It's All About That *Till*, 'Bout That *Till*, 'Bout That *Till*...

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I. The U.S. Supreme Court's Plurality Decision in Till v. SCS Credit Corp

Till v. SCS Credit Corp., 541 U.S. 465 (2004), started in the bankruptcy court with a plan that proposed to pay interest of 9.5% per year, based on prime rate plus 1.5%, to account for (among other things such as inflation and opportunity cost) the risk of nonpayment posed by the borrowers. 541 U.S. at 471. The creditor, SCS Credit Corporation ("SCS") appealed, and the District Court reversed relying upon the evidence that a lender in a "subprime" market could make new loans at 21%, which the district court adopted as the cramdown rate. Id. at 472. The debtors (the "Tills") appealed, and the Seventh Circuit Court of Appeals endorsed a modified version of the District Court's "coerced loan" approach. Id. The Court of Appeals found that the contract rate between the parties was presumptively the rate that the creditor would receive in making a new loan to a similarly situated debtor, but that evidence from either the debtor or the creditor could rebut the contract rate as too high or too low. Id. The Supreme Court granted certiorari, issued a plurality opinion, and reversed.

Plurality opinions occur when appellate judges are unable to generate a unanimous decision describing their opinions. When judges do not unanimously agree, they often write their own opinion explaining their reasoning. As the number of opinions is only limited by the number of judges, a particular judge's opinion may dissent or concur with in whole or in part with the opinions of the other judges. As a result, it is possible that no single opinion enjoys the support of the majority of judges.

At times when no single opinion reflects the majority view, we look within the various opinions to find conclusions that the opinions have in common. When those common conclusions form a majority, a plurality decision is formed for us to rely upon. Compounding the problem is that often judges reach the same conclusion, but by different reasoning. This is the case in Till. As is common with plurality opinions, understanding and interpreting the Supreme Court's plurality opinion has given rise to several unique – some correct, some incorrect – interpretations of the opinions among practitioners. Till is certainly no exception.

II. Interpretation of Supreme Court Plurality Decisions

A. Background of the Supreme Court Plurality Decisions

Prior to 1939, the use of plurality decisions by the Supreme Court was fairly rare. In that year, Justice Frankfurter wrote a concurring opinion agreeing with the result, but not the

reasoning in a case known as Graves v. New York rel. O'Keefe.1 Following Justice Frankfurter's opinion, other Justices began to increase the publication of their own concurring and dissenting views and opinions.

No doubt, the issuance of multiple non-concurring or partially concurring decisions by the Supreme Court has left many practitioners scratching their heads trying to figure out which portions of the opinions were binding and which were merely dicta. While the issuance of concurring opinions greatly increases our understanding of the Court's views and rationale, the mere affirmation or remanding of a case based on a plurality decision can create havoc with everyday life as these opinions often fail to give clear direction on important issues.

B. Judicial Entanglement: The Case of Teague v. Lane

While bankruptcy cases are important to those directly involved, and to the nation's economic interests as a whole, Supreme Court cases can often take on a much more serious life or death issue. In fact, the Supreme Court was confronted by this issue in 1989 in a case known as Teague v. Lane.2 In Teague, a man convicted of attempted murder during an armed robbery made a series of appeals ultimately reaching the Supreme Court. In Teague, the Supreme Court issued a highly fractured plurality decision on whether a recently decided case could be applied by Teague and on the effect of the pre-existing law.

From the two issues arising in this case, the Supreme Court issued a set of chaotic and confusing opinions upholding the conviction with a seven to two vote. Of the seven that voted for the judgment, there was a main plurality opinion with multiple parts, however not all of the Justices agreed on all of the parts. Five Justices agreed to parts I and III of the opinion, seven agreed to part II, and four agreed to parts IV and V. In addition, two Justices agreed to a separate concurring opinion, and another Justice wrote a concurring opinion in which another Justice agreed to Part I, but not to Part II.3,4

Untangling plurality opinions is a difficult task for lower courts and one that can leave lower courts confused as to the case's actual precedential value. In the Teague plurality opinion, Parts I, II, and III would be considered precedent because at least five Justices signed onto those sections. The remaining opinions all have less than five Justices signing onto them, making their precedential value questionable at best. Parts IV and V state the Court's reasoning on when to retroactively apply rules to decided cases, yet only

[1] Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring).
[2] Teague v. Lane, 489 U.S. 288 (1989).
[3] Teague v. Lane, 489 U.S. 288 (1989).
[4] See Linas E. Ledebur, Penn State Law Review, Vol. 113.3, page 906.

four Justices signed onto that reasoning with Justice White specifically disagreeing with the reasoning and writing his own interpretation of when to retroactively apply a Court decision. Justice Stevens further muddles the precedent by writing a separate concurring opinion, stating his interpretation on how to retroactively apply Court decisions, but disagreeing with the application of case law in the main plurality opinion. To confuse things even further, Justice Steven's concurrence was joined by another Justice with respect to the first issue, but not the second issue.5

Clear? Not hardly, and this is just one of many decisions the Supreme Court has handed down where the plurality decision muddies the water for practitioners. Many commonly cited bankruptcy cases have been also decided by a plurality including Northern Pipeline Construction Co. v. Marathon Pipe Line Co. (1982)6,7, Till v. SCS Credit Corp (1994)8,9, and Stern v. Marshall (2011)10,11.

C. Guidance from the Supreme Court

Although plurality decisions remain a source of confusion, the Supreme Court did attempt to provide guidance in 1977 as part of Marks v. United States12. In Marks, the Supreme Court stated "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Simply put, what has become known as the Mark's Narrowest Grounds Doctrine requires lower courts to look at all of the concurring opinions arising from a Supreme Court ruling that support the majority ruling, and to then determine narrowest, most restrictive commonality occurring throughout those opinions. Only the portions of the opinions that "overlap" are to be binding on the lower court, the remainder has no precedential value.*

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[5] See Linas E. Ledebur, Penn State Law Review, Vol. 113.3, page 906.

[6] Northern Pipeline v. Marathon Pipe Line, 458 U.S. 50. Justice Brennan announced the judgment of the Court and delivered an opinion, in which Marshall, Blackmun, and Stevens, joined. Rehnquist, filed an opinion concurring in the judgment, in which O'Connor joined, post, p. 458 U. S. 89. Justice Burger filed a dissenting opinion, post, p. 458 U. S. 92. White filed a dissenting opinion, in which Burger and Powell joined, post, p. 458 U. S. 92.

[7] This decision in 1982 effectively repealed provisions of the Bankruptcy Act of 1978, which empowered bankruptcy judges with many of the powers of District Court Judges.

[8] Lee M. Till v. SCS Credit Corporation, No. 02-1016; Justice Stevens delivered the Opinion, joined by Souter, Ginsburg, and Breyer. Justice Thomas filed an Opinion concurring in part. Justice Scalia filed a dissenting opinion, in which Rehnquist, O'Connor and Kennedy joined.

[9] This decision sought to provide guidance on how to calculate the proper rate of interest in a Chapter 13 cram down case.

[10] Stearn v. Marshall, No. 10–179. Justice Roberts delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito joined. Justice Scalia filed a concurring opinion. Justice Breyer filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan joined.

[11] This case decided that bankruptcy judges lacked the constitutional authority to enter final judgments on state law counterclaims that are not resolved as part of creditor's claim or similar core proceeding.

[12] Marks v. United States, 430 U.S. 188

Although the rule on interpreting Supreme Court plurality decisions has become clearer as a result of Marks, ambiguity still exists. The Supreme Court often issues opinions: pluralities, concurrences and dissents with little or no effort to clarify those places where the Justices agree and disagree thereby leaving it to practitioners and lower courts to wade through the myriad of thoughts provided by Justices.

III. Review of theThree Opinions Contained in *Till v. SCS Credit Corp*.

A. Justice Stevens' Opinion (for the Plurality)

Justice Stevens authored the plurality opinion and was joined by Justices Breyer, Ginsberg and Souter. The plurality opinion overturned (with Justice Thomas' concurrence in judgment) the Seventh Circuit Court of Appeals' decision that the contract rate between the parties was presumptively the rate that the creditor would receive in making a new loan to a similarly situated debtor, but that evidence from either the debtor or the creditor could rebut the contract rate as too high or too low. *As explained later in this paper, and in his concurrence, it is important to understand that Justice Thomas agreed with the result, but not the reasoning of these other justices.*

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

After setting out some general considerations, Justice Stevens rejects the coerced loan, presumptive contract rate, and cost of funds approaches stating that each "is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value." *Id*. at 477. With respect to the coerced loan approach, Justice Stevens rejects this method because it requires bankruptcy courts to delve into "an inquiry far removed from such courts' usual task of evaluating debtors' financial circumstances and the feasibility of their debt adjustment plans." *Id*. As an example, Justice Stevens remarks that the coerced loan approach requires a court to hear evidence regarding the loan market for similar, non-bankruptcy debtors. *Id*. [13]Additionally, he argues that "lenders' transaction costs and overall profits" "are no longer relevant" in a cramdown loan. *Id.*

[13] As authors of this article, we find this quote confusing as this is evidence and testimony often presented to bankruptcy judges. Contrastingly, later in his Opinion, Justice Stevens describes the process of being presented with evidence about the appropriate risk adjustment to "fall squarely within the bankruptcy court's area of expertise".

Next, Justice Stevens lists four reasons for rejecting the presumptive contract rate approach. First, it "improperly focuses on the creditor's potential use of the proceeds of a foreclosure sale." *Id.* Second, while Justice Stevens recognizes that the presumptive contract rate approach allows a bankruptcy court to avoid overcompensation by tailoring the interest rate to an individual creditor, he notes how this can be a burdensome for the debtor by forcing it to present evidence to rebut the presumptive contract rate. *See id.* at 477-78. Third, Justice Stevens observes that the presumptive contract rate "produces absurd results" by allowing "'inefficient, poorly managed lenders' with lower profit margins to obtain higher cramdown rates than 'well managed, better capitalized lenders.'" *Id*. at 478 (citation omitted). Finally, a dependency on the parties' prior dealings may cause "similarly situated creditors [to] end up with vastly different cramdown rates." *Id*. at 478.

Justice Stevens also rejects the cost of funds approach because "it mistakenly focuses on the creditworthiness of the *creditor* rather than the debtor." *Id*. at 478 (emphasis added by the Court). Additionally, Justice Stevens notes how this approach suffers from some of the same flaws as the presumptive contract rate and coerced loan methods. *Id*. To illustrate, he observes how the cost of funds approach "imposes a significant evidentiary burden" on the debtor and also how it can cause a situation where creditors are treated inequitably. *Id*.

In summary, as bankruptcy code section 1322 (and 1129) requires the debtor to repay the creditor the present value of its claim, Justice Stevens makes his view clear that the unique aspects of the lender are not relevant when determining this interest rate. Rather, Justice Stevens' opinion indicates that the focus should be solely on the risk faced by the creditor as presented by the unique aspects of the debtor, and the terms of the cramdown loan and the risk inherent in the debtor's plan.

ii. Justice Stevens Adopts the Prime-Plus Formula.

After dispensing with the other forms of computing cramdown rates, Justice Stevens adopts the "prime-plus" formula as the proper method to be used in cramdown proceedings. *See id*. at 478-80. To set the beginning base rate, Justice Stevens recommends looking to the national prime rate, which he states is an estimate of how much a commercial bank would charge a creditworthy commercial borrower. *Id.* at 478-79. This rate, Justice Stevens notes, includes such factors as "opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default." *Id*. at 479.

In order to adjust for the risk posed by the bankrupt debtor, factors such as "the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan" should be taken into consideration at the confirmation hearing. *Id*. While recognizing that this requires the parties to present evidence before the court, Justice Stevens mentions that some of the evidence will be included in the prebankruptcy filings, thereby limiting the expense of presenting new additional evidence. *Id.* Justice Stevens further explains that since the beginning rate is a low estimate that must be adjusted upwards, the primary evidentiary burden will be placed on the creditor, "who [is] likely to have readier access to any information absent from the debtor's [prebankruptcy] filing." *Id*. In summary, Justice Stevens notes how "the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings." *Id*. He also points out how the formula approach takes the focus off the creditor and, instead, places it on the financial markets, the bankruptcy estate, and the loan itself. *Id.*

While Justice Stevens advocates an upward adjustment of the beginning rate, he notes that the opinion does not approve any specific scale to be used for risk adjustment factors. *See id*. at 480. Specifically Justice Stevens states "We do not decide the proper scale for the risk adjustment, as the issue is not before us." Justice Stevens does, however, show approval for the 1.5% rate adopted by the bankruptcy court in the Till case and also notes many courts that have applied rates of 1% to 3%. *Id*. (*citing Gen. Motors Acceptance Corp. v. Valenti* (*In re Valenti*), 105 F.3d 55, 64 (2nd Cir. 1997), abrogated on other grounds by *Assocs. Commercial Corp., v. Rash*, 520 U.S. 953 (1997)).

iii. Justice Stevens Criticizes the Dissent's Adoption of the Presumptive Contract Rate Approach.

The next part of Justice Stevens's opinion addresses the issues raised by Justice Scalia's dissent. *See id*. at 481-85. Justice Stevens points out that the dissent makes two assumptions to support the presumptive contract rate approach, but it is "highly unlikely that Congress would endorse either premise." *Id*. at 481. Regarding the dissent's first assumption (that "subprime lending markets are competitive and therefore largely efficient"), Justice Stevens counters, stating "there is no basis for concluding that Congress relied on this assumption when it enacted Chapter 13." *Id*. As support, Justice Stevens explains that "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." *Id.* Thus, he argues, there is "no way of

determining whether the allocation of that price between goods and financing would be the same if the two components were separately negotiated." *Id*. at 482 n.20. This is significant, Justice Stevens explains, because the only issue before the Court is the cramdown interest rate and not the value of the truck which is fixed under *Rash*. *Id.* (*citing Rash,* 520 U.S. at 960).

Additionally, Justice Stevens posits that extensive state and federal regulation of sub-prime lending distorts the market and shows how regulators believe that sub-prime lenders, if left unregulated, "would exploit borrowers' ignorance and charge rates above what a competitive market would allow." *Id*. at 482. To rebut the dissent's second assumption (that the risk of default while in Chapter 13 is usually no less than at the time of the original contract), Justice Stevens argues that "Congress intended to create a program under which plans that qualify for confirmation have a high probability of success." *Id*. While acknowledging that bankruptcy judges may confirm too many risky plans, Justice Stevens suggests that the "solution is to confirm fewer such plans, not to set default cramdown rates at absurdly high levels, thereby increasing the risk of default." *Id.* at 482-83.

Justice Stevens further criticizes the dissent, noting that its assumptions may not support the presumptive contract rate approach. *Id*. To support this assertion, Justice Stevens explains that while the cramdown provision applies to sub-prime loans, it also applies to prime loans that were negotiated before "the change in circumstance . . . that rendered the debtor insolvent." *Id*. at 483-84. Also, cramdown applies in situations where national or local economies may have changed drastically since the time of the original loan contract. *Id.* at 484. "In either case," Justice Stevens writes, "there is every reason to think that a properly risk-adjusted prime rate will provide a better estimate of the creditor's current costs and exposure than a contract rate set in different times." *Id.*

iv. *Justice Stevens Criticizes the Concurring Opinion's Adoption of a "Risk-Free Approach.*

Justice Stevens briefly addresses the risk-free approach advocated by Justice Thomas. *Id*. at 483. Justice Stevens agrees with Justice Thomas that Section 1325(a)(5)(B)(ii) may have been written by Congress with no intention of compensating for the risk of default. *Id.* at 483. The risk-free approach, however, is ultimately rejected by Justice Stevens for two reasons. First, the Court's decision in *Rash* assumed that cramdown rates are adjusted to compensate for risk of default. *Id*. (*citing Rash,* 520 U.S. at 962-63). Second, because the risk-free approach has been rejected by so many judges,

it is "too late in the day to endorse that approach now." *Id.* While Justice Stevens concludes that a risk factor should be included in cramdown rates, he remarks that Justice Thomas's approach, unlike the dissent's, is more consistent with the statutory scheme of promoting successful reorganization plans. *Id*.

v. Justice Stevens's Conclusion.

To conclude his opinion, Justice Stevens points out that if all relevant information was available to the parties, both the formula and presumptive contract rate approaches would produce the same cramdown rate. *Id*. Thus, his primary disagreement with the dissent is upon which party the evidentiary burden should fall. *Id.* According to Justice Stevens, the creditor should receive the majority of this burden because the creditor is "more knowledgeable . . . thereby facilitating more accurate calculation of the appropriate interest rate." *Id*. at 484-85.

B. Justice Thomas' Opinion (Concurring in the Judgment, but not the Reasoning)

As the Justice Steven's opinion did not have a majority vote of the Justices, it was Justice Thomas's concurrence that resulted in the Seventh Circuit Court of Appeals' decision being reversed. As Justice Thomas's opinion results in a more stringent result than the Justice Stevens opinion, the plurality opinion is formed by the narrowest basis for decision, has come to be the focus of subsequent interpretation.

i. Justice Thomas Concurs in Judgment with the Plurality Opinion

Justice Thomas agreed with Justice Stevens that the interest rate given to Chapter 13 cramdown creditors should be based on the national prime rate, but he questioned the need to adjust the rate to account for any additional risk of nonpayment. *Till*, 541 U.S. at 485 (Thomas, J., concurring).[14] Justice Thomas acknowledged that a "promise of future payments is worth less than an immediate payment" of the same amount due, at least in part, to the risk of nonpayment. *Id*. (emphasis omitted). He argued, however, that this is irrelevant because the statute does not ask the court to value the promise to distribute property under the plan. *Id.* at 485-86. Rather, Justice Thomas noted, the court is to ensure that the value of the property to be distributed under the plan, at the time of the effective date of the plan, is not less than the amount of the secured creditor's claim. *Id.* at 486 (*citing* 11 U.S.C. § 1325(a)(5)(B)(ii)).

[14] In a footnote however, Justice Thomas creates confusion as he refers to the Prime Rate as the risk-free rate.

ii. The Bankruptcy Code's "Net Present Value" Calculation does not, by Its Terms, Require any Adjustment for the Debtor's Post-Confirmation Risk of Default.

The fundamental premise of Justice Thomas's opinion is that the Bankruptcy Code's calculation of "net present value" for the payment of a secured claim over time under a plan: **"does not require a debtor-specific risk adjustment** that would put secured creditors in the same position as if they had made another loan." *Id.* at 486 (emphasis added). In essence, according to Justice Thomas, the net present value requirement for a cramdown interest rate ***only***

> incorporates the principle of the time value of money. . . . [put simply,] $4,000 today is worth more than $4,000 to be received 17 months from today because if received today, the $4,000 can be invested to start earning interest immediately.

Id. at 487 (citing *Rake* v. *Wade*, 508 U. S. 464, 472 n.8 (1993)). According to Justice Thomas, "the statute [Section 1325(a)(5)(B) of the Bankruptcy Code] contains no such requirement" . . . "that the proper interest rate must also reflect the risk of [the debtor's subsequent potential] nonpayment." *Id.* at 487. Thus, "[i]n most, if not all, cases, where the plan proposes simply a stream of cash payments, the appropriate risk-free rate should suffice." *Id.*

iii. Courts (Including the Supreme Court) Should Not Consider Policies such as "Pro Debtor Rehabilitation" or "Giving Secured Creditors the Benefit of Their Bargain."

Justice Thomas rejected any considerations of matters of policy. *Id.* at 488 (the "prime-plus" approach adopted by Justice Stevens, and its resulting "systematic undercompensation" of secured creditors as complained about by Justice Scalia in his dissent, "might seem problematic as a matter of policy. But, it raises no problem as a matter of statutory interpretation"). Indeed, Justice Thomas even emphasized again later in his opinion that if compensating secured creditors only for the time value of money, and **not** including any consideration for the risk of the debtor's default "is insufficient compensation for secured creditors, given the apparent rate at which debtors fail to complete their Chapter 13 plans . . . this is a matter that should be brought to the attention of Congress rather than resolved by this Court." *Id*. at 490.

Thus, while Justice Stevens indicated that the contract rate or coerced loan rate could render many plans unconfirmable, *id.* at 482-83 (Stevens, J., for the plurality) ("In

our view . . . Congress intended to create a program under which plans that qualify for confirmation have a high probability of success. Perhaps bankruptcy judges currently confirm too many risky plans, but the solution is to confirm fewer such plans, not to set default cramdown rates at absurdly high levels, thereby increasing the risk of default."), and Justice Scalia noted on the other hand that that starting with the prime lending rate and then adjusting it slightly "will systematically undercompensate secured creditors for the true risks of default," *id.* at 492 (Scalia, J., dissenting), Justice Thomas rejected both rationales as being something Congress should consider, not the federal courts, *id*. at 480 (Thomas, J., concurring).

iv. Secured Creditors Are Already Protected by Other Provisions of the Bankruptcy Code and by Rash's Instruction that Collateral be Valued Higher in a Reorganization / Cramdown.

Moreover, Justice Thomas indicated that secured creditors **already** receive a benefit in reorganization cases by the higher valuation of their collateral. *Id.* at 489 (noting that the secured creditor's argument "overlooks the fact that secured creditors are already compensated in part for the risk of nonpayment through the valuation of the secured claim) (citing *Rash,* 520 U.S. 953). Because a reorganization case where a debtor keeps the collateral over the secured creditor's objection (*i.e.*, a cramdown reorganization plan) requires that a bankruptcy court "utilize[] a secured-creditor-friendly replacement-value standard rather than the lower foreclosure-value standard for valuing secured claims," there was no need to also further compensate the secured creditor for the potential risks of dealing with the reorganized debtor, according to Justice Thomas. *Id.*

In response to (and rejecting) arguments that the "net present value" requirement for any cramdown interest rate should protect creditors, Justice Thomas indicated there was nothing in the statute to indicate that protecting creditors was the intent behind cramdown interest rates. *Id*. at 489-90. Instead, Chapter 13 contains many other provisions to protect creditors, such as requiring a plan to be proposed in good faith, allowing secured creditors that reject a plan to either retake their collateral or maintain their liens on the collateral during the period of repayment, and requiring the bankruptcy court to find that the plan is feasible. *Id*. (citing 11 U.S.C. §§ 1325(a)(3), 1325(a)(5), 1325(a)(6)).

v. Would the Cramdown Interest Rate Ever Require any Adjustment for Risk?

Justice Thomas did state that his analysis of the statute was "**not** to say that a debtor's risk of nonpayment **can never** be a factor in determining the value of the property to be distributed." *Id.* at 488 (emphases added). However, his concurring opinion is very muddy as to the circumstances that would allow for a risk-based adjustment of the cramdown interest rate. In language that confused this author, he attempted to distinguish between a plan that provided for payments of time and a plan that gave a creditor a note (which is, after all, just a promise to make payments over time). *Id.* at 489-90. Thus, there may be a need to adjust the risk-free interest rate where "the risk of nonpayment is part of the value of the note itself." *Id.* at 489. This part of Justice Thomas's concurring opinion is very unclear, but suffice to say, he does recognize that there could be some circumstances where an adjustment of the risk-free rate might be warranted, although it is unclear what those circumstances would be.

vi. Justice Thomas's Conclusion.

Finally, Justice Thomas emphasized his point once again, that nothing in the statute requires a bankruptcy court to include **any** "risk-based adjustment" of the cramdown interest rate at all. *Id*. at 489. Indeed, in light of *Rash* and secured creditors' statutory protections explained above, Justice Thomas noted that "it is by no means irrational to assume that Congress opted **not** to provide further protection for creditors by requiring a debtor-specific risk adjustment under §1325(a)(5)." *Id.* at 490 (emphasis added). Finally, Justice Thomas notes that since Justice Stevens opinion would actually pay more than the claim amount (claim amount plus interest), it meets the Code's requirement to pay "at least" the amount of claim and therefore he concurs. Certainly, Justice Thomas could have drawn the same conclusion with Justice Scalia's opinion as well.

C. Justice Scalia's Opinion (Dissenting)

Justice Scalia,[15] begins his dissent by noting that his "areas of agreement with the plurality are substantial." *Till*, 541 U.S. at 491 (Scalia, J., concurring). However, Justice Scalia agrees with the plurality in three areas. First, he agrees that some confirmed plans nevertheless fail. *Id.* Second, Justice Scalia agrees that a secured creditor is entitled to deferred payments that include an adjustment for the risk of failure of a plan. *Id*. Finally, he agrees that while adequate compensation may call for an "eye popping" interest rate, a

[15] Justices Kennedy, O'Connor, and Rehnquist joined the dissenting opinion.

court should "refuse to confirm the plan" rather than reduce that rate. *Id*. Through Justice Scalia's opinion, the Justice's create another plurality agreement, with eight Justices indicating that a secured creditor is entitled to payments that include an adjustment for risk of plan failure and secondly, that if the resulting interest rate is too high, the court should not confirm the plan rather than use a lower rate to make the plan work.

Justice Scalia only disagrees with the plurality's use of the formula approach to computing cramdown interest rates. *Id*. According to Justice Scalia, the formula approach will "systematically undercompensate secured creditors for the true risks of default." *Id*. at 492. Instead, he adopts the presumptive contract rate approach. *Id*. This approach minimizes disputes, Justice Scalia writes, because it is a "good indicator of actual risk . . . and it will provide a quick and reasonably accurate standard." *Id.*

i. *Justice Scalia Adopts the Presumptive Contract Rate Approach.*

To support his endorsement of the presumptive contract rate approach, Justice Scalia suggests that the approach makes two important and reasonable assumptions. *Id*. The first assumption is that "subprime lending markets are competitive and therefore largely efficient." *Id*. If this assumption is accepted as true, then the high interest rates associated with sub-prime loans are a product of the actual risk of default associated with such loans. *Id*. According to Justice Scalia, if the high rates were associated with exorbitant profits or costs, "[l]enders with excessive rates would be undercut by their competitors, and inefficient ones would be priced out of the market." *Id*.

The presumptive contract rate's second assumption, according to Justice Scalia, is that the probability of default does not diminish simply by virtue of the fact that the debtor has filed for Chapter 13 relief. *Id*. at 492-93. To support this statement, Justice Scalia notes how failure rates of confirmed Chapter 13 repayment plans range from the Tills' conservative estimate of 37% to a more realistic rate of 60%. *Id*. at 493 n.1 (citations omitted). Thus, Justice Scalia writes, this relatively high rate of failure of confirmed plans "proves that bankruptcy judges are not oracles and that trustees cannot draw blood from a stone." *Id*. at 493.

While Justice Scalia does recognize that judicial and trustee oversight in Chapter 13 will provide a marginal benefit, the fact that the debtor had to file for bankruptcy shows his financial instability. *Id*. Furthermore, "the costs of foreclosure are substantially higher in bankruptcy because the automatic stay bars repossession without judicial permission." *Id*. at 494 (*citing* 11 U.S.C. § 362). For these reasons, Justice

Scalia believes it is reasonable to assume that "bankrupt debtors are riskier than other subprime debtors-or, at the very least, not systematically *less* risky. *Id*. (emphasis added by the Court). In summary, Justice Scalia notes that the first assumption means that the contract rate is a reasonable reflection of actual risk and, according to the second assumption, this risk continues even when the debtor files for Chapter 13. *Id*. These assumptions lead to Justice Scalia's conclusion that "the contract rate is a decent estimate . . . for the appropriate interest rate in cramdown", *id*., noting that the contract rate serves only as a presumption and can be adjusted according to evidence presented to the court, *id*. at 494 n.2.

ii. Justice Scalia Criticizes the Plurality's Decision.

Justice Scalia next addresses the plurality's assertions that the sub-prime lending markets are not competitive and that risk of default is less in Chapter 13 payment plans than in an ordinary sub-prime loan. *Id*. at 494-95. To rebut the plurality's first assertion, Justice Scalia acknowledges that while the subprime markets are not "*perfectly competitive*," they are nevertheless reasonably competitive and reasonably efficient. *Id*. at 495 n.3 (citations omitted) (emphasis added by the Court). Justice Scalia also notes that although cars are generally sold in tie-in transactions, this does not mean that financing terms are dictated by the seller. *Id*. at 495. Instead, Justice Scalia writes, "they only cause prices and interest rates to be considered *in tandem* rather than separately." *Id*. (emphasis added by the Court).

Next, Justice Scalia argues that the "mere existence of [state] usury laws is . . . weak support" for the plurality's position that regulators believe that the sub-prime markets are not competitive. *Id*. at 496. He notes that this is only one of many explanations for the existence of usury laws. *Id*. Regarding the Federal Truth in Lending Act, Justice Scalia argues that this legislation "positively refutes" the plurality's position. *Id*. According to Justice Scalia, because the Truth in Lending Act requires the disclosure of certain information necessary to promote the informed use of credit, it presumes that markets are competitive—otherwise consumers would have no need for such information. *Id*. Finally, Justice Scalia notes that while usury laws do distort the markets, they help keep interest rates low, thereby giving the debtor a lower rate under the presumptive contract rate approach. *Id*. at 496 n.5.

Regarding the plurality's second assertion, Justice Scalia points out that the plurality theorizes that Chapter 13 would be less risky if fewer risky plans were confirmed, rather than being less risky as currently administered. *Id*. at 496-97. Justice Scalia adds that the formula rate would not fully compensate creditors:

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

Id. at 497 (emphasis added by the Court).

Next, Justice Scalia addresses the plurality's argument that transaction costs and profits should not be included in the cramdown rate. *Id*. To rebut this argument, Justice Scalia notes that the plurality's prime lending rate itself includes overhead and profits, *id*., because commercial lenders do not lend money if they cannot cover their costs and make some form of profit, *id*. (*citing Koopmans v. Farm Credit Servs. Of Mid-Am*., 102 F.3d 874, 876 (7th Cir. 1996)).

Finally, regarding the plurality's argument that similarly situated creditors may be treated differently under the presumptive contract rate approach, Justice Scalia responds by noting that a bankruptcy judge has the power to exercise his discretion and adjust the contract rate to avoid any disparity among similar creditors. *Id*. at 498. Again, he reminds the Court that the contract rate should serve as a reasonably accurate presumption that may be adjusted according to the circumstances of the particular case. *Id*. at 498 n.7.

iii. Justice Scalia Criticizes the Formula Rate Approach.

In the next section, Justice Scalia opines as to the flaws in the formula rate approach. *Id*. at 498-504. Also, Justice Scalia analyzes the proper scale for risk adjustment, something that the plurality specifically refuses to address. *Id*. at 500-04. To begin, Justice Scalia notes that the risk premium used by the formula rate approach "is neither objective nor easily ascertainable." *Id*. at 498-99. While the effect of this flaw is minimized when the risk premium is relatively small compared to the prime rate, according to Justice Scalia, a properly computed risk premium would generally be greater than the prime rate in order to ensure that secured creditors are fairly compensated. *Id*. at 499.

Stemming from this lack of objectivity, according to Justice Scalia, is the fact that the application of the formula rate approach is anything but simple. *Id*. Thus, "judges will invariably grapple with [the] imponderables" such as "the probability of plan failure; . . . the rate of collateral depreciation; . . . the liquidity of the collateral market, and . . .

the administrative expenses of enforcement." *Id*. at 499. In contrast, Justice Scalia notes how the contract rate will reflect all of these risk factors because it is determined by the market. *Id*. Additionally, the contract rate can be easily found in the original loan document and need only be adjusted if the parties choose to contest it. *Id*.

Next, Justice Scalia rebuts the argument that the formula approach properly places the evidentiary burden on the creditor who has better access to the requisite information. *See id*. at 500. Justice Scalia points out that, "consciously choosing the less accurate estimate merely because creditors have better information smacks more of policymaking than of faithful adherence to the statutory command that the secured creditor receive property worth '*not less than* the allowed amount' of its claim." *Id*. (*quoting* 11 U.S.C. §1325(a)(5)(B)(ii)) (emphasis added by the Court).

Subsequently, Justice Scalia compares the nominal benefit the creditor would receive under the formula rate with the expected costs of default. *Id*. According to Justice Scalia's calculations, the benefit to SCS in this case would amount to about $100. *See id*. at 501-02. Justice Scalia then compared this number with three costs of default, the first of which is the cost associated with depreciation of the collateral. *See id*. In this case, Justice Scalia calculated the cost of depreciation to be approximately $550. *Id.*

Justice Scalia's second cost of default is liquidation. *Id.* at 502-03. Here, SCS was entitled to the $4,000 replacement cost. *Id.* However, if the Tills were to default under their Chapter 13 plan, SCS would not be able to sell the truck for $4,000 "because collateral markets are not perfectly liquid and there is thus a spread between what a buyer will pay and what a seller will demand." *Id.* at 503. According to Justice Scalia, the value of this spread in this case could be calculated to be about $450. *Id.*

Justice Scalia's third and final cost of default is the administrative expenses associated with foreclosure. *Id.* To estimate these costs Justice Scalia notes how the automatic stay provided by Section 362 bars repossession of the collateral. *Id*. (citing 11 U.S.C. § 362). To overcome this bar, a creditor must pay a fee and file a motion to lift the stay. *Id*. at 503. Also, a creditor will incur attorney fees for filing such motion, which Justice Scalia calculates to be approximately $600 or more. *Id*. Thus, the total costs of default in this case would be $1,600. *Id.*

Because not all Chapter 13 plans fail, Justice Scalia applies the Tills' estimated 37% failure rate of Chapter 13 repayment plans to come to an expected cost of default of $590. *Id.* at 503-04. To compensate for the disparity between the $590 expected cost and the $100 expected benefit, Justice Scalia notes that the risk premium would have to

be 16% rather than the 1.5% adopted by the plurality. *Id*. at 504. Thus, in Justice Scalia's opinion, the plurality's rate is entirely inadequate and "is far below anything approaching fair compensation." *Id.*

iv. Justice Scalia Criticizes Justice Thomas's Concurring Opinion.

In response to Justice Thomas's opinion that Section 1325(a)(5)(B)(ii) plans need only include a risk-free rate of interest, Justice Scalia presents four reasons why a plan must account for the risk of nonpayment. *See id.* at 505-508. The first is a contextual argument. While the cramdown provision does not specifically mention the risk of nonpayment, Justice Scalia argues that the context of the other two options found in Section 1325(a)(5) support a reading that includes a risk adjustment. *Id.* at 505. The creditor acceptance and collateral surrender options "are both creditor protective, leaving the secured creditor roughly as well off as he would have been had the debtor not sought bankruptcy protection." *Id*. Therefore, "it is unlikely the [cramdown] option was meant to be substantially *under*protective; that would render it so much more favorable to debtors that few would ever choose one of the alternatives." *Id*. (emphasis added by the Court).

Justice Scalia's second criticism of the risk-free approach is that it produces "anomalous results." *Id*. According to Justice Scalia, Justice Thomas admitted that if a note, rather than cash, was to be distributed under a plan, the note must take into account the risk of default. *Id*. Thus, the anomaly is that secured creditors would receive risk compensation in certain cases that have no practical difference from other cases where no such compensation is allowed. *Id.* at 505-06. The third criticism is that the circuits have all rejected the risk-free approach, and Justice Thomas never identifies such a case. *Id*. at 506.

Justice Scalia's final criticism of the risk-free approach is that it is not supported by the Court's decision in *Rash*. *Id*. As Justice Scalia argues, while *Rash* did point out that there is a greater risk involved in retention of collateral rather than surrender, the Court "made no effort to correlate that increased risk with the difference between replacement and foreclosure value." *Id.* at 507. According to Justice Scalia, "[n]othing in the opinion suggests that we thought the valuation difference reflected the degree of increased risk, or that we adopted the replacement-value standard *in order to compensate* for increased risk." *Id*. (emphasis added by the Court).

vii. Justice Scalia's Conclusion.

To conclude his opinion, Justice Scalia notes that "[e]very action in the free market has a reaction somewhere." *Id.* at 508. Justice Scalia argues that the systematic undercompensation of secured creditors in cramdown plans will result in an increase in interest rates overall and a decrease in the access to credit. *Id*. Thus, because cramdown requires full compensation for risk, Justice Scalia adopts the presumptive contract rate approach because it "has a realistic prospect of enforcing that directive. *Id*.

EXPERT TESTIMONY AND *TILL*'S FOOTNOTE 14: GUIDANCE FROM *IN RE TEXAS GRAND PRAIRIE*

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INTRODUCTION[1]

The formula approach for the Chapter 13 context seems simple enough:

Prime Rate + Risk Factor = Cramdown Interest Rate. [2]

In the Chapter 11 context, though, courts argue over whether and how the famous footnote 14 in *Till* applies.[3] The *Till* Court had observed that "in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce."[4] This is the reason for the "two tiered approach," described by Reginald Jackson: arguably, the approach reconciles the *Till* plurality with footnote 14. However, some opine that secured creditors have "seized upon" the footnote as a basis to increase the yield allowed under their claims.[5]

Expert testimony is integral to determining a rate under the "two tiered" approach. The first step is for the court to determine whether an efficient market exists for the loan. This usually requires expert testimony that "traditional" lenders would be willing to provide post-petition financing to the debtor.[6] The expert would consider the terms of the

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[2] David Griffiths, *Momentous Decision in Momentive Performance Materials: Cramdown of Secured Creditors- Part I*, Weil Bankruptcy Blog (Sept. 9, 2014) http://business-finance-restructuring.weil.com/chapter-11-plans/momentous-decision-in-momentive-performance-materials-cramdown-of-secured-creditors-part-i/. The prime rate is the lowest rate of interest at which a financial institution would lend to a commercial borrower. *Id*.

[3] The court in *In re Cook* explicitly rejected the *Till* approach. *See In re Cook*, 322 B.R. 336, 343 (Bankr. N.D. Ohio 2005). The court there adopted a coerced loan theory instead, which had been the law in the Sixth Circuit before *Till*. *In re Cook*, 322 B.R. at 343. Meanwhile, the Fifth Circuit begrudgingly applied *Till* but would not hold that the formula approach was mandatory for Chapter 11 cases.

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[5] Griffiths, *supra* note 1. Reflecting this concern, the court in *In re Momentive Performance Materials* noted that since courts do not allow Chapter 13 creditors to receive more than the present value of their allowed claim, courts also should not allow Chapter 11 creditors to do so without a good reason. *See In re MPM Silicones, LLC* ("*In re Momentive Performance Materials*"), No. 14 CV 7471 VB, 2015 WL 2330761, at *18 (S.D.N.Y. May 4, 2015).

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restructured debt, the type of collateral, the duration of the loan, and the amount of loan.[7] Other factors include the status of the market, the risks associated with the loan, the types of loans that would be available to the debtor in the market, and whether the debtor has received financing offers from willing lenders.[8]

For example, in *In re Pamplico Highway Dev.*, neither party asserted that an efficient market existed. The court seemed to note that the creditor's experts should have testified the debtor "had been offered or could obtain financing from another lender under similar terms."[9] Tiered financing, such as the combination of senior debt, mezzanine debt, and equity, would demonstrate that no efficient market exists.[10]

If the court determines that an efficient market in fact exists, the court then applies the market rate. But formulating the market rate again entails consideration of expert testimony, along with consideration of the parties' contract rate.[11] And if there is no efficient market, then the second "tier" is for the court to apply the *Till* formula approach.[12] Indeed the court in *In re Texas Grand Prairie Hotel Realty* noted "the vast majority of bankruptcy courts have taken the *Till* plurality's invitation to apply the prime-plus formula under Chapter 11."[13] Courts must determine the appropriate "risk-free" base rate, then determine the appropriate risk premium. The most common base rates for the Chapter 11 context are the national prime rate, listed in the Wall Street Journal; the applicable U.S. Treasury Bill rate; and LIBOR.[14] With respect to risk premiums, courts in

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[14] Jackson, *supra* note 6 at 7. In applying the formula approach in *In re Momentive Performance Materials*, the court noted that *Till* did not require bankruptcy courts to choose the national prime rate as the risk-free base rate. *Wells Fargo Bank N.A. v. Texas Grand Prairie Hotel Realty, LLC* (*In re Texas Grand Prairie*), No 11-11109, 2013 WL 776317 *1, *20 (5th Cir. Mar. 1, 2013). Thus the bankruptcy judge's choice of the 7-year Treasury rate was appropriate.

the Chapter 11 context "seem to be less focused on" the 1% to 3% range observed by the plurality in *Till*.[15] Factors to determine risk premiums include the nature of the collateral, the debtor's payment history, the likelihood that the plan will succeed, the debt-to-value ratio, and the existence of a solvent guarantor.[16] Thus expert testimony would again be vital in demonstrating these factors.

Expert testimony in *In re Texas Grand Prairie Hotel Realty, LLC* (*"In re Texas Grand Prairie"*)

In *In re Texas Grand Prairie Hotel Realty*, the debtors filed for Chapter 11 protection after their hotel business could not support loan payments to the creditors.[17] The court mentioned the two-tiered approach, but did not engage in analysis of whether an efficient market existed for the loan in this case.[18] It begrudgingly upheld the use of the *Till* approach when both the creditor and the debtor stipulated that it applied.[19] While the creditor's expert determined that the rate should be 8.8%, the debtor's expert calculated a rate of 5%.[20] The bankruptcy court denied the creditor's motion to strike the debtor's expert's testimony. The district court affirmed. The court of appeals also affirmed, finding no abuse of discretion by the by the bankruptcy court.[21] In doing so, the Fifth Circuit discussed *Till* at length and contrasted its reasoning against the Sixth Circuit's reliance on footnote 14.[22]

While approving the use of the *Till* formula under the stipulated facts of the case, the Fifth Circuit also gave guidance on how to compare

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CONCLUSION

Courts and academics continue to discuss the implications of *Till*, eleven years later. In the Chapter 11 context, experts will be needed at every step of the "two tier approach" adapted in light of footnote 14. Expert testimony will be critical to proving the existence of an efficient market, what the market rate is, and in the alternative, what the base rate and risk premiums should be.

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APPENDIX A

Summary of Recent Chapter 11 Cases After Till

Case	Type of Property	Applicable Test	Efficient Market?	Risk Factor Considerations	Rate Outcome	Length
In re Am. Homepatient, Inc., 420 F.3d 559 (6th Cir. 2005)	Healthcare company's assets valued at $250 million.	Two-tiered, looking first to whether there's an efficient market. If not, apply the *Till* formula method.	YES. However, a 12.6% blended rate based on a combination of senior debt, mezzanine debt, and equity was purely "hypothetical" where the debt was entirely senior.	Not reached.	6.785% based on the 6-year treasury rate plus 350 basis points for risk. (Prime at the time was 4.25%)	6 year maturity
SPCP Group, LLC v. Cypress Creek Assisted Living Residence, Inc. 434 B.R. 650 (M.D. Fla. 2010)	Assisted living facility, valued at $5.4 million.	Two-tiered, based on the two "seemingly contradictory portions of the Till opinion."	No. However, the court found that there is "no absolute mandate that a Chapter 11 debtor must attempt to find exit financing before the bankruptcy court can determine whether an efficient market exists."	Creditors were under secured, but the debtors had ample cash flow and had been paying a non-amortized interest rate of 7.25%. Debtors had an established ability to financially operate the assisted living facility and simultaneously accumulate cash.	2% over prime for a total of 5.25%	Amortized over 20 years, with a 6-year balloon feature post confirmation.

Good v. RMR Investments, Inc., 428 B.R. 249 (E.D. Tex. Mar. 31, 2010)	Acres of unimproved land, and all mineral rights and contracts related to the property.	Presumptive contract approach	Not discussed.	Debtor was in default of its contractual obligations when it filed for bankruptcy, Debtor is solvent, and Creditor is over secured." Payment of the contract rate would not reduce the payment to any other secured or unsecured creditor under the plan	15% (contract rate). Debtors proposed 5.25% under a prime-plus approach.	Not discussed.
In re G-I Holdings, Inc. No. 09-CV-05031, 2009 U.S. Dist. LEXIS 108339 (D.N.J. Nov. 12, 2009)	Priority tax lien (IRS is the party objecting)	Two-tiered.	No. The IRS did not present sufficient evidence that such a market existed.	None referenced.	LIBOR + 1% premium. Testimony indicated that LIBOR was the predominant reference point for debt instruments.	6 years
Mercury Capital Corp. v. Millford Connecticut Assocs., 354 B.R. 1 (D. Conn. 2006)	Real property, covering over 15 acres and containing three "dilapidated one-story industrial buildings" that are "no longer usable."	The bankruptcy court did not err in deciding that a "two-tiered" test was an appropriate test.	Not enough evidence. The court considered the testimony of Debtor's president, who testified that the Debtor would not be able to find a loan for less than 12.3% under current market conditions.	The court listed the considerations that were mentioned in Till, and then remanded for more fact-finding, as the bankruptcy court did not adequately consider any of these factors.	Not enough evidence. The bankruptcy court did not appropriately consider whether there was an efficient market or apply the Till test.	30-year amortization with final payment of the balance due 30 months after confirmation date.

In re Industry West Commerce Ctr., LLC, BAP No. NC-10-1336-JuHBa, 2011 Bankr. LEXIS 2090 (9th Cir. BAP May 24, 2011) (not for publication)	Real property, commercial center	Two-tiered	NO. This was based on the current market for construction, uncertainty of the global creditor markets, more restrictive underwriting criteria, and lenders' desire to curtail lending to commercial real estate until there was more certainty in the market.	The possibility that the commercial real estate market would implode due to a lack of available money in the future. However, the creditor had $1 million in equity, and there was a possibility that Congress would intervene. The property was not fully leased.	1.70% over prime for a total of 4.95%	Under its plan, debtor proposed to restructure the bank's note by making interest-only payments, with the note becoming due and payable in seven years.
In re VDG Chicken, LLC, BAP No. NV-10-1278-HKiD, 2011 Bankr. LEXIS 1795 (9th Cir. BAP April 11, 2011)	Single parcel of commercial property in Las Vegas, Nevada	Two-tiered	No; traditional lenders were unavailable to provide term-loans after construction loans matured	The BAP concluded that the bankruptcy court's risk assessments were reasonable, but did not discuss them explicitly.	6%, which is 100-200 basis points over the 10-year treasury rate.	10-year term
In re Wentworth Hills, LLC, No. 11-11448-FJB, 2011 Bankr. LEXIS 4945 (Bankr. D. Mass. Dec. 16, 2011) (not for publication)	Golf course valued at $2 million	Two-tiered	NO. The court found that no efficient market rate existed for the type of "loan" effected by the proposed cram-down treatment of the lender's claim. It did not consider	Debt-value ratio is 100%. Payment is "within the Debtor's ability and projections." The lender itself presented evidence that projected expenses, especially equipment and real	1.75% over the prime rate for a total of 5%.	Balloon payment due in 5 years; 25-year amortization. Debtors were to pay off municipal liens (amounting to

			expert testimony or other evidence.	estate tax allocations, could be significantly reduced. Payment on municipal liens will improve debtor's position.		$47,000) within 3 years.
In re DLH Master Land Holding, LLC, No. 10-30561-HDH-11, 2011 Bankr. LEXIS 4509 (Bankr. N.D. Tex. Nov. 23, 2011)	real property totaling approximately 1,350 acres, valued anywhere from $26.5 million to $86 million	Two-tiered.	No. The court merely stated that there was no efficient market.	The court noted that the creditor was over-secured, but did not discuss any considerations at length.	4% over prime for a total of 7.25%	Due in full after 5 years, amortized over 10
In re SW Boston Hotel Venture, LLC, No. 10-14535-JNF, 2011 Bankr. LEXIS 4384 (Bankr. D. Mass. Nov. 14, 2011)	Hotel, valued at roughly $61.5 million	Two-tiered	NO. Creditor argued that the market rate was 4.9%. However, the court found the Debtor's expert to be more credible. Because of the negative market, and the size of the loan, there was "no interest."	Short-term loan; first mortgage; almost $10 million in equity and an additional $14 million in assets available to secure the loan. Creditor did not present any evidence on the issue of risk premium.	1% over the prime rate for a total of 4.25%	To be paid in full in less than 4 years.
In re Walkabout Creek, Ltd., No. 09-00632, 2011 Bankr. LEXIS 4397 (Bankr. D.C. Nov. 14, 2011)	low-income apartment complexes financed by a state housing agency	Slightly modified two-tiered: A sophisticated Ch. 11 debtor has equal access to data and shares the burden of	No. Neither the debtor nor the creditor were able to present credible evidence of an efficient market.	The court did not reach this at length, denying confirmation based on a low rate compared to the 30-year treasury rate. Creditor was fully secured. The court	At least 5.24%, which is a 1% upward adjustment on the 30-year treasury rate. Held that prime is an inappropriate	35-year maturity

		proving the risk adjustment.		considered the inherent risk associated with loans of this magnitude and length.	base, and denied confirmation of the plan, proposing 5%	
In re Lilo Properties, LLC, No. 10-11303, 2011 Bankr. LEXIS 4407 (Bankr. D. Vermont Nov. 4, 2011) (not for publication).	Real Property, valued at $575, 000.	Considered alternative approaches an applied *Till* directly.	Not considered.	The court explained that 1% represents the lowest risk debtor and 3% represents the highest risk. The risk factor here was just above the middle. The court did not seem to consider any one factor in particular. Lender was over secured (although not by much).	2.5% over prime, for a total of 5.75%	Not mentioned.
In re Smithville Crossing, LLC, No. 11-02573-8-JRL, 2011 Bankr. LEXIS 4605 (Bankr. E.D.N.C. Sept. 28, 2011)	Retail shopping space, single-asset valued at $2-2.5 million.	Two-tiered	No. Creditor's expert testified that the rate would be between 11-12%. The expert submitted a report outlining his methods and calculations. In this report, he stated that the debtor could not propose a feasible plan. The court stated that the expert's	Not discussed.	The court concluded that the rate would be decided at confirmation, but anything between 3-5% above prime would be required. The debtor had suggested 8.5% total.	Not discussed.

In re 211 Waukegan LLC, 2011 Bankr. LEXIS 2535, *13-14 (Bankr. N.D. Ill. June 28, 2011)	Commercial Office Building	Applied Till directly, rejecting the Illinois statutory judgment interest rate.	Not applicable under the court's choice of test.	Not reached, based on the creditor's objection.	Not considered; the plan provided for a rate of 6%.	Not discussed.
In re Saguaro Ranch Dev. Corp., Joint Case No. 4:09-bk-02490-EWH, 2011 Bankr. LEXIS 2201 (Bankr. D. Ariz. June 1, 2011)	more than 1,000 acres of land in Arizona designated for a high-end residential project	Seemed to apply Till directly.	Not discussed or not applicable.	$50 million loan; 100% debt-value ratio; depressed market for real estate in Arizona	2% over prime for a total of 6%	Not discussed.
In re 20 Bayard Views, LLC, 445 B.R. 83 (Bankr. E.D.N.Y. 2011)	bulk, unsold condominium units (37 condominium units and 40 parking spaces, as well as related rents and leases).	Two-tiered.	No—"an efficient market does not exist for a loan of this size secured by collateral of this nature in the full amount of the value of the Property [$20.5 million, 100% loan-to-value ratio]." The court rejected the creditor's proposal of a three-tiered blended rate.	Unfavorable market, not many potential buyers, inability of buyers to get favorable financing, no equity cushion. Debtor's reorganization, which is based on sales of condominium units over a five-year period, may not succeed.	The court did not decide on the appropriate interest rate, concluding that a 1.5% adjustment was not appropriate.	5 years.

In re Riverbend Leasing LLC, 458 B.R. 520 (Bankr. S.D. Iowa 2011)	condominium development, 112 units and five vacant lots not yet developed	Two-tiered	The creditor presented no evidence of an efficient market, so the court did not consider this prong.	The creditor was fully secured. The court also considered historical data regarding vacancies and the debtor's projected earnings. The time-value of money, risk of non-payment, and inflation were also relevant.	2.5% over prime for a total of 5.75%	Payment over 15 years, amortized over 30 years.
In re Red Mountain Machinery Co., 448 B.R. 1 (Bankr. D. Ariz. 2011)	Large earth-moving equipment (caterpillars), valued at approximately $10 million	Two-tiered	No. Creditor relied on a blended rate and did not present evidence regarding an efficient market.	Positive factors included: guaranty by a solvent guarantor; positive cash flow and projections; significant amortization over 15 years. Negative factors included: 15-year term and poor real estate market.	3.25% over prime for a total of 6.5%	20 year amortization, with full balance due in 15 years, 12 monthly interest-only payments for the first year.
In re Greenwood Point, LP, 445 B.R. 885, 918-919 (Bankr. S.D. Ind. 2011)	Retail shopping center containing approximately 136,000 square feet of gross leasable space	Two-tiered	No; in today's economic climate, lenders are not lending to borrowers like the Debtor due to its bankruptcy status and level of vacancies.	fully collateralized; the cash projections were conservative yet demonstrated the ability to pay the loan payments; reserves were maintained to attract additional tenants and to maintain and	3% over prime for a total of 6.25%	10-year note

				enhance the collateral; the collateral is likely to go up in value over the life of the loan; Debtor's history of always making timely debt payments		
In re Mace, 2011 Bankr. LEXIS 280 (Bankr. M.D. Tenn. Jan. 25, 2011)	Rental real properties fully occupied with the exception of one rental property	Two-tiered	Yes, for investment property loans bundling several pieces of collateral in one loan. The Trustee obtained the proposed terms for four other similarly situated creditors within the confirmation process.	Prior to the bankruptcy petition, debtor never missed, or made late, any payments to the bank; no feasibility challenge to the trustee's plan.	2.75% over prime for a total of 6%	Fixed for 20 years: 5 years with adjustments to prime plus 2% floating monthly with a floor of 6% and a ceiling of 11%, amortized over a period of 20 years.
In re TCI 2 Holdings, LLC, 428 B.R. 117 (Bankr. D.N.J. 2010)	Three hotel casino properties in Atlantic City	Two-tiered.	Yes. The parties stipulated as such.	Not reached. The loan included the following conditions: 50% free cash flow sweep; pre-payment premium of 2% for the 1st 6 mos.,1% for the next 12 mos.; fixed maximum capital expenditures to 8% of gross gaming revenues; & right of first refusal	12%, the efficient market rate, as debtors fared poorly on the various risk metrics.	Three Years

				before the Trump Marina can be sold.		
In re Mayslake Village-Plainfield Campus, Inc., 441 B.R. 309, 320 (Bankr. N.D. Ill. 2010)	real estate improved with a 186-unit senior housing facility valued at $13.4 million	Two-tiered	No—there was no testimony that the debtor could obtain exit financing.	Not reached.	The plan proposed 3.25% (prime). The court held that some upward adjustment is necessary.	20 years
In re Linda Vista Cinemas, L.L.C., 442 B.R. 724, 751 (Bankr. D. Ariz. 2010)	Multiplex theatre	Case-by-case, considering "explicit findings" relevant to a variety of tests.	Yes—the court states that the rate proposed in the plan "reflects a market rate."	The nature of the real property is predictable and realizable. Monthly payments add stability. The collateral is well-managed, and there's no evidence of depreciation. The Debtor has stabilized itself from past problems. The guarantors are financially stable.	1.5% above floating prime rate	20 years
In re Seasons Partners, LLC, 439 B.R. 505 (Bankr. D. Ariz. 2010)	Student housing apartment complex	Two-tiered, along with the "explicit findings" test	Yes, both parties testified as to a market rate, but the court found the debtor's testimony to be more credible.	nature of creditor's security is predictable and realizable; debtor stabilized itself from past problems; Debtors received new infusion of capital worth $1.5 million; new	6.25% total, the market rate.	Amortized for 25 years, with balloon 12 years from confirmation

				management that successfully raised occupancy rate to 83%, pre-petition contract rate was 6.125%			
In re S. Canaan Cellular Investments, Inc., 427 B.R. 44 (Bankr. E.D. Pa. 2010)	Cell sites of telecommunications company	Two tiered.	NO. The creditor bears the burden of persuasion. The lender had offered some unconvincing evidence that the market rate was 10%.	The court considered the current revenues of the debtor, its cash reserves, and the presence of its parent company.	2.75% over prime for a total of 6%.	Not discussed.	
In re Princeton Office Park, LP, 423 B.R. 795 (Bankr. D.N.J. 2010)	Real Estate (office park)	Applied Till directly, noting that 8 justices agreed on an adjustment for risk.	Not considered.	Not considered; The lender had bought a municipal tax lien from the city at a discount.	Not discussed; remanded for hearing.	Not discussed	
In re Bryant, 439 B.R. 724 (Bankr. E.D. Ark. 2010)	farmland, 283 acres	Two-tiered	No. No evidence was before the court. Court took judicial notice that less that Ch. 11 cases in Arkansas account for less than 1% of cases filed.	Plan feasibility and the actions taken by the debtors to ensure the success of their farming operations (cutting costs, farming closer to home, taking on factory jobs, etc.)	2.25% over prime for a total of 5.5%	12 years	
In re SJT Ventures, LLC, 441 B.R. 248, 255 (Bankr. N.D. Tex. 2010)	Four-story commercial building	"Market formula" approach, using the formula	Not considered.	Debt-to-value ratio of 85%, creating a slim margin for collateral that will possibly depreciate	6.35%, which takes the 5-year treasury rate, adds a "spread" based	30-year amortization with a 5-year balloon payment	

		ordinarily used by the market to derive the appropriate interest rate		in value.	on debt-to-value ratio, with an upward risk adjustment.	
In re North Valley Mall, LLC, 432 B.R. 825 (C.D. Cal. 2010)	Shopping center	Market formula approach	Not considered: "markets such as they exist are but one reference point among many in an attempt to find a suitable proxy where no real market exists"	Not discussed. The blended rate was based on expert testimony regarding the current market and yields on similar property.	8.5% blended rate including a senior tranche, a mezzanine tranche, and an equity tranche. The court found that the prime rate is not an appropriate base.	7 years
In re Mendoza, No. 09-11678, 2010 Bankr. LEXIS 1308 (Bankr. N.D. Cal. April 19, 2010)	60-unit apartment house	The parties agreed that the *Till* formula approach applied.	Not applicable.	The interest rate offered by the debtor was accepted by other similarly situated lenders. The vacancy was zero, the loan was short-term, and the cash flow was more than sufficient to cover payments. However, the debtors were in violation of a due-on-encumbrance clause.	1.15% over prime for a total of 4.4%	3 years

In re Am. Trailer & Storage, Inc., 419 B.R. 412 (Bankr. W.D. Mo. 2009)	Portable container units and trailers	Two-tiered.	No. The parties agreed that a market exists only among "hard money lenders." "Hard money lenders, charging upwards of 12% to 18%, generally are not going to be appropriate options for debtors in bankruptcy."	Relatively stable past payments; projections were realistic and had historical support; equity cushion of $3 million; collateral is unlikely to decline significantly in value.	2.25% over prime for a total of 5.5%	Amortization over 10 years, with balloon payment at the end of five years
In re Winn-Dixie Stores, Inc., 356 B.R. 239 (M.D. Fla. 2006)	Tax liens on debtor's property	Two-tiered	Yes; Debtor went out and shopped for post-petition financing, resulting in 14 proposals among competing lending institutions.	Not reached.	7%, market rate of LIBOR plus 150 points.	Not discussed
In re Inv. Co. of the Southwest, Inc., No. 11-02-17878, 2004 Bankr. LEXIS 2582 (Bankr. D. N.M. Sept. 28, 2004)	Real property	Two-tiered	No. No testimony from either side that any of the national DIP financing entities would have any interest in this homegrown real estate sales/development company. There are "no closely similar loans being made."	The court did not consider the specific risk factors, but merely noted that the proposed interest rate was within the range set out in Till.	3% over prime for a total of 7%	7 years

Case	Type of Property	Applicable Test	Efficient Market?	Risk Factor Considerations	Rate Outcome	Length
Onink v. Cardelucci (*In re Cardelucci*), 285 F.3d 1231 (9th Cir. Cal. 2002)	Ch 11 $5,273,147.50 judgment against debtor for predatory pricing and unfair trade practices	Cites rationale in *In re Beguelin,* undergoing statutory interpretation of "interest at **the** legal rate" in 11 U.S.C. § 726(a)(5) to choose federal judgment rate over state	Existence not discussed	Not reached, but court analogized post-petition claim held by creditors to a federal judgment against the claim; noted that equity and efficiency are not of great concern when there are only a few creditors seeking post-petition interest and there are sufficient assets to pay all claims for all interest	3.5%, the federal interest rate	--
Wells Fargo Bank N.A. v. Texas Grand Prairie Hotel Realty, LLC (*In re Texas Grand Prairie*), No 11-11109, 2013 WL 776317 (5th Cir. Mar. 1, 2013).	Ch 11 Hotel properties and substantially all of debtor's other assets	Both parties stipulated that the prime-plus formula from *Till* should apply; court declined to establish a particular method for calculating Ch 11 cramdown interest rates	Existence not discussed, but court expressly rejected the creditor's "market-influenced" blended rate calculation	Hotel properties well maintained, excellently managed; revenues exceeded projections; plan would be "tight but feasible"	5% cramdown rate (prime rate was 3.25%, risk adjustment was 1.75%)	Ten years
In re MPM Silicones, LLC ("*In re Momentive Performance Materials*"), No. 14 CV 7471 VB, 2015 WL 2330761 (S.D.N.Y. May 4, 2015)	Ch 11 Second lein notes on debt of a company producing silicone and silicone derivatives	Formula approach; *Till* was not binding on Ch 11 cases, and court needed to "fill the gap" with Second Circuit precedent	Court noted the disadvantages of this approach	Not discussed by the district court, but the bankruptcy court judge noted that no "extreme risks" existed here	7-year Treasury rate, not the prime rate; risk adjustment within the 1%-3% range	--

APPENDIX B

Summary of Recent Chapter 13 Cases after Till

Case	Type of Property	Rate and Risk Adjustment	Relevant Facts and Risk Factors
In re Garner, 663 F.3d 1218 (11th Cir. 2011)	Tractors, trailers, and other motor vehicles	4.25% total, after confirmation. Base not mentioned.	On appeal, the issue was what rate should apply post-filing and pre-confirmation. The Eleventh Circuit held that the contract rate (10.5%) should govern. The parties agreed to the post-confirmation 4.25% *Till* rate.
In re Jones, 530 F.3d 1284 (10th Cir. 2008)	Automobile	Not discussed; remanded to the bankruptcy court.	Not discussed, remanded to the bankruptcy court to determine. Court held that *Till* applies post-BAPCPA.
Drive Fin. Servs., Inc. v. Jordan, 521 F.3d 343 (5th Cir. 2008)	Automobile	7.5% total; base not mentioned	Contract rate was 17.95%; risk factors not discussed. Court held that *Till* applies post-BAPCPA.
In re Horny, No. 11-12508-BC, 2011 U.S. Dist. LEXIS 146374 (E.D. Mich. Dec. 21, 2011)	Automobile, purchased for just over $16,000	15.2%: 11.95% risk adjustment to prime.	Contract rate was 23.99%, which the court considered relevant based on the timing of the loan (less than a week pre-petition); discrepancy in reported income between the credit application and the bankruptcy schedules; uncontested factual findings.
In re Plourde, 402 B.R. 488 (D.N.H. 2009)	Residential real property, valued at $266,720	6.25%; 3% adjustment to prime	Court considered: liquidity of the market, the creditor's inherent risks in extending credit to a Chapter 13 debtor, the high pre-petition arrearage of $ 30,310.57, and the likelihood of depreciation in value since both appraisals noted a decline in the market area of homes. Creditor was under-secured. Court found that the plan was not feasible and denied confirmation.
Ford Motor Credit Co., LLC v. Robertson, 396 B.R. 672 (S.D. W.Va. 2008)	Automobile	Not discussed; remanding to bankruptcy court	"[T]he Till analysis governs regardless of whether the contract rate of interest is less than the market prime rate."
Nowlin v. Tammac Corp., No. 05-1528, 2005 U.S. Dist. LEXIS 23881 (E.D. Pa. Oct. 17, 2005)	Mobile Home	8%; 2% risk adjustment to prime.	Although Debtor argued for a rate of 4.5% (prime at the time of trial), she agreed that 8% was reasonable.

In re Sigman, No. 11-61884, 2011 Bankr. LEXIS 3904 (Bankr. N.D. Ohio Oct. 7, 2011) (not for publication).	Automobile	5.25%: 2% risk adjustment to prime.	The court relied on precedent (*In re Dimery*, below) stating that 2% is a reasonable risk factor for automobiles—a rapidly depreciating asset.
In re Marrero, No. 10-24375, 2011 Bankr. LEXIS 3652 (Bankr. D. Conn. Sept. 20, 2011)	Residential real property	6%: 2.75% risk adjustment to prime.	The lender wanted to adjust the prime rate by 8.625%. In considering the risk factor adjustment, the court noted that the lender had the burden of putting on evidence that the factor should be more than 3%. The court noted that in *Till*, the collateral was an automobile, which depreciates in value quicker and has a greater risk factor due to mobility. Here, the debt exceeded the value of the property by $39,000. However, the lender was to receive a lump sum of $14,000 immediately after plan confirmation.
In re Dimery, No. 11-60142, 2011 Bankr. LEXIS 2433 (Bankr. N.D. Ohio June 20, 2011)	Automobile	5.25%: 2% risk adjustment to prime.	Following *Till* directly, the court stated that 2% is reasonable for automobiles, rapidly depreciating assets. Debtor asserted that the risk factor should be lower for him because of considerable equity. However, the court noted that the plurality in *Till* selected the formula approach specifically to avoid this sort of evidentiary inquiry. Furthermore, the court had some doubts about debtor's claim of equity.
In re Evans, No. 10-35238, 2011 Bankr. LEXIS 1724 (Bankr. S.D. Tex. May 9, 2011)	Principal place of residence under § 1322(c)(2)	5.25%; 2% risk adjustment to prime.	The modified rate was uncontested. The contract rate was 8.5%.
In re Blanton, No. 10-60160, 2010 Bankr. LEXIS 3878 (Bankr. N.D. Ohio Oct. 29, 2010)	Automobile (Chevrolet Blazer)	5.25%; 2% risk adjustment to prime.	The 2% interest rate suggested by the debtors fell in the middle of the 1% to 3% range suggested in *Till*. Creditor did not provide "any evidence that suggests that the circumstances of this case are exceptional.
In re Johnson, 438 B.R. 854 (Bankr. D.S.C. 2010)	Automobile	5.25%; 2% risk adjustment to prime.	The 2% interest rate suggested by the debtors fell in the middle of the 1% to 3% range suggested in *Till*. "This Court does not read *Till*'s risk of nonpayment adjustment to be

			the same as the creditworthiness factors that go into the initial lending decision. Instead, . . . the risk of nonpayment referred to in *Till* is the risk that the chapter 13 debtor's plan will not succeed."
In re Nobles, No. 10-30392, 2010 Bankr. LEXIS 2344 (Bankr. M.D. Ala. July 16, 2010)	Automobile	5.75%; 2.5% risk adjustment to prime.	Creditor was a sub-prime lender, and had to itself borrow in order to gain capital to operate its lending business. The interest rate that it was paying would be more than the proposed interest rate of 4.5%, so it would be operating at a loss in that regard.
In re Golash, 428 B.R. 189 (Bankr. W.D. Penn. 2010)	Residential Real Property	6%; 2.75% risk adjustment to prime.	"*Till* places the burden of proof on the creditor to increase the risk adjustment figure, and no evidence was offered, [so] this Court will accept the Debtor's proposed interest rate of 6%."
In re Velez, 431 B.R. 567 (Bankr. S.D.N.Y. 2010)	Automobile	5.25%; 2% adjustment to prime.	"The Debtor's Amended Plan and schedules reflect no prepetition arrears. . . . The Debtor is currently employed as a nurse, and the Debtor's schedules reflect sufficient income to maintain plan payments if the Amended Plan is confirmed."
In re Goggins, No. 05-42962, 2008 Bankr. LEXIS 1391 (Bankr. N.D. Ga. Mar. 20, 2008)	Automobile	8%; 2% risk adjustment to prime (1.5% adjustment at the time of filing).	The creditor did not contest the rate with evidence of risk.
In re Davis, No. 07-50761, 2007 Bankr. LEXIS 3175 (Bankr. M.D. Ga. Sept. 12, 2007)	Automobile	8.25%; the prime rate with no upward adjustment.	The contract rate was 4.9%. The creditor, GMAC, agreed to pay the prime rate with no upward adjustment. The debtor argued that the contract rate should prevail because it was the lower rate.
In re Yelverton, No. 06-10664, 2007 Bankr. LEXIS 1804 (Bankr. M.D. Ala. May 21, 2007).	Automobile	8.25%; the prime rate with no upward adjustment.	The contract rate was 7.2%. The creditor sought an upward adjustment of 1%, but the court refused. The creditor had limited equity in the vehicle. The creditor stipulated that the risk of nonpayment was low.

Case	Type of Property	Rate and Risk Adjustment	Applicable Test Factual Considerations
In re Evans, 2010 Bankr. LEXIS 2491 (Bankr. M.D.N.C. July 28, 2010)	Ch 13 Owed to unsecured creditors	.34% for post-petition interest, 5.25% for post-confirmation interest	Prime-plus approach, using the *Till* rate originated and adjusted by chapter 13 trustees Debtor was fully solvent in his estate; length of term was 36 months
In re Cook, 322 B.R. 336 (Bankr. N.D. Ohio 2005)	Ch 13 Owed to unsecured creditors	Not reached	"Coerced loan approach," noting that *Till* was not binding due to a lack of consensus on a legal rationale Debtor had large amount of equity in estate