed, a plan may be modified at any time prior to its confirmation as long as it complies with the requirements of § 1322. 11 U.S.C. § 1323(a) (2000).

64. 11 U.S.C. § 1324 (2000).

65. 11 U.S.C. § 1327 (2000).

66. See generally 11 U.S.C. §§ 1322, 1325 (2000) (outlining the contents and confirmation of a debt adjustment plan).

67. See RESNICK, *supra* note 51, §10.15, at 1115 (citing H.R. REP. NO. 95-595, at 123 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6084).

68. 11 U.S.C. § 1322 (2000); see *infra* Part III.D.1-3.

69. 11 U.S.C. § 1322(a)(1) (2000).

70. See *id.*

71. See RESNICK, *supra* note 51, § 10.16, at 1116.

72. 11 U.S.C. § 1322(b)(8) (2000).

under section 507" of the Code.<sup>73</sup> Section 507 includes such claims as administrative expenses related to bankruptcy proceedings,<sup>74</sup> alimony,<sup>75</sup> and certain state and federal taxes.<sup>76</sup> Although any creditor who has a § 507 priority claim has the right to full payment, the creditor may agree to have that claim treated differently as a non-priority claim.<sup>77</sup>

The final mandatory provision requires that "if the plan classifies claims, [it must] provide the same treatment for each claim within a particular class."<sup>78</sup> Each class as a whole, however, may be treated differently as long as that treatment is fair.<sup>79</sup>

## 2. Prohibited Provisions

While the Bankruptcy Code requires certain provisions to be included in the plan, it expressly forbids two others.<sup>80</sup> First, "[t]he plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period."<sup>81</sup> This longer period may not exceed five years and, again, it must be approved by a court.<sup>82</sup> Second, a plan cannot modify the rights of holders of "a claim secured only by a security interest in real property that is the debtor's principal residence."<sup>83</sup>

## 3. Optional Provisions

Although Chapter 13 mandates that certain provisions be included in the plan while at the same time prohibiting others, the debtor is allowed the freedom to tailor the plan to meet specific needs.<sup>84</sup> To facilitate this flexibility, § 1322 of the Code lists nine optional provisions that a debtor may include in the plan.<sup>85</sup> This list, however, is not exclusive and a plan

73. 11 U.S.C. § 1322(a)(2) (2000).

74. 11 U.S.C. § 507(a)(1) (2000).

75. 11 U.S.C. § 507(a)(7) (2000).

76. 11 U.S.C. § 507(a)(8) (2000). Other § 507 priority claims that must be paid in full include the following: certain wages or commissions; certain contributions to an employee benefit plan; certain claims made by farmers or fisherman; certain deposits paid in connection with the sale, lease, or rental of property or personal, family, or household services; and certain commitments to a federal depository institution. See 11 U.S.C. § 507(a)(3)-(6), (9) (2000).

77. 11 U.S.C. § 1322(a)(2) (2000).

78. 11 U.S.C. § 1322(a)(3) (2000).

79. See 11 U.S.C. § 1322(b)(1) (2000); RESNICK, *supra* note 51, § 10.18, at 1123.

80. See RESNICK, *supra* note 51, § 10.16, at 1117-19.

81. 11 U.S.C. § 1322(d) (2000).

82. *Id.*

83. 11 U.S.C. § 1322(b)(2) (2000).

84. See *infra* notes 85-86 and accompanying text.

85. See 11 U.S.C. § 1322(b)(1)-(9) (2000). For example, a plan may include a provision "for the curing or waiving of any default." 11 U.S.C. § 1322(b)(3) (2000). Also, a plan may provide for the concurrent payment of both secured and unsecured debts. 11 U.S.C. § 1322(b)(4) (2000).

may “include any other appropriate provision not inconsistent with” the Code.<sup>86</sup>

### E. Confirmation of the Plan

Once the debtor has drafted a repayment plan, a court is required to hold a confirmation hearing where creditors have the opportunity to object to the debt adjustment plan.<sup>87</sup> If the plan is filed in good faith<sup>88</sup> and meets certain requirements,<sup>89</sup> then the court must confirm the plan, making it binding on the debtor and the creditors involved.<sup>90</sup>

Along with these essentials, additional requirements must be met depending on the nature of the creditor involved. A distinguishing factor among creditors is whether they hold a secured or unsecured<sup>91</sup> claim.<sup>92</sup> With respect to unsecured claims, a creditor is protected, because the “value [of the claim], as of the effective date of the plan,” must not be “less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7.”<sup>93</sup> This means that debtors are required to pay unsecured creditors at least as much as they would receive under liquidation. Under this approach, creditors are protected and debtors have the flexibility to tailor a feasible plan that will increase their chances of success.<sup>94</sup> If, however, the unsecured creditor objects to the plan, the court is not required

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86. 11 U.S.C. § 1322(b)(10) (2000).

87. 11 U.S.C. § 1324 (2000). Even if there is no objection to the plan, the court may still have a duty to ensure that the plan complies with the Code. RESNICK, *supra* note 51, § 10.28, at 1133 n.1 (citing *In re Harris*, 62 B.R. 931 (Bankr. E.D. Mich. 1986); *In re Cash*, 51 B.R. 927, 930 (Bankr. N.D. Ala. 1985) (“Neither by statute nor by rule is the bankruptcy judge directed to confirm a chapter 13 plan simply because no party in interest objected to confirmation of the plan”); *In re Bowles*, 48 B.R. 502, 505 (Bankr. E.D. Va. 1985) (“[T]he Court is under an independent duty to verify that the plan does in fact comply with the law irrespective of the lack of objection by creditors or the Chapter 13 trustee.”)).

88. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(g), 119 Stat. 23 (to be codified at 11 U.S.C. § 1325(a)(7)). The 2005 Act and its additional good-faith requirement became effective on October 17, 2005. See Jonathan D. Epstein, *The Rush To File Bankruptcy Rule Will Be Stricter Beginning Oct. 17*, BUFF. NEWS, May 15, 2005, at B7.

89. These requirements include full compliance with the Bankruptcy Code, payment of certain fees, and proposal of the plan in good faith and without engaging in illegal activity. 11 U.S.C. § 1325(a)(1)-(3) (2000). Perhaps the most important of these requirements is ensuring that “the debtor will be able to make all payments under the plan and to comply with the plan.” 11 U.S.C. § 1325(a)(6) (2000). This includes factoring in the debtor’s ability to support himself or herself as well as any family members. H.R. REP. NO. 95-595, at 124 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6085 (“The court will necessarily be required to consider the debtor’s ability to meet his primary obligation to support his dependents, because otherwise the plan is unlikely to succeed.”).

90. 11 U.S.C. §§ 1325(a), 1327(a) (2000).

91. A secured claim is defined as a “claim held by a creditor who has a lien or a right of setoff against the debtor’s property.” BLACK’S LAW DICTIONARY 265 (8th ed. 2004). A creditor holds an unsecured claim if there is no lien or right of setoff against property held by the debtor. *Id.*

92. See 11 U.S.C. § 1325(a)(4)-(5), (b)(1) (2000). The Code provides a broad definition of a claim which can include any “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . .” 11 U.S.C. § 101(5) (2000).

93. 11 U.S.C. § 1325(a)(4) (2000).

94. H.R. REP. NO. 95-595, at 123 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6084.

to confirm the plan unless either (1) the plan calls for a distribution of property to the creditor that is at least equal to the amount of the claim, or (2) the plan requires that all of the debtor's disposable income<sup>95</sup> for the next three years be used to make payments under the plan.<sup>96</sup>

Regarding secured claims,<sup>97</sup> a debtor has three options when formulating its debt adjustment plan.<sup>98</sup> First, a debtor can try to get the secured creditor to accept the plan.<sup>99</sup> Second, a debtor may hand over the property, thereby releasing itself from the creditor's secured claim.<sup>100</sup> The debtor's third and final option is to keep the property over the objection of the creditor and draft a plan that allows the creditor to retain the lien<sup>101</sup> on the property while at the same time providing for deferred payments, the present value of which

95. The term "disposable income" is defined in the Code and refers to the excess of income after the debtor makes reasonable expenditures for (1) "the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions . . . in an amount not to exceed 15 percent of the gross income of the debtor" and (2) payments "necessary for the continuation, preservation, and operation" of a business. 11 U.S.C. § 1325(b)(2)(A)-(B) (2000). The reasonableness of expenses is a question of fact to be determined by the court while considering the specific context of the individual debtor and his or her dependents. 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 165.1, at 165-1 (3d ed. 2000 & Supp. 2002).

96. 11 U.S.C. § 1325(b)(1)(A)-(B) (2000). It is important to note that the Code uses the word "may" and not "shall" when referring to whether the court should approve the plan. *Id.* This implies that this aspect of confirmation is within the bankruptcy court's discretion and not mandatory. See RESNICK, *supra* note 51, § 10.35, at 1148 n.3 (citing *In re Otero*, 48 B.R. 704, 708 (Bankr. E.D. Va. 1985)); 2 LUNDIN, *supra* note 95, § 163.1, at 163-3.

97. According to the Bankruptcy Code, the creditor's allowed secured claim is limited to the value of the debtor's property that is securing the claim. 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 . . . 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.

*Id.* For example, if a creditor owns a \$10,000 claim that is secured by property worth \$8,000, the \$8,000 portion will be treated as a secured claim and the \$2,000 difference will be treated as unsecured. *Id.*

98. *Till v. SCS Credit Corp.*, 541 U.S. 465, 468 (2004) (plurality opinion).

99. 11 U.S.C. § 1325(a)(5)(A) (2000). Although creditors generally will only accept a plan that protects their interests, the burden of legal action may influence creditors to accept a less-than-ideal plan. Hon. John K. Pearson et al., *Ending the Judicial Snipe Hunt: The Search for the Cramdown Interest Rate*, 4 AM. BANKR. INST. L. REV. 35, 49 (1996) ("[L]enders try to avoid legal action since it consumes their own resources as well as the debtor's, which may further damage the lender's claim.").

100. 11 U.S.C. § 1325(a)(5)(C) (2000); *In re Till*, 301 F.3d 583, 588 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004) ("If the creditor receives the collateral, then its rights under state law are vindicated and its contract with the debtor is fulfilled . . ."). If the property is worth less than the amount of the claim "[t]he creditor may still seek the unsecured portion of its claim in bankruptcy, but it proceeds as an unsecured creditor and without the preference the Code gives to secured creditors." *Id.*

101. The reason for allowing the creditor to retain a lien "is to protect the holder . . . from loss occasioned by a failure on the part of the debtor to complete the proposed plan." 8 COLLIER ON BANKRUPTCY ¶ 1325.06[3][a], at 1325-28 (Alan N. Resnick et al. eds., 15th ed. rev. 2005).

“is not less than the allowed amount of such claim.”<sup>102</sup> This third option is commonly referred to as the “cram down” provision.<sup>103</sup>

#### IV. THE CRAM DOWN PROVISION

Although the words “cram down” do not appear in § 1325(a)(5)(B)(ii), this provision allows a court to approve a plan that allows the debtor to keep the property that secures the creditor’s claim and force the creditor to accept a modification of its rights.<sup>104</sup> For example, in *Till v. SCS Credit Corp.*,<sup>105</sup> the Tills came up with a plan which allowed them to keep their truck and which forced SCS to accept a repayment plan with a lesser interest rate than under the original terms of the loan.<sup>106</sup> Thus, the Tills were able to cram down a new repayment plan over the objection of SCS. In this way, the cram down provision makes debt adjustment a more feasible option for the consumer debtor because it prevents the objection of a single creditor from halting the confirmation of the repayment plan.<sup>107</sup>

The structure of each cram down case can be divided into two basic steps. First, the value of the collateral<sup>108</sup> securing the creditor’s claim must be determined.<sup>109</sup> Second, the proper interest rate on the deferred payments must be calculated in a manner that protects the present value of the secured creditor’s claim.<sup>110</sup>

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102. 11 U.S.C. § 1325(a)(5)(B)(ii) (2000); *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 956 n.1 (1997). The text of § 1325(a)(5) reads as follows:

(a) Except as provided in subsection (b), the court shall confirm a plan if—

... (5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim;

and (ii) the value, as of the effective date of the plan, of property to be distributed under

the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder . . .

11 U.S.C. § 1325(a)(5) (2000).

103. *Rash*, 520 U.S. at 956-57; *Till*, 541 U.S. at 468-69 (plurality opinion).

104. 11 U.S.C. § 1322(b)(2) (2000); David G. Epstein, *Don't Go and Do Something Rash About Cram Down Interest Rates*, 49 ALA. L. REV. 435, 437 (1998). There is one important exception to the cram down power. If the property securing the creditor’s claim is real property and is the debtor’s principal residence, then a debt adjustment plan cannot modify the rights of the creditor. 11 U.S.C. § 1322(b)(2). The cram down power may be used in all other cases where a secured claim is involved. *Id.*

105. 541 U.S. 465, 469-73 (2004) (plurality opinion).

106. *Id.*

107. Jacob D. Krawitz, Comment, *Till v. SCS Credit Corp. (In re Till): A Rash Conclusion?*, 23 ANN. REV. BANKING & FIN. L. 889, 894 (2004).

108. The term “collateral” refers to the “[p]roperty that is pledged as security against a debt; the property subject to a security interest.” BLACK’S LAW DICTIONARY 278 (8th ed. 2004)

109. Todd J. Zywicki, *Cramdown and the Code: Calculating Cramdown Interest Rates Under the Bankruptcy Code*, 19 T. MARSHALL L. REV. 241, 243 (1994).

110. *Id.*

### A. Determining the Value of the Collateral

In *Associates Commercial Corp. v. Rash*,<sup>111</sup> the Supreme Court addressed the issue of how to value collateral involved in a Chapter 13 cram down proceeding.<sup>112</sup> In that case, the Court was faced with the question of whether the value should be determined (1) by the amount of proceeds the creditor could get through a foreclosure sale, or (2) by the cost of comparable replacement property.<sup>113</sup>

In *Rash*, the debtor, Elray Rash, purchased a tractor truck using a loan later assigned to Associates Commercial Association ("Associates"), a creditor who also held a lien on Mr. Rash's truck.<sup>114</sup> Three years after purchasing the truck, Mr. Rash and his wife filed a joint petition for Chapter 13 relief.<sup>115</sup> The Rash's repayment plan invoked the cram down provision of § 1325(a)(5)(B)(ii) and provided for payments equaling the value of the net foreclosure proceeds.<sup>116</sup> Associates objected and claimed that the proper amount of payments should equal the cost of a replacement vehicle.<sup>117</sup>

In an eight-to-one decision, the Court agreed with Associates and held that "the value of property retained because the debtor has exercised the . . . 'cram down' option is the cost the debtor would incur to obtain a like asset."<sup>118</sup> Thus under the Court's holding in *Rash*, it is the replacement value of property—not the foreclosure value—that serves as the basis for calculating interest rates under the cram down provision.<sup>119</sup> Although the Court was able to come to this conclusion, it left "to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented."<sup>120</sup>

111. 520 U.S. 953 (1997).

112. *See id.*

113. *See id.* at 955.

114. *Id.* at 956. The purchase price of the truck at the time of sale was \$73,700. *Id.*

115. *Id.* at 957.

116. *Id.* at 957. The Rash's had an expert value the net foreclosure proceeds at \$31,875. *Id.* This number represented the amount of money that Associates would have realized if it had repossessed and sold the Rash's truck. *Id.*

117. *Id.* Associates' own expert valued this amount at \$41,000. *Id.*

118. *Id.* at 965.

119. *Id.* It is important to note that the *Rash* case deals only with the correct valuation of the collateral at the effective date of the plan and not the method for valuing the deferred payments, i.e., the cram down interest rate which is the focus of the *Till* case. *See* Epstein, *supra* note 104, at 460.

120. *Rash*, 520 U.S. at 956 n.6 ("Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property."). Interestingly, the holding in *Rash* has since been codified by Congress in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 327, 119 Stat. 23 (to be codified at 11 U.S.C. § 506(a)(2)). Following *Rash*, the 2005 Act sets the value of collateral at the replacement value at the time of filing for Chapter 13 relief. *Id.* In addition, the 2005 Act mandates that the replacement value for property acquired for personal, family, or household purposes be determined by the price that a retail merchant would charge for such property. *Id.*

## B. Computing the Cram Down Interest Rate

### 1. The Concept of Present Value

Once the value of the collateral is determined, the next step is to determine the proper method for computing the cram down interest rate. The cram down provision of Chapter 13 calls for the bankruptcy court to examine “the value, as of the effective date of the plan, of [the] property to be distributed under the plan.<sup>121</sup> Essentially, this means that the court must determine the present value of the payments to be made under the plan.<sup>122</sup> The term “present value” refers to the time value of money,<sup>123</sup> a concept Congress specifically intended to be examined under debt adjustment plans.<sup>124</sup> The gist of this concept is that money in hand today is worth more than the same amount of money paid in the future.<sup>125</sup>

In the context of the cram down provision, the present value requirement was designed to place the creditor in the same economic position as if the collateral was liquidated and the creditor had the benefit of the proceeds.<sup>126</sup> To accomplish this goal, a rate of interest must be applied to the payments called for under the proposed plan.<sup>127</sup> Thus, “[t]he court must arrive at an appropriate discount factor so as to fairly discount value proposed to be given in the future on account of the allowed secured claim.”<sup>128</sup>

### 2. Methods for Computing the Cram Down Interest Rate

Although the Code impliedly calls for the application of an appropriate discount or interest rate,<sup>129</sup> it does not state what method of calculation should be used.<sup>130</sup> Federal courts of appeal that have addressed this issue

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121. 11 U.S.C. § 1325(a)(5)(B)(ii) (2000).

122. 7 COLLIER ON BANKRUPTCY ¶ 1129.06[1][a], at 1129-160 (Alan N. Resnick et al. eds., 15th ed. rev. 2005).

123. *Id.*

124. H.R. REP. NO. 95-595, at 413 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6369.

125. 7 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 1129.06[1][a], at 1129-160. The basic formula for computing present value is  $PV = P/(1+I)^N$ , where P equals the future amount, I is the interest rate, and N is the number of periods. *Id.* at n.4. For example, to find the present value of \$1,000 payable in three years at an interest rate of 10%, you would divide \$1,000 by 1.1 raised to the third power (or 1.331). *Id.* This would leave you with a present value of \$751.31.

126. 8 COLLIER ON BANKRUPTCY, *supra* note 101, ¶ 1325.06[3][b][iii][B], at 1325-34 (“Through the payment of interest, the creditor is compensated for the delay in receiving the amount of the allowed secured claim, which would be received in full immediately upon confirmation if the collateral were liquidated.”).

127. *See* H.R. REP. NO. 95-595, at 124 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6085 (“The bill requires the court to value the secured creditor’s interest.”).

128. 8 COLLIER ON BANKRUPTCY, *supra* note 101, ¶ 1325.06[3][b][iii][B], at 1325-34.

129. *See* 11 U.S.C. § 1325(a)(5)(B)(ii) (2000).

130. *See* Till v. SCS Credit Corp., 541 U.S. 465, 473 (2004) (plurality opinion) (“The Bankruptcy Code provides little guidance as to which of the rates of interest . . . Congress had in mind when it adopted the cram down provision.”).

seem to agree that "the rate should compensate the creditor for its delay in receiving the value of the collateral."<sup>131</sup> Most courts also agree that a "market rate" should be used to compute cram down interest rates.<sup>132</sup> In theory, a market rate consists of "a composite of rates determined in arms length negotiations between buyers and sellers of funds in money markets."<sup>133</sup> Yet, in spite of this harmony, courts have not been able to agree on a market rate method and "have developed divergent formulae for calculating the interest rate."<sup>134</sup> Indeed, "[t]he market rate requirement, judicially imposed upon present value analysis required by the Code, is so elastic that it provides no guidance to the courts."<sup>135</sup>

Despite this confusion, courts have considered various methods for computing the cram down rate and have developed four leading approaches: (1) the coerced loan rate, (2) the cost of funds rate, (3) the presumptive contract rate, and (4) the formula rate.<sup>136</sup>

#### a. *The Coerced Loan Approach*

Under the coerced loan method, "[c]ourts . . . conceptualize the cram down provision as forcing creditors to extend a new line of credit to the debtor."<sup>137</sup> This approach allows a creditor to get a rate of interest equal to what it could have received had it foreclosed and used the proceeds to make new loans similar in duration and risk.<sup>138</sup> Following this logic, courts must find an interest rate that places the creditor "in an economic position equivalent to the one it would have occupied had it received the allowed secured amount immediately, thus terminating the relationship between the creditor and the debtor."<sup>139</sup>

131. *In re Till*, 301 F.3d 583, 589 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004) (citing *Koopmans v. Farm Credit Servs. of Mid-Am.*, ACA, 102 F.3d 874, 874 (7th Cir. 1996); *In re Smithwick*, 121 F.3d 211, 214 (5th Cir. 1997); *Gen. Motors Acceptance Corp. v. Valenti* (*In re Valenti*), 105 F.3d 55, 59-60 (2d Cir. 1997), *abrogated on other grounds by* *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997); *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 66-67 (3d Cir. 1993); *United Carolina Bank v. Hall*, 993 F.2d 1126, 1129-30 (4th Cir. 1993); *In re Fowler*, 903 F.2d 694, 696-97 (9th Cir. 1990); *In re Hardzog*, 901 F.2d 858, 859-60 (10th Cir. 1990); *United States v. Arnold*, 878 F.2d 925, 928-29 (6th Cir. 1989)).

132. See *Pearson et al.*, *supra* note 99, at 40-41.

133. Thomas O. Depperschmidt, *Choosing the Proper Interest Rate in Bankruptcy Proceedings: Resolution of Special Issues in the Sixth, Eighth, and Ninth Circuits*, 18 N. KY. L. REV. 457, 471 (1991). In other words, the market rate is the "going rate" of interest. *Id.*

134. *In re Till*, 301 F.3d at 589.

135. *Pearson et al.*, *supra* note 99, at 43 (citing *In re River Village Assocs.*, 161 B.R. 127 (Bankr. E.D. Pa. 1993)); Waltraud S. Scott, Comment, *Deferred Cash Payments to Secured Creditors in Cram Down of Chapter 11 Plans: A Matter of Interest*, 63 WASH. L. REV. 1041 (1988)).

136. See *infra* Part IV.B.2.a-d.

137. *In re Till*, 301 F.3d at 591.

138. *Koopmans v. Farm Credit Servs. of Mid-Am.*, 102 F.3d 874, 875 (7th Cir. 1996).

139. *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 66-67 (3d Cir. 1993).



While the coerced loan method may appear attractive, it is not without its faults. Critics of the coerced loan approach argue that it is too subjective and causes courts to rely on their intuition rather than on objective principles.<sup>140</sup> This is because there is no market for these types of coerced loans that courts can look to when setting a cram down rate.<sup>141</sup> As one judge has stated, “it is difficult to arrive at a current market rate of interest for a hypothetical new loan when there is no market for the loan proposed, no equity in the property and limited opportunity on the part of the debtor to obtain financing outside of the Bankruptcy Code framework.”<sup>142</sup>

Because bankruptcy courts lack a reference point upon which to base a cram down rate, they must instead turn to the testimony of expert witnesses.<sup>143</sup> Experts, however, do little to provide the court with the information necessary to make an objective decision because they must resort to formulating “a rate that a *hypothetical* lender would charge to a *hypothetical* debtor with the same characteristics for the coerced loan in question.”<sup>144</sup> Relying on expert testimony presents another problem in that the experts for the creditor will generally testify that no lender would loan funds as called for under the debt adjustment plan.<sup>145</sup> This undermines the cram down provision because it gives the creditor the power to veto any proposed plan.<sup>146</sup>

Additionally, the coerced loan method may improperly include a profit element into the cram down rate.<sup>147</sup> Critics assert that the inclusion of profit is improper because the purpose of the cram down provision is “to put the creditor in the same economic position that it would have been in had it received the value of its allowed claim immediately. The purpose is not to

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140. Monica Hartman, Comment, *Selecting the Correct Cramdown Interest Rate in Chapter 11 and Chapter 13 Bankruptcies*, 47 UCLA L. REV. 521, 536 (1999); Pearson et al., *supra* note 99, at 45 (citing Zywicki, *supra* note 109, at 257-58).

141. Pearson et al., *supra* note 99, at 47.

142. *In re Jordan*, 130 B.R. 185, 189 (Bankr. D.N.J. 1991).

143. Pearson et al., *supra* note 99, at 47.

144. *Id.* at 48 (citing Jack Friedman, *What Courts Do to Secured Creditors in Chapter 11 Cram Down*, 14 CARDOZO L. REV. 1495, 1519 (1993)).

145. Pearson et al., *supra* note 99, at 48.

146. *Id.*; see also *In re River Village Assocs.*, 161 B.R. 127, 138 (Bankr. E.D. Pa. 1993), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995).

[T]he secured creditor could . . . present expert testimony that no lender would make a loan which is comparable to the treatment of the creditor under the terms of the plan. The expert would then propose some high interest rate that a lender would require if it were to make such a loan. It is likely that the proposed rates, representing a loan which the lender would not be prepared to make, would be high enough to render the debtor's plan infeasible. If the court accepted this expert testimony, the court could not cram down the proposed plan. This turn of events would significantly reduce the debtor's chances of reorganizing, and unfairly increase the secured creditor's bargaining power during the plan negotiation process.

*Id.* (citing *In re Oaks Partners Ltd.*, 135 B.R. 440, 445 (Bankr. N.D. Ga. 1991)).

147. 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, 574 (1997).

put the creditor in the same position that it would have been in had it arranged a 'new' loan."<sup>148</sup>

*b. The Cost of Funds Approach*

The cost of funds method sets the cram down interest rate at the "rate the creditor would have to pay to borrow the amount equal to the collateral's value."<sup>149</sup> Therefore, the focus shifts onto the creditor to determine what interest rate it must pay when borrowing money.<sup>150</sup> The cost of funds rate does not include transaction costs nor does it provide for a profit to the creditor.<sup>151</sup> Thus, "[t]he creditor is entitled only to the time value of its money, not what it could receive in a hypothetical new loan to the debtor."<sup>152</sup>

Among the drawbacks to the cost of funds method is that it can be difficult to apply in actual practice.<sup>153</sup> "Because individual creditors borrow funds at different rates, bankruptcy courts would have to conduct evidentiary hearings to determine a creditor's cost of funds on a case-by-case basis."<sup>154</sup> Also, the cost of funds method could cause bankruptcy courts to treat debtors unequally because the cram down rate would depend on the rates each creditor is charged to borrow money.<sup>155</sup>

Another shortfall of the cost of funds approach, critics argue, is that creditors do not receive adequate compensation.<sup>156</sup> Although this method partially compensates creditors for a lost opportunity, it does not take into account the costs of deferring payment and extending the lending period past the time agreed in the original contract.<sup>157</sup> Also, the cost of funds method does not compensate the creditor for transactional costs associated with cram down.<sup>158</sup>

148. *Gen. Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55, 63-64 (2d Cir. 1997), *abrogated on other grounds by* *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997) (citing *In re Dingley*, 189 B.R. 264, 269 (Bankr. N.D.N.Y. 1995)).

149. *In re Till*, 301 F.3d 583, 589 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004).

150. *Zywicki*, *supra* note 109, at 253.

151. *Id.* at 255.

152. *Id.* at 254.

153. *Valenti*, 105 F.3d at 64.

154. *Id.* (citing *In re Hardzog*, 901 F.2d 858, 860 (10th Cir. 1990); *In re Dingley*, 189 B.R. 264, 271 (Bankr. N.D.N.Y. 1995)).

155. *Id.* at 64.

156. *Zywicki*, *supra* note 109, at 259.

157. *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 67 (3d Cir. 1993).

158. *Zywicki*, *supra* note 109, at 260. While one can argue that the creditor avoids transaction costs by not having to make a new loan, "there is no evidence that there is any material decrease in administrative and default costs when a secured loan becomes a cramdown loan." *Id.*

Yet another flaw in the cost of funds approach is that it improperly assumes that creditors have an unlimited supply of capital.<sup>159</sup> Since “every secured creditor has a limited amount of credit on which to draw, . . . it follows that utilizing some of that borrowing capacity without providing the secured creditor with the usual return on its capital produces a loss for the secured creditor.”<sup>160</sup>

In addition, the cost of funds approach may give the debtor a windfall.<sup>161</sup> Many creditors are commercial banks, and because of this they are able to borrow money more cheaply than an ordinary debtor.<sup>162</sup> This places the debtor in an advantageous situation relative to other similarly situated debtors not in bankruptcy because the “cost of funds rate will permit the debtor to use cram down to decrease the interest rate it is paying on its loan.”<sup>163</sup> Thus, the cost of funds approach may actually provide the debtor with an incentive to file for bankruptcy.<sup>164</sup>

### c. *The Presumptive Contract Rate Approach*

Another way to determine the cram down rate is the presumptive contract rate approach. Under this method, the original contract rate that the debtor agreed to in the original loan serves as the presumed interest rate.<sup>165</sup> Both the creditor and debtor are then allowed to rebut this presumption by presenting evidence before the court to show that the cram down rate should be either higher or lower than the original contract rate.<sup>166</sup>

The presumptive contract approach is often tied into an application of the coerced loan method.<sup>167</sup> The Third Circuit, for example, has used the original contract as a starting point from which to calculate the coerced loan rate.<sup>168</sup> Under this method, the coerced loan rate is set either higher or lower than the contract rate, depending on the evidence presented.<sup>169</sup> The Fourth Circuit, on the other hand, has applied the original contract rate as a cap on setting the coerced loan rate.<sup>170</sup> This method, it argues, prevents the creditor

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159. *In re Till*, 301 F.3d 583, 590 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004) (citing Michael E. S. Frankel, *The Emerging Fixed Cramdown Rate Regime: A Market-Driven Argument for Effective Fixed Rates in Bankruptcy Cramdown*, 2 U. CHI. L. SCH. ROUNDTABLE 643, 647 (1995)). “The cost of funds method presupposes that a creditor will opt to exhaust some of its own credit in order to replace the liquid capital it would have received after foreclosure and sale.” *Id.*

160. *United Carolina Bank v. Hall*, 993 F.2d 1126, 1130 (4th Cir. 1993).

161. *In re Till*, 301 F.3d at 590.

162. Zywicki, *supra* note 109, at 253.

163. *Id.*

164. Hartman, *supra* note 140, at 541.

165. *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 70-71 (3d Cir. 1993).

166. *Id.*

167. *See id.* at 70; *United Carolina Bank v. Hall*, 993 F.2d 1126, 1130 (4th Cir. 1993).

168. *Jones*, 999 F.2d at 70-71.

169. *Id.* For example, a creditor could present evidence before the court to show that its current rate is higher than the original contract rate because of fluctuating interest rates in the market. *Id.* On the other hand, the debtor could also present evidence to show that the creditor's current rate is lower than the contract rate. *Id.*

170. *Hall*, 993 F.2d at 1131.

from receiving a windfall by limiting the creditor's claim to the amount provided for in the original agreement.<sup>171</sup>

When tied into the coerced loan method, the presumptive contract rate will naturally suffer from many of the same faults of that method, such as the lack of a coerced loan market and the reliance on expert testimony.<sup>172</sup> Yet because the original contract rate serves as a presumption, it will become the cram down rate if there is no evidence to show that it should be increased or decreased. Thus, under the rationale of one court, the parties will be bound to a rate which they previously agreed was "a fair return to the secured creditor over an extended period of time."<sup>173</sup>

#### d. *The Formula Rate Approach*

Yet another method for determining the cram down rate is the formula rate approach, which "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."<sup>174</sup> Courts generally determine the base by referring to the United States Treasury rate or some other prime rate.<sup>175</sup> The risk premium, which generally ranges from one to three percent,<sup>176</sup> is determined on a case-by-case basis.<sup>177</sup> Because the base rate is relatively easy to determine and the risk premium is small, the formula approach can be "clear and predictable."<sup>178</sup>

Although the formula rate may be a simple and predictable method, this simplicity may limit the discretion of a bankruptcy court because it locks the court into the risk-free rate with only a small adjustment for risk.<sup>179</sup> Critics of the formula approach argue that the exercise of judicial discretion is inherent in the Code's cram down provision.<sup>180</sup> Thus, by restricting that discretion, the formula rate does not conform to the spirit of the cram down provision.<sup>181</sup> Another problem with the formula approach is that a risk

171. *Id.*

172. *See supra* notes 140-146 and accompanying text.

173. *In re Einspahr*, 30 B.R. 356, 356 (Bankr. E.D. Pa. 1983).

174. *Pearson et al.*, *supra* note 99, at 50.

175. *Id.*; *see, e.g.*, *Gen. Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55, 64 (2nd Cir. 1997), *abrogated on other grounds by* *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997) ("[T]he market rate of interest under § 1325(a)(5)(B)(ii) should be fixed at the rate on a United States Treasury instrument . . .").

176. *See, e.g.*, *In re Collins*, 167 B.R. 842, 847 (Bankr. E.D. Tex. 1994) (finding a risk premium of 2.8% appropriate); *In re DeMaggio*, 175 B.R. 144, 152 (Bankr. D.N.H. 1994) (finding a risk premium of 1% sufficient); *In re Fisher*, 29 B.R. 542, 551-52 (Bankr. D. Kan. 1983) (finding a risk premium of 1% adequate).

177. *Pearson et al.*, *supra* note 99, at 50-51.

178. *In re Till*, 301 F.3d 583, 590 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004).

179. *Id.* at 591.

180. *Id.*

181. *Id.* In the words of the Seventh Circuit:

premium of only one to three percent may be too small to compensate creditors sufficiently.<sup>182</sup> Additionally, the risk-free rate cannot be adjusted to account for unusual circumstances within particular market segments such as increases in interest rates within that market.<sup>183</sup>

## V. *TILL V. SCS CREDIT CORP.*

Needless to say, there has been considerable disagreement over the proper interest rate method that should be applied to the Code's cram down provisions.<sup>184</sup> In 2004, the Supreme Court sought to address this issue in *Till v. SCS Credit Corp.*<sup>185</sup> Although it was able to render a judgment in the case, the Court was unable to come to a majority decision.<sup>186</sup> So, despite its recent ruling, the Court has failed to resolve definitively the debate over which cram down method should be used.<sup>187</sup>

### A. *Facts*

The facts of *Till* are akin to the typical Chapter 13 cram down case.<sup>188</sup> Petitioners Lee and Amy Till purchased a used truck from Instant Auto Finance on October 2, 1998.<sup>189</sup> To pay for the truck, the Tills made a \$300 down payment and financed the remaining balance of \$6,425.75 by signing

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There are a multitude of possible creditor/debtor relationships subject to the cramdown provision. Each presents its own risks; to adopt a standard interest rate with limited discretion vested in the bankruptcy court only to take into consideration the contingency of nonpayment would not necessarily fulfill the statutory command that the creditor be afforded the full value of his interest at the time the reorganization plan becomes effective. The statutory provision necessarily leaves the particular questions of valuation to the informed discretion of the bankruptcy court. Our adoption of a rigid formula would unduly restrict that discretion. The statute contemplates a more particularized inquiry, and we are bound by Congress' policy choice in this regard.

*Id.*

182. *In re Busconi*, 147 B.R. 54, 55 (Bankr. D. Mass. 1992) (finding the formula rate to be "patently unfair to secured claimants" and that creditors "should not be denied compensation for profit and risk of nonpayment in a cramdown.").

183. *In re Neff*, 89 B.R. 672, 679 (Bankr. S.D. Ohio 1988), *amended in part on other grounds* by 96 B.R. 800 (Bankr. S.D. Ohio 1989).

184. See Depperschmidt, *supra* note 133, at 457.

185. 541 U.S. 465 (2004) (plurality opinion).

186. *Id.* Justice Stevens announced the judgment of the Court and delivered a plurality opinion, in which Justice Souter, Justice Ginsburg, and Justice Breyer joined. *Id.* at 468. Justice Thomas concurred only in the judgment of the plurality and wrote a separate opinion. *Id.* at 485-86. Justice Scalia delivered a dissenting opinion, in which Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy joined. *Id.* at 492.

187. 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. . . .'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); see also Hon. James D. Walker, Jr. & Amber Nickell, *Bankruptcy*, 55 MERCER L. REV. 1101, 1128 (2004) ("The lack of a majority opinion raises the question of whether *Till* is binding precedent.").

188. See Kristopher Aungst, *The Supreme Court Till(s) for the Method to Compute Cramdown Interest Rates*, 2003 NO. 8 NORTON BANKR. L. ADVISER 3 ("Till is not factually unique.").

189. *Till*, 541 U.S. at 469 (plurality opinion).

an installment contract with Instant Auto.<sup>190</sup> Instant Auto immediately assigned this contract to Respondent, SCS Credit Corporation ("SCS"), a sub-prime lender who makes loans to individuals with poor credit histories, such as the Tills.<sup>191</sup> Per the terms of the contract, the Tills were required to make sixty-eight biweekly payments and were charged an interest rate of 21% on the outstanding balance for the duration of the loan.<sup>192</sup> To protect its interest, SCS retained the right to repossess the truck should the Tills ever default on their repayment contract.<sup>193</sup>

Unfortunately, the Tills did default on their payments to SCS and on October 25, 1999, they filed for bankruptcy under Chapter 13.<sup>194</sup> On that date, the Tills still owed SCS \$4,894.89 even though the truck was only worth \$4,000.<sup>195</sup>

Under their repayment plan, the Tills were required to surrender their future earnings to the bankruptcy court for a period of three years.<sup>196</sup> Additionally, \$740 of their wages were to be assigned to the trustee each month, who was then required to distribute this money among the Tills' various creditors.<sup>197</sup> Regarding the truck and the secured portion of SCS's claim, the Tills invoked the cram down provision of § 1325(a)(5)(B)(ii) in a plan that provided for interest to be paid at an annual rate of 9.5%.<sup>198</sup> SCS, however, objected to this plan claiming that it was entitled to the original contract rate of 21%—the rate it could get by selling the truck and reinvesting the proceeds in a loan comparable to the original loan made to the Tills.<sup>199</sup>

190. *Id.* at 470.

191. *Id.*; *In re Till*, 301 F.3d 583, 585 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004).

192. *Till*, 541 U.S. at 470 (plurality opinion).

193. *Id.*

194. *Id.*

195. *Id.* Both parties agreed that the truck had a fair market value of \$4,000. *Id.*; Joint Appendix at 16-17, *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (No. 02-1016). In its telling of the facts, the appellate court stated the value of the truck at \$4,500. *In re Till*, 301 F.3d at 585. The Joint Appendix that was filed with the Supreme Court, however, lists the value at \$4,000. Joint Appendix at 16-17, *Till*, 541 U.S. 465 (No. 02-1016). Thus, according to § 506(a) of the Bankruptcy Code, SCS had a secured claim of \$4,000 and an unsecured claim of \$894.89. *See* 11 U.S.C. § 506(a) (2000).

196. *Till*, 541 U.S. at 471 (plurality opinion).

197. *Id.*

198. *Id.* The Tills arrived at this rate using the formula rate method by adding a 1.5% risk premium to the national prime rate of 8%. *Id.* In this case, the national prime rate of 8% was the rate that banks applied to low-risk loans. *Id.*

199. *Id.*; Joint Appendix at 19-20, *Till*, 541 U.S. 465 (No. 02-1016). SCS was the sole creditor to object to the Tills' Chapter 13 debt adjustment plan. *In re Till*, 301 F.3d at 585.

## B. Procedural History

In a hearing before a bankruptcy court, SCS presented testimony to show that it normally charged a rate of 21% to customers with poor credit, a rate that SCS claimed was typical in the sub-prime market.<sup>200</sup> Testifying on behalf of the Tills, an economics professor opined that the proposed 9.5% rate was adequate for two reasons: (1) it was financially feasible; and (2) court supervision lowered the risk of nonpayment.<sup>201</sup> Finding in favor of the Tills, the court overruled SCS's objection and confirmed the debt adjustment plan and its 9.5% cram down rate.<sup>202</sup>

In an appeal to the United States District Court for the Southern District of Indiana, SCS again asserted that it was entitled to the contract rate of 21%.<sup>203</sup> Relying on its interpretation of Seventh Circuit precedent, which adopted the coerced loan method, the district court held that SCS's proposed rate of 21% was appropriate.<sup>204</sup>

Unhappy with this result, the Tills appealed to the Seventh Circuit.<sup>205</sup> Finding that the district court had misread Seventh Circuit precedent, a majority of the court applied the coerced loan method using the original contract rate as a starting point from which to adjust the cram down rate.<sup>206</sup> To be fair, the court remanded the case to the bankruptcy court so that the parties could each have the chance to rebut the presumptive rate of 21%.<sup>207</sup>

## VI. ANALYSIS OF THE COURT'S DECISION IN *TILL V. SCS CREDIT CORP.*

When the Supreme Court granted certiorari in June 2003,<sup>208</sup> it seemed that the debate over cram down rates would be laid to rest. Because the Court was unable to reach a majority opinion in *Till*, however, the issue has not been settled.<sup>209</sup>

Justice Stevens, writing a plurality opinion that garnered the support of three other Justices,<sup>210</sup> adopted the formula rate approach to Chapter 13 cram down cases.<sup>211</sup> Justice Thomas, although concurring with the plurality's judgment in the case, wrote a separate opinion adopting a risk-free approach to cram down.<sup>212</sup> Justice Scalia, on the other hand, wrote a dissenting

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200. *Till*, 541 U.S. at 471 (plurality opinion).

201. *Id.* at 471-72. The professor presented his opinion to the court despite admitting that he was unfamiliar with the sub-prime auto lending market. *Id.*

202. *Id.* at 472.

203. *In re Till*, 301 F.3d at 586.

204. *Till*, 541 U.S. at 472 (plurality opinion).

205. *In re Till*, 301 F.3d at 586.

206. *Id.* at 592.

207. *Id.* at 593.

208. *Till v. SCS Credit Corp.*, 539 U.S. 925 (2003).

209. Walker & Nickell, *supra* note 187, at 1126 (stating that the Court's recent decision in *Till* "offers no resolution" on the cram down issue); *see also infra* Part VII.A.

210. *Till v. SCS Credit Corp.*, 541 U.S. 465, 468 (2004) (plurality opinion). Justice Stevens was joined by Justice Souter, Justice Ginsburg, and Justice Breyer. *Id.*

211. *See id.* at 479-80.

212. *Id.* at 487.

opinion that drew the support of three other Justices.<sup>213</sup> In his opinion, Justice Scalia argued that the presumptive contract method should be used in Chapter 13 debt adjustment proceedings.<sup>214</sup> The following section will analyze and critique each opinion written by the Court in the *Till* case.

### A. Justice Stevens's Plurality Opinion

After laying out the facts and procedural history of the case, Justice Stevens begins his opinion by examining the cram down provision of Chapter 13.<sup>215</sup> Justice Stevens first recognizes that the Code "provides little guidance" as to the appropriate method for computing cram down rates.<sup>216</sup> He also acknowledges that bankruptcy courts must make a difficult choice when faced with what method to apply.<sup>217</sup> According to Justice Stevens, a court must address three important considerations when making that decision.<sup>218</sup>

"First," Justice Stevens writes, "the Bankruptcy Code includes numerous provisions that . . . require a court to 'discoun[t] . . . [a] stream of deferred payments back to the[ir] present dollar value.'" <sup>219</sup> Because the same present value language appears in a number of provisions in the Code, according to Justice Stevens it is likely the intention of Congress to have the same interest rate method applied to all of the Code's provisions that require a present value calculation.<sup>220</sup> Additionally, Justice Stevens points out how "Congress would favor an approach that is familiar in the financial community and that minimizes the need for expensive evidentiary proceedings."<sup>221</sup>

Second, Justice Stevens confirms that under § 1322(b)(2) a court's power to modify the original terms of a loan is "perfectly clear."<sup>222</sup> Justice Stevens goes further by stating that this power may be exercised to "account for intervening changes in circumstances."<sup>223</sup>

Justice Stevens's final consideration is that § 1325(a)(5)(B) mandates an objective approach.<sup>224</sup> He shuns a subjective approach and posits that §

213. *Id.* at 491. Justice Scalia was joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy. *Id.*

214. *Id.* at 492.

215. *See id.* at 473-77.

216. *Id.* at 473.

217. *Id.* at 474.

218. *Id.* at 474.

219. *Id.* (quoting *Rake v. Wade*, 508 U.S. 464, 472 n.8 (1993)).

220. *Id.* at 474.

221. *Id.* at 474-75.

222. *Id.* at 475.

223. *Id.*

224. *Id.* at 476-77. To support this conclusion, Justice Stevens cites to *Rash*, 520 U.S. 953, a case dealing with the proper valuation of collateral. *See supra* Part IV.A. In that case, Justice Stevens



1325(a)(5)(B) does not require cram down terms to match those provided in the original contract.<sup>225</sup> Therefore, “a court choosing a cram down interest rate need not consider the creditor’s individual circumstances . . . [r]ather, the court should aim to treat similarly situated creditors similarly.”<sup>226</sup>

### 1. Justice Stevens Rejects the Coerced Loan, Presumptive Contract Rate, and Cost of Funds Approaches

After setting out these general considerations, Justice Stevens rejects the coerced loan, presumptive contract rate, and cost of funds approaches stating that each “is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor’s payments have the required present value.”<sup>227</sup>

With respect to the coerced loan approach, Justice Stevens rejects this method because it requires bankruptcy courts to delve into “an inquiry far removed from such courts’ usual task of evaluating debtors’ financial circumstances and the feasibility of their debt adjustment plans.”<sup>228</sup> Additionally, he argues that transaction costs and overall profits are improper components to be included in a cram down loan.<sup>229</sup>

Next, Justice Stevens lists four reasons for rejecting the presumptive contract rate approach. First, it “improperly focuses on the creditor’s potential use of the proceeds of a foreclosure sale.”<sup>230</sup> Second, while Justice Stevens recognizes that the presumptive contract rate approach allows a bankruptcy court to avoid overcompensation by tailoring the interest rate to an individual creditor, he notes how this can be a burdensome for the debtor by forcing it to present evidence to rebut the presumptive contract rate.<sup>231</sup> Third, Justice Stevens asseverates that the presumptive contract rate “produces absurd results” by allowing “inefficient, poorly managed lenders’ with lower profit margins to obtain higher cramdown rates than ‘well managed, better capitalized lenders.’”<sup>232</sup> Finally, a dependency on the parties’ prior dealings may cause “similarly situated creditors [to] end up with vastly different cram down rates.”<sup>233</sup>

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notes, the Court held that collateral should be valued from the debtor’s perspective rather than the creditor’s perspective. *Till*, 541 U.S. at 476 n.13 (plurality opinion). Stevens argues that the same rationale should apply in this case. *Id.* at 476.

225. *Id.*

226. *Id.* at 476-77.

227. *Id.* at 477.

228. *Id.* As an example, Justice Stevens notes that the coerced loan approach requires a court to hear evidence regarding the loan market for similar, nonbankrupt debtors. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 477-78.

232. *Id.* at 478 (quoting 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 112.1, 112-8 (3d ed. 2000)).

233. *Id.* at 478. To illustrate, Justice Stevens poses the following hypothetical:

[S]uppose a debtor purchases two identical used cars, buying the first at a low purchase price from a lender who charges high interest, and buying the second at a much higher purchase price from a lender who charges zero-percent or nominal interest.

Justice Stevens also rejects the cost of funds approach because "it mistakenly focuses on the creditworthiness of the *creditor* rather than the debtor."<sup>234</sup> Additionally, Justice Stevens notes how this approach suffers from some of the same flaws as the presumptive contract rate and coerced loan methods.<sup>235</sup> To illustrate, he notes how the cost of funds approach "imposes a significant evidentiary burden" on the debtor and also how it can cause a situation where creditors are treated inequitably.<sup>236</sup>

## 2. Justice Stevens Adopts the Formula Approach

After dispensing with the other forms of computing cram down rates, Justice Stevens adopts the formula approach as the proper method to be used in cram down proceedings.<sup>237</sup> To set the risk-free basis, Justice Stevens recommends looking to the national prime rate which estimates how much a commercial bank would charge a creditworthy commercial borrower.<sup>238</sup> In order to adjust for the risk posed by the bankrupt debtor, factors such as "the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan" should be taken into consideration at the confirmation hearing.<sup>239</sup> While recognizing that this requires the parties to present evidence before the court, Justice Stevens mentions that some of the evidence will be included in the prebankruptcy filings, thereby limiting the expense of presenting new additional evidence.<sup>240</sup> Justice Stevens goes further, noting that since the risk-free rate is a low estimate that must be adjusted upwards, the primary evidentiary burden will be placed on the creditor, "who [is] likely to have readier access to any information absent from the debtor's [prebankruptcy] filing."<sup>241</sup>

In summary, Justice Stevens notes how "the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings."<sup>242</sup> He also points out

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Prebankruptcy, these two loans might well produce identical income streams for the two lenders. Postbankruptcy, however, the presumptive contract rate approach would entitle the first lender to a considerably higher cram down interest rate, even though the two secured debts are objectively indistinguishable.

*Id.* at 478 n.17.

234. *Id.* at 478.

235. *Id.*

236. *Id.* For example, in order for the debtor to rebut the creditor's coerced loan rate, it would have to produce evidence regarding the creditor's financial status and at what rate the creditor would lend money to similarly-situated debtors. *See id.*

237. *See id.* at 477-80.

238. *Id.* at 478-79. This rate, Justice Stevens notes, includes such factors as "opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default." *Id.* at 479.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

how the formula approach takes the focus off the creditor and, instead, places it on the financial markets, the bankruptcy estate, and the loan itself.<sup>243</sup>

While Justice Stevens advocates an upward adjustment of the risk-free rate, he refuses to adopt a proper scale for such an adjustment, stating that “the issue is not before us.”<sup>244</sup> Justice Stevens does, however, show approval for the 1.5% rate adopted by the bankruptcy court in this case and also cites to other courts that have applied rates of 1% to 3%.<sup>245</sup> Also, Justice Stevens refuses to resolve a dispute among the parties regarding the failure rate of consumer debt adjustment plans, stating that “[i]t is sufficient for our purposes to note that . . . [the Code] obligates the court to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan.”<sup>246</sup>

### 3. Justice Stevens Criticizes the Dissent

The next part of Justice Stevens’s opinion addresses the issues raised by Justice Scalia’s dissent.<sup>247</sup> Justice Stevens points out that the dissent makes two assumptions to support the presumptive contract rate approach, but it is “highly unlikely that Congress would endorse either premise.”<sup>248</sup> Regarding the dissent’s first assumption—that “subprime lending markets are competitive and therefore largely efficient”—Justice Stevens simply states that “there is no basis for concluding that Congress relied on this assumption when it enacted Chapter 13.”<sup>249</sup> Justice Stevens also notes how used vehicles are sold in “tie-in” transactions where purchase prices are negotiated in tandem with financing terms that are dictated by the seller.<sup>250</sup> Thus, he argues, there is “no way of determining whether the allocation of that price between goods and financing would be the same if the two components were separately negotiated.”<sup>251</sup> This is significant, Justice Stevens notes, because the only issue before the Court is the cram down interest rate and not the value of the truck which is fixed under *Rash*.<sup>252</sup> Additionally, Justice Stevens posits that extensive state and federal regulation of sub-prime lending distorts the market and shows how

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243. *Id.*

244. *Id.* at 480.

245. *Id.* (citing *Gen. Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55, 64 (2nd Cir. 1997), *abrogated on other grounds by* *Assoc. Commercial Corp., v. Rash*, 520 U.S. 953 (1997)).

246. *Id.* at 480.

247. *See id.* at 481-85.

248. *Id.* at 481.

249. *Id.*

250. *Id.* For example, if the seller knows that he will be able to make money off of finance charges, he may be willing to sell at a lower price. Conversely, if the buyer pays for the car in cash, the seller may only sell at a price that will compensate for the missed opportunity to collect finance charges.

251. *Id.* at 482 n.20.

252. *Id.* For an explanation of the Court’s previous holding in *Rash*, see *supra* Part IV.A.

regulators believe that sub-prime lenders, if left unregulated, "would exploit borrowers' ignorance and charge rates above what a competitive market would allow."<sup>253</sup>

To rebut the dissent's second assumption—that the risk of default while in Chapter 13 is usually no less than at the time of the original contract—Justice Stevens argues that "Congress intended to create a program under which plans that qualify for confirmation have a high probability of success."<sup>254</sup> While acknowledging that bankruptcy judges may confirm too many risky plans, Justice Stevens suggests that the "solution is to confirm fewer such plans, not to set default cram down rates at absurdly high levels, thereby increasing the risk of default."<sup>255</sup>

Next, Justice Stevens briefly addresses the risk-free approach advocated by Justice Thomas.<sup>256</sup> Justice Stevens agrees with Justice Thomas that § 1325(a)(5)(B)(ii) may have been written by Congress with no intention of compensating for the risk of default.<sup>257</sup> The risk-free approach, however, is ultimately rejected by Justice Stevens for two reasons. First, the Court's decision in *Rash* assumed that cram down rates are adjusted to compensate for risk of default.<sup>258</sup> Second, because the risk-free approach has been rejected by so many judges, it is "too late in the day to endorse that approach now."<sup>259</sup> While Justice Stevens concludes that a risk factor should be included in cram down rates, he notes how Justice Thomas's approach, unlike the dissent's, is more consistent with the statutory scheme of promoting successful reorganization plans.<sup>260</sup>

Justice Stevens further criticizes the dissent, noting that its assumptions may not support the presumptive contract rate approach.<sup>261</sup> To support this assertion, Justice Stevens explains that while the cram down provision applies to sub-prime loans, it also applies to prime loans that were negotiated before "the change in circumstance . . . that rendered the debtor insolvent."<sup>262</sup> Also, cram down applies in situations where national or local economies may have changed drastically since the time of the original loan contract.<sup>263</sup> "In either case," Justice Stevens writes, "there is every reason to think that a properly risk-adjusted prime rate will provide a better estimate

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253. *Till*, 541 U.S. at 482 (plurality opinion).

254. *Id.*

255. *Id.* at 482-83.

256. *Id.* at 483. For a report and analysis of Justice Thomas's risk-free approach to cram down see *infra* Part VI.C-D.

257. *Till*, 541 U.S. at 483 (plurality opinion).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 483-84.

263. *Id.* at 484.

of the creditor's current costs and exposure than a contract rate set in different times."<sup>264</sup>

To conclude his opinion, Justice Stevens points out that if all relevant information was available to the parties, both the formula and presumptive contract rate approaches would produce the same cram down rate.<sup>265</sup> Thus, his primary disagreement with the dissent is upon which party the evidentiary burden should fall.<sup>266</sup> According to Justice Stevens, the creditor should receive the majority of this burden because the creditor is "more knowledgeable . . . thereby facilitating more accurate calculation of the appropriate interest rate."<sup>267</sup>

## B. Critique of Justice Stevens's Plurality Opinion

Although four justices adopted the formula rate approach, Justice Stevens failed to attract the requisite support of a majority of the Court.<sup>268</sup> This may be for good reason, as there are significant shortcomings associated with the application of the formula rate approach in cram down proceedings.<sup>269</sup>

### 1. The Formula Rate Limits Judicial Discretion

The first drawback to the formula rate approach is that it has the potential to limit judicial discretion, which is an essential element in cram down proceedings.<sup>270</sup> Indeed, Justice Stevens himself recognized that a bankruptcy court has the power to modify original loan terms and that such authority is "perfectly clear."<sup>271</sup> The formula rate, however, may be too inflexible because the prime rate starting point is determined by a source independent of the specifics of the case at hand.<sup>272</sup> Thus, a judge is bound

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264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 484-85.

268. Justices Souter, Ginsburg, and Breyer joined Stevens's opinion. *Id.* at 468 (plurality opinion). Justice Thomas wrote a separate opinion concurring only in the judgment of the plurality. *Id.* at 485 (Thomas, J., concurring). Justice Scalia delivered a dissenting opinion in which Chief Justice Rehnquist and Justices O'Connor and Kennedy joined. *Id.* at 491 (Scalia, J., dissenting). Thus, Justice Stevens's selection of the formula rate approach for computing cram down rates is supported only by a plurality of the Court.

269. *See infra* Part VI.B.1-4.

270. Judicial discretion is important in the cram down context because each creditor/debtor relationship presents its own unique characteristics. *See In re Till*, 301 F.3d 583, 590-91 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004). In order to respond to each specific case, a bankruptcy court must have the flexibility to adapt to the circumstances at hand. *Id.*

271. *Till*, 541 U.S. at 475 (plurality opinion).

272. *See In re Till*, 301 F.3d at 591. "The statutory provision necessarily leaves the particular questions of valuation to the informed discretion of the bankruptcy court. Our adoption of a rigid formula would unduly restrict that discretion. The statute contemplates a more particularized inquiry, and we are bound by Congress' policy choice in this regard." *Id.*

by the generally accepted prime rate—a percentage that is wholly outside the discretion of the court.<sup>273</sup>

While one may argue that the addition of the risk premium is enough to satisfy the role of judicial discretion, it is important to note that this premium is set at a small number.<sup>274</sup> Indeed Justice Stevens recognizes this when he notes that typical risk premiums range from 1% to 3%.<sup>275</sup> Thus, with regard to setting the appropriate cram down rate, judicial discretion is limited to a maximum spread of only two percentage points.

In a similar vein, the formula rate's rigid approach presents another issue—the need of the bankruptcy court to adjust to changes in circumstances. Justice Stevens recognizes as much, stating that “the potential need to modify the loan terms to account for intervening changes in circumstances is . . . clear.”<sup>276</sup> Yet a predetermined prime rate with a minimal risk adjustment can hardly give a bankruptcy court the requisite room to set a cram down rate that conforms to the particulars of a certain case.<sup>277</sup>

## 2. The Formula Rate May Undercompensate Secured Creditors

In addition to its inflexibility, the formula rate approach may result in the undercompensation of secured creditors. In fact, Justice Stevens acknowledges that the formula rate is a low estimate.<sup>278</sup> Indeed his prime rate is one at which *commercial* banks lend money to *commercial* borrowers<sup>279</sup>—a far cry from the ordinary consumer subjecting himself to the liability and expense of a sub-prime loan.<sup>280</sup> To defend his position, Justice Stevens notes how the prime rate can be adjusted upwards in order to compensate for the increased risk that occurs in sub-prime lending.<sup>281</sup> However, one must still question whether the 1% to 3% risk adjustment

273. Justice Stevens recommends that a court look to an outside source in order to determine the prime rate. *Till*, 541 U.S. at 478-79 (plurality opinion) (“[T]he [formula] approach begins by looking to the national prime rate, reported daily in the press.”).

274. See *supra* note 182 and accompanying text.

275. *Till*, 541 U.S. at 480 (plurality opinion).

276. *Id.* at 475.

277. See *In re Neff*, 89 B.R. 672, 679 (Bankr. S.D. Ohio 1988), *amended in part on other grounds* by 96 B.R. 800 (Bankr. S.D. Ohio 1989) (“The problem with [the formula rate] approach is that it does not permit sufficient latitude for consideration of unusual factual circumstances present in particular cases and is not specific for a particular market segment.”).

278. *Till*, 541 U.S. at 479 (plurality opinion).

279. *Id.*

280. Generally, commercial borrowers present a lower risk of default than do ordinary consumers because of their superior resources. This distinction is compounded when compared to a consumer with poor credit that qualifies only for sub-prime lending.

281. *Till*, 541 U.S. at 479 (plurality opinion).

scale approved by the plurality is enough to compensate non-commercial, secured creditors.<sup>282</sup>

### 3. Justice Stevens Fails to Address the Issue of the Proper Risk Adjustment Scale

Another point of criticism of Justice Stevens's plurality opinion is that he fails to decide on the proper risk adjustment scale for the formula rate.<sup>283</sup> Justice Stevens avoids the question simply stating that "the issue is not before us."<sup>284</sup> Instead, he notes how other courts have approved a 1% to 3% scale, and, thus, the 1.5% rate proposed by the Tills was appropriate.<sup>285</sup> While Justice Stevens's referral to the other courts may have implicitly approved the 1% to 3% scale, one wonders why he failed definitively to address such an integral part of the very approach he adopts in this case.<sup>286</sup>

### 4. The Formula Rate Suffers From the Same Evidentiary Problems as Many of the Other Cram Down Rate Approaches

While Justice Stevens praises the formula rate as an approach that "minimizes the need for potentially costly additional evidentiary proceedings,"<sup>287</sup> this method may present the same evidentiary problems as other cram down approaches. Because the bankruptcy court must adjust the prime rate to account for risk, the parties will still be involved in litigation over the proper risk adjustment.<sup>288</sup> Indeed, Justice Stevens states that "[t]he court must . . . hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment."<sup>289</sup> This process,

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282. Harris, *supra* note 147, at 579.

[T]he suggested one percent to three percent cap on a risk-free rate works a grave injustice to secured creditors . . . . The potential for undercompensation generated by this approach greatly undermines the statutory objective of putting the secured creditor in the same position he would have been had he been able to repossess the collateral at the time of bankruptcy.

*Id.*

283. *Till*, 541 U.S. at 480 (plurality opinion).

284. *Id.*

285. *Id.*

286. Mark G. Douglas, *Supreme Court Ruling on Cram-Down Interest Rates Creates Uncertainty for Secured Creditors*, JONES DAY BUS. RESTRUCTURING REV., Oct.-Nov. 2004, at 7, <http://www.jonesday.com/pubs/detail.asp?language=English&pubid=1631> ("By declining to specify how the risk premium is to be computed, the Supreme Court has left the bankruptcy courts in much the same position as they were before *Till* purported to answer definitively the cram-down interest question.").

287. *Till*, 541 U.S. at 479 (plurality opinion).

288. Ronald F. Greenspan & Cynthia Nelson, "UnTill" We Meet Again: Why the Till Decision Might Not Be the Last Word on Cramdown Interest Rates, 23-10 AM. BANKR. INST. J. 48, 70 (2005). "Till virtually mandates that creditors mount 'potentially costly' oppositions to debtors' plans (and that debtors respond accordingly) or risk being regularly undercompensated for risk. Moreover, certain ambiguities in the opinion also mean that inquiries as to the appropriate risk adjustment may be less than 'straightforward.'" *Id.*

289. *Till*, 541 U.S. at 479 (plurality opinion).

according to one commentator, “remains fact sensitive” and “will make adjudication of the issue no less time-consuming to the courts.”<sup>290</sup>

In short, Justice Stevens’s formula approach suffers from the following weaknesses: (1) it limits judicial discretion; (2) it may undercompensate secured creditors; (3) its risk adjustment scale is not defined; and (4) it presents evidentiary problems for the parties and the bankruptcy court.<sup>291</sup>

### C. Justice Thomas’s Concurring Opinion

In his concurring opinion, Justice Thomas acknowledges that a stream of deferred payments is worth less than an instant payment, in part because of the risk of default.<sup>292</sup> According to Justice Thomas, this fact is irrelevant, however, because § 1325(a)(5)(B)(ii) “requires only that ‘the value . . . of property to be distributed under the plan,’ at the time of the effective date of the plan, be no less than the amount of the secured creditor’s claim.”<sup>293</sup> To illustrate, Justice Thomas notes that the cram down provision never mentions the value of the *promise* to distribute property under the plan.<sup>294</sup> Because § 1325(a)(5)(B)(ii) only mentions the value of property—and not the value of a promise to distribute property—Justice Thomas adopts a risk-free approach to computing the cram down rate.<sup>295</sup>

To begin, Justice Thomas reminds the Court of the well-established principle that “when the statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms.”<sup>296</sup> Justice Thomas then poses a brief example in order to explain the basic principles of the time value of money.<sup>297</sup> Next, Justice Thomas points out the major flaw in both the plurality and dissenting opinions: the cram down provision does not contain a requirement that the interest rate reflect the risk of nonpayment.<sup>298</sup> According to Justice Thomas, “it is nonsensical to speak of a debtor’s risk of default being inherent in the value of ‘property’ unless that property is a promise or a debt.”<sup>299</sup> To illustrate this point, Justice Thomas poses another

290. Harris, *supra* note 147, at 579; see also Hartman, *supra* note 140, at 543 (“[T]he risk premium issue could require significant court time to resolve.”); Greenspan & Nelson, *supra* note 288, at 48 (“[Till] imposes significant new evidentiary burdens on secured creditors.”).

291. See discussion *supra* Part VI.B.1-4.

292. *Till*, 541 U.S. at 485 (Thomas, J., concurring).

293. *Id.* at 486 (quoting 11 U.S.C. § 1325(a)(5)(B)(ii) (2000) (emphasis added)).

294. *Id.* at 486 (“[T]he statute that Congress enacted does not require a debtor-specific risk adjustment that would put secured creditors in the same position as if they had made another loan.”).

295. *Id.* at 487.

296. *Id.* at 486 (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)).

297. *Id.* at 487 n.1. For a brief explanation of the concepts of present value and the time value of money see *supra* Part IV.B.1.

298. *Till*, 541 U.S. at 487 (Thomas, J., concurring).

299. *Id.* at 487-88.



hypothetical showing how property, including cash, “can be and is determined without any inclusion of any risk that the debtor will fail to transfer the cash at the appropriate time.”<sup>300</sup> Justice Thomas does agree with the dissent, however, that the use of the prime rate in cram down proceedings will systematically undercompensate creditors, thus raising policy concerns.<sup>301</sup> Nevertheless, Justice Thomas adheres to a strict statutory interpretation, maintaining that the cram down provision does not take risk of nonpayment into account.<sup>302</sup>

Next, Justice Thomas notes that in certain circumstances, the risk of nonpayment can be factored into the cram down rate but only if it is already included as part of the value of the property itself.<sup>303</sup> To explain, Justice Thomas notes how the cram down provision does not limit the term “property” to only cash.<sup>304</sup> Instead, it can include such things as securities, personal property, real property, or anything of value.<sup>305</sup> Thus, Justice Thomas writes, “if the ‘property to be distributed’ . . . is a note . . . the value of that note necessarily includes the risk” of nonpayment.<sup>306</sup> According to Justice Thomas, however, this risk is built into the value of the note itself and should not play a part in calculating the appropriate cram down rate.<sup>307</sup>

Justice Thomas next addresses SCS’s argument that the cram down provision was enacted to protect creditors and not debtors.<sup>308</sup> First, Justice Thomas points out that secured creditors are already partially compensated for the risk of nonpayment by the creditor-friendly holding in *Associates Commercial Corp. v. Rash*, which sets the value of a secured claim at the higher replacement value rather than the lower foreclosure value.<sup>309</sup> Second, Justice Thomas notes that despite the many creditor-friendly provisions found in other subsections of § 1325, Congress chose not to make §

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300. *Id.* at 488. Justice Thomas’s hypothetical is as follows:

Suppose, for instance, that it is currently time *A*, the property to be distributed is a house, and it will be distributed at time *B*. Although market conditions might cause the value of the house to fluctuate between time *A* and time *B*, the fluctuating value of the house itself has nothing to do with the risk that the debtor will not deliver the house at time *B*. The value of the house, then, can be and is determined entirely without any reference to any possibility that a promise to transfer the house would not be honored. So too, then, with cash: the value of the cash can be and is determined without any inclusion of any risk that the debtor will fail to transfer the cash at the appropriate time.

*Id.* Justice Thomas poses this hypothetical to show that, while risk can be factor, it is not *required* to properly discount property to its present value.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* (citing 7 COLLIER ON BANKRUPTCY, *supra* note 122, ¶ 1129.03[7][b][i], at 1129-44).

306. *Id.* at 488-89. For example, if a creditor were to loan a sum of money in exchange for a note and charge interest at 7%, a portion of this percentage could be allocated to compensate for risk. Yet the note itself will still yield a 7% return on the creditor’s funds. In this sense, the value of the property—i.e., the note—is equal to the principal plus the 7% rate of return.

307. *Id.* at 489.

308. *Id.* (citing Brief for Respondent at 24, *Till*, 541 U.S. 465 (No. 02-1016)).

309. *Till*, 541 U.S. at 489 (Thomas, J., concurring) (citing *Assoc. Commercial Corp. v. Rash*, 520 U.S. 953 (1997)); *see also supra* Part IV.A.

1325(a)(5) creditor protective by adding a debtor-specific risk adjustment requirement.<sup>310</sup> According to Justice Thomas, if the risk-free rate is insufficient to fully compensate secured creditors, the issue is a political question that should be addressed through Congress rather than remedied by the Court.<sup>311</sup>

Turning to the specifics of the case at hand, Justice Thomas notes that the 9.5% interest rate called for by the Tills' proposed plan was higher than the risk-free rate.<sup>312</sup> Thus, Justice Thomas concurred in the judgment because the proposed 9.5% rate would "sufficiently compensate" SCS as required under § 1325(a)(5)(B)(ii).<sup>313</sup>

#### D. Critique of Justice Thomas's Concurring Opinion

The principle defect in Justice Thomas's concurring opinion is that his position lacks support and goes against the grain of bankruptcy precedent. While Justice Thomas may view the language of § 1325(a)(5)(B)(ii) as clear and enforceable on its terms,<sup>314</sup> other judges and commentators faced with interpreting the cram down provision have struggled to extract its meaning.<sup>315</sup> Indeed, the Supreme Court in the instant case was unable to come to a majority decision on the issue.<sup>316</sup> Thus, it is not surprising that Justice Thomas's interpretation of the provision and resulting risk-free approach have not been widely accepted. In fact, both the plurality and dissent in this case, as well as virtually all the lower circuit courts, have rejected the risk-free approach in favor of some form of risk compensation.<sup>317</sup> In addition, the risk-free approach may result in an interest

310. *Till*, 541 U.S. at 489-90 (Thomas, J., concurring).

311. *Id.* at 490.

312. *Id.* at 491.

313. *See id.*

314. *See id.* at 486.

315. *See* Depperschmidt, *supra* note 133, at 457 ("The interest rate that debtors pay on claims outstanding at the time of a bankruptcy reorganization hearing arguably is the most debated economic issue in bankruptcy litigation."); Chaim J. Fortgang & Thomas Moers Mayer, *Valuation in Bankruptcy*, 32 UCLA L. REV. 1061, 1119 (1985) ("Few bankruptcy issues have met with as much confusion as the determination of a proper discount rate.").

316. *See infra* note 421.

317. *See In re Kidd*, 315 F.3d 671, 676-77 (6th Cir. 2003) (adopting the coerced loan rate); *In re Till*, 301 F.3d 583, 589 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004) (adopting the contract rate); *In re Smithwick*, 121 F.3d 211, 214 (5th Cir. 1997) (adopting the contract rate); *In re Valenti*, 105 F.3d 55, 64 (2nd Cir. 1997), *abrogated on other grounds by* Assocs. Commercial Corp. v. Rash, 520 U.S. 953 (1997) (adopting the formula rate); *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 71 (3d Cir. 1993) (adopting the contract rate); *United Carolina Bank v. Hall*, 993 F.2d 1126, 1131 (4th Cir. 1993) (adopting the coerced loan rate capped by the contract rate); *In re Fisher*, 930 F.2d 1361, 1364 (8th Cir. 1991) (adopting the coerced loan rate); *In re Fowler*, 903 F.2d 694, 698 (9th Cir. 1990) (adopting the formula rate); *In re Hardzog*, 901 F.2d 858, 860 (10th Cir. 1990) (adopting the coerced loan rate capped by the contract rate); *In re S. States Motor Inns, Inc.*, 709 F.2d 647, 652-53 (11th Cir. 1983) (adopting the coerced loan rate).

rate that even the most qualified and creditworthy borrowers cannot attain.<sup>318</sup> For these reasons, the risk-free rate has been rejected by the vast majority of circuit courts<sup>319</sup> as well as the eight other Supreme Court Justices in this case.<sup>320</sup>

### E. Justice Scalia's Dissenting Opinion

One of these justices, Justice Scalia, begins his dissent by noting that his "areas of agreement with the plurality are substantial."<sup>321</sup> The only area that he disagrees with is the plurality's use of the formula approach to computing cram down interest rates.<sup>322</sup> According to Justice Scalia, the formula approach will "systematically undercompensate secured creditors for the true risks of default."<sup>323</sup> Instead, he adopts the presumptive contract rate approach.<sup>324</sup> This approach minimizes disputes, Justice Scalia writes, because it is a "good indicator of actual risk . . . and it will provide a quick and reasonably accurate standard."<sup>325</sup>

#### 1. Justice Scalia Adopts the Presumptive Contract Rate Approach

To support his endorsement of the presumptive contract rate approach, Justice Scalia posits that the approach makes two important and reasonable assumptions.<sup>326</sup> The first assumption is that "subprime lending markets are competitive and therefore largely efficient."<sup>327</sup> If this assumption is accepted as true, then the high interest rates associated with sub-prime loans are a product of the actual risk of default associated with such loans.<sup>328</sup> According to Justice Scalia, if the high rates were associated with exorbitant

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318. See Greenspan & Nelson, *supra* note 288, at 48 n.4 ("[M]any solvent commercial borrowers who are not in bankruptcy may not qualify for a loan at the prime rate."); see also Harris, *supra* note 147, at 579; Hartman, *supra* note 140, at 543.

319. See *supra* note 317.

320. Justice Stevens, writing for a plurality of four Justices, rejects the risk-free rate proposed by Justice Thomas because it was "too late in the day" to go against the longstanding practice of accounting for the risk of default when computing the cram down rate. *Till*, 541 U.S. at 483 (plurality opinion). Justice Scalia, with the support of three other Justices, also rejects the risk-free rate "[b]ecause there is no guarantee that the promised payments will in fact be made . . ." *Id.* at 505 (Scalia, J., dissenting).

321. *Id.* at 491 (Scalia, J., dissenting). Justice Scalia agrees with the plurality in three areas. First, he agrees that some confirmed plans nevertheless fail. *Id.* Second, Scalia agrees that a secured creditor is entitled to deferred payments that include an adjustment for the risk of failure of a plan. *Id.* Finally, he agrees that while adequate compensation may call for an "eye popping" interest rate, a court should "refuse to confirm the plan" rather than reduce that rate. *Id.*

322. *Id.* at 491.

323. *Id.* at 492.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

profits or costs, "[l]enders with excessive rates would be undercut by their competitors, and inefficient ones would be priced out of the market."<sup>329</sup>

The presumptive contract rate's second assumption, according to Justice Scalia, is that the probability of default does not diminish simply by virtue of the fact that the debtor has filed for Chapter 13 relief.<sup>330</sup> To support this statement, Justice Scalia notes how failure rates of confirmed Chapter 13 repayment plans range from the Tills' conservative estimate of 37% to a more realistic rate of 60%.<sup>331</sup> Thus, Justice Scalia writes, this relatively high rate of failure of confirmed plans "proves that bankruptcy judges are not oracles and that trustees cannot draw blood from a stone."<sup>332</sup> While Justice Scalia does recognize that judicial and trustee oversight in Chapter 13 will provide a marginal benefit, the fact that the debtor had to file for bankruptcy shows his financial instability.<sup>333</sup> Furthermore, "the costs of foreclosure are substantially higher in bankruptcy because the automatic stay bars repossession without judicial permission."<sup>334</sup> For these reasons, Justice Scalia believes it is reasonable to assume that "bankrupt debtors are riskier than other subprime debtors—or, at the very least, not systematically *less* risky."<sup>335</sup>

In summary, Justice Scalia notes that the first assumption means that the contract rate is a reasonable reflection of actual risk and, according to the second assumption, this risk continues even when the debtor files for Chapter 13.<sup>336</sup> These assumptions lead to Justice Scalia's conclusion that "the contract rate is a decent estimate . . . for the appropriate interest rate in cram down."<sup>337</sup>

## 2. Justice Scalia Criticizes the Plurality's Decision

Justice Scalia next addresses the plurality's assertions that the sub-prime lending markets are not competitive and that risk of default is less in Chapter 13 payment plans than in an ordinary sub-prime loan.<sup>338</sup> To rebut the

329. *Id.* To illustrate, if a lender were to charge an extra 10% interest simply for profit, customers would take their business elsewhere to a lender who would charge a lower rate with, for example, only a 2% profit percentage.

330. *Id.* at 492-93.

331. *Id.* at 493 n.1 (citing Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 *IND. L.J.* 17, 40-42 (1989); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 *AM. BANKR. INST. L. REV.* 415, 440-41 (1999)).

332. *Id.* at 493.

333. *Id.*

334. *Id.* at 494 (citing 11 U.S.C. § 362).

335. *Id.*

336. *Id.*

337. *Id.* Justice Scalia is careful to point out that the contract rate serves only as a presumption and can be adjusted either up or down according to evidence presented to the court. *Id.* at 494 n.2.

338. *Id.* at 494-95.

plurality's first assertion, Justice Scalia acknowledges that while the sub-prime markets are not "perfectly competitive," they are nevertheless reasonably competitive and reasonably efficient.<sup>339</sup> Justice Scalia also notes that although cars are generally sold in tie-in transactions, this does not mean that financing terms are dictated by the seller.<sup>340</sup> Instead, Justice Scalia writes, "they only cause prices and interest rates to be considered *in tandem* rather than separately."<sup>341</sup> Justice Scalia appears to make one concession, however, and agrees that the plurality "makes a fair point" when it argues that in a tie-in transaction there is no way to determine "whether the allocation of . . . price between goods and financing would be the same if the two components were separately negotiated."<sup>342</sup> Yet Justice Scalia argues that this "is not likely to bias the contract-rate approach in favor of creditors to any significant degree" and "[w]hile joint pricing may introduce some inaccuracy, the contract rate is still a far better initial estimate than the prime rate."<sup>343</sup>

Next, Justice Scalia argues that the "mere existence of [state] usury laws is . . . weak support" for the plurality's position that regulators believe that the sub-prime markets are not competitive.<sup>344</sup> He notes that this is only one of many explanations for the existence of usury laws.<sup>345</sup> Regarding the Federal Truth in Lending Act,<sup>346</sup> Justice Scalia argues that this legislation "positively refutes" the plurality's position.<sup>347</sup> According to Justice Scalia, because the Truth in Lending Act requires the disclosure of certain information necessary to promote the informed use of credit, it presumes that markets are competitive—otherwise consumers would have no need for such information.<sup>348</sup> Finally, Justice Scalia notes that while usury laws do distort the markets, they help keep interest rates low, thereby giving the debtor a lower rate under the presumptive contract rate approach.<sup>349</sup>

Regarding the plurality's second assertion—that the risk of default is less in Chapter 13 repayment plans than in ordinary sub-prime loans—

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339. *Id.* at 495 n.3.

340. *Id.* at 495.

341. *Id.* To support this statement Justice Scalia notes how "car sellers routinely advertise their interest rates, offer promotions like 'zero-percent financing,' and engage in other behavior that plainly assumes customers are sensitive to interest rates and not just price." *Id.*

342. *Id.* at 495 n.4; *Id.* at 481 n.20 (plurality opinion).

343. *Id.* at 495 n.4 (Scalia, J., dissenting). This is because when a car is sold with a high sale price and a low interest rate, the creditor will bear the burden of showing that the actual interest rate is greater than stated on the sales contract. *Id.* If, on the other hand, a car is offered with a low sales price and a high interest rate, the buyer can obtain financing at a lower rate from a third party and benefit from the low sales price. *Id.*

344. *Id.* at 496.

345. *Id.* According to Scalia, one such alternative explanation would be that the laws were enacted to keep interest rates low for those with financial difficulties. *Id.* (citing Edward L. Glaeser & José Scheinkman, *Neither a Borrower Nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws*, 41 J.L. & ECON. 1, 26 (1998)).

346. 15 U.S.C. §§ 1601-13, 1631-49, 1661-65, 1666(a)-(j), 1667(a)-(e), 1671-77 (2000).

347. *Till*, 541 U.S. at 496 (Scalia, J., dissenting).

348. *Id.*

349. *Id.* at 496 n.5.

Justice Scalia points out that the plurality assumes that Chapter 13 would be less risky *if* fewer risky plans were confirmed, rather than being less risky as currently administered.<sup>350</sup> Justice Scalia adds that the formula rate would not fully compensate creditors:

While full compensation can be attained either by low-risk plans and low interest rates, or by high-risk plans and high interest rates, it cannot be attained by *high-risk* plans and *low* interest rates, which, absent cause to anticipate a change in confirmation practices, is precisely what the formula approach would yield.<sup>351</sup>

Next, Justice Scalia addresses the plurality's argument that transaction costs and profits should not be included in the cram down rate.<sup>352</sup> To rebut this argument, Justice Scalia notes that the plurality's prime lending rate itself includes overhead and profits,<sup>353</sup> because commercial lenders do not lend money if they cannot cover their costs and make some form of profit.<sup>354</sup>

Finally, regarding the plurality's argument that similarly situated creditors may be treated differently under the presumptive contract rate approach, Justice Scalia responds by noting that a bankruptcy judge has the power to exercise his discretion and adjust the contract rate to avoid any disparity among similar creditors.<sup>355</sup> Again, he reminds the Court that the contract rate should serve as a reasonably accurate presumption that may be adjusted according to the circumstances of the particular case.<sup>356</sup>

### 3. Justice Scalia Criticizes the Formula Rate Approach

In the next section, Justice Scalia opines as to the flaws in the formula rate approach.<sup>357</sup> Also, Justice Scalia analyzes the proper scale for risk adjustment, something that the plurality specifically refuses to address.<sup>358</sup> To begin, Justice Scalia notes that the risk premium used by the formula rate approach "is neither objective nor easily ascertainable."<sup>359</sup> While the effect of this flaw is minimized when the risk premium is relatively small compared to the prime rate, according to Justice Scalia, a properly computed risk premium would generally be greater than the prime rate in order to

350. *Id.* at 496-97.

351. *Id.* at 497.

352. *Id.*

353. *Id.*

354. *Id.* (citing *Koopmans v. Farm Credit Servs. of Mid-Am.*, 102 F.3d 874, 876 (7th Cir. 1996)).

355. *Id.* at 498.

356. *Id.* at 498 n.7.

357. *See id.* at 498-504.

358. *Id.* at 480 (plurality opinion) ("We do not decide the proper scale for the risk adjustment, as the issue is not before us.").

359. *Id.* at 498-99 (Scalia, J., dissenting).

ensure that secured creditors are fairly compensated.<sup>360</sup> Thus, Justice Scalia writes, “[w]hen the risk premium is the greater part of the overall rate, the formula approach no longer depends on objective and easily ascertainable numbers. The prime rate becomes the objective tail wagging a dog of unknown size.”<sup>361</sup>

Stemming from this lack of objectivity, according to Justice Scalia, is the fact that the application of the formula rate approach is anything but simple.<sup>362</sup> Instead, the formula approach requires a bankruptcy court to compute a risk premium in every case.<sup>363</sup> Thus, “judges will invariably grapple with [the] imponderables” such as “the probability of plan failure; . . . the rate of collateral depreciation; . . . the liquidity of the collateral market, and . . . the administrative expenses of enforcement.”<sup>364</sup> In contrast, Justice Scalia notes how the contract rate will reflect all of these risk factors because it is determined by the market.<sup>365</sup> Additionally, the contract rate can be easily found in the original loan document and need only be adjusted if the parties choose to contest it.<sup>366</sup>

Next, Justice Scalia rebuts the argument that the formula approach properly places the evidentiary burden on the creditor who has better access to the requisite information.<sup>367</sup> Justice Scalia points out that, “consciously choosing the less accurate estimate merely because creditors have better information smacks more of policymaking than of faithful adherence to the statutory command that the secured creditor receive property worth ‘*not less than* the allowed amount’ of its claim.”<sup>368</sup> Also, Justice Scalia predicts that in most consumer loan cases the cost of litigating the risk premium can make the issue not worth litigating.<sup>369</sup> Thus, Justice Scalia opines, “it is far more important that the initial estimate be accurate than that the burden of proving inaccuracy fall on the better informed party.”<sup>370</sup>

To illustrate his point, Justice Scalia uses the instant case as an example of the shortcomings of the formula rate approach.<sup>371</sup> According to Justice Scalia, there is nothing in the record to substantiate the recommendation of the 1.5% rate by the Tills’ expert witness—especially considering the fact that the witness admitted that he had only a marginal familiarity with the sub-prime market and that he had no familiarity with default rates or market collection costs.<sup>372</sup> “In light of these devastating concessions,” Justice

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360. *See id.* at 499.

361. *Id.*

362. *Id.*

363. *Id.* at 499.

364. *Id.*

365. *Id.*

366. *Id.*

367. *See id.* at 500.

368. *Id.* (quoting 11 U.S.C. § 1325(a)(5)(B)(ii) (emphasis added by the Court)).

369. *Id.*

370. *Id.*

371. *See id.* at 500-02.

372. *Id.* at 500-01.

Scalia writes, "it is impossible to view the 1.5% figure as anything other than a smallish number picked out of a hat."<sup>373</sup>

Next, Justice Scalia compares the nominal benefit the creditor would receive under the formula rate with the expected costs of default.<sup>374</sup> According to Justice Scalia's calculations, the benefit to SCS in this case would amount to about \$100.<sup>375</sup> Justice Scalia then compared this number with three costs of default, the first of which is the cost associated with depreciation of the collateral.<sup>376</sup> In this case, Justice Scalia calculated the cost of depreciation to be approximately \$550.<sup>377</sup>

Justice Scalia's second cost of default is liquidation.<sup>378</sup> Here, SCS was entitled to the \$4,000 replacement cost.<sup>379</sup> However, if the Tills were to default under their Chapter 13 plan, SCS would not be able to sell the truck for \$4,000 "because collateral markets are not perfectly liquid and there is thus a spread between what a buyer will pay and what a seller will demand."<sup>380</sup> According to Justice Scalia, the value of this spread in this case could be calculated to be about \$450.<sup>381</sup>

Justice Scalia's third and final cost of default is the administrative expenses associated with foreclosure.<sup>382</sup> To estimate these costs Justice Scalia notes how the automatic stay provided by § 362 of the Code bars

373. *Id.* at 501.

374. *Id.*

375. *See id.* at 501-02. To come to this number, Justice Scalia explains that if the 1.5% risk premium were fully paid it would produce about \$60.

Given its priority, and in light of the amended plan's reduced debtor contributions, the \$4,000 secured claim would be fully repaid by about the end of the second year of the plan. The average balance over that period would be about \$2,000, *i.e.*, half the initial balance. The total interest premium would therefore be  $1.5\% \times 2 \times \$2,000 = \$60$ . In this and all following calculations, I do not adjust for time value, as timing effects have no substantial effect on the conclusion.

*Id.* at 501 n.8. Next, Scalia notes that if the debtor defaulted, the expected value of the \$60 would be only \$50. *Id.* at 501. "Assuming a 37% rate of default that results on average in only half the interest's being paid, the expected value is  $\$60 \times (1-37\%/2)$ , or about \$50." *Id.* at 501 n.9. To this \$50, Scalia adds another \$50 that represents the compensation for risk that is already included in the prime rate. *Id.* at 501. Thus, the total expected benefit to SCS was \$100. *Id.* at 502.

376. *See id.* at 501-02.

377. *Id.* "On the original loan, depreciation (\$6,395 - \$4,000, or \$2,395) exceeded loan repayment (\$6,426 - \$4,895, or \$1,531) by \$864, *i.e.*, 14% of the original truck value of \$6,395. Applying the same percentage to the new \$4,000 truck value yields approximately \$550." *Id.* at 502 n.12.

378. *Id.* at 502.

379. *Id.*

380. *Id.* at 503.

381. *Id.* To come to this number Scalia used the *Rash* case as a rough guide. *Id.* at 503 n.13; *see* *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 965 (1997). "The truck in *Rash* had a replacement value of \$41,000 and a foreclosure value of \$31,875, *i.e.*, 22% less. If the market in this case had similar liquidity and the truck were repossessed after losing half its remaining value, the loss would be 22% of \$2,000, or about \$450." *Till*, 504 U.S. at 503 n.13 (Scalia, J., dissenting) (citing *Rash*, 520 U.S. at 957).

382. *Till*, 541 U.S. at 503 (Scalia, J., dissenting).



repossession of the collateral.<sup>383</sup> To overcome this bar, a creditor must pay a fee and file a motion to lift the stay.<sup>384</sup> Also, a creditor will incur attorney fees for filing such motions, which Justice Scalia calculates to be approximately \$600 or more.<sup>385</sup>

Thus, the total costs of default in this case would be \$1,600.<sup>386</sup> Because not all Chapter 13 plans fail, Justice Scalia applies the Tills' estimated 37% failure rate of Chapter 13 repayment plans to come to an expected cost of default of \$590.<sup>387</sup> To compensate for the disparity between the \$590 expected cost and the \$100 expected benefit, Justice Scalia notes that the risk premium would have to be 16% rather than the 1.5% adopted by the plurality.<sup>388</sup> Thus, in Justice Scalia's opinion, the plurality's rate is entirely inadequate and "is far below anything approaching fair compensation."<sup>389</sup>

#### 4. Justice Scalia Criticizes of Justice Thomas's Concurring Opinion

In response to Justice Thomas's opinion that § 1325(a)(5)(B)(ii) plans need only include a risk-free rate of interest, Justice Scalia presents four reasons why a plan must account for the risk of nonpayment.<sup>390</sup> The first is a contextual argument. While the cram down provision does not specifically mention the risk of nonpayment, Justice Scalia argues that the context of the other two options found in § 1325(a)(5) support a reading that includes a risk adjustment.<sup>391</sup> The creditor acceptance and collateral surrender options "are both creditor protective, leaving the secured creditor roughly as well off as he would have been had the debtor not sought bankruptcy protection."<sup>392</sup> Therefore, "it is unlikely the [cram down] option was meant to be substantially *under*protective; that would render it so much more favorable to debtors that few would ever choose one of the alternatives."<sup>393</sup>

Justice Scalia's second criticism of the risk-free approach is that it produces "anomalous results."<sup>394</sup> According to Justice Scalia, Justice Thomas admitted that if a note, rather than cash, was to be distributed under a plan, the note must take into account the risk of default.<sup>395</sup> Thus, the anomaly is that secured creditors would receive risk compensation in certain

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383. *Id.* (citing 11 U.S.C. § 362).

384. *Id.* at 503. Here, Scalia notes that the fee in this case would be \$150. *Id.* (citation omitted).

385. *Id.* In Indiana and other states, Scalia points out that attorney fees range anywhere from \$350 to \$875 per motion. *Id.* (citation omitted).

386. *Id.*

387. *Id.* at 503.

388. *Id.* at 504.

389. *Id.*

390. *See id.* at 505-508.

391. *Id.* at 505.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

cases that have no practical difference from other cases where no such compensation is allowed.<sup>396</sup>

The third criticism is that the circuits have all rejected the risk-free approach.<sup>397</sup> According to Justice Scalia, there is no evidence that the lower courts have adopted the risk-free approach, and Justice Thomas never identifies such a case.<sup>398</sup>

Justice Scalia's final criticism of the risk-free approach is that it is not supported by the Court's decision in *Rash*.<sup>399</sup> Justice Thomas argued that because the *Rash* decision set the value of collateral at the higher debtor replacement cost, the secured creditor has already been compensated.<sup>400</sup> Yet, as Justice Scalia argues, while *Rash* did point out that there is a greater risk involved in retention of collateral rather than surrender, the Court "made no effort to correlate that increased risk with the difference between replacement and foreclosure value."<sup>401</sup> According to Justice Scalia, "[n]othing in the opinion suggests that we thought the valuation difference reflected the degree of increased risk, or that we adopted the replacement-value standard *in order to compensate* for increased risk."<sup>402</sup> Additionally, Justice Scalia remarks that setting a specific approach to valuing collateral would not be the choice action "[i]f Congress wanted to compensate secured creditors for the risk of plan failure."<sup>403</sup>

To conclude his opinion, Justice Scalia notes that "[e]very action in the free market has a reaction somewhere."<sup>404</sup> Justice Scalia argues that the systematic undercompensation of secured creditors in cram down plans will result in an increase in interest rates overall and a decrease in the access to credit.<sup>405</sup> Thus, because cram down requires full compensation for risk, Justice Scalia adopts the presumptive contract rate approach because it "has a realistic prospect of enforcing that directive."<sup>406</sup>

396. *Id.* at 505-06 ("There is no conceivable reason why Congress would give secured creditors risk compensation in one case but not the other.")

397. *Id.* at 506.

398. *Id.*; see also *supra* note 317 and accompanying text.

399. *Till*, 541 U.S. at 506 (Scalia, J., dissenting) (citing *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997)).

400. *Id.*; see also *supra* note 309 and accompanying text.

401. *Till*, 541 U.S. at 507 (Scalia, J., dissenting).

402. *Id.*

403. *Id.*

404. *Id.* at 508.

405. *Id.*

406. *Id.*

## F. Critique of Justice Scalia's Dissenting Opinion

Although Justice Scalia did not speak for a majority of the Court, his dissenting opinion was able to draw the support of three other Justices.<sup>407</sup> Indeed, if he had been able to garner the support of just one more Justice, his opinion would be the majority rather than the dissent. Nevertheless, there are reasons why a majority of the Court did not see things as Justice Scalia saw them.

One of Justice Scalia's principal reasons for dissenting is that, in his view, the formula rate approach "will systematically undercompensate secured creditors."<sup>408</sup> While this statement may be true, it is important to remember that Congress intended Chapter 13 bankruptcy to allow debtors to get back on their feet.<sup>409</sup> In addition to this pro-debtor stance, Chapter 13 was intended to be an alternative to liquidation under Chapter 7.<sup>410</sup> In this sense, Chapter 13 benefits creditors in that many times they will be able to recover more under a repayment plan than under liquidation.<sup>411</sup> Thus, the concern over undercompensation is minimized when creditors receive more value than under a liquidation proceeding.

Another concern over Justice Scalia's presumptive contract rate approach is that it places a significant burden of proof on the shoulders of the debtor. In his defense, Justice Scalia states that the contract rate will only become an issue if the parties choose to dispute it.<sup>412</sup> Yet in reality, it is difficult to imagine a situation where a debtor would not want to contest the rate which may have contributed to his current financial plight. To do this, the debtor is forced to take on the task of investigating the creditor rather than focusing his efforts on drafting a feasible repayment plan.<sup>413</sup> Indeed, Justice Scalia himself notes how the debtor may need to present evidence in order to show that the creditor is substantially oversecured.<sup>414</sup> Thus, the presumptive contract rate heaps the burden of proving the creditor's financial condition onto the plate of a consumer who is already faced with financial pressures and the difficulty associated with filing for bankruptcy.<sup>415</sup>

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407. Justice Scalia was joined in his dissent by Chief Justice Rehnquist and Justices O'Connor and Kennedy. *Id.* at 491.

408. *Id.* at 492.

409. H.R. REP. NO. 95-595, at 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079 ("[Consumer] bankruptcy relief should be effective, and should provide the debtor with a fresh start.").

410. *See* H.R. REP. NO. 95-595, at 118, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079.

411. H.R. REP. NO. 95-595, at 118, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079 ("The benefit to creditors [under Chapter 13] is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.").

412. *Till*, 541 U.S. at 499 (Scalia, J., dissenting).

413. *Id.* at 478 (plurality opinion) ("The debtor must obtain information about the creditor's costs of overhead, financial circumstances, and lending practices to rebut the presumptive contract rate.").

414. *Id.* at 499 (Scalia, J., dissenting).

415. Proponents of the presumptive contract rate, however, argue that the formula rate yields much too low an estimate. *Id.* at 500. In contrast, the presumptive contract rate is more reflective of the actual costs and risk involved in Chapter 13 repayment plans. *Id.* Therefore, "it is far more important that the initial estimate be accurate than that the burden of proving inaccuracy fall on the better informed party." *Id.*

Finally, Justice Scalia's endorsement of the presumptive contract rate may be undermined by the fact that Congress may have already rejected the approach. In 1983, Congress considered but ultimately rejected a bill that would have supported the presumptive contract rate.<sup>416</sup> Given this action, a red flag is raised as to whether the approach advocated by Justice Scalia comports with congressional intent.<sup>417</sup>

## VII. THE IMPACT OF *TILL* V. *SCS CREDIT CORP.*

In *Till*, the Court sought to give meaning to the phrase "value, as of the effective date of the plan."<sup>418</sup> While the opinions in *Till* specifically addressed cram down in Chapter 13, the case is likely to have repercussions in other areas of the Code that contain similar cram down language.<sup>419</sup> This section will first discuss the value of *Till*'s precedent and subsequent bankruptcy court decisions and then address the likely impact of *Till* on the Code and on financial markets as a whole.

### A. Is *Till* Binding Precedent?

While many anticipated a resolution to the cram down interest rate issue,<sup>420</sup> the Court in *Till* did not provide us with a clear-cut majority answer.<sup>421</sup> Because *Till* is a plurality opinion with no majority, questions arise as to its precedential value on lower courts.<sup>422</sup> In this case, there are

416. *Id.* at 480 n.19 (plurality opinion) (citing H.R. 1085, 98th Cong. § 19(2)(A) (1983)).

417. See Krawitz, *supra* note 107, at 904.

418. 11 U.S.C. § 1325(a)(5)(B)(ii) (2000).

419. See 11 U.S.C. § 1129(b)(2)(A)(i)(II) (2000) (cram down provision under Chapter 11 bankruptcy); 11 U.S.C. § 1225(a)(5)(B)(ii) (2000) (cram down provision under Chapter 12 bankruptcy); Thomas J. Yerbich, *How Do You Count the Votes—or Did Till Tilt the Game?*, 23-6 AM. BANKR. INST. J. 10, 10 (2004); *Till v. SCS Credit Corp.—U.S. Supreme Court Rejects Application of Contract Rate to Deferred Cram Down Payments*, SHEARMAN & STERLING CLIENT PUBL'N., May 24, 2004, [http://www.shearman.com/documents/CM\\_052404.pdf](http://www.shearman.com/documents/CM_052404.pdf).

420. Roger S. Cox & Marc W. Taubenfeld, *Bankruptcy and Creditors' Rights*, 57 SMU L. REV. 611, 614 (2004) (anticipating *Till* as providing a resolution to the issue of the proper Chapter 13 cram down interest rate method); Hon. Barbara J. Houser et al., *Disclosure Statements; Confirmation and Cramdown of Chapter 11 Plans*, SJ082 A.L.I.-A.B.A. PROGRAM MATERIAL 305, 341 (2004) (anticipating *Till* as providing a resolution to the issue of the proper Chapter 11 cram down interest rate method).

421. Justice Stevens announced the judgment of the Court and delivered a plurality opinion in which Justice Souter, Justice Ginsburg, and Justice Breyer joined. *Till*, 541 U.S. at 467. Justice Thomas concurred only in the judgment of the plurality and wrote a separate opinion. *Id.* at 485. Justice Scalia delivered a dissenting opinion in which Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy joined. *Id.* at 491.

422. 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 . . .'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); Yerbich, *supra* note 419, at 10 ("Plurality pronouncements have long been the bane of lower federal

two ways to view the Court's plurality opinion. First, because the formula rate and the presumptive contract rate each drew the support of four justices, one option is to view this split as giving bankruptcy courts a choice between the two methods.<sup>423</sup> The second option is to view the *Till* opinion as giving bankruptcy courts a majority answer on which methods *not* to use. For example, since the plurality adopted the formula rate and Justice Thomas adopted the risk-free rate, it follows that a majority of the court rejected all other approaches including the presumptive contract approach argued by the dissent.<sup>424</sup> While the precedent of *Till* may be susceptible to different interpretations, recent bankruptcy court decisions dealing with cram down issues lend support to the latter option.<sup>425</sup>

### B. Subsequent Bankruptcy Court Decisions

As of August 2005, there have been twelve post-*Till* court decisions that have addressed the Chapter 13 cram down interest rate issue.<sup>426</sup> In eleven of these cases, the bankruptcy courts followed the formula rate approach as adopted by the plurality in *Till*.<sup>427</sup> Thus, it appears that the immediate trend among bankruptcy courts is to follow the plurality's formula rate approach.<sup>428</sup> In fact, some have even read *Till* as definitively ending the dispute over the proper cram down interest rate.<sup>429</sup> Despite this readiness to adopt the formula rate approach, at least one court has decided to not to follow the plurality holding of *Till*.<sup>430</sup>

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courts in attempting to apply them."); Walker & Nickell, *supra* note 187, at 1128 ("The lack of a majority opinion raises the question of whether *Till* is binding precedent.").

423. See Walker & Nickell, *supra* note 187, at 1128 ("Whether or not the courts will be able to find some narrow grounds of agreement on which to base future decisions remains to be seen.").

424. See Yerbich, *supra* note 419, at 10.

425. See *infra* Part VII.B.

426. See *In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal., 2005); *In re Caple*, No. 05-50213, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005); *In re Cook*, 322 B.R. 336 (Bankr. N.D. Ohio 2005); *In re Pike*, No. 03-16382, 2005 Bankr. LEXIS 381 (Bankr. D. Kan., Mar. 10, 2005); *In re Willoughby*, 324 B.R. 66 (Bankr. S.D. Ind., 2005); *Nowlin v. Tammac Fin. Corp.* (*In re Nowlin*), 321 B.R. 678 (Bankr. E.D. Pa., 2005); *In re Berksteiner*, No. 03-13203, 2004 Bankr. LEXIS 1576 (Bankr. S.D. Ga. Sept. 9, 2004); *In re Bivens*, 317 B.R. 755 (Bankr. N.D. Ill. 2004); *In re Harken*, No. 04-02914, 2004 Bankr. LEXIS 2062 (Bankr. N.D. Iowa Nov. 29, 2004); *In re Pokrzywinski*, 311 B.R. 846 (Bankr. E.D. Wis. 2004); *In re Scrogum*, No. 04-72289, 2004 Bankr. LEXIS 1376 (Bankr. C.D. Ill. Sept. 15, 2004); *In re Smith*, 310 B.R. 631 (Bankr. D. Kan. 2004).

427. See *In re Cachu*, 321 B.R. at 718-19; *In re Caple*, 2005 Bankr. LEXIS 1094, at \*27; *In re Pike*, 2005 Bankr. LEXIS 381, at \*6; *In re Willoughby*, 324 B.R. at 70; *In re Nowlin*, 321 B.R. at 685; *In re Berksteiner*, 2004 Bankr. LEXIS 1576, at \*3-4; *In re Bivens*, 317 B.R. at 763; *In re Harken*, 2004 Bankr. LEXIS 2062, at \*3; *In re Pokrzywinski*, 311 B.R. at 849; *In re Scrogum*, 2004 Bankr. LEXIS 1376, at \*3; *In re Smith*, 310 B.R. at 633.

428. See Craig Rankinand & Christopher Alliotts, *The Importance of 'Till'*, NAT'L L.J., Sept. 6, 2004, at 13 ("[T]he plurality's more traditional formula approach will probably continue to be the method applied by bankruptcy courts.").

429. See, e.g., *In re Bivens*, 317 B.R. at 763 ("The Supreme Court ended the dispute among the circuit courts as to which approach provides equivalent present value of an allowed secured claim as paid over time when it decided *Till v. SCS Credit Corp.*").

430. See *infra* notes 431-36 and accompanying text.

In Ohio, a bankruptcy court recently decided to eschew *Till*'s formula rate approach in favor of the coerced loan approach that the Sixth Circuit had previously adopted.<sup>431</sup> In that case, the court was faced with the cram down provision of § 1325(a)(4), which deals with unsecured creditors in Chapter 13 proceedings.<sup>432</sup> While *Till* addressed secured creditors under § 1325(a)(5)(B), both provisions contain the identical cram down language of "value, as of the effective date of the plan."<sup>433</sup> Nevertheless, the court held that *Till* was not binding authority because there was no majority opinion.<sup>434</sup> In its reasoning, the court stated that "the opinion of five Justices makes the law of the land, but the opinion of four Justices makes interesting reading."<sup>435</sup>

Despite this single case, however, the majority of bankruptcy courts have followed the plurality's formula rate approach.<sup>436</sup> Yet while there appears to be some agreement in the context of Chapter 13 consumer debt adjustment, it remains to be seen whether *Till* will be applicable in contexts other than Chapter 13 cases.<sup>437</sup>

### C. How Will *Till* Affect Bankruptcy Under Chapter 11?

While the specific facts of *Till* limited the opinions of the Court to the Chapter 13 context, *Till*'s impact may affect Chapter 11,<sup>438</sup> which contains a similar cram down provision.<sup>439</sup> Indeed, Justice Stevens noted that it was "likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of [the cram down] provisions."<sup>440</sup> While this statement may seem to indicate that *Till* applies to all cram down provisions, commentators have raised some questions as to whether or not *Till* should be applied in the

431. *In re Cook*, 322 B.R. at 346.

432. See 11 U.S.C. § 1325(a)(4) (2000); *In re Cook*, 322 B.R. at 339.

433. Compare 11 U.S.C. § 1325(a)(4) (2000) ("[V]alue, as of the effective date of the plan . . ."), with 11 U.S.C. § 1325(a)(5)(B)(ii) (2000) ("[V]alue, as of the effective date of the plan . . .").

434. See *In re Cook*, 322 B.R. at 341-45. "The lack of a legal rationale shared by five Justices leads to the inescapable conclusion that *Till* does not produce binding precedent." *Id.* at 341

435. *Id.* at 344.

436. See *supra* note 426-27 and accompanying text.

437. See *infra* Part VII.C.

438. Chapter 11 of the Code deals with commercial reorganization. See generally 11 U.S.C. §§ 1101-1174 (2000).

439. See 11 U.S.C. § 1129(b)(2)(A)(i)(II) (2000) (cram down provision under Chapter 11 bankruptcy); see also John J. Rapisardi, *Court Adopts Chapter 13 Interest Rate for Secured Creditors*, N.Y.L.J., July 22, 2004, at 3 ("The *Till* plurality's rejection of the market approach to determining value may have repercussions in other areas of the Bankruptcy Code, such as determining the valuation of a company in the context of making distributions to creditors under a chapter 11 plan of reorganization.")

440. *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 (2004) (plurality opinion).

Chapter 11 context.<sup>441</sup> Some of these suspicions seem to stem from an unassuming footnote in Justice Stevens's plurality opinion.<sup>442</sup> In that footnote, Justice Stevens reminds us that there is no readily apparent market for cram down loans in the Chapter 13 context.<sup>443</sup> Justice Stevens goes further, however, and notes that "the same is *not* true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession."<sup>444</sup> Thus, Justice Stevens recommends that "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce."<sup>445</sup>

According to one commentator, Justice Stevens's note "appear[s] to leave the door open to argument that the formula approach should not apply because of the existence of a [debtor in possession] lending market that can act as a benchmark for cram-down interest rates."<sup>446</sup> The fact that there is no efficient market for sub-prime auto loans seems to have been a major reason why Justice Stevens adopted the formula rate approach.<sup>447</sup> In contrast, there does appear to be an efficient sub-prime loan market in Chapter 11 cases,<sup>448</sup> and, therefore, "we are left to wonder if footnote 14 nullifies *Till* in a chapter 11 context . . . , modifies its application or is merely an irrelevant musing."<sup>449</sup> Also, the fact that this footnote is dicta adds to the uncertainty.<sup>450</sup> In the words of one commentator, "[w]e are left once again to wrestle with the dreaded footnote, which in the twinkling of an eye renders what might have been a consistent . . . opinion into an ambiguous platform in the Chapter 11 context."<sup>451</sup>

In addition to the ambiguities raised by Justice Stevens's footnote, another question threatens *Till*'s effect on Chapter 11. This issue stems from

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441. Daniel J. Carragher, *News at 11: What the Supreme Court's Prime Plus Ruling Means for Chapter 11*, 23-6 AM. BANKR. INST. J. 26, 26 (2004) ("[T]here are many reasons why the *Till* ruling should not affect existing precedents under chapter 11."); Douglas, *supra* note 286 ("[W]e are left to speculate concerning *Till*'s impact on cram-down interest rates under a chapter 11 plan."); Greenspan & Nelson, *supra* note 288, at 48 ("[P]articularly in a chapter 11 context, *Till* raises a host of issues and contains numerous internal contradictions that inevitably will only be resolved upon application and appeal.").

442. See *Till*, 541 U.S. at 477 n.14 (plurality opinion).

443. *Id.*

444. *Id.* (citing, e.g., Balmoral Financial Corporation, <http://www.balmoral.com/bdip.htm>; Debtor in Possession Financing: 1st National Assistance Finance Association DIP Division, <http://www.loanmallusa.com/dip.htm>).

445. *Id.*

446. Douglas, *supra* note 286.

447. Greenspan & Nelson, *supra* note 288, at 48.

448. See *supra* note 444 and accompanying text.

449. Greenspan & Nelson, *supra* note 288, at 48. Yet according to one commentator, *Till* may nevertheless have a lingering effect on Chapter 11 in that creditors will "face an uphill battle in opposing confirmation of a plan that utilizes the formula rate in a chapter 11 case." *Till v. SCS Credit Corp.—U.S. Supreme Court Rejects Application of Contract Rate to Deferred Cram Down Payments*, SHEARMAN & STERLING CLIENT PUBL'N., May 24, 2004, [http://www.shearman.com/documents/CM\\_052404.pdf](http://www.shearman.com/documents/CM_052404.pdf).

450. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935) (finding that dicta "may be followed if sufficiently persuasive" but are not controlling).

451. Robert C. Goodrich, Jr. & Madison Cashman, *Money in the "Till"*, 2004 NO. 10 NORTON BANKR. L. ADVISER 1.

the different policy concerns raised by Chapter 11 and Chapter 13.<sup>452</sup> In his endorsement of the formula rate approach, Justice Stevens was aware that the process of filing for Chapter 13 debt adjustment should be as simple and straightforward as possible for the debtor.<sup>453</sup> In fact, Justice Stevens made a conscious effort to place the evidentiary burden squarely on the shoulders of the secured creditor.<sup>454</sup> Yet some would argue that the same policy concerns are not present in the Chapter 11 context, and, thus, the *Till* ruling should not apply.<sup>455</sup> As one commentator stated:

The Court was split, we suspect, because this case involved a consumer debtor. Although Chapter 13's cramdown provision is theoretically identical in substance to § 1129(b)(2)(A), we doubt the Court would have reached the same conclusion if the secured lender were the United States with a tax lien or if the debtor were a business debtor.<sup>456</sup>

Therefore, because Chapter 13 involves consumers and Chapter 11 involves commercial entities, the different policy concerns attached to each may limit *Till*'s reach.<sup>457</sup> Nevertheless, *Till* will likely "provide additional fodder for business debtors to squeeze secured lenders in contested bankruptcy confirmations."<sup>458</sup>

With the uncertainties raised by Justice Stevens's footnote and the various policy concerns involved in applying *Till* to Chapter 11 cram down cases, it may be helpful to examine how bankruptcy courts have addressed this issue. As of August 2005, at least two bankruptcy courts have examined *Till*'s effect on Chapter 11's cram down provision.<sup>459</sup> Interestingly, both cases refused to hold *Till*'s formula rate approach as binding authority, finding that "*Till* is instructive, but it is not controlling, insofar as mandating

452. See Carragher, *supra* note 441, at 26, 64.

453. See *Till v. SCS Credit Corp.*, 541 U.S. 465, 479 (plurality opinion) (noting how the formula approach "entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings.").

454. *Id.*

455. Carragher, *supra* note 441, at 26.

456. Michael L. Cook, *Preface to 1 UNDERSTANDING THE BASICS OF BANKRUPTCY & REORGANIZATION 2004*, at 27, 40 (Lewis Kruger ed., 2004). "Causing the lender to bear [the evidentiary] burden in a consumer bankruptcy case . . . is quite different from requiring the lender to bear it in the business reorganization context." *Id.*

457. See Carragher, *supra* note 441, at 26; see also Greenspan & Nelson, *supra* note 288, at 48 (recognizing that *Till* may not apply to complex Chapter 11 cases that involve businesses rather than individuals); Clyde Mitchell, *High Court Takes Interest in 'Cramming Down' Banks*, N.Y.L.J., July 14, 2004, at 3 ("*Till* involved a consumer debtor, and thus, the case may be limited to its unique facts.").

458. Dennis J. Connolly, *High Court Cram-Down Decision Will Have Big Impact: The Plurality Opinion in 'Till' Will Have Economic Effects on Lenders, Creditors*, NAT'L L.J., Aug. 9, 2004, at 20.

459. See *In re Am. Homepatient, Inc.*, Nos. 03-6500/03-6501, 2005 U.S. App. LEXIS 17203 (6th Cir. 2005); *In re Prussia Assocs.*, 322 B.R. 572 (Bankr. E.D. Pa. 2005).



the use of the ‘formula’ approach described in *Till* in every Chapter 11 case.”<sup>460</sup> Although one of these courts did apply the formula approach to the Chapter 11 case, it stated that *Till* was merely a fallback and not binding authority in all Chapter 11 cases.<sup>461</sup>

#### D. *What Does Till Mean for the Average Consumer Filing for Chapter 13 Relief?*

While there may be some uncertainty as to whether *Till* should apply to Chapter 11, the plurality’s formula rate approach will most likely be used by bankruptcy courts in the Chapter 13 context.<sup>462</sup> This will affect the Chapter 13 debtor in two ways. First, in the words of Justice Stevens, debtors now have a “straightforward, familiar, and objective inquiry.”<sup>463</sup> All debtors need to do is set the cram down rate at prime and then adjust it for risk.<sup>464</sup> While disputes could arise as to the proper risk adjustment,<sup>465</sup> as long as debtors add 1% to 3% to the prime rate their chances of confirmation are very good.<sup>466</sup> In any case, “*Till* gives debtors extra leverage by placing the burden on the secured creditor to demonstrate what the risk premium for a cram-down loan should be.”<sup>467</sup>

Second, setting the cram down interest at the low prime-plus-risk rate is likely to save debtors millions in finance charges every year.<sup>468</sup> These savings, in turn, will make the debtors’ repayment plans more manageable and will provide more money to pay unsecured creditors.<sup>469</sup>

#### E. *What Does Till Mean for the Sub-Prime Lending Markets?*

While *Till* presents significant advantages to the Chapter 13 debtor, the case is likely to have a detrimental effect on the sub-prime lending markets as a whole.<sup>470</sup> For example, because *Till* allows debtors to deprive sub-prime lenders of their initial high contract rates, these lenders will have to

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460. *In re Am. Homepatient, Inc.*, 2005 U.S. App. LEXIS 17203, at \*19 (citing *In re Prussia Assocs.*, 322 B.R. at 585).

461. *In re Prussia Assocs.* 322 B.R. at 590.

462. See Rankinand & Alliotts, *supra* note 428, at 13; Yerbich, *supra* note 419, at 10; see also *supra* Part VII.B (explaining how all post-*Till* bankruptcy court decisions dealing with the proper Chapter 13 cram down rate have applied the formula approach).

463. *Till v. SCS Credit Corp.*, 541 U.S. 465, 479 (2004) (plurality opinion).

464. *Id.*

465. See Dan Schechter, *Supreme Court Approves “Formula Approach” to Cramdown Interest: Ruling Will Affect Subprime Market and May Affect Commercial Finance*, Com. Fin. News, May 24, 2004, at 36.

466. Yerbich, *supra* note 419, at 59.

467. Douglas, *supra* note 286.

468. James J. Haller, *What Till v. SCS Credit Corp. Means for Your Chapter 13 Clients*, 92 Ill. B.J. 478, 480 (2004) (estimating that as a result of the lower interest rates presented by the formula rate method Chapter 13 debtors will save over \$335 million per year nationwide).

469. *Id.*

470. See Connolly, *supra* note 458, at 20; Douglas, *supra* note 286; Schechter, *supra* note 465, at 36.

turn to other methods of making profits.<sup>471</sup> This, in turn, may force creditors to charge higher up-front fees and increase their sub-prime interest rates across the board.<sup>472</sup> Thus, in the words of one commentator, these "other means of extracting value . . . can only mean bad news for the nation's riskiest borrowers."<sup>473</sup>

*F. How Will the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Affect Chapter 13 Filings?*

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.<sup>474</sup> Aimed at those who "walk[] away from debts even when they [have] the ability to repay them,"<sup>475</sup> the 2005 Act makes it more difficult to file for liquidation under Chapter 7 and forces more debtors to turn to repayment plans under Chapter 13.<sup>476</sup>

This reform is accomplished through a more stringent qualification test for those seeking Chapter 7 relief.<sup>477</sup> Prior to the 2005 Act, if it was determined that the debtor abused Code provisions, the case would be dismissed.<sup>478</sup> This abuse included unreasonable delays by the debtor, nonpayment of fees or charges, and the failure to file certain documents required by the bankruptcy court.<sup>479</sup> The 2005 Act, however, amended Chapter 7 to include an additional presumption of abuse that can arise if the debtor fails a two-part test.<sup>480</sup> Under this test, the first level of inquiry is whether the debtor's annual income falls below the median family income of those who reside in the applicable state.<sup>481</sup> If the debtor is below the state

471. Douglas, *supra* note 286; *see also* Connolly, *supra* note 458, at 21 ("[I]nvestors will require more of a cushion to address bankruptcy issues.").

472. Douglas, *supra* note 286 ("[Till's repercussions] could entail higher front-end fees, even higher interest rates"); Schechter, *supra* note 465, at 36 ("[L]enders will have to 'frontload' [cram down] risk by building it into every borrower's interest rates.").

473. Douglas, *supra* note 286.

474. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, § 102(g) (to be codified at 11 U.S.C. § 1325(a)(7)); Nedra Pickler, *Bush Signs Big Rewrite of Bankruptcy Law*, ASSOCIATED PRESS NEWSWIREs, April 20, 2005, available at <http://abcnews.go.com/Politics/WireStory?id=688026>.

475. Press Release, The White House, President Bush Signs Bankruptcy Abuse Prevention, Consumer Protection Act (April 20, 2005), <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html> [hereinafter White House Press Release].

476. Jeanne Sahadi, *President Signs Bankruptcy Bill* (April 20, 2005), [http://money.cnn.com/2005/04/20/pf/bankruptcy\\_bill/](http://money.cnn.com/2005/04/20/pf/bankruptcy_bill/).

477. *See id.*

478. *See* 11 U.S.C. § 707 (2000).

479. *See* 11 U.S.C. § 707(a).

480. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, § 102(a)(2)(C) (to be codified at 11 U.S.C. §§ 707(b)(2)(A), (b)(6)-(7)).

481. *See id.* § 102(a)(2)(C) (to be codified at 11 U.S.C. § 707(b)(6)-(7)).

median income, then the presumption of abuse will not arise and that individual may still qualify for Chapter 7 relief.<sup>482</sup> If the debtor is above the median income, however, then the individual is subjected to a second level of inquiry to determine whether or not he or she can afford to repay debtors.<sup>483</sup>

Under this second level, the debtor must pass a means test which involves a calculation of monthly income. First, the debtor's monthly earnings are reduced by necessary living expenses as determined by Internal Revenue Service (IRS) standards.<sup>484</sup> The reduced monthly income is then multiplied by sixty months.<sup>485</sup> To avoid a presumption of abuse, this total amount must be less than the lesser of (i) \$10,000 or (ii) 25% of unsecured claims, or \$6,000, whichever is greater.<sup>486</sup> If the debtor fails this second test, then a presumption of abuse arises which prohibits the debtor from filing for liquidation under Chapter 7.<sup>487</sup>

Thus, the new legislation—which is set to take effect on October 17, 2005<sup>488</sup>—“will help ensure that debtors make a good-faith effort to repay as much as they can afford.”<sup>489</sup> Consequently, the Act will force more individuals to file for repayment plans under Chapter 13.<sup>490</sup> Because of this anticipated increase in consumer debt adjustment filing, it follows that more secured creditors will be subjected to the cram down provision of Chapter 13 and the holding of *Till*.

## VIII. CONCLUSION

In *Till*, the Supreme Court sought to bring clarity to the “murky waters” that are the Bankruptcy Code's cram down provisions.<sup>491</sup> Despite these good intentions, the Court's decision may have brought more confusion to the issue.<sup>492</sup> On one hand, *Till* has provided a guide from which debtors can model their repayment plans, creditors can strategize, and bankruptcy courts can follow.<sup>493</sup> Indeed, bankruptcy cases subsequent to the Court's decision

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482. *See id.*

483. *See id.*

484. *Id.* § 102(a)(2)(C) (to be codified at 11 U.S.C. § 707(b)(2)(A)(i)).

485. *Id.*

486. *Id.* For example, assume that Debtor's reduced monthly income over sixty months totals \$5,900 and 25% of his unsecured claims equals \$5,000. Although the \$5,000 is less than \$10,000, Debtor's reduced income will be compared with \$6,000 because it is greater than 25% of his unsecured debts. In this case, Debtor avoids the presumption of abuse because his reduced income is less than the \$6,000 minimum. As a further example, assume that Debtor's reduced monthly income total now amounts to \$9,900 and 25% of his unsecured claims equals \$15,000. Because the unsecured claim percentage is greater than \$10,000, the \$10,000 number controls. In this instance, Debtor may also avoid the presumption of abuse because his reduced income is less than \$10,000.

487. *See id.*

488. Epstein, *supra* note 88, at B7.

489. White House Press Release, *supra* note 475.

490. Sahadi, *supra* note 476.

491. *See* Connolly, *supra* note 458, at 20.

492. Goodrich, *supra* note 451, at 1.

493. *See* Yerbich, *supra* note 419, at 59.

have adopted and applied the plurality's formula rate method.<sup>494</sup> On the other hand, the lack of a majority opinion severely limits *Till*'s application beyond Chapter 13 proceedings.<sup>495</sup> Because of its narrow scope and a solitary footnote in the plurality opinion, commentators are left to wonder how or if *Till* will apply in the Chapter 11 context of commercial reorganization.<sup>496</sup> Certainly, "the decision leaves significant uncertainty in the area of valuation of deferred payment streams."<sup>497</sup>

In short, *Till* leaves us with three questions: Is *Till* the last word on the proper method for computing cram down rates? Will the plurality's formula rate approach apply to Chapter 11 bankruptcy cases? Will Congress amend the Code and provide us with its intended meaning of the words "value, as of the effective date of the plan?" Only time can answer these questions.

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494. See *supra* Part VII.B.

495. See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("[W]hen 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 . . .'" (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

496. See discussion *supra* Part VII.C.

497. *Connolly*, *supra* note 458, at 21.

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