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## Lost in Translation: Till v. SCS Credit Corp. and the Mistaken Transfer of a Consumer Bankruptcy Repayment Formula to Chapter 11 Reorganizations

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LOST IN TRANSLATION: *TILL V. SCS CREDIT CORP.* AND THE  
MISTAKEN TRANSFER OF A CONSUMER BANKRUPTCY  
REPAYMENT FORMULA TO CHAPTER 11 REORGANIZATIONS

*Mark J. Thompson and Katie M. McDonough*

**LOST IN TRANSLATION: *TILL* v. *SCS CREDIT CORP.* AND THE MISTAKEN TRANSFER OF A CONSUMER BANKRUPTCY REPAYMENT FORMULA TO CHAPTER 11 REORGANIZATIONS**

*Mark J. Thompson*\* and *Katie M. McDonough*\*\*

**ABSTRACT**

This Article argues that courts overseeing chapter 11 cases have been mistakenly invoking the Supreme Court’s 2004 decision in *Till v. SCS Credit Corp.*—which specified a consumer-friendly formula for setting the interest rate on the remaining payments on a loan that financed a used pickup truck—at the expense of over a century of Supreme Court precedents that established the contrastingly creditor-friendly “fair and equitable” standard for repayment of business debts, as well as disregarding a clear statutory distinction between the present value tests in chapters 11 and 13. This Article also discusses the controversial 2014 decision in *Momentive Performance Materials* and is particularly helpful in light of the recent publication by the ABI Commission to Study the Reform of Chapter 11 of its voluminous 2012–2014 Final Report and Recommendations. That Report concludes, with little explanation, that *Till* should not be applied in chapter 11 cases. This Article provides a detailed justification of that position, serving as a guide for judges who are tasked with analyses of chapter 11 cramdown interest rates and assisting those practitioners who would argue that application of the *Till* “prime-plus” formula violates existing “fair and equitable” jurisprudence. This Article also provides academics with additional historical and jurisprudential background concerning *Till* in the consumer bankruptcy context.

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INTRODUCTION

In 2004, a divided Supreme Court decided *Till v. SCS Credit Corp.*,<sup>1</sup> mandating use of a “prime-plus” formula to determine the interest rate applicable to repayment over time of a secured creditor’s claim in a chapter 13 (consumer) bankruptcy. The “prime-plus” formula substantially reduced the amount repaid to secured creditors as compared to the interest rates that consumer credit usually entails. Subsequently, courts have interpreted dicta in *Till’s* plurality opinion to require use of the same “prime-plus” formula in chapter 11 (business) bankruptcies, in spite of a century or more of Supreme Court precedent developing the “absolute priority” doctrine, which has provided creditors with greater recoveries in corporate reorganizations. While the

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

plurality's dicta undoubtedly put the matter of chapter 11 interest rates into play, a "deep dive" into the proceedings before the *Till* Court reveals that the field of chapter 11 jurisprudence was barely mentioned in the briefing, argument, or the Justices' questions. This lack of judicial analysis throws into question the weight lower courts have uncritically accorded *Till*'s chapter 11 dicta. Further, when we contrast the relevant sections of chapter 13 and chapter 11 (a task surprisingly unperformed by the lower courts that have extended *Till* to the chapter 11 context), they prove far more dissimilar than those courts have assumed. The decisions extending *Till*'s consumer-protecting formula to business bankruptcies rest on a superficial deference to the plurality's dicta that becomes untenable when measured against the full record of proceedings in *Till* and the relevant statutory language.

Ultimately, we argue the *Till* "prime-plus" method for pricing interest rates in chapter 13 was endorsed by *Till*'s plurality solely as a pragmatic response to certain characteristics specific to chapter 13 that are not found in chapter 11. This conclusion enables *Till* to stand on its own as a chapter 13 pronouncement, while remaining harmonious with the long line of Supreme Court decisions in the business reorganization context that have provided secured creditors greater protection than the *Tills*' lender received.

Part I of this article contains a brief history of the Supreme Court's development of the "fair and equitable" standard and the absolute priority doctrine in business reorganization. Part II provides an overview of cramdowns under the current Code as set forth in chapter 11 and chapter 13.<sup>2</sup> Part III presents a "deep dive" into the Supreme Court proceedings in *Till* with a focus on the practical and fact-specific considerations that led to the fractured decision. Part IV reviews how lower courts are mistakenly applying *Till* in chapter 11 bankruptcies. Part V argues that *Till* has no place in chapter 11 cramdowns and that courts should instead revert to following the century's worth of existing Supreme Court opinions and their progeny that specifically address treatment of creditors in chapter 11 cramdowns.

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2. Confirmation standards under chapter 11 and chapter 13 require that either, (1) the court finds that all classes of creditors accept the plan, or (2) if an impaired class of creditors votes against the plan (and therefore is a "dissenting" class), the court find that the plan meets certain additional standards set forth in § 1129(b) or § 1325(a)(5). *See* 11 U.S.C. § 1129 (2012); 13 U.S.C. § 1325 (2012). Confirmation over the objection of a dissenting class after those additional findings are made is called a "cramdown."

**I. PRE-CODE DEVELOPMENTS: THE “FAIR AND EQUITABLE”  
STANDARD AND THE ABSOLUTE PRIORITY DOCTRINE**

The Supreme Court has consistently affirmed the absolute priority doctrine over the past century. The doctrine is most famously associated with the Court’s 1913 decision in *Northern Pacific Railway Co. v. Boyd*, which stated that a plan of reorganization may not provide value to shareholders until all creditors’ claims were first satisfied in full.<sup>3</sup> But when it came to reorganization practice, *Boyd* was honored mostly in the breach,<sup>4</sup> as business bankruptcies in that era tended instead to apportion debt reduction among the different layers of the businesses’ capital structure in a negotiated manner.<sup>5</sup> The practice tended to favor stockholders (often managers of the business or prominent members of the local business community) to the detriment of the most senior creditors (often more distant investors who had purchased the company’s secured bonds as a source of steady income).<sup>6</sup> The

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3. *N. Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 508 (1913) (“If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever.”).

4. See ARTHUR STONE DEWING, 2 THE FINANCING POLICY OF CORPORATIONS 1303–04 (5th ed. 1953) (“In the twenty-five years following the *Boyd* case little was added to clarify the extent to which the absolute priority rights of creditors could be carried. . . . At all events reorganization plans gave lip service to the *Boyd* decision without weighing too nicely the value of shares of stock the entire worth of which rested on future undetermined earning power.”).

5. See *id.* at 1299–1300 (explaining that following the panic of 1893, the “relative priority” theory was employed, “[A] hierarchy of relative values was worked out in which creditors and stockholders were each called upon to make certain sacrifices, but after these had been exacted, the claim of each security-holder was given a place in the reorganization in the order of priority . . . . [N]o hard line of demarcation was drawn between bondholder and stockholder, each being regarded as a contributor to the railroad’s capital and therefore, in accordance with their relative priority, entitled to participate in the reorganization . . . . [T]he rigor of the bondholders’ lien on the corporate property was softened in order to justify the participation by the old stockholders in the securities of the new company.”). *Id.* The *Boyd* decision did not immediately alter this arrangement. See *id.*

6. John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 MICH. L. REV. 963, 969–71 (1989); see DEWING, *supra* note 4, at 1275 n.mmm (“It has been long known that many reorganization committees of bankrupt real estate companies were little more than a racket. Field cites a case within his personal knowledge, of a real estate default—

negotiation over the divvying up of debt reduction often led to protracted proceedings that struck observers as inefficient.<sup>7</sup> Worst of all, as debt reduction was not an outcome that creditors embraced enthusiastically, the “relative priority” practice frequently left companies overly leveraged when they eventually did emerge, to the dismay of economic policy makers.<sup>8</sup>

In 1934, Congress passed the nation’s first corporate reorganization statute, which codified the *Boyd* doctrine that a plan be “fair and equitable” prior to confirmation. Again, however, the edict did not adequately protect creditors in practice. As one contemporary scholar explained:

[i]n many cases, it was charged, the committees or others purportedly representing the bondholders, general creditors and stockholders in the informal negotiations resulting in the final plan, were not actually effective and independent representatives of the interests they purported to serve. In some cases, . . . such committees or other representatives were in fact affiliated with or even designated by the old management or other “inside” interests, whose real purpose might be to perpetuate existing control and cover up possible past mismanagement.<sup>9</sup>

In short, shareholders continued to retain value at the expense of creditors, even under the new reorganization statute.<sup>10</sup>

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with a ‘committee’ organized by the managing owners—apparently for no other purpose than of defraud the individual bondholders.”); *id.* at 1275–81 and accompanying notes for examples illustrating the problem of committees, including that they often inadequately served their constituents.

7. See, e.g., John H. Crider, *Court Ruling Seen Speeding 77B Cases*, N.Y. TIMES, Nov. 23, 1939, at 48; DEWING, *supra* note 4, at 1256, n.uu.

8. Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 932-36 (2001).

9. Emmet McCaffery, *Corporate Reorganization Under the Chandler Bankruptcy Act*, 26 CAL. L. REV. 643, 650 (1938).

10. See Perry Anderson, *U.S. Supreme Court Rule of Valuation as Applied to Corporate Reorganization*, 27 MARQ. L. REV. 111, 123 (1943) (“The principle of absolute priority has recently been restated in the U.S. Supreme Court case of *Case v. Los Angeles Lumber Products Co.* The absolute priority rule had earlier been stated in the U. S. Supreme Court decision in *Northern Pacific R.R. v. Boyd* but so many reorganizations later followed the rule of relative priority that it became necessary to clarify and state definitely the rule to be followed in reorganizations.”) (citation omitted).

The very next year, a Supreme Court dominated by New Deal era reformers, urged on by fellow reformer Solicitor General Robert Jackson on behalf of the Securities and Exchange Commission and the Interstate Commerce Commission, seized upon a small, largely consensual Chapter X reorganization to torpedo these practices.<sup>11</sup> The resultant opinion in *Case v. Los Angeles Lumber Products Co.* reaffirmed in no uncertain terms that “fair and equitable” requires faithful adherence to the absolute priority doctrine.<sup>12</sup> Justice Douglas wrote:

“fair and equitable” . . . are words of art which prior to the advent of section 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in the case of other terms or phrases used in that section . . . we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary.<sup>13</sup>

The court thus confirmed that “fair and equitable” is a term of art with a fixed meaning.

In *Los Angeles Lumber*, the Court rejected the assertion that it was “fair and equitable” to make secured bondholders share with equity interests the going concern premium, even though the premium would have been lost in a liquidation but was preserved by the cooperation of equity interests in reorganization.<sup>14</sup> The Court explained that liquidation was not the only alternative, because the court could have approved a going concern reorganization that delivered all the ownership to the secured creditors.<sup>15</sup> Therefore, the equity interests were entitled to nothing in exchange for filing a voluntary petition for reorganization rather than being forced into an involuntary liquidation.<sup>16</sup> On remand, the District Court approved a modified plan that delivered all the value

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11. *See Crider, supra* note 7, at 48.

12. *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106 (1939).

13. *L.A. Lumber*, 308 U.S. at 115 (citing *Keck v. United States*, 172 U.S. 434, 446 (1899)).

14. *Id.* at 124.

15. *Id.* at 131.

16. *Id.*



of the business to the secured creditors and wiped out the equity's stake.<sup>17</sup>

Two years later, in *Consolidated Rock Products v. Du Bois*, the Supreme Court again overturned a confirmed plan because it failed the “fair and equitable” standard in its treatment of creditors.<sup>18</sup> In another opinion by Justice Douglas, the Court held that the plan “comes within judicial denunciation because it does not recognize the creditors’ ‘equitable right to be preferred to stockholders against the *full* value of *all* property belonging to the debtor corporation.’”<sup>19</sup> The Court further opined that

[T]he bondholders have not been *made whole*. They have received an inferior grade of securities, inferior in the sense that the interest rate has been reduced, a contingent return has been substituted for a fixed one, the maturities have been in part extended and in part eliminated by the substitution of preferred stock, and their former strategic position has been weakened. Those lost rights are of value. *Full* compensatory provision must be made for the *entire* bundle of rights which the creditors surrender.<sup>20</sup>

This passage illustrates the Supreme Court’s settled view that a creditor’s “entire bundle of rights” merit protecting, and, where junior interests participate in a reorganization, senior creditors must be “made whole” for the plan to satisfy the “fair and equitable” standard.<sup>21</sup>

The Bankruptcy Reform Act of 1978 carried the “fair and equitable” language into the modern era with procedural modification that resulted in what is known as a “relaxed” version of the absolute priority standard.<sup>22</sup> Under the current Code, if a class of creditors accepts the reorganization plan, the class’s treatment under the plan will

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17. See DEWING, *supra* note 4, at 1309, n.o (“Following the Supreme Court decision the district judge approved an ‘absolute priority’ reorganization in which all the issued stock was given to the bondholders—all the previous stockholders were eliminated.”).

18. *Consol. Rock Prods. Co. v. Du Bois*, 312 U.S. 510 (1941).

19. *Id.* at 529 (emphasis added) (citing *Kan. City Terminal Ry. Co. v. Cent. Union Trust Co.*, 271 U.S. 445, 454 (1926)).

20. *Id.* at 527–28 (emphasis added).

21. *Id.*

22. See *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988) (stating that “the Code provides that a “fair and equitable” reorganization plan is one which complies with the absolute priority rule”) (citing 11 U.S.C. § 1129(b)(2)(B)(ii) (2012)).

not be scrutinized by the “fair and equitable” standard.<sup>23</sup> If, however, that class of creditors dissents, then the plan proponent must show that its proposed treatment of the class satisfies the “fair and equitable” standard for the plan to be confirmed.<sup>24</sup> This “encourages a negotiated restructuring and eliminates the necessity of establishing the going concern value of a company in every case,”<sup>25</sup> but it also protects the interests of a dissenting class of creditors from inequitable treatment vis-à-vis the interests of creditors junior to it.

Congress reformed the Code with no intention of severing the incorporated phrase “fair and equitable” from the meaning given it by cases like *Boyd* and *Los Angeles Lumber*.<sup>26</sup> Contemporaneous statements by participants in the reform underscore the view that section 1129 cramdown standards were reformed to protect secured creditor interests. Kenneth Klee, the House Judiciary Committee staffer most involved in drafting the Code (including chapter 11 and chapter 13)<sup>27</sup> stated that the new Code would afford additional “protection for secured claims that is not provided under present law,”<sup>28</sup> and Ronald Trost, a member of the National Bankruptcy Conference who was deeply involved in the 1970s reform project, wrote: “In the usual chapter 11 case either secured creditors will consent to the plan or the business will not be able to be reorganized.”<sup>29</sup> The intent of the reform, then, was certainly not to weaken recoveries by chapter 11 secured creditors.

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23. If no class dissents, the plan must satisfy only the conditions set forth in 11 U.S.C. §§ 1129(a)(1)–(16).

24. 11 U.S.C. § 1129(b)(2).

25. MICHAEL A. GERBER, *BUSINESS REORGANIZATIONS* 734, 744 (2d. ed. 2000).

26. See H.R. REP. NO. 95-595 at 413 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6369 (explaining that subsection (b) “requires simply that the plan meet certain standards of fairness to dissenting creditors or equity security holders. The general principle of the subsection permits confirmation notwithstanding nonacceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule. . . . That is, if the class is impaired, then they must be paid in full or, if paid less than in full, then no class junior may receive anything under the plan. This codifies the absolute priority rule from the dissenting class on down.”).

27. Kenneth Klee was one of the principal draftsmen of the Code. J. Ronald Trost, *Business Reorganizations Under Chapter 11 of the New Bankruptcy Code*, 34 *BUS. LAW* 1309, 1309 n.\* (1979).

28. See Kenneth Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 *AM. BANKR. L.J.* 133, 143 (1979).

29. See Trost, *supra* note 27, at 1335 n.182.

## II. THE CURRENT CODE AND POST-CODE DEVELOPMENTS

### A. CRAMDOWN UNDER SECTION 1129

The text of Section 1129(b)(1) of the Code states that where there is a dissenting class, the plan must be “fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.”<sup>30</sup> Section 1129(b)(2) thereafter lists three separate tests to assist in determining whether a plan is “fair and equitable” to dissenting classes: one each for classes of secured claims, unsecured claims, and equity interests.<sup>31</sup>

The test for secured claims set forth in Section 1129(b)(2)(A) contains three disjunctive criteria for the plan to be “fair and equitable” with respect to a dissenting class of secured claims. The criterion relevant to this article is the first, which permits confirmation so long as the secured claimholder retains its lien and receives deferred cash payments that are (1) equal to at least the allowed amount of the claim and (2) have “a value, as of the effective date of the plan, of at least the value of such holder’s interest” in the collateral securing the claim (hereinafter referred to as the “deferred payments” condition).<sup>32</sup> There is little question that the language “value, as of the effective date of the plan” equates to the present value of the sum in question.<sup>33</sup> This latter

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30. 11 U.S.C. § 1129(b)(1) (2012).

31. 11 U.S.C. § 1129(b)(2).

32. 11 U.S.C. § 1129(b)(2)(A)(i)(II). With respect to a class of unsecured claims, the plan must provide: (i) “that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim” or (ii) “the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property . . . .” 11 U.S.C. § 1129(b)(2)(B). Similarly, with respect to a class of equity interests, the plan must provide: (i) “that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.” 11 U.S.C. § 1129(b)(2)(C); see Richard Maloy, *A Primer on Cramdown—How and Why it Works*, 16 ST. THOMAS L. REV. 1, 14 (2003).

33. H.R. REP. NO. 95-595, at 408, 413, 414 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6364, 6369, 6370.

requirement, then, calls for calculation of the present value of the deferred payments as of the effective date of the plan and a determination that such value is at least equal to the value of the secured claim (hereinafter referred to as the “chapter 11 present value test”).

Within this statutory scheme, various factors affect the value of deferred cash payments. In particular, the discount rate applies when calculating the present value of the payments.<sup>34</sup> Typically, in chapter 11 cramdowns, experts offer evidence of current market conditions. They will also value the enterprise as a going concern and, if necessary, value the proposed repayment so the court can decide whether, in light of the current market, the treatment of the class is “fair and equitable.” Each of these factors impacts the ultimate value of the repayments to be made, and therefore the value of the recovery of secured creditors, which is used to determine compliance with the absolute priority doctrine.

In the more than 35 years since the Bankruptcy Code was adopted, the Supreme Court has confirmed in no uncertain terms that the absolute priority rule “gained express statutory force, and was incorporated into Chapter 11 . . . .”<sup>35</sup> Moreover, the Court has continued its practice of applying the rule strictly. In *Norwest Bank Worthington v. Ahlers*, decided in 1988, the Court held that the absolute priority doctrine is violated even where debtors retain otherwise “worthless” equity interests over the objection of an impaired class.<sup>36</sup> The Court stated that “the Code provides that it is up to the creditors—and not the courts—to accept or reject a reorganization plan which fails to provide them

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‘Value as of the effective date of the plan,’ as used in paragraph (3) and in proposed 11 U.S.C. § 1179(a)(7)(B) [sic], 1129(a)(9), 1129(b), 1172(2) [sic], 1325(a)(4), 1325(a)(5)(B), and 1328(b), indicated that the promised payment under the plan must be discounted to present value as of the effective date of the plan. The discounting should be based only on the unpaid balance of the amount due under the plan, until that amount, including interest, is paid in full. *Id.* at 6364.

34. See Maloy, *supra* note 32, at 21–25.

35. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (“Under current law, no Chapter 11 reorganization plan can be confirmed over the creditors’ legitimate objections (absent certain conditions not relevant here) if it fails to comply with the absolute priority rule.”).

36. *Id.* at 208 (reasoning that “there may still be some value in the control of the enterprise . . .”).

adequate protection or fails to honor the absolute priority rule.”<sup>37</sup> The Court later cited this language in *Bank of America National Trust & Savings Ass’n v. 203 North LaSalle Street Partnership*, decided in 1999.<sup>38</sup> There, the Court held that prepetition owners may not cram down a plan that allows only those owners to contribute new capital in exchange for equity in the reorganized debtor where the dissenting class of creditors was not paid in full.<sup>39</sup> In *203 North LaSalle*, the Court further communicated a preference for market valuations rather than judicial ones. It opined that Congress intended to “narrow the occasions for courts to make valuation judgments” and implied a “disfavor for decisions untested by competitive choice” under section 1129(b)(2)(B),<sup>40</sup> which governs the cramdown of unsecured claims. A test by the market—specifically, by giving creditors the right to participate through submitting bids or proposing competing plans—satisfies the absolute priority rule by ensuring that “top dollar” is paid.<sup>41</sup> Thus, less than five years prior to deciding the Tills’ consumer bankruptcy case, the Court was firmly wedded to maintaining the absolute priority rule in chapter 11 cases.

#### B. CRAMDOWN UNDER SECTION 1325

In order for a plan to be confirmed under chapter 13, it must comply with general confirmation requirements similar to those in chapter 11. Such requirements, like section 1129, include a court finding that either (1) all classes of creditors have accepted the plan or (2) if a class dissents, the plan satisfies specific criteria. In the case of a secured creditor, those criteria are that the plan must provide that either (1) the debtor surrenders the collateral to the claimholder or (2) the claimholder retains its lien and “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.”<sup>42</sup> Thus, cramdown in

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37. *Id.* at 207.

38. *Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 457 (1999).

39. *Id.* at 437.

40. *Id.* at 457–58. The Court held that promoting market valuations is in the interest of “statutory coherence” with other sections of the Code; specifically, it renders § 1129(b)(2)(B) consistent with the “supramajoritarian class creditor voting scheme” of § 1126(c). *Id.*

41. *Id.* at 457.

42. 11 U.S.C. § 1325(a)(5)(B)(ii) (2012).

chapter 13 requires a “present value” test (hereinafter referred to as the “chapter 13 present value test”) that is facially similar to the chapter 11 present value test.<sup>43</sup> However, section 1325(a)(5) makes no reference to the “fair and equitable” requirement, a distinction that has gone largely unrecognized by courts considering the relevance of *Till* to chapter 11 cases, as we discuss further in Part IV.

Before *Till* was decided, the circuit courts adopted various methods of calculating the discount rate applicable to the chapter 13 present value test. These methods included the “coerced loan” approach<sup>44</sup> (adoption of market rates for similar loans); the “presumptive contract rate” approach<sup>45</sup> (adoption of the prepetition contract rate as a presumption that either party may refute with evidence); “the cost of funds” approach<sup>46</sup> (adoption of the rate that it would cost the lender to obtain an equal amount of money, *i.e.*, the *lender’s* cost of funds); and various formula approaches<sup>47</sup> (adoption of a relatively riskless rate—like the US Treasury rate—and the addition of a risk premium, such as for default risk). In 2004, the Supreme Court’s decision in *Till* eliminated the debate over interest rates in chapter 13 cramdown fights and mandated use of the “prime-plus” method, a formula approach involving

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43. Section 1325 differs in requiring (1) assessment of the value of the “property” to be distributed, whereas § 1129 specifically requires “deferred payments,” and (2) the present value of the property be “not less than” the “allowed amount of the claim,” whereas § 1129 requires that the present value of the deferred payments be “at least” the value of the collateral securing the claim. *Compare id.*, with 11 U.S.C. § 1129(b)(2)(A)(i)(II). Further, the tests are not identical in practice because experts are not typically retained in chapter 13 bankruptcies given the small sums at stake.

44. Six circuits adopted variations of the “coerced loan” approach. *See, e.g., In re Smithwick*, 121 F.3d 211 (5th Cir. 1997); *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63 (3d Cir. 1993); *United Carolina Bank v. Hall*, 993 F.2d 1126 (4th Cir. 1993); *In re Hardzog*, 901 F.2d 858 (10th Cir. 1990); *United States v. Arnold*, 878 F.2d 925 (6th Cir. 1989); *In re S. States Motor Inns, Inc.*, 709 F.2d 647 (11th Cir. 1983).

45. *In re Till*, 301 F.3d 583, 592 (7th Cir. 2002), *rev’d sub nom. Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (holding the original contract rate should serve as the “presumptive rate” for cramdown).

46. *Id.* at 593 (Rovner, J., dissenting).

47. Three circuits adopted alternative “formula” methods for discounting payments to present value. *See In re Valenti*, 105 F.3d 55, 64 (2d Cir. 1997), *abrogated by* *Assoc. Commercial Corp. v. Rash*, 520 U.S. 953 (1997) (holding chapter 13 cramdown interest should be fixed at the treasury bond rate plus a 1-3% risk premium); *In re Fowler*, 903 F.2d 694, 698 (9th Cir. 1990) (approving formula approach for chapter 12 cramdown); *United States v. Doud*, 869 F.2d 1144, 1146 (8th Cir. 1989) (endorsing formula approach in determining chapter 12 cramdown interest).

adoption of the prime rate plus a risk variable that typically is, but need not be, within the range of one to three percent.<sup>48</sup>

### III. A “DEEP DIVE” INTO *TILL v. SCS CREDIT CORP.*

#### A. FACTS AND PROCEDURAL HISTORY

The bankruptcy case of Lee and Amy Till was in most respects an ordinary consumer bankruptcy. In 1998, Instant Auto Finance, a subprime auto lender, financed the Tills’ purchase of a used 1991 Chevrolet pickup truck at a 21% annual interest rate,<sup>49</sup> the maximum rate chargeable under Indiana’s usury law.<sup>50</sup> The loan was for \$6,426, and the bimonthly payments were to be \$122.<sup>51</sup> In 1999, the Tills, who had reduced the principal by about 25% but were in default, filed for chapter 13 relief in bankruptcy court for the Southern District of Indiana.<sup>52</sup> The parties stipulated to a \$4,000 secured claim for the lender.<sup>53</sup>

The Tills’ plan proposed to repay the secured claim in full over 17 months at a 9.5% interest rate at a time when the “prime” rate was around 8%.<sup>54</sup> The 1.5% premium was set by local rule (a fact not

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48. *Till*, 541 U.S. at 466 (“The risk adjustment’s proper scale is not before this Court. The Bankruptcy Court approved 1.5% in this case, and other courts have generally approved 1% to 3%.”).

49. Brief for Respondent at 1, *Till*, 541 U.S. 465 (No. 02-1016), 2003 WL 22466039.

50. *Id.* at 31 (citing Ind. Code Ann. § 24-4.5-3-201).

51. *Till*, 541 U.S. at 470 (“Petitioners’ initial indebtedness amounted to \$8,285.24—the \$6,425.75 balance of the truck purchase plus a finance charge of 21% per year for 136 weeks, or \$1,859.49. Under the contract, petitioners agreed to make 68 biweekly payments to cover this debt . . .”).

52. *See* Brief for Respondent, *Till*, 541 U.S. 465 (No. 02-1016); Brief for Petitioners at 3, *Till*, 541 U.S. 465 (No. 02-1016). The lender also received an \$895 deficiency claim which was not satisfied in full. *See id.* This is worth keeping in mind to the extent one wants to think about whether the Tills’ plan was “fair” or “equitable” in a broad sense, especially when advocates of greater debtor relief emphasize the 21% pre-petition interest rate and the supposed profit reaped by the lender. The lender here was not paid in full on its total claim.

53. *Till*, 541 U.S. at 470.

54. Brief for Petitioners at 3, *Till*, 541 U.S. 465 (No. 02-1016); Brief for Respondent at 5, *Till*, 541 U.S. 465 (No. 02-1016).

disclosed in any of the Court's opinions).<sup>55</sup> The lender voted to reject the proposed treatment and, at the confirmation hearing, showed through two fact witnesses that (1) it "uniformly" charged a 21% interest rate on loans of similar credit quality and purpose and (2) such a rate was the prevailing industry rate for car loans to creditors like the Tills<sup>56</sup> (none of which was surprising given that 21% was the usury ceiling<sup>57</sup>).

The Tills responded with expert testimony to the effect that a fair market price of capital and the time value of money were captured by the prime rate of 8% interest, and a 1.5% risk premium should be added to cover the risk that petitioners would not make payments as required by the plan.<sup>58</sup> The resultant 9.5% rate dovetailed with the rate established by local rule. The expert asserted that this 9.5% formula rate was "very reasonable" given that chapter 13 plans are "supposed to be financially feasible" and opined that respondent's exposure was fairly limited because chapter 13 plans are performed "under the supervision of the court."<sup>59</sup> The chapter 13 trustee filed comments supporting the formula rate as, "among other things, easily ascertainable, closely tied to the 'condition of the financial market,' and independent of the financial circumstances of any particular lender."<sup>60</sup> The bankruptcy judge allowed the debtors' expert's testimony, adopted his reasoning, and confirmed the plan in an unreported opinion in June 2000.<sup>61</sup>

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55. See Transcript of Oral Argument at 14, *Till*, 541 U.S. 465 (No. 02-1016), 2003 WL 22955931. This is surprising given that the plurality would go on to declare that the "prime-plus" approach provided room for individualized risk assessment.

56. *Till*, 541 U.S. at 471.

57. Brief for Respondent at 31, *Till*, 541 U.S. 465 (No. 02-1016) (citing Ind. Code Ann. § 24-4.5-3-201).

58. The expert was an Indiana University-Purdue University Indianapolis economics professor who "acknowledged that he had only limited familiarity with the subprime auto lending market." *Till*, 541 U.S. at 471. Paying an academic expert to deliver expert testimony is unusual in Chapter 13, especially where the amount in controversy is less than \$1,000. Here, the UAW was representing the Tills and bore the cost of the expert outside of the estate. Correspondence between Annette Rush, attorney for United Auto Worker Legal Services Plan, and Mark J. Thompson (Jan. 6, 2014) (on file with authors). On a \$4,000 note over 17 months, the 11.5% difference in interest rates amounted to about \$600 in additional payments.

59. *Till*, 541 U.S. at 471-72.

60. *Id.* at 472 (citing App. to Pet. for Cert. 41a-42a).

61. Brief for Petitioners at 1, *Till*, 541 U.S. 465 (No. 02-1016); see Petition for Writ of Certiorari at Appendix D, *Till*, 541 U.S. 465 (No. 02-1016).



The lender appealed to the United States District Court for the Southern District of Indiana, which reversed on the grounds that unrebutted evidence established that a subprime market existed with rates of 21%, and therefore the contract rate should be utilized.<sup>62</sup>

The Seventh Circuit affirmed in August 2002, by 2 to 1, but did so on different grounds than the opinion below.<sup>63</sup> Its opinion echoed the district court in reasoning that a secured creditor “is entitled to the rate of interest it could have obtained had it foreclosed and reinvested the proceeds in loans of equivalent duration and risk” to a similarly situated debtor since nothing less would give the creditor the “indubitable equivalent” of its nonbankruptcy entitlement.<sup>64</sup> However, the Seventh Circuit went further, announcing that the pre-petition non-default contract rate was presumptive evidence of the correct rate,<sup>65</sup> thus endorsing the “presumptive contract rate” approach. The lone dissenter advocated reimbursing the lender only for its “cost of funds,” an approach she touted as “closer to recognizing the economic consequences of the debtor’s decision to keep the collateral.”<sup>66</sup> After denying writs of *certiorari* in similar disputes, the Supreme Court chose *Till* as the vehicle to resolve the circuit split.

Ultimately, in *Till*, the Supreme Court reversed and remanded the decision below, endorsing the formula approach and ordering application of the “prime-plus” method. It rejected the presumptive contract rate approach in a 5-4 decision that comprised three camps. A

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62. Brief for Petitioners at 4, *Till*, 541 U.S. 465 (No. 02-1016). The District Court considered this to answer the controlling inquiry under *Koopmans v. Farm Credit Servs. Of Mid-Am.*, 102 F.3d 874 (7th Cir. 1996). See also *In re Till*, 301 F.3d 583, 586 (7th Cir. 2002), *rev’d sub nom. Till*, 541 U.S. 465. The Seventh Circuit explained that its decision in *Koopmans* stood for the proposition that “the creditor must get the market rate of interest, at the time of the hypothetical foreclosure, for loans of equivalent duration and risk.” *In re Till*, 301 F.3d at 591 (quoting *Koopmans*, 102 F.3d at 875).

63. *In re Till*, 301 F.3d at 593.

64. *In re Till*, 301 F.3d at 591-92.

65. See *id.* at 592 (stating that the “old contract rate will yield a rate sufficiently reflective of the value of the collateral at the time of the effectiveness of the plan to serve as a presumptive rate”) (adopting the reasoning of *General Motors Acceptance Corp. v. Jones*, 999 F.2d 63 (3d Cir. 1993) and *In re Smithwick*, 121 F.3d 211, 214 (5th Cir. 1997)).

66. *Id.* at 595 (Rovner, J., dissenting). This analysis is neither legally sound nor accurately reflects the basic principles of finance in a market economy. The fact that a risk has materialized has nothing to do with whether the government can coercively re-expose the lender to a renewal of that risk or a different one, or at what price.

plurality, supporting the “prime-plus” method, narrowly prevailed in an opinion authored by Justice Stevens and joined by Justices Breyer, Ginsberg, and Souter. Justice Thomas authored a separate concurrence that advocated use of the risk-free rate because it is “[t]he interest rate most closely approximating the riskless or pure rate for money.”<sup>67</sup> Justices Kennedy, O’Connor, and Rehnquist joined a dissent written by Justice Scalia that argued for use of the “presumptive contract” rate, a variation of the “coerced loan” approach.<sup>68</sup> The lack of a clear majority view suggests the *Till* prime-plus method should have had weak precedential effect, especially outside of chapter 13 cramdowns, but this has not been the case.<sup>69</sup>

#### B. THE *TILL* DICTA

The plurality included two dicta that, some argue, bear on the chapter 11 present value test. First, the *Till* plurality stated: “We think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions.”<sup>70</sup> This “same approach” dictum was followed by the comment that Congress would favor an approach “familiar in the financial community” and that “minimizes the need for expensive evidentiary proceedings.” The comment was the first in a list

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67. *Till*, 541 U.S. at 488 (Thomas, J., concurring).

68. *See id.* at 490–508 (Scalia, J., dissenting).

69. It bears noting that eight of the nine justices did agree that the rate should be higher than the prime rate (the plurality having endorsed the prime-plus approach and the dissent having endorsed the coerced loan approach). *See also* Daniel R. Wong, Note and Comment, *Chapter 11 Bankruptcy and Cramdowns: Adopting a Contract Rate Approach*, 106 NW. U. L. REV. 1927, 1945 (2012) (citing *Till*, 541 U.S. at 477). Wong opines that “[t]he narrowest interpretation [of the holding of *Till*] is that the Supreme Court did not endorse the coerced loan approach for Chapter 13 debtors.” *Id.* Where no single rationale explains the decision of the majority of the court, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (Stewart, Powell & Stevens, JJ., plurality). In *Till*, a majority of the justices (the plurality and Justice Thomas) agreed to reject of the presumptive contract rate approach in the Chapter 13 case before them, but only four of the nine justices (the plurality) endorsed the prime-plus approach as an alternative.

70. *Till*, 541 U.S. at 474, 474 n.10 (referencing 11 U. S. C. § 1129(a)(7)(A)(ii) (2012), which requires payment of property with a “value, as of the effective date of the plan” equals or exceeds the value of the creditor’s claim, and other related sections).

of three considerations said to govern how to choose an interest rate “sufficient to compensate the creditor” for concerns that accompany future payments under section 1325(a)(5)(B)(ii).<sup>71</sup> The second consideration in the list was that “Chapter 13 expressly authorizes a bankruptcy court to modify the rights of any creditor whose claim is secured by an interest in anything other than real property that is the debtor’s principal residence.”<sup>72</sup> The third was that the calculation should be “objective” rather than subjective “from the point of view of the creditor.”<sup>73</sup>

In its discussion of this third point regarding the need for an “objective” calculation method, the plurality opinion included a footnote, “Footnote 14,” that stated: “when picking a cramdown rate in a chapter 11 case, it might make sense to ask what rate an efficient market would produce.”<sup>74</sup> Footnote 14 made this assertion after explaining that “there is no free market of willing cram down lenders” (presumably, in chapter 13 bankruptcies).<sup>75</sup> Contrasting this observation with its perception of chapter 11 practice, the court noted that, in chapter 11, there exist lender advertisements offering debtor-in-possession financing

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71. *Id.* at 473-74.

72. *Id.* at 475 (citing 11 U.S.C. § 1322(b)(2)).

73. *Id.* at 476.

74. *Id.* at 476 n.14. The full text of Footnote 14 is as follows:

This fact helps to explain why there is no readily apparent Chapter 13 “cram down market rate of interest”: Because every cramdown loan is imposed by a court over the objection of the secured creditor, there is no free market of willing cramdown lenders. Interestingly, the same is not true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession. *See, e.g.*, Balmoral Financial Corporation, <http://www.balmoral.com/bdip.htm> (all Internet materials as visited Mar. 4, 2004, and available in Clerk of Court’s case file) (advertising debtor in possession lending); Debtor in Possession Financing: 1st National Assistance Finance Association DIP Division, <http://www.loanmallusa.com/dip.htm> (offering “to tailor a financing program . . . to your business needs and . . . to work closely with your bankruptcy counsel). Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce. In the Chapter 13 context, by contrast, the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure.

75. *Id.*

to debtors.<sup>76</sup> After making the key assertion that looking to market rates might make sense in a chapter 11 case, the plurality concluded the footnote by contrasting chapter 13, in which “the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure.”<sup>77</sup> Both *Till* dicta—the “same approach” remark and Footnote 14—have influenced cramdowns outside of the chapter 13 consumer context, as discussed in Part IV.

### C. *TILL*: A PRAGMATIC CHAPTER 13 DECISION

*Till* was a chapter 13 bankruptcy case that was likely unintended to overrule the Court’s past century of precedent upholding the application of the absolute priority doctrine in business reorganizations, from *Boyd* to *203 North LaSalle*, none of which received a mention in the plurality’s opinion. This reading of the case is supported by a close review not only of the opinion, but also the briefs submitted to and arguments before the Court. First, there was negligible consideration, in either briefing or oral argument, of chapter 11 statutory parallels to chapter 13 cramdown issues. Second, significant portions of the briefing and oral argument centered on an issue specific to consumer bankruptcy cases—subprime lending—which has little bearing on chapter 11 business reorganizations. Finally, the Court, as evidenced at oral argument, was focused predominantly on the administrative concern of how the various present value calculation methods would operate in practice in the chapter 13 environment without any regard for the implications of such methods in chapter 11. These factors suggest that *Till*’s dicta should not be afforded significant weight outside of chapter 13 cases.

#### 1. *Negligible Consideration of Chapter 11 Statutory Parallels*

In their submissions to the Supreme Court, the parties’ arguments dwelled on the pragmatic aspects of chapter 13 cases. The debtors’ briefing barely discussed the language of the Bankruptcy Code or pre-Code law. The debtors contrasted chapters 11 and 13 only once, in a footnote in their reply brief highlighting only *differences* between the

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76. *Id.* (as opposed to exit financing, which is more akin to chapter 11 cramdown payments).

77. *Id.*

two chapters. They argued that the “complexity of assets” and “variety of risks” typical of chapter 11 bankruptcies “make the present value analysis as part of the ‘fair and equitable’ standard under Chapter 11 a complex endeavor beyond the scope of consumer chapter 13.”<sup>78</sup> The rest of the debtors’ brief underscored chapter 13’s purpose and how chapter 13 operates in practice.

The lender’s brief devoted less than three pages to business reorganization parallels.<sup>79</sup> It argued that Congress intended for section 1325 to be construed within the confines of the “indubitable equivalence” standard of *In re Murel Holding Co.*, a business reorganization case.<sup>80</sup> However, the lender failed to provide authority for that thesis, and it did not address the critical textual distinction<sup>81</sup> between sections 1129 and 1325 that plainly contradicts the lender’s argument.<sup>82</sup> In contrast (and correctly<sup>83</sup>), the amicus brief for the United States, submitted by the Solicitor General, highlighted some of the textual *differences* between the cramdown provisions in chapters 11 and 13. Notably, the Solicitor General emphasized that the “indubitable equivalence” standard does not appear in section 1325.<sup>84</sup> The brief stated:

The statutory term “indubitable equivalent,” however, appears only in two provisions of the Bankruptcy Code, *neither of which applies here*. See 11 U.S.C. 361(3) . . . 11 U.S.C. 1129(b)(2)(A)(iii) (prescribing an “indubitable equivalent” standard as an alternative to cram down in Chapter 11 proceedings) . . . . Disputes over present value and discount rates concern how courts should calculate that equivalence. *Language quoted from*

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78. Reply Brief for Petitioner at 1 n.1, *Till*, 541 U.S. 465 (No. 02-1016).

79. See Brief for Respondent at 41–43, *Till*, 541 U.S. 465 (No. 02-1016).

80. *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1941).

81. See *infra* Part V.A.

82. Brief for Respondent at 41–43, *Till*, 541 U.S. 465 (No. 02-1016) (citing only to authority treating chapter 11 and failing to rationalize its extension of the “indubitable equivalence” concept to chapter 13 cases). Lender also spent most of its brief on topics other than language, arguing principally that market rates and contract rates are the best evidence of risk, and discounting to present value should be done on a risk-adjusted basis.

83. See *infra* Part V.A.

84. Brief for the United States at 18, n.9, *Till*, 541 U.S. 465 (No. 02-1016), 2003 WL 22070345.

*Sections 361(3) and 1129(b)(2)(A)(i) does not in any way answer that question.*<sup>85</sup>

In short, the Solicitor General made the point that chapter 11 standards do not necessarily inform chapter 13 cramdowns.

Consistent with the parties' and Solicitor General's briefs, the oral argument gave minimal consideration to chapter 11 cramdown principles as authorities (or even as analogies) for interpreting section 1325(a)(5)(B). The Court's interrogation of the Tills' counsel centered on chapter 13 debtors' risks of default, including statistics relating to such defaults and means of calculating a risk premium. During argument by lender's counsel, Justice Breyer brushed aside discussion of "indubitable equivalence"<sup>86</sup> and changed the focus of the argument to the "practical question" before the Court. Likewise, when lender's counsel compared how interest rates are generated in chapter 11 and 13 cases, attempting to answer the question of the best evidence of a market rate, Justice Breyer dismissively retorted, "Tell me . . . a question I don't know the answer to"<sup>87</sup> and again redirected the discussion to a practical concern: what would happen if a chapter 13 debtor defaulted under the plan. In her rebuttal, counsel for the Tills closed her oral argument with the succinct statement that "indubitable equivalence is not a chapter 13 concept."<sup>88</sup> Overall, oral argument focused on the practical challenges of determining a rate in a chapter 13 case rather than on concepts like "indubitable equivalence" and "fair and equitable," which are integral to chapter 11 cramdowns. Mirroring this concentration on chapter 13 practicalities rather than on chapter 11 standards, the plurality opinion did not conduct an in-depth review of case law or the statutory text, as might be expected in a litigation turning on statutory interpretation. The business reorganization standard invoked by the lender—"indubitable

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85. *Id.* at 18 n.9 (emphasis added). Although the paragraph begins as a response to the lender's invocation of "indubitable equivalence," the 1129 reference that closes the point is not to the clause that contains the phrase "indubitable equivalence" (clause (iii)) but to the "deferred cash payment" test two clauses earlier in the statute.

86. Transcript of Oral Argument at 39, *Till*, 541 U.S. 465 (No. 02-1016) (stating that "nobody is disagreeing" that the concept of indubitable equivalence is compensatory).

87. *Id.* at 41–42.

88. *Id.* at 55.

equivalence”—was not mentioned at all in any of the opinions issued by the Supreme Court.<sup>89</sup>

## 2. Focus on Subprime Lending in Chapter 13

A second issue emphasized in the briefing and argument was subprime auto lending, the challenges of which are only relevant to consumer credit.<sup>90</sup> The debtors’ brief emphasized the supposedly egregious pricing practices associated with subprime auto loans,<sup>91</sup> a subset of subprime consumer lending wherein interest rates are often capped by state usury laws. Usury rates tend not to fluctuate with the market. They are maximum rates that a lender may charge a consumer borrower, who typically has weak bargaining power or choice of financing packages.<sup>92</sup>

The inflexibility of the usury rate was a key issue during oral argument. Justice Breyer seemed especially perturbed. He expressed concern that a “presumptive contract rate” approach would not adjust to match changes in credit market rates that were relevant to a present value computation. He observed that interest rates had fallen in the years between the Tills’ truck purchase and confirmation of their plan, but the contract rate approach would not pass the benefit of that reduction through to the Tills nor adjust their interest rate to reflect the presumed rehabilitation of their finances in chapter 13.<sup>93</sup> The lender’s counsel

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89. See *Till*, 541 U.S. 465.

90. Subprime lending is “extending consumer credit to individuals with incomplete or somewhat tarnished credit records who often are unable to obtain traditional financing.” Joseph A. Smith, Jr., *The Federal Banking Agencies’ Guidance on Subprime Lending: Regulation with A Divided Mind*, 6 N.C. BANKING INST. 73, 76 (2002).

91. The brief included a description of subprime auto lending, stating “the higher interest rates charged by subprime lenders cannot be fully explained solely as a function of the ‘additional risks’ presented by these loans.” See Brief for Petitioners at 17, *Till*, 541 U.S. 465 (No. 02-1016).

92. See Smith, *supra* note 90, at 76, for general discussions of subprime lending. Such characteristics make the subprime borrower susceptible to exploitation by lenders. The Solicitor General’s brief communicated a disdain for “eye-popping” interest rates. Brief for the United States at 6, *Till*, 541 U.S. 465 (No. 02-1016). This sentiment was echoed by the plurality. *Till*, 541 U.S. at 480-81.

93. See, e.g., Transcript of Oral Argument at 28-29, *Till*, 541 U.S. 465 (No. 02-1016). Justice Breyer questioning, in relevant part:

MR. BRUNSTAD: Your Honor, the contract rate is the best evidence, the single best evidence of the market rate.

explained that the market rate was capped by state usury law.<sup>94</sup> The plurality, of which Justice Breyer was a member, wound up presenting the “prime-plus” formula approach as a self-adjusting “market” approach in contrast to the contract rate presumption. The plurality favored the “prime-plus” rate because it “depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan, not on the creditor’s circumstances or its prior interactions with the debtor.”<sup>95</sup> At the same time, the plurality conceptualized the subprime contract market as inappropriately rigid, opining that “several considerations suggest that the subprime market is not, in fact, perfectly competitive.”<sup>96</sup>

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QUESTION: Contract rate—if there has to be a number that’s wrong, it has to be that one. . . . The contract rate by definition was entered into at some significant period of time prior to the present, and the present, by chance in this instance, is 2 years later, and we know that interest rates fell at least 1 or 2 percent during that time.

MR. BRUNSTAD: But not for subprime—

QUESTION: So—what?

MR. BRUNSTAD: But not for subprime loans.

QUESTION: That’s impossible. The prime rate—

MR. BRUNSTAD: No, Your Honor. This is why.

QUESTION: If that’s so, then the risk went up.

MR. BRUNSTAD: No, that’s not correct, Your Honor, and this is why.

QUESTION: No. It isn’t?

MR. BRUNSTAD: Because State law caps the maximum rate that can be paid.

QUESTION: Oh, okay. . . . All right, because it’s a usury problem.

MR. BRUNSTAD: Correct.

94. *Id.*

95. *Till*, 541 U.S., at 466.

96. *Id.* at 481-82 (stating that “several considerations suggest that the subprime market is not, in fact, perfectly competitive. To begin with, used vehicles are regularly sold by means of tie-in transactions, in which the price of the vehicle is the subject of negotiation, while the terms of the financing are dictated by the seller. In addition, there is extensive federal and state regulation of subprime lending, which not only itself distorts the market, but also evinces regulators’ belief that unregulated subprime lenders would exploit borrowers’ ignorance and charge rates above what a competitive market would allow.”).



### 3. Focus on Ease of Administration of Chapter 13 Cases

Oral argument addressed ease of administration more than any other topic. A traditional examination of statutory text and case law precedents was conspicuously absent. Early in the oral argument, Justice Kennedy described the coerced loan theory as “hard to administer” and questioned whether the “prime-plus” approach might present a similar challenge.<sup>97</sup> The justices repeatedly asked counsel—and each other—one practical question: whether it made more sense to calculate the cramdown rate by starting with a floor, like the prime rate, and work *upward* for increased risk, or by starting with the contract rate, which presumably reflects risk, and adjusting *downward* to reflect the supposed benefits to lenders of chapter 13 administration (such as the presence of a plan trustee and court supervision of plan performance). When the Solicitor General was questioned about the wisdom of starting with the prime rate and working up from it, he countered with the observation that in this case the search is for an easily calculable proxy rather than a perfect rate, explaining that “there is no rate you can find that—that precisely reflects the unique mix of risks and benefits and protections that are available under the Bankruptcy Code. And so by definition, everyone here is talking about a proxy in some form or another.”<sup>98</sup> Justice Scalia, who authored the dissent, epitomized the focus of the debate on practical concerns by asking during argument, “*Is it possible that the statute does not provide an answer to this question?* That since both of these schemes, your proposal and the other side’s proposal, are theoretically perfect, if they are done correctly, the bankruptcy court is free to use either one so long as he comes up with the right answer . . . . I think what we’re trying to get to—*it’s a practical question.*”<sup>99</sup> While Justice Scalia elicited laughter from the gallery by suggesting that perhaps “the statute does not provide an answer to this question,”<sup>100</sup> the plurality opinion admitted the point: “[t]he Bankruptcy Code provides little guidance . . .” as to which method to choose.<sup>101</sup>

The Justices directed the balance of their questions toward other practical concerns specific to chapter 13 cases. Justice Ginsburg highlighted these by noting that “[m]ost of these debtors are very small

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97. Transcript of Oral Argument at 5, *Till*, 541 U.S. 465 (No. 02-1016).

98. *Id.* at 22.

99. *Id.* at 38–40 (emphasis added).

100. *Id.* at 38–39.

101. *Till*, 541 U.S. at 473.

debtors.”<sup>102</sup> She noted that, under such circumstances, starting with the contract rate as a presumptive rate and requiring the debtor to argue for downward adjustments to offset factors like the high replacement cost of collateral, compensation for risk embedded in the contract rate, and the transaction cost saved would be too burdensome on an individual debtor.<sup>103</sup> She went on to explain that,

... the debtor has no money at all and certainly you don't want the debtor's money eaten up hiring an attorney and further depleting the money that could go to the creditors. So it seems to me wildly unrealistic to expect that if you say the presumptive price is the contract price, you're going to get a debtor who will be able to—I mean, I was surprised, looking at this record, that this debtor got an expert. Who paid the expert? Maybe because the union was involved ... isn't it typical that these chapter 13 debtors don't have lawyers and don't have experts?<sup>104</sup>

Her question evidenced a concern that typical chapter 13 debtors cannot afford to pay experts, so a calculation method that required one would render proceedings increasingly complicated and prohibitively expensive for chapter 13 debtors. Similarly, the Court asked lender's counsel about the advantages of chapter 13 to the creditor,<sup>105</sup> the difficulties of administration,<sup>106</sup> and the attendant costs, like the need to hire a lawyer to pursue a defaulting chapter 13 debtor in court.<sup>107</sup>

This focus on the practicalities of administering a chapter 13 bankruptcy and the specifics of the Tills' situation carried through to the plurality opinion. The Court rejected the “coerced loan” approach for reasons of administration and practicality that are specific to chapter 13, not because the text of the Code prohibits it. As the Court noted, “the coerced loan approach requires bankruptcy courts to consider evidence about the market for comparable loans to similar (though nonbankrupt) debtors, an inquiry far removed from such courts' usual task of evaluating debtors' financial circumstances and the feasibility of their

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102. Transcript of Oral Argument at 48, *Till*, 541 U.S. 465 (No. 02-1016).

103. *Id.*

104. *Id.* at 48–49.

105. *Id.* at 37 (such as the existence of a wage order and replacement value as opposed to foreclosure value due to *Rash*).

106. *Id.* at 47.

107. *Id.* at 42–43.

debt adjustment plans.”<sup>108</sup> This rationale is inapplicable to a chapter 11 context where courts necessarily and routinely receive expert testimony concerning financial markets in valuing the debtor’s business or related valuation questions. The plurality also charged—regrettably, without further explanation or any citations—that the “coerced loan” approach “overcompensates creditors because the market lending rate must be high enough to cover factors, like lenders’ transaction costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cram down loans.”<sup>109</sup> This reason for rejecting the “coerced loan” approach is inapplicable to the chapter 11 context, where, after the effective date of the plan, the reorganized debtor proceeds without any court supervision, trustee administration, or wage garnishment orders, which are among those benefits ostensibly afforded to lenders under chapter 13.

The plurality likewise rejected the “presumptive contract rate” and “cost of funds” approaches, concluding that those methods were less “objective” because they focused on something other than the debtor’s proposed payment stream.<sup>110</sup> Similarly, the plurality recognized that those methods imposed evidentiary burdens on chapter 13 debtors who generally could not afford to bear them and would therefore be unfairly disadvantaged at trial.<sup>111</sup> Such a concern does not typically arise in chapter 11. If a chapter 11 debtor’s business is sufficiently viable to discuss multi-year repayment terms, that almost invariably means operation of the business during the chapter 11 case has generated sufficient funds to cover the fees of counsel and often a valuation expert or financial advisor. Indeed, to confirm a chapter 11 plan at all, the debtor must show the court it can pay all such administration expenses.<sup>112</sup>

Conversely, the plurality found that the “prime-plus” formula “has none of [the other methods’] defects.”<sup>113</sup> It stated that the “prime-plus” approach takes “its cue from ordinary lending practices” because it starts with the “prime rate,” which is in the newspaper every day.<sup>114</sup> Once a risk adjustment factor is added, “the resulting ‘prime plus’ rate of

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108. *Till*, 541 U.S. at 477.

109. *Id.*

110. *See id.* at 479.

111. *See id.* (“[T]he formula approach . . . minimizes the need for potentially costly additional evidentiary proceedings.”).

112. § 1129 (a)(9)(A)–(B) (2012).

113. *Till*, 541 U.S. at 478.

114. *Id.* at 478–79.

interest depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan, not on the creditor's circumstances or its prior interactions with the debtor. For these reasons, the prime-plus or formula rate best comports with the purposes of the Bankruptcy Code."<sup>115</sup> Justice Thomas, who provided the fifth vote, joined the plurality because the "prime-plus" approach came closest to his view that the correct rate be totally devoid of any risk factor at all.<sup>116</sup>

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115. *Id.* at 479–80.

116. Justice Thomas's concurrence states that the statute requires the "property" to be distributed under the plan to be valued rather than the debtor's "promise" to distribute said property. *See id.* at 485–487 (Thomas, J., concurring). He asserts, without any detailed explanation of how he reaches his conclusion, that this means that the only discounting needed is at the risk-free rate, because otherwise, the bankruptcy court would be valuing the "promise." *See id.* In other words, he assumes that only a risk-free rate values the "property," *i.e.*, the cash that will be received in the future. *See id.* at 486–87. While it may be correct to observe that the other justices are valuing the debtor's "promise to deliver property under the plan," it can be plausibly argued that Justice Thomas's approach likewise values a promise. *See id.* at 485–90. It cannot value "the property to be distributed under the plan" because no one at plan confirmation knows exactly how much actually will be distributed, so even his approach values "the property promised to be delivered under the plan." *See id.* Stated differently, Justice Thomas's approach suggests valuing the promise at 100% probability of performance whereas the others are assigning some lower prospect. *See id.* Even within the literalist framework, one may just as easily conclude that the directive to the bankruptcy court to value what is "to be distributed" calls for the bankruptcy court to take into account, not merely what the plan says on paper is going to be distributed, but also the risk that what is supposed "to be distributed" does not actually turn out to be distributed. The statute does not explicitly say "property that is supposed to be distributed under the plan"; rather, it just refers to what is "to be distributed." *See id.* at 487 (citing 11 U.S.C. § 1325(a)(5)(B)(ii)).

As a policy matter, if Justice Thomas's interpretation were extended into the chapter 11 context, companies in Chapter 11 would be entitled to turn crammed-down debt into bonds with interest at the rate the U.S. Treasury pays on its 30-year bonds. As a consequence, such companies would be much more likely to reduce their debt as little as possible in the reorganization, since they could cram down the cheapest capital possible. Moreover, it would raise the question of why Congress bothered to provide for disclosure and voting by secured creditors in chapter 11 if a non-consensual approach was capable of producing only a risk-free rate. Finally, since the Bankruptcy Code does not require insolvency as a prerequisite for filing a chapter 11 case or proposing a plan, Justice Thomas's interpretation would invite companies to resort frequently and liberally to chapter 11 just to re-price their debt downward in a falling rate environment.

#### IV. (MIS)APPLICATIONS OF *TILL* IN CHAPTER 11 CRAMDOWNS

Notwithstanding the absence in *Till* of any endorsement of a parallel between the chapter 13 and chapter 11 present value tests, a number of bankruptcy decisions in *Till*'s wake have nonetheless extended *Till*'s formula approach to chapter 11 cases.<sup>117</sup> Some scholars and lower courts have taken the “same approach” dictum or Footnote 14 to suggest that *Till*'s “prime-plus” method should determine cramdown rates in chapter 11. In the ten years since *Till* was decided, a clear consensus among the lower courts as to whether and how *Till* applies in chapter 11 cramdowns has yet to form.<sup>118</sup> Some courts decline to apply *Till*,<sup>119</sup> but those that embrace it follow one of two approaches.

##### A. *AMERICAN HOMEPATIENT*'S TWO-STEP INQUIRY

First, several courts have adopted the “two step inquiry” of the Sixth Circuit in *In re American HomePatient, Inc.*<sup>120</sup> In that case the court construed the plurality's Footnote 14 dictum to mean that the *Till* Court's formula approach applies to chapter 11 cramdowns when no “efficient market” exists.<sup>121</sup> *American HomePatient* elevated that dictum

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117. See, e.g., *In re GAC Storage Lansing, LLC*, 485 B.R. 174, 193 (Bankr. N.D. Ill. 2013); *In re Moultonborough Hotel Grp., LLC*, No. 10-14214-JMD, 2012 WL 5464630, at \*6–9 (Bankr. D.N.H. Nov. 8, 2012) (applying formula approach where no efficient market exists); *In re Riverbend Leasing LLC*, 458 B.R. 520, 535 (Bankr. S.D. Iowa 2011) (applying formula approach where no efficient market exists); see also *In re G-I Holdings Inc.*, 420 B.R. 216, 239 (D.N.J. 2009) (endorsing a formula approach that begins with LIBOR); *In re Deep River Warehouse, Inc.*, No. 04-52749, 2005 WL 2319201 at \*11–12 (Bankr. M.D.N.C. Sept. 22, 2005) (endorsing a formula approach that begins with the 10-year Treasury rate).

118. For a useful summary of the state of the law after *Till*, see Louis E. Robichaux IV, Russell A. Perry, Jonathan L. Howell, *Till in Chapter 11 Cases and the Looming “Efficient Market” Debate*, 32 AM. BANKR. INST. J. 22 (2013).

119. See, e.g., *In re Linda Vista Cinemas, L.L.C.*, 442 B.R. 724, 749 (Bankr. D. Ariz. 2010) (market approach); *In re DBSD. N. Am., Inc.*, 419 BR 179, 209 (Bankr. S.D.N.Y. 2009), *rev'd on other grounds*, 634 F.3d 79 (2d Cir. 2010) (preferring contract or comparable loan approach); *In re Valencia Flour Mill, Ltd.*, 348 B.R. 573, 578–79 (Bankr. D.N.M. 2006) (contract rate; declining *Till*'s prime-plus); *In re Winn-Dixie Stores, Inc.*, 356 BR 239, 256 (Bankr. M.D. Fla. 2006) (market rate).

120. See *In re Am. HomePatient, Inc.*, 420 F.3d 559 (6th Cir. 2005).

121. *Id.* at 568 (“[W]e opt to take our cue from Footnote 14 of the opinion, which offered the guiding principle 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.’ *Till*, 541 U.S. at 476 n. 14, 124 S.Ct. 1951. This means that the market rate should be applied in

to a rule of law: first, the court should determine whether the lending market is “efficient”; if it is not, the court should apply *Till’s* “prime-plus” formula.<sup>122</sup> The Ninth Circuit Bankruptcy Appellate Panel has likewise affirmed the application of *Till’s* “prime-plus” method in the absence of an “efficient market,” and other courts have accepted this method as well.<sup>123</sup>

The only other circuit court opinion addressing this issue in chapter 11 bankruptcies is *In re Texas Grand Prairie Hotel, L.L.C.*<sup>124</sup> In that case, the debtor and the secured lender stipulated that *Till* controlled.<sup>125</sup> The debtor’s expert argued for the prime rate plus a 1.75% risk premium to account for “the factors enumerated by the *Till* plurality,” including the circumstances of the bankruptcy estate, the nature of the security, and the feasibility of the plan.<sup>126</sup> The creditor’s expert, in contrast, argued for a “blended market rate” approach consisting of: first, the prime rate plus a premium so great the resultant rate equaled the weighted average of the rates the market would charge for an equivalent exit financing package and, second, a discount for the circumstances of the estate and the plan’s feasibility.<sup>127</sup> The bankruptcy court adopted the debtor’s proposed rate.<sup>128</sup> On appeal, the Fifth Circuit criticized the creditor’s approach as amounting to an effective choice of “the market rate, and not the prime rate, as the starting point”<sup>129</sup> contrary to the stipulation to follow *Till’s* “prime-plus” formula. It then affirmed the bankruptcy court’s adoption of the debtor’s “prime-plus” method, which the court could not find to be “clearly erroneous” because the approach was “endorsed by a plurality of the Supreme Court, adopted by the vast majority of bankruptcy courts, and, perhaps most importantly, accepted

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Chapter 11 cases where there exists an efficient market. But where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by the *Till* plurality. This nuanced approach should obviate the concern of commentators who argue that, even in the Chapter 11 context, there are instances where no efficient market exists.”).

122. *Id.*

123. *See, e.g., In re VDG Chicken, LLC*, No. NV-10-1278-HKiD, 2011 WL 3299089, at \*8-9 (B.A.P. 9th Cir. Apr. 11, 2011).

124. *See In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324 (5th Cir. 2013).

125. *Id.* at 327.

126. *Id.* at 334.

127. *See id.* at 335.

128. *Id.*

129. *Id.* at 335 n.57.

as governing by both parties.”<sup>130</sup> Notably, the Fifth Circuit concluded its opinion by stating that its holding should not be taken to suggest that the “prime-plus” formula is “the only—or even the optimal—method for calculating the chapter 11 cramdown rate.”<sup>131</sup>

The *American HomePatient* line of cases is flawed for two reasons. First, bankruptcy courts have no particular competence in determining whether markets are efficient. It is ironic that *Till*, which called market analysis “an inquiry far removed from such courts’ usual task[s],”<sup>132</sup> would be construed to instruct those same courts to engage in the kind of market analysis usually conducted by the Department of Justice or the Federal Trade Commission. Second, courts have inexplicably allowed debtors to define the criterion of efficiency to be whether the debtor can get the terms the debtor wants in the market (a “did-Santa-bring-you-everything-on-your-list” approach).<sup>133</sup> This perversely incentivizes debtors to propose wildly off-market loan terms, causing the market to look inefficient and thereby inducing the judge to approve the proposed cramdown rate based on currently low prime rates and a below-market risk premium.

For instance, in *Texas Grand Prairie*, the debtor’s expert had testified that average terms for loans to similar hotels in 2010 included a loan-to-value ratio of 58%, an interest rate of 7.9%, and a debt-coverage ratio (net operating income divided by debt service) of 1.5,<sup>134</sup> none of which came close to the terms of the proposed plan. He nonetheless disregarded the market “because he believed that the market for hotel and hospitality loans generally was not an efficient market,” a conclusion which cleared the way for the debtor’s proposed cramdown rate, which was only 5%.<sup>135</sup>

A particularly egregious example of a debtor proposing off-market repayment terms to elicit a finding that the loan market is not efficient is

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130. *Id.* at 337.

131. *Id.*

132. *Till v. SCS Credit Corp.*, 541 U.S. 465, 477 (2004).

133. While a discussion of what is, or is not, an “efficient market” is well beyond the scope of this article, it is safe to say that the satisfaction or dissatisfaction of a single market participant is not considered to be a sufficient datum by which to gauge a market’s efficiency.

134. Brief of Appellant at 18, *In re Tex. Grand Prairie*, 710 F.3d 324 (No. 11-11109), 2012 WL 1197681.

135. *Id.* at 20-22.

*In re Castleton Plaza*.<sup>136</sup> There, the debtor, which owned a shopping center, proposed a plan that left a loan-to-value ratio of approximately 97% and provided for repayment of the balance of the mortgage over 10 years based on a 30-year amortization schedule.<sup>137</sup> The bankruptcy court presented its “efficient market analysis” in a single sentence, stating: “There is not an efficient market in which a loan can be obtained for more than 97% of the value of a shopping center with an occupancy rate of less than 70% . . . .”<sup>138</sup> Instead of realizing the market was behaving rationally not to lend that much against a property that was thirty percent vacant, the court endorsed the debtor’s proposed prime-plus 3% rate.

The *American HomePatient* formulation of Footnote 14 defies common sense. Instead of inferring from the fact that “the market would not make the loan on the terms proposed” that the terms were not “fair” and “equitable” to the creditor, *American HomePatient*’s “nuanced approach” has led courts to assume that the terms are fair and equitable and the market is simply inefficient precisely because it will not support those terms. Thus, although a proper recognition of the depth and efficiency of U.S. capital markets may bring the *American HomePatient* approach more or less into line with the absolute priority rule, the implementation of the approach has been seriously flawed.<sup>139</sup> The approach is reminiscent of the reasoning of the debtor’s expert in *Till* who opined that the prime-plus rate of 9.5% was “very reasonable” given that chapter 13 plans are “supposed to be financially feasible.”<sup>140</sup> Such reasoning may be accepted in the chapter 13 context, but it has never been accepted as satisfying chapter 11’s established “fair and equitable” standard.

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136. *In re Castleton Plaza*, LP, 707 F.3d 821, 822 (7th Cir. 2013) (vacating and remanding confirmation order on other grounds).

137. *Id.* at 822. On remand, the bankruptcy judge dismissed after giving debtor multiple opportunities to modify the plan. Order Granting EL-SNPR Notes Holdings, LLC’s Motion to Dismiss Pursuant to 11 U.S.C. § 1112(b), *In re Castleton Plaza*, LP, Case No. 11-01444-BHL (Bankr. S.D. Ind. Feb. 11, 2014). The Debtor appealed to the Seventh Circuit; the case has been fully briefed and argued as of April 22, 2015.

138. Order Confirming the Debtor’s Plan of Reorganization at 9, *In re Castleton Plaza*, LP, Case No. 11-01444-BHL (Bankr. S.D. Ind. May 31, 2012).

139. While the definition of an “efficient market” is a vigorously debated and studied topic in academics, there is absolutely zero support for a thesis that the efficiency of a market is measured by whether one would-be participant is satisfied with the range of offers the market affords that participant.

140. *Till v. SCS Credit Corp.*, 541 U.S. 465, 471-72 (2004) (emphasis added) (citation omitted).



## B. MOMENTIVE PERFORMANCE MATERIALS

A second, more radical approach has been to impose the “prime-plus” method without any analysis of the market’s efficiency. The decision in *In re Momentive Performance Materials* exemplified this approach.<sup>141</sup> The *Momentive* court declared as a “first principle” that “the cramdown interest rate, under Section 1129(b)(2)(A)(i)(II), should not contain any profit or cost element.”<sup>142</sup> For this proposition, the court cited *Till* (which, as discussed *infra*, itself cited no authority for this proposition) as well as another chapter 13 case within the Second Circuit, *In re Valenti*.<sup>143</sup> The court also addressed Footnote 14 and its dictum that “it might make sense to look at what rate an efficient market might produce.” The court explained that Footnote 14’s reference to debtor-in-possession financing (the extension of funds to a debtor in bankruptcy) betrayed a mistaken understanding of those loans and undermined the footnote’s persuasive value. It said that “[l]oans imposed at confirmation resemble more traditional exit or long-term financing than interim debtor-in-possession financing,” and, given this fact, Footnote 14 could not have been referencing cramdown loans.<sup>144</sup>

The *Momentive* court further concluded that other courts’ emphasis on whether an efficient market exists is misplaced, noting that “there clearly was some form of market... in the *Till* case.”<sup>145</sup> Moreover, it contended that the presence or absence of a perfect market was not the driving factor of the *Till* Court’s decision, as evidenced by the fact that the plurality “again referred to a perfectly competitive market.”<sup>146</sup> Rather, according to the *Momentive* court, what drove the *Till* decision was “an interest rate that takes the profit out, takes the fees out, and compensates the creditor under a formula starting with a base rate, that is essentially riskless, plus up to a 1 to 3 percent additional risk premium, if any, at least as against the prime rate, for the debtor’s own

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141. See *In re MPM Silicones, LLC*, No. 14-22503-rdd, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff’d*, No. 14-cv-07471-vb, 2015 WL 2330761 (S.D.N.Y. May 4, 2015); see also *In re G-I Holdings Inc.*, 420 BR 216, 267 (D.N.J. 2009) (preferring to start with LIBOR); *In re Deep River Warehouse, Inc.*, No. 04-52749, 2005 WL 2319201 (Bankr. M.D.N.C. Sept. 22, 2005) (preferring 10-year US treasury rate).

142. *In re MPM Silicones*, No. 14-22503-rdd, at \*26.

143. *Id.* at \*24; *In re Valenti*, 105 F.3d 55 (2d Cir. 1997) does not mention chapter 11 or § 1129 at all.

144. *In re MPM Silicones*, No. 14-22503-rdd, at \*27.

145. *Id.*

146. *Id.*

unique risks . . . coming out of bankruptcy.”<sup>147</sup> Thus, the *Momentive* decision aptly discredits the *American HomePatient* approach in its interpretation of Footnote 14’s reference to efficient markets, but it does not go on to hold that *Till* does not apply to chapter 11 cases. Rather, the *Momentive* decision is premised on the assertion that the chapter 13 present value test is “closely analogous to other provisions of the Bankruptcy Code, including 1129(b)(2),” and it invokes the *Till* “same approach” dictum to justify the analogy.<sup>148</sup> Ultimately, the court in *Momentive* used the “prime-plus” approach—the “same approach” used in *Till* and *Valenti*—to determine the cramdown interest rate for the secured claims.<sup>149</sup>

The *Momentive* court’s novel claim that profit has no place in the chapter 11 present value test conflicts with Supreme Court decisions upholding the absolute priority rule. For example, in *Reconstruction Finance Corp. v. Denver & Rio Grande Railway Co.*, the plan confirmed by the lower court in 1943, in the midst of World War II, awarded first lien creditors new restructured secured debt instruments and stock amounting to 90% of the reorganized debtor’s equity; the second liens received only the remaining 10% of the equity.<sup>150</sup> Several appeals were taken from confirmation by junior interests, principally arguing that the first liens were being overcompensated. The second lien holders’ reasoning was that the underlying business valuation had failed to account for the “excess war profits” the railroad would reap during the war after the effective date, 90% of which would flow to the first lien holders through their newly-awarded common stock.<sup>151</sup> The

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147. *Id.* at 28.

148. *Id.* at 24 (“Congress likely intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of the many Code provisions requiring a court to discount a stream of deferred payments back to their present dollar value.”) (citing *Till*, 541 U.S. at 466).

149. *See id.* at 29. The Southern District of New York Bankruptcy Court held that *Valenti*, the pre-*Till* Second Circuit chapter 13 decision that adopted the prime-plus approach, was controlling. *Id.*

150. *Reconstruction Fin. Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495, 502 n.6 (1946). The decision was approved by the lower court, but the Circuit Court held that the General bondholders were “reasonably justified” in rejecting the plan because, among other reasons, “free cash in excess of operating capital needs and large earnings from war business after the date of the plan should be for the benefit of the General bondholders.” *Id.* at 531.

151. *Id.* at 521.

appellate court agreed that the secured creditors were over-compensated by the debtor's plan.<sup>152</sup> In a seven to one ruling, the Supreme Court reversed the circuit court, reinstated the confirmation of the plan, and justified the award of "unlimited profits" to the first lien holders as necessary to achieve full compensation under the "fair and equitable" standard.<sup>153</sup> In a section of the opinion titled "Cash and War Earnings," the Court noted that the Interstate Commerce Commission<sup>154</sup> had justified the plan's departure from full cash equivalency for the first liens by the fact that the senior secured bondholders would receive 90% of the common stock and thereby participate in the "excess war profits."<sup>155</sup> The Supreme Court wrote that "the error of the Circuit Court . . . lies in its assumption that the senior bondholders were paid in full by the securities allotted to them without also accepting the determination of the Commission . . . [that] all subsequent earnings were a part also of the common stock that was awarded the senior bondholders,"<sup>156</sup> and the "fair and equitable" principle entitled the creditors to potentially "unlimited dividends that might be earned and paid on the common stock to have a part in the 'lush years.'"<sup>157</sup>

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152. *Id.* at 520. The Circuit Court of Appeals had stated: "The senior bondholders were paid in full. They received all the new securities and most of the common stock. Ninety percent of the General Bondholders' claims were wiped out. They received only a small amount of common stock, ten per cent of their total claim. . . . We think any plan which fails to take this [buildup of huge retained earnings during WWII] into account and which gives the Senior Bondholders their claims in full by substantially delivering the road to them, and gives them the surplus cash actually on hand and further enables them to receive in addition the excess war profits which are reasonably sure to come, is inherently inequitable and unfair, so long as there are classes of creditors whose claims are not fully satisfied." *Id.* at 520–21. Such reasoning is much the same as that deployed by the plurality in *Till* and by lower courts like the Second Circuit in *Valenti*, each of which concluded that creditors are "overcompensated" if they make a profit.

153. *See id.* at 533 ("The grounds accepted by us in former sections of this opinion as sustaining, as of January 1, 1943, the valuation of the road, the allocation of the securities, and the treatment of cash, war earnings and capital reductions establish that for the act of confirmation on November 29, 1944, over the objection of the General bondholders, the finding of the judge that the plan then made 'adequate provision for fair and equitable treatment' of the dissenters was justified.").

154. The Interstate Commerce Commission was a regulatory agency created by Congress to regulate railroads' compliance with the Interstate Commerce Act of 1887.

155. *Id.* at 520–21.

156. *Id.* at 523–24.

157. *Id.* at 518.

In a follow-up case the next year, the Court succinctly summarized its holding:

To justify the change of position of creditors from fully secured to partially secured, creditors were given opportunities *to participate in profits* through common stock ownership with a chance at larger earnings than the Commission's forecast anticipated. *We held the priority rule was satisfied by this type of allocation.*<sup>158</sup>

In that second case, *Insurance Group Committee v. Denver & R.G.W.R. Co.*, the issue posed to the Court was remarkably similar to the one the Tills would present nearly 60 years later: whether the secured creditors would receive interest rates that were simply too high to be “fair and equitable.” In contrast with the *Till* Court's rejection of market inquiries in chapter 13 cases, the 1947 Court—in the business reorganization context—had the opposite perspective. It cited bond market data from Moody's showing that the first lien bonds had traded in the 102.89 to 103.82 range during 1945 and 1946 but, in 1947, had traded below 90. The Court concluded that “[u]ntil it can be contended with some show of reasonableness that the [senior creditors] have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support.”<sup>159</sup> In short, the Court in both *Reconstruction Finance Corp.* and *Insurance Group Committee v. Denver & R.G.W.R. Co.* recognized that secured creditors may receive potentially unlimited profits in order to satisfy the “fair and equitable” standard, and market evidence is certainly relevant to evaluating whether packages of securities satisfy the “fair and equitable” standard.

This was the understanding when the Bankruptcy Code was adopted in 1978. The House Judiciary Committee staff member who led its drafting wrote that “[t]he discount rate is equivalent to the rate of interest that would be paid on an obligation of the debtor considering a market rate of interest that reflects the risk of the debtor's business.”<sup>160</sup> In giving a numerical example of the computation, he employed illustrative discount rates of 20% and 25%—at a time when the risk-free

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158. *Ins. Grp. Comm. v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 617 (1947) (emphasis added).

159. *Id.* at 588 (citations omitted).

160. *See Klee, supra* note 28, at 158.

rate was roughly half of those rates.<sup>161</sup> Similarly, *Momentive* makes no mention of *203 North LaSalle*, even though that case construed the chapter 11 provision in question just five years before *Till* and posited that a “market test” should be conducted before an equity contribution from existing owners would satisfy the “fair and equitable” requirement.

Thus, the assertion in *Momentive* that profit has no place in calculating chapter 11 cramdown rates contravenes the Supreme Court’s jurisprudence on this very point. Neither Congress nor the Supreme Court has plausibly indicated that chapter 11 cramdown rates should be stripped of the profit element. Both the *American HomePatient* and *Momentive* lines of cases conflict with the century-old line of Supreme Court precedents in the business reorganization context requiring, pursuant to the “fair and equitable” requirement, that secured creditors recover payment in full before junior constituencies participate in the reorganization. We doubt that the two casual remarks of the plurality that have been seized upon by lower courts (Footnote 14 and the “same approach” remark) were intended to overrule those precedents, especially in the absence of any briefing, argument, or explanation on the record to that effect.

#### V. COURTS SHOULD ANALYZE CHAPTER 11 CRAMDOWN RATES BASED ON SUPREME COURT PRECEDENT IN BUSINESS REORGANIZATION CASES

Having walked through the briefs, argument, and plurality opinion of *Till*, and having examined the two groups of lower court decisions adopting it in chapter 11, we circle back to this article’s starting point. The phrase “fair and equitable”—judicially developed over the past century in at least half a dozen Supreme Court opinions and codified with its attendant judicial gloss in section 1129(b)(2) of the Bankruptcy Code — requires that senior creditors be paid in full, or “made whole,” with due regard for the evidentiary value of market information and without a moralistic bias against profit-making. In contrast, the phrase “fair and equitable” is absent from chapter 13 jurisprudence because the phrase “fair and equitable” simply does not appear anywhere in chapter 13. The absence of this concept renders present value approaches for cramdown purposes qualitatively different in chapter 13 versus chapter 11.

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161. *Id.* at 158–59.

A. CHAPTER 11 VERSUS CHAPTER 13: THE STATUTORY LANGUAGE  
DIFFERS MEANINGFULLY

Lower courts applying *Till* have failed to appreciate the differences between sections 1129 and 1325. Specifically, they have failed to recognize that the former expressly incorporates the “fair and equitable” standard and the latter utterly omits it. Even though section 1129’s “deferred payment” condition and section 1325’s “deferred payment” condition each require very similar present value tests, the statutory contexts in which each present value test resides have meaningful differences.

The chapter 11 present value test appears in a clause that is subordinate to the well-developed phrase “fair and equitable.” 1129(b)(2) states:

For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder’s interest in the estate’s interest in such property.<sup>162</sup>

The condition that a plan be “fair and equitable” “includes,” as one of three alternatives, that a secured claimholder receive deferred cash payments.<sup>163</sup> The implication of Congress’s use of the word “includes” is that “technical compliance with the requirements of section 1129(b)(2) will not insure that a plan will be crammed down if it is unfair and inequitable for some other reason,” such as that senior

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162. 11 U.S.C. § 1129(b)(2) (2012) (emphasis added).

163. *Id.* (emphasis added).

creditors are not paid in full while junior creditors receive value.<sup>164</sup> In other words, the statute does not limit assessment of what is “fair and equitable” to only those criteria explicitly listed in the Code; other considerations, *including* those treated by existing Supreme Court jurisprudence, must likewise be assessed under the current Code.

The statute commands that the plan’s treatment of a dissenting class must be “fair and equitable,” and it is merely a subordinate clause that allows deferred cash payments to be used as long as they deliver full present value. The conscious choice to locate “fair and equitable” in the main clause, especially in light of *Los Angeles Lumber’s* express declaration that the incorporation of the phrase in prior laws endorsed the Supreme Court’s interpretations of it,<sup>165</sup> signals that Congress intended the well-developed standard to govern the application of the subordinate clauses. A contrary conclusion would be inconsistent with the dominant/subordinate relationship and would effectively read the phrase, and its century of judicial affirmation, out of the Code. Had Congress wanted to free plans of reorganization from the absolute priority standard, it would have simply omitted “fair and equitable” entirely and jumped directly to the subordinate clause.

That is exactly the approach Congress took in drafting chapter 13. Chapter 13 does not incorporate the “fair and equitable” standard in any way. It gets directly to the present value test. Section 1325(a)(5) 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 . . .

(B)(i) the plan provides that . . .

(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 . . . .

Consistent with our prior analysis of section 1129(b)(2)(A), by its omission of “fair and equitable” from chapter 13, Congress signaled that the chapter 13 present value test was to be interpreted without regard to the absolute priority rule.

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164. GERBER, *supra* note 25, at 729.

165. Case v. L.A. Lumber Prods. Co., 308 U.S. 106, 115 (1939).

This contrast provides a coherent framework within which to locate *Till*. Chapter 11 uses the phrase “fair and equitable”; chapter 13 does not. Thus, chapter 11 cramdown analysis has to fit within the parameters established by a century of Supreme Court decisions, which require creditors to be “made whole” economically, but chapter 13 is free of that requirement.

*Till* can thus stand on its own as a chapter 13 decision, separate and apart from the business reorganization precedents it never mentions. But conversely, it is those decisions, not *Till*, that courts should be turning to when they confront cramdown proposals in chapter 11 reorganizations. Courts applying *Till* in chapter 11 cramdowns are supervening Congress’s intent that the absolute priority rule be satisfied in chapter 11, as well as the fact that the Court has written numerous times—from *Boyd* to *203 LaSalle*—that section 1129’s “fair and equitable” standard includes the absolute priority doctrine.

#### B. MAKING SENSE OF *TILL*’S CHAPTER 11 DICTA

This statutory framework also provides a coherent explanation of the dicta in *Till* concerning chapter 11—the “same approach” remark and Footnote 14. In *Till*, the plurality’s remark that Congress “likely” intended courts to use “essentially the same approach when choosing an interest rate” to discount payment streams to present value throughout the Bankruptcy Code does not mandate that courts use the exact same method of calculating present value in every chapter.<sup>166</sup> Rather, the “same approach” dictum is better interpreted to say that courts should adopt a present value method that comports with the statutory particularities and administrative realities of the cramdown provision of the chapter in question, as it did in *Till*. This is apparent in the decision itself: on the very next page following the “same approach” remark, the Court’s Footnote 14 suggests outright that chapter 11 cramdowns should be handled *differently* than chapter 13 cramdowns by reference to “the rate an efficient market would produce.”<sup>167</sup> Footnote 14 then continues by stating that, “in the Chapter 13 context, *by contrast*, the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure.”<sup>168</sup> By

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166. *Till v. SCS Credit Corp.*, 541 U.S. 465, 474–75 (2004).

167. *Id.* at 476 n.14.

168. *Id.* (emphasis added).



*contrasting* cramdown under the two chapters, the plurality implicitly adopts a perspective similar to the framework proposed in this article that differentiates consumer bankruptcies from business reorganizations. Such a framework allows greater flexibility in consumer bankruptcies, while upholding Congress's intention that chapter 11 cramdowns be based upon the "fair and equitable" standard and the century of precedents thereunder.

The *Till* plurality's omission of any treatment of the "fair and equitable" phrase can be interpreted as affording more leeway to chapter 13 plan terms in concordance with the implication of the statutory scheme that chapter 13 was designed with individual debtor rehabilitation, and not creditor protection, in mind. This is consistent with the fact that section 1325 omits the "fair and equitable" requirement and thus is free from the lengthy line of cases that construe "fair and equitable" as mandating application of the absolute priority rule. Given the history, the relevant statutory schemes, and the peculiarities of the *Till* decision, the most informed way to reconcile the plurality's "same approach" remark with existing precedent and the language of the Code is to interpret the chapter 11 cramdown provision in the context of the "fair and equitable" precedents rather than mandating use of the formula method. Meanwhile, the present value language in chapter 13 should be interpreted in light of *Till* and the specific administrative challenges of chapter 13 cases.

### CONCLUSION

Contrary to the implication of the decisions trending in the lower courts, the *Till* plurality's dicta was never intended to transform cramdown standards in chapter 11. The proceedings in *Till* were so focused on practical concerns unique to chapter 13 scenarios that its reasoning should not be invoked elsewhere.<sup>169</sup> The dicta on which the *Momentive* and *American HomePatient* lines of cases rely do not mandate application of *Till* to chapter 11, and, in fact,<sup>170</sup> the "efficient market" remark in *Till*'s Footnote 14 serves to underscore the Court's recognition that there are more differences than similarities between chapter 13 and chapter 11 cramdowns.<sup>171</sup>

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169. See *supra* Part III.

170. See *supra* Part IV.

171. See *supra* Part V.

Courts should therefore take their lead from those Supreme Court decisions that bear directly upon chapter 11 cramdowns. Those decisions mandate adherence to the absolute priority doctrine and strict application of the “fair and equitable” standard, both of which afford protections to chapter 11 secured creditors that are not afforded to their counterparts in chapter 13 consumer bankruptcies.”