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No More Russian Roulette: Chapter 13 “Cram-down” Creditors Take a Bullet

*Till v. SCS Credit Corp.*¹

I. INTRODUCTION

Until the United States Supreme Court’s decision in *Till v. SCS Credit Corp.*,² secured creditors in Chapter 13 bankruptcy cases likely viewed the forced acceptance of a debtor’s Chapter 13 repayment plan as a high-stakes game of chance. Prior to this decision, the interest rate applied to the deferred payments to “cram-down” creditors³ varied dramatically, depending upon the jurisdiction in which the debtor filed bankruptcy and the broad discretion of the bankruptcy court judge. However, by misinterpreting the legislative intent of Congress, the Supreme Court adopted a standard that will consistently under-compensate creditors. Suddenly, secured creditors’ high-stakes game of chance has become a game of Russian Roulette using a fully-loaded gun – no longer do they even have hope of escaping a harsh result.

In addition, the economic impact of the court’s decision may extend well beyond the profit margins of Chapter 13 creditors. To compensate for their low rate of return in bankruptcy cases, creditors will likely increase interest rates to all borrowers. This reaction could both dampen consumer confidence and force additional debtors into bankruptcy. The Court indicated *Till* may also apply to equivalent cram-down provisions in Chapter 11 corporate reorganization plans. As the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005⁴ becomes law, the economic ripple effect of *Till* will be magnified as even greater numbers of debtors are funneled into Chapter 13 bankruptcy.

II. FACTS AND HOLDING

On October 2, 1998, Lee and Amy Till purchased a used truck from Instant Auto Finance (“Instant Auto”) for \$6,725.75, including fees and taxes.⁵

1. 541 U.S. 465 (2004).

2. *Id.*

3. The term “cram-down” refers a statutory provision allowing a bankruptcy judge to confirm a debtor’s Chapter 13 debt repayment plan over the objection of the creditor. *See infra* notes 49-50 and accompanying text; 11 U.S.C. § 1325(a)(5)(B)(ii) (2000).

4. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Congress (2005).

5. *Till*, 541 U.S. at 469 (plurality opinion). The purchase price of the truck was \$6,395 plus \$330.75 in fees and taxes. *Id.*

They made a \$300 down payment and financed the remaining balance by entering into a retail installment contract with Instant Auto.⁶ The contract provided for sixty-eight bi-weekly payments spread over 136 weeks with an annual interest rate of 21%.⁷ The resulting \$1,859.49 interest obligation brought the Tills' total indebtedness to \$8,285.24.⁸ Instant Auto immediately assigned the contract to SCS Credit Corporation (SCS).⁹ As provided in the contract, SCS retained a purchase money security interest, which gave SCS the right to repossess the truck if the Tills defaulted on the contract.¹⁰

A year later, the Tills were in default on their payments to SCS and other creditors.¹¹ On October 25, 1999, they filed a joint Chapter 13 bankruptcy petition.¹² The bankruptcy petition placed an automatic stay on the debt-collection activity of SCS and the Tills' other creditors.¹³ In addition, the filing created a trustee-administered bankruptcy estate that included the truck.¹⁴ At the time of the filing, the Tills' outstanding debt to SCS amounted to \$4,894.89, while the truck securing the debt was worth only \$4,000.¹⁵ Under the Bankruptcy Code, SCS's secured claim was limited to \$4,000,¹⁶ and the remaining \$894.89 balance was retained as an unsecured claim.¹⁷

The Tills proposed a three-year debt adjustment plan requiring them to submit \$740 of their wages to the court-appointed bankruptcy trustee each

6. *Id.* at 470.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* In addition to SCS, other creditors included in the Tills' bankruptcy petition included the Internal Revenue Service, three other holders of secured claims, and unidentified unsecured creditors. *Id.*

12. *Id.*

13. *Id.*; see 11 U.S.C. § 362 (2000).

14. *Id.*

15. *Id.*

16. *Id.* 11 U.S.C. § 506(a) (2000) provides:

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 or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

17. *Till*, 541 U.S. at 470 (citing 11 U.S.C. § 541(a) (2000); 11 U.S.C. § 1306(a) (2000)).

month.¹⁸ According to the plan, the trustee would then distribute the assigned wages to the appropriate creditors according to the following priority: (1) administrative costs, (2) the Internal Revenue Service's priority tax claim, (3) claims of secured creditors, and (4) claims of unsecured creditors.¹⁹

The proposed plan also provided that the Tills would pay interest on the secured portion of SCS's claim at a rate of 9.5% per year.²⁰ They arrived at this "formula rate" by taking the national prime rate of approximately 8%²¹ and adding 1.5% for an estimated risk of non-payment.²² SCS objected to the proposed rate, claiming it was entitled to a "forced loan rate" of 21%, the rate it would earn if it foreclosed on the debt and reinvested the funds by making loans to comparable debtors.²³

The bankruptcy court held a hearing on the issue, and SCS presented expert testimony that creditors routinely receive 21% interest on loans to debtors with poor credit ratings.²⁴ The Tills argued a court-supervised repayment plan limited the risk of non-payment and, consequently, should reduce the interest rate.²⁵ The bankruptcy trustee supported the Tills' use of the formula rate.²⁶ The trustee reasoned this method makes the appropriate rate easily ascertainable based on the present condition of the financial market, rather than making an independent inquiry into the circumstances of the individual creditor.²⁷ After considering the testimony, the bankruptcy court overruled SCS's objection and confirmed the Tills' proposed plan using the formula rate.²⁸

18. *Id.* at 470. The Tills' original plan called for \$1,089 of their wages to be assigned to the trustee every month, but the Tills later amended their plan to require a payment of only \$740 per month. *Id.* at 471 n.7.

19. *Id.* at 471.

20. *Id.*

21. *Id.* The prime rate is generally the rate applied by banks to low-risk loans. *Id.*

22. *Id.*

23. *Id.* at 471-72.

24. *Id.* at 471. SCS referred to its focus on borrowers with low credit ratings as the "subprime" market. *Id.* It noted SCS was not alone in charging this rate; other creditors in this market regularly charge 21% on loans to customers with poor credit. *Id.*

25. *Id.* at 472. During the hearing, an Indiana University/Purdue University-Indianapolis economics professor testified on behalf of the Tills. *Id.* at 471. After acknowledging his familiarity with the "subprime" auto lending market was limited, he asserted his belief that the 9.5% formula rate was "very reasonable," given that Chapter 13 plans are "supposed to be financially feasible." *Id.* at 471-72 (referring to 11 U.S.C. § 1325(a)(6) (2000), which dictates the bankruptcy judge should only "confirm a plan if . . . the debtor will be able to make all payments under the plan and to comply with the plan"). The professor believed SCS's risk in this case was "fairly limited because [the Tills were] under the supervision of the court." *Id.* at 472.

26. *Id.* at 472.

27. *Id.*

28. *Id.*

The district court reversed the opinion of the bankruptcy court, agreeing with SCS that a forced loan rate should be applied.²⁹ In the absence of contrary testimony, the court concluded 21% was the prevailing rate in SCS's target market and was, therefore, the appropriate rate that should be applied to its secured claim.³⁰

On appeal, the Seventh Circuit adopted a third approach that attempted to ascertain the interest rate "the creditor in question would obtain in making a new loan in the same industry to a debtor who is similarly situated, although not in bankruptcy."³¹ The majority noted the new loan rate could be approximated by looking to the parties' pre-bankruptcy contract rate.³² However, the court observed this rate would not "duplicat[e] precisely . . . the present value of the collateral to the creditor" because loans to debtors in bankruptcy "involve some risks that would not be incurred in a new loan to a debtor not in default" and conversely involve "some economies" as well.³³ The court concluded the parties' pre-bankruptcy contract rate should merely be the "presumptive contract rate."³⁴ The Seventh Circuit remanded the case to the bankruptcy court to allow each party the opportunity to present evidence in rebuttal of this presumptive rate.³⁵

In a dissenting opinion, Judge Rovner argued in favor of a fourth approach.³⁶ Rovner asserted the presumptive contract rate approach adopted by the majority was inflated because it did not consider the transactional costs incurred by the creditor if it used the recovered funds in the issuance of new loans.³⁷ As a solution, Judge Rovner suggested a "cost of funds" rate valued at "what it would cost the creditor to obtain the cash equivalent of the collateral from an alternative source."³⁸

29. *Id.*

30. *Id.*

31. *Id.* (quoting *In re Till*, 301 F.3d 583, 592 (7th Cir. 2002)).

32. *Id.*

33. *Id.* at 472-73.

34. *Id.* at 477-78.

35. *Id.* In this case, the remand would likely benefit only the Tills. As residents of Indiana, the Tills are subject to Indiana's usury statute, which caps the maximum interest rate at 21%. *Id.* at 473 n.9 (citing IND. CODE § 24-4.5-3-201 (1993)). Because the Seventh Circuit placed the presumptive contract rate at 21%, any modification to this amount would presumably be in the form of a reduction. *Id.* at 473 n.9.

36. *Id.* at 473 (Rovner, J., dissenting).

37. *Id.* (Rovner, J., dissenting).

38. *In re Till*, 301 F.3d 583, 595-96 (7th Cir. 2002) (Rovner, J., dissenting). Judge Rovner also noted that, although the values produced by the formula rate or the cost of funds rate approaches were relatively small compared to the forced loan rate or presumptive contract rate methods, courts should "consider the extent to which the creditor has already been compensated for . . . the risk that the debtor will be unable to discharge his obligations under the reorganization plan . . . in the rate of interest that it charged to the debtor in return for the original loan." *Id.* at 596.

The United States Supreme Court granted certiorari to divine the proper method for determining the interest rate from among the abundance of conflicting, lower-court opinions.³⁹ The Court held the formula approach, adding a small risk adjustment to the national prime rate, was appropriate for determining the interest rate applied for the deferred payments to Chapter 13 cram-down creditors.⁴⁰

III. LEGAL BACKGROUND

The United States Constitution provides “[t]he Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”⁴¹ In 1938, with the enactment of the Chandler Act, Congress created consumer bankruptcy provisions allowing debtors to repay their debts over time.⁴² Prior to the creation of this provision, debtors’ only bankruptcy option was “straight bankruptcy,” which required the liquidation of all non-exempt assets.⁴³ This new bankruptcy tool was intended to benefit creditors, who would generally get more money than liquidation bankruptcy would provide, and to benefit debtors, who could retain their assets throughout the bankruptcy process.⁴⁴

In 1978, Congress enacted the Bankruptcy Reform Act, which replaced the consumer bankruptcy provision of the Chandler Act,⁴⁵ yet maintained its intent. The new Bankruptcy Code (“the Code”) included a provision for Chapter 13 bankruptcies.⁴⁶ Chapter 13 allows individual debtors to retain their assets while restructuring their debts and repaying their creditors over a period of time.⁴⁷ A Chapter 13 debtor is required to submit a debt adjustment plan for court approval.⁴⁸ The bankruptcy court will approve a plan only if it accommodates secured creditors in one of the following three ways: (1) the creditor accepts the plan, (2) the debtor surrenders the property securing the claim, or (3) the creditor retains a lien on the property securing its claim and the debtor’s future payments have at least as much “value, as of the effective date of the plan” as the creditor’s secured claim.⁴⁹ This third option has been

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

40. *Till*, 541 U.S. at 479-80 (plurality opinion).

41. U.S. CONST., art. I, § 8, cl. 1, 4.

42. Act of June 22, 1938, ch. 575, 52 Stat. 840 (1938) (repealed 1978).

43. *In re Scher*, 12 B.R. 258, 261 (Bankr. S.D.N.Y. 1981).

44. *Id.* at 268.

45. Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549 [hereinafter “the Code”].

46. H.R.Rep. No. 595, 95th Cong., 2d Sess. 118 (1977).

47. *Id.*

48. See 11 U.S.C. §§ 1322, 1325 (2000).

49. 11 U.S.C. § 1325(a)(5) (2000). This section states:

(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-

labeled the “cram-down” provision because the statute allows for judicial confirmation of a debtor’s repayment plan over the objection of the creditor.⁵⁰

In 1993, the Supreme Court noted in *Rake v. Wade* that the future property distributions defined in the cram-down provision may take the form of “a stream of future payments.”⁵¹ However, the statute does not specifically state that an interest rate be applied to compensate creditors for delayed payments.⁵² In *Rake*, the Court noted there are numerous references in the Code where payments are “discount[ed] . . . back to the present dollar value of the claim at confirmation.”⁵³ Although the Court acknowledged the need to apply some interest rate to deferred payments to cram-down creditors, the court declined to identify the specific interest rate that should be employed.⁵⁴

In the absence of clear guidelines, district courts have failed to establish a standard interest rate valuation method. The methods adopted by various courts have included the forced loan rate,⁵⁵ cost of funds rate,⁵⁶ contract rate,⁵⁷ the state statutory rate,⁵⁸ treasury bill rate,⁵⁹ prime rate,⁶⁰ market rate,⁶¹

- (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.

Id.

50. *Till v. SCS Credit Corp.*, 541 U.S. 465, 468-69 (2004) (plurality opinion).

51. 508 U.S. 464, 472 n.8 (1993).

52. *See supra* note 49.

53. *Rake*, 508 U.S. at 472 n.8.

54. *Id.*

55. *See supra* note 23 and accompanying text.

56. *See supra* note 38 and accompanying text.

57. *See In re Einspahr*, 30 B.R. 356, 356 (Bankr. E.D. Pa. 1983) (reasoning the contract rate was a fair rate because the parties agreed to it); *In re Evans*, 20 B.R. 175, 176-77 (Bankr. E.D. Pa. 1982) (limiting the discount rate on the bank loan to the original 6% rate rather than revaluating it based on the prevailing market rate); *In re Kaufinger*, 16 B.R. 666, 669 (Bankr. D.N.J. 1981) (holding the contract rate should be applied because Congressional legislative history suggests a presumption that the rates originally agreed upon by the parties are equivalent to the discount rate); *In re Hartford*, 7 B.R. 914, 917-18 (Bankr. D. Me. 1981) (memorandum decision) (applying the original home mortgage rate to the payments to the bank under the debtor’s Chapter 13 plan); *In re Smith*, 4 B.R. 12, 13 (Bankr. E.D.N.Y. 1980) (holding the secured creditor should be given an interest rate of 12.68%, the original contract rate on the car loan).

58. *See In re Crockett*, 3 B.R. 365, 368 (Bankr. N.D. Ill. 1980) (holding the Illinois statutory rate of 9% was appropriate to compensate secured creditors for Chapter 13 installment payments).

59. *See In re Trent*, 42 B.R. 279, 282 (Bankr. W.D. Va. 1984) (holding that the rate imposed on cram-down loans be based on the United States Treasury Bills rate at the time of Chapter 13 bankruptcy filing); *In re Corliss*, 43 B.R. 176, 179 (Bankr. D. Or. 1984) (discounting future payments based on the yield rate of the 52-week treas-

agreed rate,⁶² Internal Revenue Code rate,⁶³ compromised rate,⁶⁴ and the liquidation/reinvestment rate.⁶⁵ Because courts failed to reach a consensus as to the interest rate applied to the delayed payments to cram-down creditors, the Supreme Court granted certiorari to resolve the dispute.⁶⁶

ury bills); *In re Jewell*, 25 B.R. 44, 46 (Bankr. D. Kan. 1982) (valuing delayed payments based on the 52-week treasury bills rate on the date of filing); *Gen. Motors Acceptance Corp. v. Willis* (*In re Willis*), 6 B.R. 555, 557 (Bankr. N.D. Ill. 1980) (capping the interest rate to no greater than 0.5% above the auction average of 3-month United States Treasury Bills rate as of the Monday of the week in which the debtor filed for Chapter 13 bankruptcy).

60. See *In re Bivens*, 317 B.R. 755, 764 (Bankr. N.D. Ill. 2004) (applying the risk-free prime rate of 4.75%, and adding a risk factor interest rate to compensate for the risk to the creditor); *In re Smith*, 310 B.R. 631, 633-34 (Bankr. D. Kan. 2004) (starting with the national prime rate, then conducting an evidentiary hearing to gauge the proper risk adjustment for each loan).

61. See *In re Chang*, 274 B.R. 295, 305 (Bankr. D. Mass. 2002) (holding the "market rate plus" method would be employed when a creditor is forced to accept a loan rather than entering the transaction voluntarily); *In re Crompton*, 73 B.R. 800, 807 (Bankr. E.D. Pa. 1987) (reducing the interest rate from the original contract amount after concluding the market rate had dropped since the original mortgage was signed); *In re Webb*, 29 B.R. 280, 286 (Bankr. E.D.N.Y. 1983) (scheduling a hearing to determine investment opportunities after concluding the creditor was entitled to the rate at which the creditor would be compensated if the lump sum payment were invested).

62. See *In re Pokrzywinski*, 311 B.R. 846, 850-51 (Bankr. E.D. Wis. 2004) (memorandum decision) (reasoning the 5.75% agreed rate would not be too high as to put the repayment of the plan in jeopardy); *In re Gregory*, 8 B.R. 256, 258 (Bankr. S.D.N.Y. 1981) (applying a 7% rate to cram-down payments because the creditor and debtor both agreed to this rate).

63. See *In re Johnson*, 8 B.R. 503, 506 (Bankr. S.D. Tex. 1981) (memorandum opinion) (applying the IRS rate from 26 U.S.C.A. § 6621 to all cram-down creditors in the interest of administrative efficiency); *In re Busman*, 5 B.R. 332, 341 (Bankr. E.D.N.Y. 1980) (rejecting the debtor's plan of no-interest installment payments to the Internal Revenue Service and adopting the interest rate identified in 26 U.S.C.A. § 6621 of the Internal Revenue Code).

64. See *Gen. Motors Acceptance Corp. v. Miller* (*In re Miller*), 13 B.R. 110, 113 (Bankr. S.D. Ind. 1981) (averaging the original contract rate and the market rate on similar loans to arrive at the discount rate for cram-down payments).

65. See *Ford Motor Credit Co. v. Olson* (*In re Olson*), 300 B.R. 96, 98 (Bankr. S.D. Ga. 2003) (determining value of the payments based on (1) the liquidation value of the property had the debtor surrendered it, and (2) the rate at which the creditor could reinvest the funds to borrowers who were similarly situated to the debtor and seeking similar financing).

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

IV. INSTANT DECISION

A. *The Plurality Opinion*

Justice Stevens authored the plurality opinion and was joined by Justices Souter, Ginsburg, and Breyer.⁶⁷ Justice Stevens noted that the Code provides little guidance as to the rate to apply to the deferred payments made to cram-down creditors in Chapter 13 bankruptcy cases.⁶⁸ The relevant section of the Code mentions neither the word “interest” nor the term “discount rate.”⁶⁹ The Code merely requires the distribution to the secured creditor must have a total “value, as of the effective date of the plan,” of at least as much as the allowed secured claim.⁷⁰ While this mandate is clearly met if the creditor were paid the full amount of its claim on the day of the bankruptcy filing, the statute’s requirements are less clear when the payments are spread over time.⁷¹

Justice Stevens acknowledged that a debtor’s promise to make future payments was worth less than an immediate payment because of inflation and risk of nonpayment.⁷² In selecting an appropriate interest rate scheme to compensate the creditor for these burdens, the plurality took into account three “important considerations.”⁷³

First, there are numerous references in the Code requiring courts to ensure creditors receive their proper claim value by discounting future payments back to their value as of the time of bankruptcy filing.⁷⁴ Justice Stevens sur-

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

68. *Id.* at 473-74 (plurality opinion).

69. *Id.* at 473; *see* 11 U.S.C. § 1325(a)(5)(B) (2000).

70. *Id.* at 473-74 (quoting 11 U.S.C. § 1325(a)(5)(B)(ii) (2000)). In this case the “value, as of the effective date of the plan” must be at least as much as \$4,000, the amount of SCS’s secured claim against the Tills’ truck. *Id.*

71. *Id.* at 474.

72. *Id.* Although Justice Stevens acknowledged that inflation and the risk of nonpayment are factors leading to the discount of future payments, notably absent from his list is any reference to “opportunity costs.” In terms of creditors such as SCS, opportunity costs include forgone interest revenue from new loans. To include opportunity costs as a factor in the time value of money analysis would be to argue in favor of the presumptive contract rate approach advocated by the dissent. *See infra* Part IV.C.

73. *Till*, 541 U.S. at 474 (plurality opinion).

74. *Id.* (citing *Rake v. Wade*, 508 U.S. 464, 472 n.8 (1993)). These references in the Code include 11 U.S.C. § 1129(a)(7)(A)(ii) (2000), which requires payment of property whose “value, as of the effective date of the plan” equals or exceeds the value of the creditor’s claim; 11 U.S.C. § 1129(a)(7)(B) (2000), which requires that secured creditors in Chapter 11 be compensated for the “value, as of the effective date of the plan,” of the property securing the claim; 11 U.S.C. § 1129(a)(9)(B)(i) (2000), which allows confirmation of Chapter 11 plans to certain priority creditors if the creditors are compensated for the full “value, as of the effective date of the plan,” of their allowed claims; 11 U.S.C. § 1129(a)(9)(C) (2000), which requires governmental units in Chapter 11 cases be compensated for the “value, as of the effective date of the plan,” of certain

mised that Congress intended courts to apply a similar approach for deferred payments to cram down creditors.⁷⁵ He further theorized that Congress would want a method “familiar in the financial community” which would minimize the need for extensive evidentiary hearings.⁷⁶

The Court’s second consideration was that the Code gives courts the express authority in Chapter 13 cases to modify the rights of secured creditors.⁷⁷ Justice Stevens reasoned that this provision allows the court to change the number, timing, or amount of the debtor’s payments under the original contract to account for changes in circumstance.⁷⁸ The fact that the debtor is in bankruptcy indicates a simultaneous increase in the risk of default because the debtor is overextended and a countervailing decrease in risk because the process will be supervised by the court.⁷⁹

tax claims within six years; 11 U.S.C. § 1129(b)(2)(A)(iii) (2000), which mandates Chapter 11 secured creditors be given the “indubitable equivalent” of their claims; 11 U.S.C. § 1129(b)(2)(B)(i) (2000), which requires Chapter 11 unsecured creditors in a lower-ranked class are not compensated until creditors in higher-ranked class are fully compensated for their claim’s “value, as of the effective date of the plan;” 11 U.S.C. § 1129(b)(2)(C)(i) (2000), which specifies the “value” of class interests is determined “as of the effective date of the plan;” 11 U.S.C. § 1173(a)(2) (2000), which requires creditors under railroad reorganization plans receive the “value, as of the effective date of the plan,” as the creditor would have received if the railroad’s assets were liquidated under Chapter 7; 11 U.S.C. § 1225(a)(4) (2000), which allows for plan confirmation only when payments to unsecured Chapter 12 creditors have at least the “value, as of the effective date of the plan,” as the creditor would have received if the debtor’s estate were liquidated under Chapter 7; 11 U.S.C. § 1325(a)(4) (2000), which allows for plan confirmation only when payments to unsecured Chapter 13 creditors have at least the “value, as of the effective date of the plan,” as the creditor would have received if the debtor’s estate were liquidated under Chapter 7; and 11 U.S.C. § 1228(b)(2) (2000), which allows for early discharge under Chapter 12, only if creditors have received at least the “value, as of the effective date of the plan,” as the creditor would have received if the debtor’s estate were liquidated under Chapter 7.

75. *Till*, 541 U.S. at 474 (plurality opinion).

76. *Id.* at 474-45.

77. *Id.* at 475 (noting that 11 U.S.C. § 1322(b)(2) (2000) states, “[T]he plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, . . . or leave unaffected the rights of holders of any class of claims”).

78. *Id.*

79. *Id.* Justice Stevens indicated the reduction in the creditor’s risk of default is produced by the following four factors: (1) per 11 U.S.C. § 1325(a)(6) (2000), bankruptcy judges only approve debt adjustment plans when they believe the debtor will be able to make the scheduled payments; (2) per § 1322(a)(1) (2000), Chapter 13 plans must “provide for the submission” to the trustee “of all or such portion of [the debtor’s] future . . . income . . . as is necessary for the execution of the plan,” thus reducing the possibility of nonpayment; (3) the Code requires extensive disclosure to reduce the likelihood of undisclosed obligations; and (4) the debtor’s bankruptcy status will likely reduce the debtor’s opportunities to acquire additional debt. *Id.* at 474 n.12.

Third, the Court had previously determined the cram-down provision should be evaluated using an objective standard.⁸⁰ This standard does not obligate the courts to match the terms of the individual creditor's pre-bankruptcy contract.⁸¹ In fact, the very nature of the cram-down provision indicates that the creditor is being forced to accept future payments over its preference of foreclosure.⁸² Instead, the court should treat similarly situated creditors similarly⁸³ and seek to ensure creditors are compensated for the risk of default and the time value of money.⁸⁴

Based upon these three considerations, the plurality rejected the forced loan rate, presumptive contract rate, and cost of funds approaches.⁸⁵ Justice Stevens noted these approaches are not only complicated, but also involve increased evidentiary costs.⁸⁶ Additionally, these approaches attempt to "make each individual creditor whole" rather than merely ensuring future payments are adequate to provide creditors with the present value of their secured claims.⁸⁷ Finally, the plurality argued that the approaches starting

80. *Id.* at 476 (citing *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997) (holding "a creditor's secured interest should be valued from the debtor's, rather than the creditor's, perspective").

81. *Id.*

82. *Id.* Justice Stevens observed the fact that these cram-down loans are forced on a creditor over its objections helps explain why there is no readily apparent Chapter 13 free market of cram-down lenders from which a court can derive an appropriate market interest rate. *Id.* at 476 n.14. In contrast, there are many creditors who advertise to Chapter 11 debtors which might allow a bankruptcy court to look at the market to determine the going rate. *See id.* at 477.

83. *Id.* at 477 (citing 11 U.S.C. § 1322(a)(3) (2000) ("The plan shall . . . provide the same treatment for each claim within a particular class")).

84. *Id.*

85. *Id.* To examine the forced loan rate approach, see *supra* note 23 and accompanying text; for the presumptive contract rate approach, see *supra* notes 31-35 and accompanying text; and for cost of funds approach, see *supra* note 38 and accompanying text.

86. *Till*, 541 U.S. at 477 (plurality opinion).

87. *Id.* Justice Stevens addressed the weaknesses of each of these three methods. First, the forced loan approach requires bankruptcy courts to examine the market for non-bankrupt debtors, which is outside the usual scope of examining the individual debtor's situation and ability to meet the demands of their debt adjustment plan. *Id.* The approach also overcompensates creditors because the market rate provides compensation for transaction costs and profits which are not relevant factors in setting an interest rate for court-supervised cram-down creditors. *Id.*

Similarly, the presumptive contract rate approach turns the courts' focus outside of the debtors' situations and looks at creditors' possible alternate uses of the proceeds. *Id.* Because this presumptive rate can be rebutted, the debtors must undertake the task of obtaining information about the creditors' individual financial situations and lending practices. *Id.* at 477-78. In addition, this method rewards inefficient, poorly managed creditors with higher rates than its competent, more efficient counterparts. *Id.* at 478.

with the rates charged by subprime lenders are flawed because they assume these markets are competitive⁸⁸ and incorporate a fair rate.⁸⁹

The plurality noted the formula rate approach does not contain these flaws.⁹⁰ This approach begins with the national prime rate,⁹¹ which is then

Finally, Justice Stevens claimed the focus of the cost of funds approach is also misguided. *Id.* Although it correctly disregards the parties' pre-bankruptcy dealings, it mistakenly turns courts' attention to the creditworthiness of creditors rather than of debtors. *Id.* As with the presumptive contract rate approach, the cost of funds approach requires additional evidentiary tasks of debtors by effectively requiring expert testimony about creditors' financial situations to rebut creditors' assertions. *Id.* Additionally, this method, again, rewards the less efficient, poorly managed lender. *Id.*

88. *Id.* at 481. The plurality argued that subprime loans are not bargained for between "fully informed buyers and sellers in a classic free market." *Id.* at 481-82. These loans usually arise as a result of "tie-in" transactions with car dealerships. *Id.* at 481. The cost of the car is often the focus of the negotiation with the interest rates dictated by the seller once an agreement has been reached on the purchase price of the automobile. *Id.*

The dissent, however, took issue with this "unsubstantiated assertion" that car buyers do not bargain for interest rates. *Id.* at 495 (Scalia, J., dissenting). Advertising promotions such as "zero-percent financing" indicated customers are aware of interest rates as well as price. *Id.*

89. *Id.* at 481-82 (plurality opinion). The plurality noted that the significant regulations focused on the subprime lending market reflects legislative belief that "unregulated subprime lenders would exploit borrowers' ignorance and charge rates above what a competitive market would allow." *Id.* at 482. A prime example of this regulation are state usury laws which place a cap on the maximum interest rate that can be charged. *Id.* at 482 n.22 (citing COLO. REV. STAT. § 5-2-201 (2002); FLA. STAT. ANN. § 537.011 (Supp. 2004); IND. CODE § 24-4.5-3- 201 (1995); MD. COM. LAW CODE ANN. § 12-404(d) (2000)). In support of its view that the subprime market is exploitative in nature, the plurality pointed to lending practices where no usury laws have been passed. *Id.* at 482 n.23. In Mississippi, for example, left unchecked by the legislature, rates in the subprime market have reached "as high as 30 to 40%." *Id.* (citing Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 438-439 (1999)).

The dissent questioned the plurality's use of usury laws to support a conclusion that the subprime market is exploitative. *Id.* at 496 (Scalia, J., dissenting). Justice Scalia acknowledged this is one possible interpretation, but suggested instead that the purpose of usury laws could also be a "primitive means of social insurance" which provides artificially low interest rates for high-risk debtors. *Id.* (citing Glaeser & Scheinkman, *Neither a Borrower Nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws*, 41 J. LAW & ECON. 1, 26 (1998)).

90. *Id.* at 478 (plurality opinion).

91. *Id.* at 478-79. The national prime rate is the financial market's estimate of the rate a commercial bank should charge a creditworthy commercial customer. *Id.* The rate is designed to compensate the lender for opportunity costs, the risk of inflation, and a minimal risk of default. *Id.* The rate is familiar to the financial community and readily ascertainable as it is reported daily in the press. *Id.*

adjusted to compensate creditors for the risk of nonpayment posed by a particular debtor.⁹² Unlike the methods previously examined by the Court, the formula rate approach puts the evidentiary burden on the creditor to establish any upward adjustment to the interest rate.⁹³ Much of the relevant evidence is likely to be included in the debtor's bankruptcy filings and already in the hands of the parties, thereby minimizing the expense of evidentiary fact finding.⁹⁴ Additionally, the focus of a court's inquiry will be properly placed on the debtor's financial situation rather than the creditor's circumstances.⁹⁵ Accordingly, the plurality concluded the "formula rate best comports with the purposes of the Bankruptcy Code."⁹⁶

The Court declined to define the limits of the risk adjustment, but noted courts have generally approved adjustments from 1% to 3%.⁹⁷ In this case, the bankruptcy court approved a risk adjustment of 1.5%.⁹⁸ The Court reversed the judgment of the Seventh Circuit Court of Appeals and remanded the case to the bankruptcy court for proceedings consistent with its opinion.⁹⁹

B. The Concurrence

Justice Thomas, concurring in the judgment, agreed with Justice Stevens that the interest rate given to Chapter 13 cram-down creditors should be based on the national prime rate, but he questioned the need to adjust the rate to account for any additional risk of nonpayment.¹⁰⁰ Justice Thomas acknowledged that a "promise of future payments is worth less than an immediate payment" of the same amount due, at least in part, to the risk of nonpayment.¹⁰¹ He argued, however, that this is irrelevant because the statute does

92. *Id.* at 479. Justice Stevens noted that, if bankruptcy courts could guarantee debtor compliance with the terms of the debt reorganization plan, the prime rate would be sufficient to compensate the secured cram-down creditor. *Id.* at 479 n.18. Absent a judicial guarantee, however, some risk of nonpayment will continue to exist. *Id.* at 479 n.18. As a result, the court must consider the debtor's individual circumstances, including the nature of the security and the duration and feasibility of the reorganization plan in determining the amount of adjustment the court will make to the national prime rate. *Id.* at 479.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 479-80. Justice Stevens acknowledged that "[i]f we have misinterpreted Congress' intended meaning of 'value, as of the date of the plan,' we are confident it will enact appropriate remedial legislation." *Id.* at 480 n.19.

97. *Id.* at 480 (citing *Gen. Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55, 64 (2d Cir. 1997) for a collection of cases).

98. *Id.*

99. *Id.* at 485.

100. *Id.* (Thomas, J., concurring).

101. *Id.* (emphasis omitted).

not ask the court to value the *promise* to distribute property under the plan.¹⁰² Rather, the court is to ensure that the value of the *property* to be distributed under the plan, at the time of the effective date of the plan, is not less than the amount of the secured creditor's claim.¹⁰³

Justice Thomas argued that the plurality ignored "the clear text of the statute in an apparent rush to ensure that secured creditors [were] not under-compensated."¹⁰⁴ According to Justice Thomas, the statute clearly indicates that a requirement to determine the "value" of the distributed property "as of the effective date of the plan incorporates the principle of the time value of money."¹⁰⁵ No statute, however, indicates that the appropriate interest rate must also include the risk of nonpayment.¹⁰⁶ The statute requires valuation of the "property to be distributed," not the valuation of the debt repayment plan (i.e., the debtor's promise to make the scheduled payments).¹⁰⁷ Thus, to satisfy section 1325(a)(5)(B)(ii), it is sufficient that the plan incorporate an interest rate that compensates the creditor for the delayed payments and need not include an additional risk premium.¹⁰⁸ Justice Thomas noted, "[i]n most, if not all, cases, where the plan proposes simply a stream of cash payments, the appropriate risk-free rate should suffice."¹⁰⁹

Justice Thomas deduced that the issue then became whether the proposed 9.5% interest rate in the Tills' debt plan had sufficiently compensated SCS for receiving \$4,000 plus 9.5% interest over a period of up to three years rather than receiving \$4,000 immediately.¹¹⁰ Because the 9.5% rate was higher than the national prime rate, Justice Thomas concluded that the compensation to SCS was sufficient and concurred that the judgment of the Seventh Circuit Court of Appeals should be reversed.¹¹¹

102. *Id.* at 485-86.

103. *Id.* at 486 (citing 11 U.S.C. § 1325(a)(5)(B)(ii) (2000)).

104. *Id.*

105. *Id.* at 486-87. Justice Thomas further clarified the concept of the time value of money by stating: "To put it simply, \$4,000 today is worth more than \$4,000 to be received 17 months from today because if received today, the \$4,000 can be invested to start earning interest immediately." *Id.* at 487 (citing *ENCYCLOPEDIA OF BANKING & FINANCE* 1015 (9th ed. 1991)).

For example, if the relevant interest rate is 10%, receiving \$4,000 one year from now is the equivalent to receiving \$3,636.36 today. In other words, an investor would be indifferent to receiving \$3,636.36 today and receiving \$4,000 one year from now because each will equal \$4,000 one year from now.

Id. at 487 n.1.

106. *Id.* at 489.

107. *Id.* at 487.

108. *Id.*

109. *Id.*

110. *Id.* at 491.

111. *Id.*

C. The Dissent

Justice Scalia was joined in his dissenting opinion by Chief Justice Rehnquist and Justices O'Connor and Kennedy.¹¹² Justice Scalia argued the plurality's adoption of the formula approach would "systematically under-compensate" cram-down creditors.¹¹³ The formula approach begins with the prime lending rate, a rate which eight of the nine justices agreed was too low to compensate for the risk of default.¹¹⁴ This method then requires the bankruptcy judge to determine the amount of increase in every case.¹¹⁵

Instead, the dissent argued in favor of the presumptive contract rate as the starting point in a court's determination.¹¹⁶ Because the contract rate is the rate at which the creditor actually loaned its funds to the debtor, it provides a good indication of the actual risk of default in each case.¹¹⁷ This presumptive rate can then be challenged by either party and modified accordingly by the bankruptcy judge.¹¹⁸

Justice Scalia noted the presumptive contract rate approach is based on two reasonable assumptions.¹¹⁹ It assumes the subprime lending market is competitive, and it assumes the risk of default to Chapter 13 creditors is usually not less than the risk at the time of lending.¹²⁰ Justice Scalia addressed each of these assumptions in turn.¹²¹

First, in support of the assumption the subprime lending market is competitive, Justice Scalia relied primarily on logical deduction.¹²² He reasoned that if lenders charged excessive rates, competitors could undercut these rates, and the uncompetitive, inefficient lenders would be effectively forced out of the market.¹²³ Justice Scalia supported this assumption by pointing to a study concluding that lenders in the subprime market were twice as likely to be unprofitable, suggesting a "fiercely competitive environment."¹²⁴ Accepting this assumption, Justice Scalia concluded that the high interest rates charged by subprime lenders accurately reflect the high risk of default for a particular debtor.¹²⁵

112. *Id.* (Scalia, J., dissenting).

113. *Id.* at 491-92.

114. *Id.* at 491.

115. *Id.*

116. *Id.* at 492.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 492-93.

121. *Id.*

122. *Id.* at 492.

123. *Id.*

124. *Id.* (citation omitted).

125. *Id.*

Second, Justice Scalia believed it was also reasonable to assume that the risks and costs of default are not diminished when a debtor enters Chapter 13 bankruptcy.¹²⁶ Recent studies indicate a failure rate of at least 37% among judicially confirmed Chapter 13 bankruptcy plans.¹²⁷ Although court oversight may provide the creditor “some marginal benefit,” any benefit is dwarfed by the fact the bankruptcy alone indicates a “financial instability” beyond that of most subprime debtors.¹²⁸ Additionally, bankruptcy introduces additional costs of default for the secured creditor including depreciation,¹²⁹ lack of liquidity,¹³⁰ and administrative costs of foreclosure.¹³¹

After estimating the value of each of these enumerated costs and factoring in a 37% risk of default, Justice Scalia estimated the appropriate risk adjustment in this case is 16% above the prime lending rate, or 24%.¹³² Justice Scalia suggested the plurality’s estimate of a 1.5% risk adjustment is “far below anything approaching fair compensation.”¹³³ In contrast, the presumptive contract approach would set the default rate at 21%, a rate much closer to the actual risk of default, and allow the parties to present evidence to rebut this presumption.¹³⁴

126. *Id.* at 492-93.

127. *Id.* at 493 (citing Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 *IND. L.J.* 17, 40-42 (1989) (reporting a 63.1% success rate)).

128. *Id.*

129. *Id.* at 494. Because the creditor’s claim is secured by the value of the collateral, depreciation inhibits the creditor’s ability to fully recover in the event of default. *Id.* at 502. Bankruptcy requires that cram-down creditors delay repossessing the property and recovering its value, and this delay continues to affect the value of the collateral over time as the property depreciates. *Id.* For example, when the Tills bought their truck, the balance of the loan was roughly equal to the value of the collateral. *Id.* However, by the time the debt repayment plan was confirmed, the balance of the loan was \$4,895, while the truck had depreciated to a mere \$4,000. *Id.* Continued non-payment would further widen this gap.

130. *Id.* at 499. The value of the property for the purposes of the cram-down provision is based on the debtor’s replacement value. *Id.* at 502 (citing *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 965 (1997)). However, should the creditor foreclose on the loan and sell the collateral property, the creditor will only be able to get a liquidation price, due to the non-liquidity of the collateral markets. *Id.* at 502-03. Justice Scalia notes that in *Rash*, the liquidation value of the truck used as collateral for the loan was 22% less than the replacement value. *Id.* at 503 n.13 (citing *Rash*, 520 U.S. at 957).

131. *Id.* at 499. Chapter 13 cram-down creditors must comply with the requirements of the automatic stay provision, which prevents repossession of collateral. *Id.* at 503 (citing 11 U.S.C. § 362 (2000)). To lift the stay, the creditor’s attorney must file a motion. *Id.* (citing § 362(d)). In the district court where the case arose, the cost of filing this motion is currently \$150. *Id.* (citation omitted). After adding in reasonable attorney fees, Justice Scalia estimated the cost of the motion in this case would be \$650 or more. *Id.* (citation omitted).

132. *Id.* at 503-04.

133. *Id.* at 504.

134. *Id.* at 495 n.4.

Not only did Justice Scalia think an adoption of the presumptive contract rate was a more accurate starting place, he suggested that it would also prevent a ripple effect throughout the economy.¹³⁵ He reasoned that if cram-down creditors are “systematically undercompensated,” lenders will either charge higher rates or decline to lend money to the riskiest debtors.¹³⁶

The dissent criticized the plurality’s opinion, suggesting that it “is unlikely to burnish the Court’s reputation for reasoned decisionmaking.”¹³⁷ Justice Scalia noted eight of the nine justices in this case agreed the rate given to Chapter 13 cram-down creditors should reflect some premium for the risk of default.¹³⁸ He concluded that the bankruptcy provision was intended to provide “full risk compensation,” and thus, the presumptive contract rate approach should be adopted because it is the best method for attaining this objective.¹³⁹

V. COMMENT

A. Determining Legislative Intent

An examination of legislative history reveals support for the presumptive contract approach endorsed by the *Till* dissent. A cursory look into the legislative history of section 1325(a)(5) provides little help in determining the cram-down interest rate intended by the legislature.¹⁴⁰ However, a reading of the original versions approved by each house of Congress reveals that a debtor’s Chapter 13 repayment plan should only be confirmed if it is in the “best interests of creditors” to confirm the plan rather than require liquidation under Chapter 7.¹⁴¹

While the “best interests” language was omitted in the final version of the statute,¹⁴² courts have determined the purpose of this provision was “to

135. *Id.* at 508.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. See 124 CONG. REC. H11,107 (Sept. 28, 1978) which states:

Unless the secured creditor accepts the plan, the plan must provide that the secured creditor retain the lien securing the creditor’s allowed secured claim in addition to receiving *value, as of the effective date of the plan* of property to be distributed under the plan on account of the claim not less than the allowed amount of the claim.

(emphasis added).

141. See S. REP. NO. 95-989, at 142 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5928; H. REP. NO. 95-595, at 430 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6385.

142. See 124 CONG. REC. H11,107 (Sept. 28, 1978) (stating “[s]ection 1325(a)(5)(B) of the House amendment modifies the House bill and Senate amendment”). The consolidated version appears in 11 U.S.C. § 1325(a)(4) (2000) (stating “the value, as of the effective date of the plan, of property to be distributed under the plan on account of each

put the secured 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."¹⁴³

To achieve this purpose, a bankruptcy court must determine the interest rate a creditor would receive if the debtor's bankruptcy estate were liquidated under Chapter 7 and the funds reinvested by the creditor in loans to other borrowers. This process would lead the court to establish a market rate for cram-down creditors – a method adopted by several courts, including the Eighth Circuit.¹⁴⁴

An adoption of the market rate, however, would require bankruptcy courts to hold evidentiary hearings in every case to determine the rate at which the creditor would lend funds to a similarly situated debtor.¹⁴⁵ Rather than trying to glean the terms of a hypothetical agreement with a similarly-situated debtor, why not set a default rate at the amount the creditor actually agreed to lend to the debtor in question? In the interest of judicial efficiency, the court could presume the contract rate previously agreed to by the parties was appropriate and allow the parties to present evidence to rebut this presumption in cases where the original contract rate is no longer appropriate.¹⁴⁶

The adoption of the presumptive contract rate is further supported by legislative history of another bankruptcy provision.¹⁴⁷ The Code provides that unmatured interest will not be allowed as a bankruptcy claim for an unsecured or undersecured creditor.¹⁴⁸ According to the legislative history, this disallowance represents a "discounting factor for claims" back to its value as of the date of the bankruptcy filing.¹⁴⁹ Congress further clarified that "the

allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7").

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

144. *United States v. Roso (In re Roso)*, 76 F.3d 179, 180 (8th Cir. 1996); *see also supra* note 61.

145. This determination assumes the creditor is a commercial lender continuing in the business of lending funds to similarly situated debtors. If this assumption is factually inconsistent with a given case, the court's adherence to the presumption of the contract rate only serves as the starting place in the court's analysis and this rate can be rebutted by one or both parties.

146. *See Till v. SCS Credit Corp.*, 541 U.S. 465, 492 (2004) (Scalia, J., dissenting) (discussing the judicial efficiency of adopting the contract rate as a rebuttable presumption).

147. *See S. REP. NO. 95-989*, at 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5849; *H. REP. NO. 95-595*, at 353 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6309.

148. 11 U.S.C. § 502(b)(2) (2000).

149. *S. REP. NO. 95-989*, at 62 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5848; *H. REP. NO. 95-595*, at 352 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6308 explains:

For example, a claim on a \$1,000 note issued the day before bankruptcy would only be allowed to the extent of the case actually advanced. If the original discount

discounting factor for claims after the commencement of the case is equivalent to contractual interest rate on the claim."¹⁵⁰ This occurs "because of the irrefutable presumption that the discounting rate and the contractual interest rate . . . are equivalent."¹⁵¹

The *Till* plurality believed that Congress intended a uniform discount rate be applied throughout the Code to the "numerous provisions . . . like the cramdown provision" which "discount a stream of deferred payments back to their present dollar value."¹⁵² If the legislative history that Congress intended the presumptive contract rate applied to section 502 is correct and the *Till* plurality is correct that Congress intended a uniform discount rate to apply throughout the Code, then a logical deduction can be made: Congress intended cram-down creditors to be presumptively given the contract rate on deferred future payments.

B. The Implications for Individual Creditors

Until the Supreme Court's decision in *Till v. SCS Credit Corp.*, secured creditors undoubtedly viewed the forced acceptance of a debtor's Chapter 13 repayment plan as a high-stakes game of chance. Depending upon the jurisdiction in which the debtor filed bankruptcy and the discretion of the bankruptcy court judge, Chapter 13's repayment provisions could produce widely disparate results.¹⁵³ Exemplifying this, the justices in *Till* reviewed the same set of facts and suggested methods that would have resulted in annual interest rates ranging from 8% to 24%.¹⁵⁴

While *Till* adds much-needed certainty for cram-down creditors, it comes in the form of certain misfortune. The Court's adoption of the formula rate will ensure secured creditors are nearly always undercompensated for

was 10% so that the cash advanced was only \$900, then notwithstanding the face amount of note, only \$900 would be allowed. If \$900 was advanced under the note some time before the bankruptcy, the interest component of the note would have to be pro-rated and disallowed to the extent it was for interest after the commencement of the case.

150. S. REP. NO. 95-989, at 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5849; H. REP. NO. 95-595, at 353 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6309.

151. S. REP. NO. 95-989, at 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5849; H. REP. NO. 95-595, at 353 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6309.

152. *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 (2004) (plurality opinion) (quotations omitted)). For a list of references within the Code to discounting future payments to present dollar values, see *supra* note 74.

153. For a survey of several approaches to the cram-down interest rate valuation method, see *supra* notes 55-65 and accompanying text.

154. *Till*, 541 U.S. at 465, 487 (Thomas, J., concurring) (Justice Thomas advocated a prime rate, which was 8%); *Id.* at 503-04 (Scalia, J., dissenting) (Justice Scalia argued for the presumptive contract rate, but seemed to indicate that the facts of the case were sufficient to overcome the presumptive rate of 21% and establish a cram-down interest rate of 24%).

their risk. Additionally, because the plurality's method ignores the terms of the original contract, there is apparently no way to contract around the risk. Although the Court failed to define the risk factor to be added to the prime rate in its formula, the Court's guidance that the rate will usually be between 1% and 3% will effectively establish permissive boundaries for judicial discretion.¹⁵⁵ By setting a maximum interest rate of prime plus 3% for the segment of our population with the greatest risk of default, it appears cram-down creditors no longer have a chance of attaining full compensation on their loans to debtors in bankruptcy.

C. The Scope of the Decision

While the *Till* case involved a determination of the cram-down rate for secured creditors under section 1325(a)(5), the Court leaves unanswered whether bankruptcy courts should apply this same interest rate to unsecured claims as well.¹⁵⁶ In addition to its secured claim, SCS also had an unsecured claim in the Tills' bankruptcy estate.¹⁵⁷ However, the issue of the interest rate applied to the unsecured claim was not raised by either party on appeal.

Of even greater economic significance is the uncertainty of whether the Court's new interest rate selection method will extend beyond consumer bankruptcies to Chapter 11 corporate reorganizations. Although the Court did not address whether its decision would extend to Chapter 11 cases, it provided conflicting references within its opinion. First, the plurality looked at the interest rate provisions of Chapters 11, 12, and 13 bankruptcies and concluded 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 these provisions."¹⁵⁸ However, the Court later noted that, although the provisions of Chapter 13 prevent a free market from which to

155. *Id.* at 480. At least one bankruptcy judge has deviated from this range. While presiding over *In re Cachu*, Judge W. Richard Lee decided that the interest rate for a local taxing authority's secured claim should be a mere 0.5% over prime. 321 B.R. 716, 724-25 (Bankr. E.D. Cal. 2005). He reasoned the claim had little risk of non-payment because the claim was given priority status under California law and the claim was secured by a lien against residential property in which the Chapter 13 debtor had significant equity. *Id.* at 722-23.

156. The equivalent provision for unsecured creditors is contained in 11 U.S.C. § 1325(a)(4) (2000). As with secured creditors, the court is required to value the claim "as of the effective date of the plan" and ensure that the creditor is compensated for this "value" over the life of the plan. *Id.*

157. *Till*, 541 U.S. at 470 (plurality opinion). At the time of filing, the Tills' outstanding debt to SCS amounted to \$4,894.89, while the truck securing the claim was worth only \$4,000. *Id.* Per 11 U.S.C. § 506(a) (2000), SCS's secured claim was limited to \$4,000, and the remaining \$894.89 balance was retained as an unsecured claim. *Id.*

158. *Id.* at 474.

determine a market rate of interest, some creditors advertise specifically to Chapter 11 debtors.¹⁵⁹ “Thus, when picking a cram-down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce.”¹⁶⁰

At least one critic has remarked that *Till* is a case “in which the Supreme Court has taken a complex, difficult, murky issue and made it even more complex, difficult and murky, at least in the Chapter 11 context.”¹⁶¹ Although the references in *Till* to Chapter 11 were entirely dicta, they still carry significant weight in lower courts.¹⁶² However, because the dicta is contradictory, the district courts should feel free to disregard it, as the Supreme Court has previously done with its own dicta.¹⁶³

D. The Economic Impact of the Decision

Under the Court’s new guidelines, lending rates are likely to increase for all borrowers as creditors attempt to compensate for their bankruptcy losses.¹⁶⁴ Debtors managing to stay out of bankruptcy will be forced to subsidize the under-compensated rates mandated by the cram-down provision.¹⁶⁵ Some high-risk debtors will be unable to obtain credit.¹⁶⁶ This will have the

159. *Id.* at 477 n.14.

160. *Id.* at 477.

161. Robert C. Goodrich, Jr. and Madison Cashman, *Money in the “Till”*, 2004 No. 10 NORTON BANKR. L. ADVISER 1, at 1.

162. *See* Peterson v. BMI Refractories, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997) (noting “dicta from the Supreme Court is not something to be lightly cast aside”).

163. *See* Central Green Co. v. United States, 531 U.S. 425, 430 (2001) (looking to statutory construction rather than following its own prior “admittedly confusing dicta”); Colgrove v. Battin, 413 U.S. 149, 157 (1973) (deciding not to follow prior dicta that the Seventh Amendment mandated a twelve-person jury in civil trials).

164. *See* Todd J. Zywicki, *Cramdown and the Code: Calculating Cramdown Interest Rates Under the Bankruptcy Code*, 19 THURGOOD MARSHALL L. REV. 241 (1994). Zywicki stated:

[A]ny redistribution afforded debtors as a class as a result of [a] pro-debtor bankruptcy rule will be eliminated by the increased rate creditors will charge initially. The apparent pro-debtor effects of the bankruptcy rule will be eliminated by the increased interest rates charged to debtors as a class. At the same time, debtors who end up in bankruptcy will receive a windfall, as they will reap the rewards of the pro-debtor bankruptcy rule.

Id.

165. *See* Assocs. Commercial Corp. v. Rash (*In re Rash*), 90 F.3d 1036, 1073 n.17 (5th Cir. 1996) (Smith, J., dissenting), *rev’d*, 520 U.S. 953 (1997) (arguing a pro-debtor bankruptcy rule “might have adverse economic consequences, redistributing wealth from responsible debtors to bad credit risks and thereby forcing good risks out of the credit market”).

166. This concern is particularly prevalent in the subprime market, where the interest rates already approach the maximum interest rates allowed under state usury

effect of dampening consumer spending.¹⁶⁷ By shifting the financial responsibility to non-bankrupt debtors who are able to obtain credit, the additional burden may force more debtors into bankruptcy.

Arguably, if secured creditors were fully compensated for their risk, some debtors already struggling to establish manageable repayment plans would be unable to meet the additional obligations and would need to file under Chapter 7 liquidation bankruptcy rather than Chapter 13. However, this possible negative result is outweighed by the benefits of keeping additional debtors out of bankruptcy altogether, keeping interest rates for other debtors at lower rates, and making credit available to a higher number of consumers.

In addition, the economic impact of the Court's opinion will likely be magnified in the future as Chapter 13 bankruptcies become more pervasive. In the three decades since Congress enacted the Bankruptcy Reform Act, federal courts have seen a drastic increase in the annual number of total bankruptcy filings – from 200,000 cases in 1978 to 1.6 million cases in 2004.¹⁶⁸ With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,¹⁶⁹ a greater percentage of these cases will likely be Chapter 13 cases.¹⁷⁰ This legislation added additional barriers to debtors seeking Chapter 7 bankruptcy, which will effectively funnel additional consumers seeking bankruptcy protection into Chapter 13 repayment plans.¹⁷¹

VI. CONCLUSION

As bankruptcy reform garners substantial media attention, the Supreme Court in *Till v. SCS Credit Corp.* quietly undermined the bankruptcy process by establishing an interest rate valuation method that will consistently undercompensate secured creditors for their Chapter 13 bankruptcy claims. In adopting its prime-plus formula, the *Till* plurality ignores legislative history and adopts a standard contrary to one of the basic tenants of the Bankruptcy Code. The Court's decision effectively established a social subsidy requiring non-bankrupt debtors to pay for the mistakes of their bankrupt counterparts.

laws. See COLO. REV. STAT. § 5-2-201 (2002 & Supp. 2003); FLA. STAT. § 537.011 (2002 & Supp. 2003); IND. CODE § 24-4.5-3-201 (1995 & Supp. 1999); MD. CODE ANN., COM. LAW § 12-404(d) (West 2000).

167. This position was asserted in an Amicus Brief by commercial lenders in support of SCS in this case. Brief Amicus Curiae for Commercial Lenders in support of Respondent at *23, *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (No. 02-1016).

168. Stephen Labaton, *Bankruptcy Bill Set for Passage; Victory for Bush*, N.Y. TIMES, Mar. 9, 2005, at A1.

169. Pub. L. No. 109-8, 119 Stat. 23 (2005).

170. Stephen Labaton, *supra* note 168, at A1 (noting that the means test would prevent Chapter 7 bankruptcy for debtors earning more than half the median income in their state and who have the ability to pay at least \$6,000 over five years, and instead, require filing under Chapter 13).

171. *Id.*

Although it is not yet clear whether this subsidy will be applied to corporate reorganizations, even the narrowest reading of the Supreme Court's decision indicates repercussions throughout the economy. *Till's* effect will only become magnified when the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 becomes law and additional numbers of debtors are funneled into Chapter 13 debt repayment plans.

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